
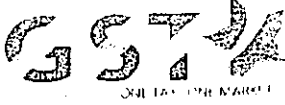


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद - उत्तर, कस्टम हाउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
<p>फ़ोन नंबर/ PHONE No.: 079-27544557</p>	<p>फैक्स/ FAX : 079-27544463</p>	<p>E-mail:- aaahmedabad2@gmail.com</p>

निबन्धित पावती डाक द्वारा/By R.P.A.D

DIN 20210364WT000000FCD7

फा.सं./F.No. V.84/15-106/OA/2013/Pt-II

आदेश की तारीख/Date of Order :- 26.03.2021

जारी करने की तारीख/Date of Issue :- 26.03.2021

द्वारा पारित/Passed by:-

एँम.एल.मीणा / M.L.Meena

अपर आयुक्त / Additional Commissioner

मूल आदेश संख्या / Order-In-Original No. 67/ADC/ MLM /2020-21

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।

(1) उक्त अपील की प्रति।

(2) 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:

(1) Copy of accompanied Appeal.

(2) 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/ Proceeding initiated against Show Cause Notice No. V.84/15-106/OA/2013 dated 03.01.2014 issued to M/s.Mexcel Engineering, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad.

BRIEF FACTS OF THE CASE:

Preventive officers of erstwhile Central Excise Commissionerate, Ahmedabad-II on the basis of intelligence received from Income Tax Department that M/s.Excel Pump Industries and M/s. Umiya Pumps, D-1/B, Diamond Park, Opp: Gujarat Agro. Naroda GIDC, NH No.8, Ahmedabad, who were engaged in the manufacturing of Submersible Pumps falling under Chapter 8413 of the CETA, 1985, had made sales in cash and had not disclosed the same and had not maintained any books of accounts for the purpose of Income Tax, that they had disclosed additional income to the tune of Rs.1.28 crores for the year 2008-09 and 2009-10 and had paid Income Tax of Rs.37,74,500/-, that during the IT investigation, Shri Bikhhabhai K.Patel, Proprietor of M/s.Excel Pump had declared that the additional income disclosed by them was generated through the sale of submersible pumps; that they had manufactured during the corresponding period. To verify the impact on the payment of Central Excise duty by the noticee in respect of their said disclosure before Income Tax, the Central Excise Preventive Officers conducted search operations at the following premises on **12.01.2012**.

- 1) D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad.
- 2) Residence of Shri Bikhhabhai K. Patel, Prop. of M/s. Excel Pump Industries situated at 71, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmedabad.
- 3) Residence of Shri' Dinesh'bhai Patel, Prop. of M/s. Umiya Pumps situated at 69, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmedabad.

2. During the panchnama proceedings at the factory premises situated at D-1, Diamond Park Industrial Estate, Opp. Gujarat Agro, N.H.8, GIDC, Naroda, Ahmedabad, Shri Bhikabhai K.Patel, the authorised person for M/s.Mexcel Engineering (hereinafter also referred to as 'the noticee') informed that M/s.Excel Pump Industries had ceased functioning w.e.f. January-2010 at the said address after the Income Tax raid on 14.01.2010 and thereafter M/s.Mexcel Engineering came into existence from November-2010, however, only the name and the proprietor of the firm had been changed; that at present Shri Harshalbhai C Patel was the proprietor of M/s.Mexcel Engineering which was functioning at present at the said address and he was out of station. Shri Ramesh M Shah, who was also present during the course of the search operations had stated, inter alia, that he looked after the commercial activities of M/s.Mexcel Engineering pertaining to accounts, book keeping, preparation of invoices, marketing and other office work, Shri Dineshbhai Patel was looking after the technical details/workshop responsibilities of M/s.Mexcel Engineering. On being asked Shri Bhikabhai Patel had deposed that at the premises situated at D-1/B Diamond Park Industrial Estate, opposite Gujarat Agro, NH No.8, GIDC Naroda, Ahmedabad, both M/s.Umiya Pumps and M/s.Excel Pump Industries were functioning and were engaged in the manufacture and sale of submersible pumps of V6 type; that Shri Dineshbhai Patel was the proprietor of M/s.Umiya Pumps and he (Bikhhabhai) was the proprietor of M/s.Excel Pump Industries. He had further deposed that after the Income Tax raid on 14.01.2010 (i.e. January 2010), both the firms had ceased commercial activities. He had further informed that from November, 2010, M/s.Excel Pump Industries changed their name to M/s.Mexcel Engineering and Shri H.C.Patel became the proprietor and since then he (Bikhhabhai) was only functioning as an authorised signatory for day to day work.

3. During the search of the above factory premises as well as the office premises of M/s Mexcel Engineering, D-1 Diamond Park Industrial Estate, Opp. Gujarat Agro, N. H. No 8, GIDC Naroda, Ahmedabad, 6 lathe machines, One press of 10 MT and one press of 5 MT, one Hexo machine, one Compressor, one Dimmer, one Panel, one Flow meter, one Drill machine and one high voltage meter etc. were found installed, which were being used for the manufacture / assembly of submersible pumps. During the search operations, raw material necessary for the manufacture of submersible pumps like winding wire, stampings, Pipes, impellers, top /bottom castings etc. were found stored or at various stages of assembly in the premises. It was observed that there was no stock of finished / packed /ready to dispatch submersible pumps within the said factory premises. Shri Dinesh bhai and Shri Ramesh Shah had informed that the entire manufacturing/ assembling activity was carried out within the same premises and that they did not undertake any job work activity for anyone, nor did they send inputs / goods outside for manufacture on job work. Certain documents found necessary for further investigation of the case were withdrawn from the factory premises under panchnama dated 12.01.2012

4. Search of the residence premises of Shri Bikhabhai K Patel situated at 71, Gangadhar Society, Nr. Bhadreshwar Colony, Hansol Ahmedabad was also conducted by the team of C. Ex Preventive officers and certain records/documents such as, diaries i.e. Diary No.2, Red Diary (cloth Covered), 14 delivery challan books etc were withdrawn during the panchnama proceeding on 12.01.2012. On verification of the said documents, it was revealed that the said documents were the Collection book (Diaries) for the sale of submersible pumps to various buyers across India through delivery challans/kacchha chits for which no bills were prepared by M/s. Mexcel Engineering and the sale proceeds of sold submersible pumps were received in cash from various buyers whose names were listed in code form in the said collection book (Diaries).

5. Further, in a statement dated 03.02.2012, Shri Bikhabhai K. Patel, proprietor of M/s. Excel Pump Industries, on being asked as to how certain incriminating documents like challans, diaries etc. pertaining to M/s. Excel Pump Industries recovered from his residence during search under panchnama dated 12.01.2012 were showing dates after the closure of M/s Excel Pump Industries in January-2010 i.e. after the Income Tax raid in January-2010, had stated that incriminating documents such as challans, diaries etc which were found from his residence during the search on 12.01.2012 were pertaining to M/s. Mexcel Engineering as Shri H.C. Patel was his relative and was residing out of Ahmedabad and was not regularly coming to the factory and that the unused printed challans of M/s. Excel Pump industries were used for business of M/s. Mexcel Engineering and that the documents, challans, diaries etc which were recovered from his residence were relating to the transactions i.e. purchase / sale by M/s. Mexcel Engineering. Further, all these facts appeared to be not correct as per the verification at the buyer's end, which had revealed that even after the period of closing down of M/s. Excel Pump Industries in January-2010 as stated by Shri Bikhabhai, the buyers had purchased submersible pumps from M/s. Excel Pump Industries through Kaccha chits and had made payments in cash to Shri Bikhabhai or his representative and, thus M/s.Excel Pump Industries had been functioning even after January 2010 till October-2010 and M/s. Mexcel Engineering started functioning at the said address from November-2010 onwards. He had stated further that in the absence of Shri H.C. Patel, proprietor of M/s. Mexcel

Engineering, Shri Rameshbhai M. Shah was looking after the accounts and the working of the unit. On being shown his statement dated 14.01.2010 recorded by the Income Tax department, he agreed with the contents of the said statement.

6. In his statement dated 09.02.2012 recorded under Section 14 of the Central Excise Act, 1944, Shri H.C. Patel, proprietor of M/s. Mexcel Engineering, after perusing the panchnama dated 12.01.2012 and statement dated 03.2.2012 of Shri Bikhabhai Patel, proprietor of M/s. Excel Pump Industries, stated that M/s. Mexcel Engineering owned by him was engaged in manufacturing and sales of submersible pump since the year 2010 for which machineries such as lathe machine, machines for machining, machines for inspection etc. were installed in the said premises; that they were registered with VAT department and the VAT No. was 24075203979; that they were not registered with BIS; that they had applied for trade mark registry: that raw materials for manufacture of submersible pump was purchased from local market and payment for the same were made in cash; that order for purchase of raw material were placed telephonically; that they manufactured and sold submersible pumps in Gujarat as well as other states and payments for the same were received in cash; that they sold submersible pumps directly to its customers as per their order which were placed telephonically: that on closure of M/s Excel Pump Industries, the machineries available were purchased by them; that he agreed with the statement dated 03.02.2012 wherein Shri Bikhabhai Patel had stated that on closure of business by M/s Excel Pump Industries, the stock of raw material as well as finished goods were sold to M/s Mexcel Engineering and also that the responsibility of debtors and creditors of M/s Excel Pump Industries would lie with M/s Mexcel Engineering and that the challans, documents, diaries withdrawn under Panchnama dated 03.02.2012 drawn at residence of Shri Bikhabhai Patel for the period after January, 2010 pertain to M/s Mexcel Engineering.

7. Shri Rameshbhai Mithalal Shah, Accountant for M/s Mexcel Engineering, in his statements dated 12.01.2012 and 21.02.2013 had stated after perusing and agreeing to the contents of the panchnama dated 12/01/2012 drawn at the factory premises of M/s Mexcel Engineering at D-1 Diamond Park Industrial Estate, opposite Gujarat Agro, N H No 8, GIDC Naroda, Ahmadabad wherein he was present throughout the course of the said panchnama, that, M/s Mexcel Engineering was a proprietorship firm whose proprietor was Shri Harshalbhai Chinubhai Patel; that the said unit was engaged in the manufacture and sale of submersible pump sets of V6 type and used the brand names like "EXCEL", "AQUA", "OMAXE" "MATCOT" registered with BIS; that though officially on statutory records his name did not appear in any capacity of M/s Mexcel Engineering, in actuality he looked after the marketing, office work, accounts, banking, preparation of delivery challans & invoices; that this arrangement was with the consent and understanding of Shri Harshalbhai C Patel. Further he stated that Shri Bikhabhai Patel was the proprietor of M/s Excel Pump Industries and his brother Shri Dineshbhai Patel was the proprietor of M/s Umiya Pumps, but after the Income Tax raid in January 2010, both the said firms ceased functioning and had stopped production and M/s Mexcel Engineering under the proprietorship of Shri Harshalbhai C Patel had started functioning from November 2010; that even though Shri Harshalbhai C. Patel was the proprietor of the said firm, he had a stake@ 33% in the profits of M/s Mexcel Engineering and the other persons having equal stake were Shri Dineshbhai Patel and the proprietor Shri Harshalbhai Patel, i.e. 33% each; that Shri Bikhabhai K Patel was then only the authorized

signatory in M/s Mexcel Engineering and had no stake in the profit / loss of the firm, since he was the proprietor in M/s Excel Pump Industries and since his name was registered in the BIS certification, it was understood and accepted that his name as proprietor would continue for the specific purpose of BIS certification work for one year; that Shri Dineshbhai Patel looked after the production and technical aspects of the manufacturing activities of the unit; that M/s Mexcel Engineering was neither registered nor had applied for registration under Central Excise.

8. On perusing the 14 (fourteen) delivery challan books for the period 25.12.2010 to 09.01.2012 appearing at Sl. No 1 to Annexure A to the said panchnama, Shri R.M. Shah, Accountant of the said unit had stated that the said books contain carbon copies of delivery challans mentioning details of the clearance of submersible pumps that were manufactured on the machineries installed in the factory premises and cleared from M/s Mexcel Engineering to the persons as stated in the respective delivery challan on the dates specified; that the words "MX" appearing on such Delivery challans pertained to M/s Mexcel Engineering; that copies of Lorry Receipts (LRs) were also stapled to the respective delivery challan; that the said delivery challans were prepared by him in his own hand writing and that no bills or invoices were issued by him or M/s Mexcel Engineering for the sales dispatches of submersible pumps removed on the basis of such delivery challans and that all the amounts as written in the delivery challan were coded e.g. 657912/- was written as 6579/12. On being asked to explain the entries of value, Shri R.M. Shah, Accountant stated that in order to arrive at the correct sales value (Assessable Value), the amount as written in the delivery challan had to be multiplied by 100, and the resultant sum would be the amount in rupees of the transaction, that the receipt of sales proceeds of such sales were received in cash. Further on being shown a worksheet titled Annexure B to panchnama dated 12/01/12 that had been prepared on the basis of the 14 Delivery challan Books appearing at Sl. No.1. to said Annexure A of Panchnama and after going through the same, Shri R.M. Shah stated that worksheet had been correctly prepared on the basis of the details as mentioned in the delivery challan books and further stated that all the transactions as mentioned in the said delivery challan and reproduced in the worksheet were sales/ removals of complete submersible pump sets manufactured by M/s Mexcel Engineering at D-1 Diamond Park Industrial Estate, Opp. Gujarat Agro, N H No 8, GIDC Naroda, and that no bills or invoices were ever issued or asked to be issued for such removals / sales and that no Central Excise duty was paid on such sales.

9. In the statement dated 21.02.2013 recorded under Section 14 of the CEA, 1944, Shri H.C. Patel, proprietor of M/s. Mexcel Engineering 12.01.2012, after perusing the panchnama dated 03.02.2012 and 11.02.2013 of Shri Bikhhabhai Patel, proprietor of M/s. Excel Pump Industries and on perusing Diary No.2 had stated that they were engaged in production and clearance of submersible pumps manufactured using machineries like Lathe Machine, machines for machining which were installed in their factory premises and clearing the submersible pumps to various buyers across India on the kacchha chits without preparing invoice, delivery challans and without paying VAT and Central Excise duty; that they were not maintaining any records for the production and clearance of submersible pumps manufactured by them and were clearing the same under kaccha chits/delivery challans and the details of such submersible pumps manufactured and cleared by them under kaccha chits/Delivery challans were entered by him in various diaries, in particular Diary No.2, Red Diary and Diary No.16 and the payments thereof were received in cash by him or through his representatives

and the said diaries were seized during the panchnama proceedings from Shri Bikhhabhai Patel's residence. Further he had stated that the delivery challans had been prepared by Shri R.M Shah in his own hand writing and that no bills or invoices were issued by M/s Mexcel Engineering for the sales / dispatches of submersible pumps removed on the basis of such delivery challans and had stated that all the amounts as written in the delivery challan were coded i.e. e.g.Rs.657912/- was written as Rs.6579/12. On being asked to explain, he had stated that in order to arrive at the correct sales value, the amount as written in the delivery challan had to be multiplied by 100 and the resultant Sum would be the amount in rupees of the transaction. On being asked regarding the receipt of sales proceeds of such sales, he had stated that they had received all the sales proceeds in cash. The said modus operandi had been explained by Shri H.C. Patel, proprietor of M/s. Mexcel Engineering in his statement dated 21.02.2013; that in Delivery Challan No. 1-274 dated 26.10.2010 they had sold one No. of MATCOT brand submersible pumps 8/16 variety showing an amount of Rs.224.64 to M/s. TMS Latur and 02 No. of 8/18 variety submersible pump showing an amount as Rs.235.84 and accordingly 03 Nos. of submersible pumps had been sold wherein total amount of sales value had been shown as Rs. 696.32 and on the said sales value discount of 43% i.e. Rs. 299.41 had been given and after giving the said discount the sales value shown was Rs. 396.91 and the said sales amount had been entered in Diary No.2 at Page No.65 showing the sales value as Rs.39,691/- ($396.91 \times 100 = 39691$) and thus evidencing the above facts. Thus the details i.e. sales value entered in Diary No.2 had to be multiplied by 100 to arrive at the correct assessable value. Thus he had stated that they had entered the sales value in Code in the delivery challans and entered the same in diary No.2 and Red Diary and were giving the same to transporters and the same were cleared without payment of VAT and Central Excise duty and the payments for submersible pumps sold were received in cash from buyers. Further he had stated that he was ready to pay the Central Excise duty along with interest on such sales value. Further on being shown the BIS registration file of M/s. Mexcel Engineering and on being shown the signature of Shri B.K. Patel who had signed on the said application as proprietor of M/s. Mexcel Engineering, which appeared in File No.4 (Misc. File)(BIS application of M/s. Mexcel Engineering) at page Nos.: 01, 03, 05, 07, 35, 37, 39, 41, 43, 45, 47, 49 Application/Licensee's, Declaration of Brand Name/Trademark Proposed to be covered under certification in respect of Application No.CML 7912280 dt:25.08.2010, Shri H.C. Patel had stated that Shri B.K. Patel, was his relative and as he was looking after all the government works of their unit he had signed on the same but he was the only proprietor of M/s. Mexcel Engineering. Further on perusing the worksheet prepared on the basis of 14 delivery challan books seized during the panchnama proceedings dated 12.01.2012 pertaining to the period of 25.12.2010 to 31.03.2011 showing an amount of Rs.3,68,86,927/- and an amount of Rs. 3,75,79,100/- for the period 01.04.2011 to 09.01.2012, Shri H.C. Patel stated that the said amounts reflected the manufacture and illicit clearance of submersible pumps as well as goods returned during the periods and were true; that they were not aware that manufacture and sales of submersible pumps would attract Central Excise duty; that they had not paid Central Excise duty on sales of submersible pumps manufactured and sold during the period from 25.12.2010 to 31.03.2011 valued at Rs.3,68, 86,927/- and from 01.04.2011 to 09.01.2012 valued at Rs.73,75,79,100/- but were ready to pay the duty.

10. Even though Shri Bhikhabhai Keshavlal Patel, Proprietor of M/s Excel Pump Industries had stated that they had stopped functioning at the same said address from January, 2010

after the Income Tax raid appeared to be incorrect in view of the fact that the application dated 26.08.2010 [contained in BIS file of Mexcel at Sr.No.12 of panchnama dated 12.01.12 drawn at the factory premises for change of name from Excel to Mexcel made to BIS registration] carried the signature of Shri Bhikhabhai Keshavlal Patel. The acceptance of scheme of testing and inspection dated 25.8.2010 and acceptance of rate of marking fee dated 25.8.2010 issued in respect of M/s. Mexcel Engineering for licence No. CM/L-7912280 had also been signed by Shri Bhikhabhai Patel in his capacity as Proprietor of M/s. Mexcel Engineering. However, Shri H.C. Patel, proprietor of M/s. Mexcel Engineering in his statement dated 09.02.2012 had stated that they were not registered with BIS but had applied for trade mark registry. From the above, it appeared that, Shri Bhikhabhai Patel was the person responsible in the day to day working and dealings with other Government departments for the firm M/s. Mexcel Engineering.

11. From the documents withdrawn from the factory premises and the residential premises of Shri Bhikhabhai Patel, it was revealed that M/s. Mexcel Engineering had issued invoices, challans for clearing pumps manufactured by them from 29.11.2010 onwards. Therefore, duty was to be demanded from M/s. Mexcel Engineering for the period from 29.11.2010 onwards only. The duty calculations were made from the documents for the period starting from 29.11.2010 only as a show cause notice for the period upto 28.11.2010 for all the clearance made by M/s. Excel Pump Industries, even after the closing down, had been issued to M/s. Excel Pump Industries by the Commissioner, Central Excise, Ahmedabad-II on 02.04.2013.

12. The value of clearances in respect of goods manufactured and cleared by M/s Mexcel Engineering was worked out on the basis of Challan Books and Diaries seized by the Central Excise Officers during the course of panchnama at the factory premises of M/s. Mexcel Engineering and the residential premises of Shri Bhikhabhai Patel on 12.01.2012, and Consequently duty payable by M/s Mexcel Engineering, for the period 29/11/2010 to 31/03/2011 was worked out to be Rs.14,33,658/ and for the period 01/04/2011 to 09/01/2012 was worked out to be Rs. 20,47,944/-. M/s Mexcel Engineering appeared not to be eligible for exemption under Notification No.8/2003-CE dated 01.03.2003, as amended, for the year 2010-11 as the total value of clearance by M/s. Excel Pump Industries from the same premises for the year 2009-10 had exceeded 4 crores. It also appeared that M/s Mexcel Engineering had exceeded clearance value of Rs. 4 crores during the year 2010-11 and was thus ineligible for the said exemption for the year 2011-12 also.

13. The verification carried out at the buyer's end in respect of submersible pumps sold by M/s. Mexcel Engineering revealed the following facts:

(i) A statement of Shri Durgesh C Parmar, Manager & Authorised Signatory of M/s Ratan India Traders opposite Durgadevi Temple, Dajibanpeth, Hubli 580028 was recorded on 5.2.2013 before Superintendent, C. Ex. (Preventive) Hubli Division, where Shri Durgesh C. Parmar had deposed that, they had purchased submersible pumps from M/s Excel Pump Industries and M/s Mexcel Engineering, Ahmedabad; that during January 2008 to January 2012 they had purchased approximately 35 Sets (70 Nos.) from the said firms; that the said goods were received under delivery challans issued by the above firms; that these delivery challans were destroyed by him and no entries were made in books of accounts maintained;

that they had made payment through Cash to the representatives of both the firms and no payment details were recorded in their books of account.

(ii) A statement of Shri Mukeshbhal Patel, proprietor of M/S Dinesh Pump House, Indore was recorded on 16.1.2013 before Superintendent Central Excise (Preventive), HQ, Indore, where Shri Mukeshbhal Patel had deposed that they had purchased submersible pumps from M/s Excel Pump industries and M/s. Mexcel Engineering; that sometimes the order for pumps were given telephonically and sometimes Shri Bhikhabalhai came to Indore and had taken the orders personally; that the payment was made through demand draft that he had also submitted Ledger Account in respect of M/s. Mexcel Engineering, Form 49, Form 402 and LR and that they had purchased pumps valued at Rs.3,70,354/- from M/s Mexcel Engineering.

(iii) A statement of Shri Jitendra Dineshbhai Patel, owner of M/s. Patel Pump House, 14, Mehta Towers, Panjarapole Chowk, Solapur, was recorded on 18.4.2012 before the Superintendent (Preventive), Central Excise, Solapur, under which Shri Jitendra Dineshbhai Patel had deposed that they had purchased 6 pump-sets from M/s, Mexcel Engineering under invoice No 03/23.5.2011; that they had placed orders telephonically and made the payment in cash and not taken any receipt of the payment; that they had received the goods through transport but no transportation documents were available, that he had furnished copy of invoice No, 03/23.5.2011 and Form 402.

(iv) A statement of Shri Rajesh Thaku, partner, Sona Sales, Ujjain, was recorded by Superintendent, Central Excise, Ujjain, under which Shri Rajesh Thakur had deposed that they had received 10 sets of pumps from M/s. Mexcel Engineering without any bill and transport document and the payment of which amounting to Rs.1,19,900/- had been made in cash to the owner of the unit during his visit to Ujjain

(v) A statement of Shri Seventilal Shah son of Shri Tribovandas Shah, proprietor of M/s Sevanilal & Co 1, J K Building, Hamidia Road Bhopal was recorded on 10.12.2012 by the Superintendent (Preventive) Central Excise. (Hq.) Bhopal, where he had stated that they had purchased submersible pumps from M/s Excel Pump Industries Ahmedabad in 2009-10 on two occasions; that for first transaction invoice was received by him but on second occasion the goods were supplied from Bhopal by M/s Mexcel Engineering for which no bill or invoice was received by him but was told that the bill will be sent later on but had not received and that he had made full payment for this.

14. With a view to verify the correctness of the transportation relating to sale of submersible pumps manufactured and sold by M/s Mexcel Engineering, inquiry was extended to the transporters. Statements of various transporters were recorded under Section 14 of the C. Ex. Act, 1944, which are as under:

(i) In his statement dated 24.1.2012 recorded under section 14 of the Central Excise Act, 1944, Shri Yogeshkumar K. Jain, Accountant of M/s. Girnar Logistics Pvt. Ltd., Raipur Gate, Ahmedabad had stated that their company was transporting goods to Maharashtra, Madhya Pradesh, Chhatisgarh, Orissa and Karnataka and they had transported two Consignments of M/s. Mexcel Engineering, Naroda, Ahmedabad that were delivered and transported to M/s. Vardhman Agencies, Dodanchia, Maharashtra. The goods to be

transported were brought in the tempo of M/s. Mexcel Engineering to their godown after booking were transported from their godown for which kacchi chittis/delivery challans were given by M/s. Mexcel Engineering and payment for transportation were received from the place where the goods were delivered for which no ledger account of M/s. Mexcel Engineering had been maintained by their transport company.

(ii) In his statement dated 25.1.2012, Shri Harshad R. Vyas, Manager of M/s. Super Road Lines, 131, Tejendra Park Estate, Odhav, Ahmedabad had stated that their company was transporting goods to Secunderabad for which booking of consignments were made in the name of Shri R.M. Shah of M/s. Mexcel Engineering; that the goods to be transported were brought in the tempo of M/s. Mexcel Engineering to their godown and were booked to be transported and thereafter transported from their godown for which kacchi chittis/delivery challans were given by M/s. Mexcel Engineering and payment for transportation were received from the place where the goods were delivered for which no ledger account of M/s. Mexcel Engineering had been maintained by their transport Company.

(iii) In his statement dated 24.1.2012, Shri Pawankumar Sharma, Manager of M/s. Express Cargo Carriers Pvt. Ltd., 4, Aalok Complex, near Sevak Toll Naka, Rakhial Road Ahmedabad had stated that their company was transporting goods to Madhya Pradesh & Chhattisgarh and they had transported consignments of M/s. Mexcel Engineering; that the goods to be transported were brought in the tempo of M/s. Mexcel Engineering to their godown the goods were booked to be transported and thereafter transported from their godown for which kacchi chittis were given by M/s. Mexcel Engineering and payment for transportation were received from the place where the goods were delivered for which no ledger account of M/s. Mexcel Engineering had been maintained by their transport Company.

(v) Shri Kawaljeet Singh Darshansingh Bhatia, Manager of M/s Speed Motors, Plot No.24/3, GIDC, Odhav, Ahmedabad in his statement dated 25.01.2012, had stated that they did not have entry for transportation of goods in respect of M/s. Mexcel Engineering but one Bilti No.71368 dated 29.01.11 had been issued to M/s. Mexcel Engineering; that he did not remember what documents were given by them; that the goods to be transported were brought in the tempo of M/s. Mexcel Engineering to their godown where the goods were booked to be transported and thereafter were transported from their godown for which kacchi chittis were given by M/s. Mexcel Engineering and payment for transportation were received from the place where the goods were delivered for which no ledger account of M/s. Mexcel Engineering had been maintained by their transport company.

15. It, thus, appeared that Shri Bhikhabhai Patel and Shri Harshalbhai Patel were the architects in the whole gamut of evasion of Central Excise duty on submersible pumps that were manufactured and cleared from the factory premises of M/s Mexcel Engineering and that they had knowingly indulged and involved themselves in clearing submersible pumps that were manufactured on the machineries installed in their said unit illicitly. Thus they appeared to have engaged in production and clearance of submersible pumps using the machineries like Lathe Machine, machines for machining which were installed in their factory premises and had cleared the submersible pumps to various buyers across India on kacchha chits/delivery challans without preparing invoice and without paying VAT and Central Excise duty and that they were not maintaining any records for the production. The involvement of

Shri Bhikhabhai Patel was further compounded by the fact that he was looking after the day to day work of purchase of raw material without bill and without transporter's documents, for making payments for purchase of raw material in cash, for inspection of quality of raw material, for booking of raw material on telephone, for not entering the details of raw material in the records, for the day to day planning and scheduling of the manufacture of submersible pumps and taking order from buyers on telephone, for not maintaining records for day to day production of submersible pump and clearing the same under kaccha chits/delivery challan without preparing invoices and the delivery challans/kaccha chits were destroyed by the buyers immediately on receipt of submersible pumps in their factory and for receiving the payments in cash for such clearance of submersible pumps. In order to continue with such duty evasion, he himself had made the application for changing the name of the firm from M/s Excel Pump Industries to M/s Mexcel Engineering with the Director, Bureau of Indian Standards after the Income Tax raid and also had made the correspondence with BIS authorities in respect of the "ACCEPTANCE OF SCHEME OF TESTING AND INSPECTION", "ACCEPTANCE OF RATE OF MARKING FEE" and APPLICANTS/ LICENSEE'S DECLARATION OF BRAND NAME/ TRADEMARK PROPOSED TO BE COVERED UNDER CERTIFICATION" all dated 25.08.2010 etc. in the capacity of Proprietor of M/s Mexcel Engineering. Shri H.C. Patel in his statement dated 21.3.2013 had stated that Shri Bhikhabhai Patel was not an authorized signatory of M/s. Mexcel Engineering and he was just the proprietor of the firm. The documents related to the firm M/s Mexcel Engineering withdrawn from the residential premises of Shri Bhikhabhai Patel also confirmed the fact that Shri Bhikhabhai was the person who was behind all the illegal activities of M/s. Mexcel Engineering. Thus, it appeared that Shri H.C. Patel, proprietor of M/s Mexcel Engineering had failed to determine and discharge the correct Central Excise Duty on excisable goods cleared illicitly and appeared to have contravened the provisions of Rule 9 of the Central Excise Rules, 2002 in as much as he had failed to obtain registration as required under Section 6 of the Central Excise Act, 1944; contravened the provisions of Rule 4 and Rule 6 of the Central Excise Rules, 2002 in as much as he had failed to assess and pay the appropriate Central Excise duty on excisable goods manufactured and cleared by him; contravened the provisions of Rule 8 of Central Excise Rules, 2002, in as much as he had failed to pay the appropriate duties by the due date; contravened the provisions of Rule 10 of Central Excise Rules, 2002 in as much as he failed to maintain proper records and accounts of their finished goods; Contravened the provisions of Rule 11 of the Central Excise Rules 2002 in as much as he had failed to issue any valid Central Excise invoice in respect of the said goods cleared from their factory and contravened the provisions of Rule 12 of Central Excise Rules, 2002 as he had failed to file proper and correct return with the jurisdictional officer. Therefore, the duty that was not paid was required to be demanded and recovered from him under Section 11 A(4) of Central Excise Act, 1944 invoking the extended period of 5 years on account of willful contravention of various provisions as discussed hereinabove and suppression of facts with an intention to evade payment of Central Excise duty. All these acts of contravention appear to constitute an offence of the nature and type as described in clauses (a),(b) ,(c) , & (d) of Rule 25 of Central Excise Rules 2002. Therefore, it further appeared that they had rendered themselves liable for penalty under section 11AC of Central Excise Act, 1944, read with Rule 25 of the Central Excise Rules, 2002. The noticee also appeared liable to pay interest on the delayed payment of Central Excise duty under the provision of section 11 AB of Central Excise Act, 1944. It

appeared that all these activities were carried out by Shri Bhikhabhai Patel and Shri H.C. Patel by way of suppression of facts and in contravention of various provisions of the Central Excise Act/Rules with intent to evade payment of Central Excise duty. Shri Bhikhabhai was looking after the entire functioning of the factory and was responsible for the purchases, sales, accounting and production etc., as stated by him in his statements but most of the time Shri H.C. Patel was not present in the factory when it appeared that, Shri Bhikhabhai Patel and Shri H.C. Patel, were responsible for the manufacturing and clearance of excisable goods from their factory that they had reason to believe was liable for confiscation under the Central Excise Act, 1944 and the rules framed thereunder, rendering them liable to penalty under the provisions of Rule 26(1) of Central Excise Rules, 2002.

16. It further appeared that, the buyers viz. Shri Durgesh C Parmar Manager & Authorised Signatory of M/s. Ratan India Traders, Opposite Durgadevi Temple, Daljibanpeth, Hubli 580028; Shri Rajesh Thakur, son of Shri Kanhaiyalal Thakur, 112, Nai Sadak, Ujjain, partner of M/s. Sona Sales, Ujjain and Shri Sevantilal Shah, Son of Shri Tribhovandas Shah, proprietor of M/s. Sevantilal & Co, 1, J.K. Building, Hamidia Road, Bhopal, had also rendered themselves liable for penalty under the provisions of Rule 26(1), of Central excise Rules, 2002 in as much as they had acquired possession of and were concerned in transporting, removing, depositing, keeping, concealing, selling and purchasing and dealing with the excisable goods, which they knew and had reasons to believe were liable to confiscation under Central excise Act, 1944 and Rules framed thereunder.

17. Therefore, a **Show Cause Notice bearing F.No. V.84/15-108/OA/2013** dated **03.01.2014** was issued to M/s Mexcel Engineering, demanding Central Excise duty amounting to Rs.34,81,602/- [Rupees Thirty Four Lakhs Eighty One Thousand Six Hundred and Two only] for the period 2010-11 and 2011-12 from 29.11.2010 to 09.01.2012] under the proviso to Section 11A(1) of the Central Excise Act, 1944 [now section 11A(4)] and proposing to appropriate an amount of Rs.5,00,000/- already paid by them towards the said duty liability. In this show cause notice, interest has been demanded to be paid at appropriate rates under section 11AB [now 1AA] of the Central Excise Act, 1944 and penalty has been proposed to be imposed on M/s Mexcel Industries under section 11AC of the Central Excise Act, 1944 read with, Rule 25 of the Central Excise Rules, 2002.

17.1 Under the said SCN, penalties under Rule 26(1) of the Central Excise Rules, 2002 have also been proposed to be imposed on (i) Shri Harshalbhai Patel, proprietor of M/s. Mexcel Pump Industries; (ii) Shri Bhikhabhai Patel who was looking after the day to day work of M/s. Mexcel Engineering; (iii) buyer, Shri Durgesh C Parmar, Manager & Authorized signatory of M/s. Ratan India Traders, Opp. Durgadevi Temple, Daljibanpeth, Hubli- 580 028; (iv) buyer, Shri Rajesh Thakur, son of Shri Kanhaiyalal Thakur, 112, Nai Sadak, Ujjain, partner of M/s. Sona Sales, Ujjain and (v) buyer, Shri Sevantilal Shah, son of Shri Tribhovandas Shah, Proprietor of M/s. Sevantilal & Co., 1, J.K. Building, Hamidia Road, Bhopal.

18. The said Show Cause Notice was adjudicated by the Additional Commissioner, Central Excise, Ahmedabad-II, vide OIO No.41/ADC/2014/MRM dated 25.06.2014/26.06.2014 wherein he passed the following orders:

- (i) Confirmed the demand for Central Excise duty of Rs.34,81,602/- under the provisions of Section 11A(1)/Section 11A(4) of the Central Excise Act, 1944 invoking the extended period of limitation.
- (ii) Ordered to appropriate an amount of Rs.5,00,000/- already paid by the notice towards the confirmed demand of duty.
- (iii) Confirmed levy of interest under Section 11AB/11AA as applicable on the duty confirmed.
- (iv) Imposed a penalty of Rs.34,81,602/- on M/s.Mexcel Engineering under Rule 25(1) of the Central Excise Rules, 2002 read with the provisions of Section 11AC of the Central Excise Act, 1944.
- (v) Imposed a penalty of Rs.5,00,000/- on Shri Bhikhabhai K.Patel, under Rule 26(1) of Central Excise Rules, 2002.
- (vi) Dropped the proposal for penalty on Shri Harshalbhai C Patel, Proprietor of the notice firm.
- (vii) Dropped the proposal for penalty on the buyers, viz. (i) Shri Durgesh C.Parmar, Manager & Authorised Signatory of M/s.Ratan India Traders, Opp: Durgadevi Temple, Dajibanpeth, Hubli, 580 028, (ii) Shri Rajesh Thakur, Son of Shri Kanhyalyalal Thakur, 112, Nal Sadak, Ujjain Partner of Sona Sales, Ujjain and (iii) Shri Sevantilal Shah, Son of Shri Tribhovandas Shah, Proprietor of M/s.Sevantilal & Co, 1, JK Building, Hamidia Road, Bhopal.

19. Aggrieved with the above Order-In-Original, the noticee filed appeal before Commissioner(A), Central Excise, Ahmedabad, who vide OIA No.AHM-EXCUS-002-APP-024-025-15-16 dated 23.10.2015/06.11.2015 upheld the Order-In-Original. Aggrieved with the said Order-in-Appeal, the noticee filed appeal before CESTAT, Ahmedabad, who vide its order No.A/13491-13492/2017 dated 09.11.2017 remanded the case to the adjudicating authority to reconsider the matter as per the direction of Hon'ble High Court of Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd in respect of Section 9D of the Central Excise Act, 1944. It is also ordered by the Hon'ble CESTAT to follow the principles of natural justice.

DEFENSE SUBMISSION:

20. The noticee, M/s.Mexcel Engineering, vide their letter dated 29.09.2018, submitted their defense submission, wherein he, *inter alia*, stated that;

(i) the show cause notice has been culminated out of investigation initiated against M/s. Excel Pumps Industries and M/s.Umiya Pumps. In the show cause notice, it has been mentioned that some disclosure of income was made by Shri Bhikhabhai K Patel, Proprietor of M/s.Excel Pumps Industries and Shri Dineshbhai Patel, Proprietor of M/s. Umiya Pumps before the Income Tax authorities.

(ii) it was also mentioned in the SCN that Shri Bhikhabhai K Patel has contented that M/s.Excel Industries was working at D-1, Diamond Paark Industrial Estate, Opp. Gujarat Agro, NH No.8, GIDC, Naroda, Ahmedabad. It has ceased to function w.e.f. January 2010 and thereafter, M/s.Mexcel Industries came into existence from November 2010.

(iii) they wanted to cross examine, Shri Bhikhabhai K.Patel in order to highlight before the Department that there is no relevance or connection in between M/s Excel Pumps or M/s.Umiya Pumps and they, themselves i.e. M/s.Mexcel Engineering. M/s Mexcel Engineering is a proprietorship of Shri Harshalbhai C.Patel.

(iv) As per show cause notice, Shri Dineshbhai Patel, Proprietor of M/s.Umiya Pump and one Shri Ramesh Shah had informed that entire manufacturing/assembly activity was carried out within their premises (premises of M/s.Mexcel Industries) and they do not take any job work activity for anyone, nor do they send input/goods outside for manufacture of job work.

(v) since the said contentions said to have been made by Shri Dineshbhai Patel, Proprietor of M/s.Umiya Pumps and one Shri Ramesh Shah are completely false and since these contentions are relied upon in the SCN, they requested to accord cross examination of both of them.

(vi) the SCN also claims that the officers of the Central Excise Department had recovered some diaries from the premises of Mr.Bhikhabhai K Patel, situated at 71, Gangadhar Society, Nr.Bhadreshwar Colony, Hansol, Ahmedabad. The SCN claimed that it was record of sale of submersible pumps to various buyers across India through delivery challan/kutchra chits for which no bills were prepared by M/s.Mexcel Engineering.

(vii) even if such books/diaries are found from the premises of Shri Bhikhabhai K.Patel, same could not be made base for making allegation of clandestine clearance on them. They requested to afford them opportunity of cross examination of Shri Bhikhabhai Patel from whose premises the said diaries are said to have been recovered. It is so because, wrongly and without any relevance said diaries were forcefully relied upon for the purpose of impugned SCN.

(viii) the SCN further alleged that a statement dated 03.02.2012 of Shri Bhikhabhai K Patel, Proprietor of M/s.Excel Pumps Industries was recorded. He is said to have contended that certain incriminating documents like challans, diaries etc. which were found from his residence during the course of panchnama proceedings on 12.01.2012 belonged to M/s.Mexcel Engineering. He has also stated that although the said challans, diaries etc. were on the letterhead of M/s.Excel Pumps Industries, since M/s.Excel Pumps Industries were closed, M/s.Mexcel Engineering was using unused stationary belonging to M/s.Excel Pumps Industries.

(ix) they have no concern with any documents whatsoever found from the premises of M/s.Bhikhabhai K.Patel. Secondly, if the said documents are on letterheads/stationary belonging to M/s.Excel Pumps Industries which was a Proprietorship firm of Shri Bhikhabhai K Patel, it can under no stretch of imagination be presumed that the said challan/diaries etc belonged to them i.e. M/s.Mexcel Engineering. Therefore, they requested to grant them opportunity of cross examination of Shri Bhikhabhai Patel.

(x) their aforesaid submissions are supported by the conclusion drawn at para 4 of the SCN itself. It is incorporated in the said para itself that the statement of Shri Bhikhabhai K Patel could not be correct because various buyers have stated that they were purchasing

submersible pumps manufactured by M/s Excel Pumps Industries during the period from January 2010 till October 2010.

(xi) however, Shri Bhikhabhai K Patel has also stated that in absence of Shri H.C Patel, Proprietor of M/s.Mexcel Engineering, Shri Rameshbhai K Shah was looking after the accounts and the working of the unit. However, same is completely false. Therefore, they wanted to cross examine Shri Bhikhabhai K Patel as well as Shri Rameshbhai K Shah.

(xii) in para 5 of the SCN, a reference has been made of the statement dated 09.02.2012 of Shri H.C.Patel, Proprietor of M/s.Mexcel Engineering. However, the said statement is not reliable as the same was obtained by officers of Central Excise under pressure, threat and duress so as to suit their needs. Likewise, as far as the statement of Shri Bhikhabhai K Patel, dated 03.02.2012 is concerned, which is said to have been confirmed by Shri H.C.Patel, Proprietor of M/s.Mexcel Engineering in his statement dated 09.02.2012. On this account also, they wanted to cross examine, Shri Bhikhabhai Patel as the contentions in same could not be correct.

(xiii) the SCN further placed reliance on the statements dated 12.01.2012 and 21.02.2013 of Shri Rameshbhai Shah. It is claimed that the said Rameshbhai Shah had stated that although he holds no position in M/s.Mexcel Engineering on paper, he is an accountant and looked after the entire business. He is also said to have used words like Shri Harshalbhai Chinubhai Patel is at present the Proprietor of the said firm. However, such statements on the facts of it could be correct because Proprietorship cannot be shifted from one person to another. Secondly, they failed to understand as to what is 'on paper having no role but otherwise handling the company'. He is also stated to have said that Shri Harshalbhai had a stake of 33% in the profits of M/s.Mexcel Engineering and that Shri Dineshbhai Patel and he himself i.e. Shri Rameshbhai M Shah had the same amount of stake in the profit of M/s.Mexcel Engineering. He is also said to have stated that Shri Dineshbhai Patel looked after production and technical aspect of manufacturing activities in M/s.Mexcel Engineering. It is surprising and shocking as to how somebody could make such baseless, implausible and completely false statement. It is shocking as to how such statement is relied upon in the SCN. However, since the same is done they requested to cross examine Shri Rameshbhai Mithalal Shah as his statement is relied upon for the purpose of SCN.

(xiv) in the SCN, it has been mentioned that on perusing 14 delivery challan books, Shri Rameshbhai Shah is said to have stated that it is pertained to clearance of submersible pumps manufactured at the factory of M/s.Mexcel Engineering . He is also said to have described the contents of the said delivery challans. However, the same is not correct. Neither the said delivery challans belonged to M/s.Mexcel Engineering nor are they pertaining to manufacturing and clearance of submersible pumps by M/s. Mexcel Engineering. They stated that the SCN placed reliance on the statement dated 21.02.2013 of Shri HC Patel, Proprietor of M/s.Mexcel Engineering. The said statement cannot be reliable because his signature was obtained under pressure, threat or duress on the same.

(xv) In para 11 of the impugned SCN, reliance is placed on the statement recorded on 05.02.2013 of Shri Durgesh C Parmar, Mager & Authorised Signatory of M/s.Ratan India Traders, Opp. Durgadevi Temple, Dajibanpet, Hubli; Statement recorded on

16.01.2013 of Shri Mukesh Patel, Proprietor, M/s.Dinesh Pump House, Indore statement dated 10.12.2012 of Shri Sevantilal Shah, Proprietor of M/s.Sevantilal & Co, the SCN claimed that all these people are buyers of clandestinely cleared goods being cleared by M/s.Mexcel Engineering. However, same is completely false. They did not agree with the said statements, as the officers obtained their signatures on statements under pressure, threat and duress. Therefore, they requested to allow cross examination of said five alleged buyers of alleged clandestinely cleared goods.

(xvi) statements of following Transporters were recorded by the officers of Central Excise:

- a. Statement dated 24.01.2012 of Shri Yogeshkumar K.Jain, Acctt. of M/s. Girnar Logistics Pvt. Ltd., Raipur Gate, Ahmedabad.
- b. Statement dated 25.01.2012 of Shri Harshad R Vyas, Manager of M/s. Super Roadlines, 131, Tejendra Park Estate, Odhav, Ahmedabad.
- c. Statement dated 24.01.2012 of Shri Pavankumar Sharma, Manager of M/s. Express Cargo Carriers Pvt. Ltd, 4, Aalok Complex, Nr. Sevak Toll Naka, Rakhial Road, Ahmedabad.
- d. Statement dated 25.01.2012 of Shri Kavaljitsingh Darshansingh Bhatia, Manager of M/s. Speed Motors, Plot No.24/3, GIDC, Odhav, Ahmedabad.

They requested to allow cross examination of all the Transporters whose statements have been relied in the SCN.

(xvii) In the aforesaid backdrops, they requested to allow cross-examination of the persons, viz. (a) Shri Bhikhabhai K.Patel, (b) Shri Dineshbhai Patel, (c) Shri Rameshbhai Mithalal Shah, (d) Shri Durgesh C.Parmar, (e) Shri Mukesh Patel, (f) Shri Jitendra Dineshbhai Patel; (g) Shri Rajesh Thakur, (h) Shri Sevantilal Shah, (i) Shri Yogeshkumar K.Jain, (j) Shri Harshad R Vyas, (k) Shri Pavankumar Sharma & (l) Shri Kavaljitsingh Darshansingh Bhatia.

21. M/s. Mexcel Engineering also submitted further defense submission dated 08.01.2021 wherein they submitted that:

(i) they are small scale manufacturers of submersible pumps. The factory started functioning in the name and style of M/s Mexcel Engineering in November, 2010. Before that M/s Excel Pumps was functioning there. The company had taken the plant, machine and other equipments from M/s Excel Pumps and started production in November 2010. They have no capacity to manufacture goods valued at Rs.4 Crores in a year. The machines installed at their premises were mentioned in the Panchnama. As per their estimation the capacity of production is about 175 to 190 pumps per month. Their products vary from 3HP pump sets to 15 HP sets. The price of pump sets varies from Rs.3,000/- to Rs.7,000/-per pump depending upon the variety. Therefore, even for a higher estimation, the maxim value of clearance would be less than Rs.1.5 crore which is well within the threshold of SSI exemption under Notification No.8/2003-CE. They produced certificate of Chartered Engineer certifying the production capacity of the factory wherein it is certified that the production capacity is an average of 189 pumps per month. Thus, the annual production will come to maximum of 2268 pumps. Taking

value of one pump as average of Rs.6,000/-, the annual value of clearance would be maximum of Rs.1,36,08,000/-, which is well within the exemption limit.

(ii) Central Excise duty cannot be made on the basis of the statement of Shri Bikhhabhai Patel who is a proprietor of M/s. Excel Pump Industries and he has retracted his statement on 11.02.2013 and said retracted statement cannot be made a relied upon statement. They further submitted that the demand has been made only on basis of statement of Shri Bikhhabhai K. Patel, proprietor. But the statement of Shri Bikhhabhai K. Patel was not according to his say and version. The officers themselves had prepared the statement and obtained his statement by coercion. Shri Bikhhabhai K. Patel had retracted his statement and informed the Central Excise officers on 11.02.2013. They stated that Hon'ble High Court of Gujarat in the case of *Suntrek Aluminum P. Ltd. 2013 (288) E.L.T. 500 (Guj.)* held that uncorroborated statement of Director which was retracted could not have been used as evidence. They also relied upon the case of M/s. Centurian Laboratories - 2013 (293) ELT 689 (Tri.- Ahmd.), M/s. Great India Steel Fabricators - 2013 (290) ELT 115 (Tri.- Del.), M/s. Vijay Packaging Systems Ltd.-2010 (262) ELT 832 (Tri.- Bang.), M/s. Vishwa Traders P. Ltd. - 2013 (287) ELT 243 (Guj.), M/s. Tejal Dyestuff Industries.-2009 (234) ELT 242 (Guj.), M/s. Dalmia Vinyls P. Ltd. - 2005 (192) ELT 606 (Tri.- Bang.), M/s. Chemco Steels P. Ltd. - 2005 (191) ELT 856 (Tri.- Bang.), M/s. TGL Poshak Corpn. - 2002 (140) ELT 187 (Tri.- Che.), M/s. Minakshi Steels - 2005 (190) ELT 395 (Tri.- Kol.), M/s. Sri Jayajothi & Co. Ltd. - 2002 (141) ELT 676 (Tri.- Che.), M/s. Opel Alloys P. Ltd. - 2005 (182) ELT 64 (Tri.- Del.), M/s. D. P. Industries - 2007 (218) ELT 242 (Tri.- Del.)

(iii) In view of the above facts and circumstances they stated that they had not manufactured and sold any goods. The details furnished in the Annexure on the basis of delivery Challan and invoices cannot be made applicable to the case of evasion of Central Excise duty. Therefore, they requested that the demand of central excise duty may be dropped in the interest of natural justice.

(iv) They further submitted that no demand of Central Excise duty can be made on the basis of amount shown in the delivery Challan or invoices which is maintained by the third party and not disclosing the quantity manufactured and cleared. The central excise duty is charged under Section 3 of Central Excise Act, 1944 and it is on the goods manufactured. Throughout the show cause notice, there was no allegation that they had manufactured this much of goods and cleared the same clandestinely. The onus to prove that they had manufactured goods and cleared clandestinely rests on the department. The department failed to prove that they had manufactured excisable goods. Therefore, no duty of excise can be demanded from them.

(v) They further submitted that Shri Bikhahai Patel was not the authorized person of their company and he was not authorized to sign or prepare any documents on behalf of the company. He was only looking after the day to day work in absence of the proprietor Shri H.C. Patel. Shri Bikhhabhai Patel also categorically stated that he looked after the factory in absence of Shri H.C. Patel. Therefore, the records recovered from his residence have no relevancy with the affairs of the company and no demand can be made on the basis of said records.

(vi) They submitted that the department has not identified the author of the diary. The contents of the diary were to be explained by its author and not certainly the proprietor of the company. Perusal of the said diary would reveal that there is nothing in the said diary suggesting that it related to M/s Mexcel Engineering. The department has not adduced any evidence to prove that the entries made in the said diary were the clearances made by the noticee. Without establishing the relationship with the company, no demand of duty can be made on the basis of entries made in the diary.

(vii) They further submitted that the department in the show cause notice at paragraph 6.2 had alleged that M/s Excel Pump continued to work even after January 2010. If that is so the records recovered from the possession of Shri Bikhabhai Patel might be belonging to his erstwhile company. Shri Bikhabhai Patel has no business to keep the records of M/s Mexcel Engineering as he is neither a partner nor employee. He looked after the work **only in absence of Shri H.C. Patel** as he was a relative.

(viii) They further stated that they had not made any clearances other than those made under the cover of the invoices. The allegation made in the notice that they had made clearances without preparing invoices is not supported by any evidence.

(ix) They further submitted that there is a mistake in the Annexure-A to the show cause notice. The value for the year 2011-12 at column No.5 (4th column) is the value as per delivery challan and the amount mentioned is Rs.2,19,74,048/- whereas the value given at Annexure-A-7 giving the details of such delivery challans is Rs.1,71,89,714/-. The value of Rs.2,19,74,048/- is pertaining to the value as per red diary.

(x) They further submitted that there is duplication of value in the delivery challans. The pumps once cleared to the dealers were often returned back unsold. These pumps were again cleared to some other dealers under delivery challans. Thus same pumps were cleared again and again. It is evident from the statements of the buyers recorded by the department. Shri Umesh Bapurao Thanke of M/s Shrinath Machinery Stores, Latur stated that he had received 35 pumps from M/s Excel Pumps out of which 25 pumps were returned. Shri Ghule Jalindar Lahanu of M/s Sukhshanti Agency, Ahmednagar had also stated that out of total 24 pumps received he had returned 21 pumps. They enclosed copies of the said statements. Since they had continued to use the same brand name, the same practice followed in their case also. As their brand name was not popular, the traders used to return most the consignments. And they again cleared the same pumps to some other dealers. Thus same pumps are cleared again and again and therefore the value of clearances has been increased without manufacture of goods. The department has not adduced any evidence to prove that they had in fact manufactured this much quantity of pumps in their factory. They had already submitted certificate issued by chartered engineer to prove that they had no capacity to manufacture goods valued at Rs.4 crores in a year. Therefore, the demand made on the basis of delivery challans and diary maintained by Shri B.K. Patel is not sustainable.

(xi) They brought to the notice that the investigating officers had not inquired about the premises in which they said that the goods were manufactured in the said premises i.e. D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No. 8, Naroda,

Ahmedabad by M/s. Mexcel Engineering. In fact, the said premises was under the control of M/s. V.M. Industries and M/s. V. M. Industries was carrying out manufacturing activity and he is the actual manufacturer of the Submersible Pump but officers have not taken care to carry out the correct investigation. In support of working of M/s. V.M. Industries, they produced details of Electricity bill issued to M/s. V. M. Industries right from the year 2004 to 2020 and also the copy of Ahmedabad Municipal Corporation Invoice which also supports that M/s. V. M. Industries was working there, hence the demand cannot be made from M/s. Mexcel Engineering as said unit has not manufactured the goods but the goods have been manufactured by M/s. V. M. Industries, hence the demand is to be required to be made to the actual manufacturer and not from the others. Even in number of cases, it has been held by the Hon'ble CESTAT and Hon'ble Supreme Court also that demand of Central Excise duty should be made from the manufacturers and not from the buyers and others. It is, therefore, requested that on this count also demand is not sustainable, hence it may be dropped.

(xii) They further submitted that Shri Harshalbhai C. Patel is the Proprietor of said unit and, hence, he is not liable for the personal penalty as detailed submissions made in his written submissions dated 13.03.2014, whereas Shri Bhikhabhai Patel is neither the Proprietor nor connected with the activities of the said unit, hence he is also not liable for personal penalty as explained in written submissions. So far, Shri Durgesh C. Parmar and other buyers are concerned, they were buyers and they were under impression that said unit is working under exemption, hence, not liable to pay Central Excise duty and they had no knowledge that the goods were liable for confiscation hence no penalty should be imposed. Even in identical case of M/s. Excel Pump Industries, the Commissioner of Central Excise, Ahmedabad-II, vide Order-in-Original No.AHM-EXCUS-002-COMMR-053-13-14 dated 09.01.2014 has considered the said pleas of the noticee and not imposed penalty on the noticees. The ratio of the said decision is squarely applicable in this case also and no personal penalty should be imposed.

(xiii) In view of the above, they requested that the show cause notice may be vacated and no penalty should be imposed on them.

DISCUSSION AND FINDINGS:

22. I have carefully gone through the records of the case, submissions made by the noticee during the course of personal hearing, their written submissions also gone through the direction given by the Hon'ble CESTAT, Ahmedabad, under which the case was remanded for a fresh adjudication.

23. I find that the Hon'ble CESTAT, Ahmedabad, vide order No.A/13491-13492/2017 dated 09.11.2017 has remanded the matter to the adjudicating authority for considering the matter as per the direction of the Hon'ble High Court of Punjab and Haryana in the case of Jindal Drugs Pvt.Ltd., in respect of Section 9D of the Central Excise Act, 1944. It is also stressed in the CESTAT order that the authorities will follow the principles of natural justice before arriving at any conclusion.

24. Accordingly, I have proceeded for *de novo* adjudication of subject case. Having carefully gone through the contents of the Show Cause Notice, the defense submissions made by the noticee and direction of the CESTAT, a date of cross examinations was fixed on 13.06.2019. M/s. Mexcel Engineering, vide their letter dated 10.06.2019 requested for 15 days time as their Advocate was not available. M/s. Seventilal & Co, vide their letter dated nil stated that in view of ill health, they could not come for the cross examination. Other parties did not turn up for the cross examinations.

24.1 Therefore, another date for cross examination was fixed on 09.07.2019 wherein Shri Krishna Sharma, Advocate and Shri Pankaj A Vyas, Accountant of M/s. Girnar Logistics Pvt. Ltd. appeared for cross-examination. Shri Pankaj A Vyas stated that Shri Yogesh K. Jain, Accountant of M/s. Girnar Logistics Pvt. Ltd. has left the company around 6-7 years back, his present whereabouts is not known to him and hence, requested to cross-examine Mr. Yogesh K Jain, whose statement was recorded at the time of investigation of the said case. None, other than Shri Pankaj A Vyas, appeared for cross-examination on that day. Vide a letter dated 08.07.2019, Shri Bhikhabhai Keshvlal Patel informed that due to a marriage in his family, he could not appear for cross examination on 09.07.2019 and, therefore, requested for another date.

24.2 Further, next date for cross examination was fixed on 30.07.2019 wherein except, Shri Pawan Sharma, Manager of M/s. Express Cargo Pvt. Ltd., nobody appeared for the cross-examination. M/s. Mexcel, vide their letter dated 29.07.2019, stated that they had applied under SVLDRS and, therefore, requested to keep the cross examination proceedings in abeyance. Subsequently, it was ascertained that they have not been issued a discharge Certificate i.e. Form SVLDRS-4.

24.3 Therefore, date of cross-examination was again fixed on 28.12.2020 wherein Shri M.H. Raval, Consultant duly authorized by the noticee along with Shri Kawaljeet Singh, Manager, M/s Speed Movers and Transport, Patel Bhikhabhai Keshavlal of M/s Excel Engineering and Shri Dineshbhai Shanabhai Patel, Proprietor of M/s Umiya Pump were present themselves. Shri M.H. Raval again requested for fresh date for cross-examination.

24.4 Accordingly, a fresh date for cross examination was fixed on 08.01.2021 wherein Shri M.H. Raval, Consultant along with Patel Bhikhabhai Keshavlal of M/s Excel Engineering and Shri Dineshbhai Shankabhai Patel, Proprietor of M/s Umiya Pump appeared. Shri M.H. Raval submitted a written submission dated 08.01.2021 and requested to take into consideration of the same. He also stated that they are nowhere in the picture, as they were under the exemption of SSI exemption. He also stated that no enquiry/notice was issued to the party from whose premises the case was detected. He requested to drop the proceedings in view of the various judgments/case laws mentioned in the written submission. Shri Bhikhabhai stated that his statement was recorded but was not aware for which purpose and he is not involved in any clandestine removal of the goods. Shri Dineshbhai Shankabhai Patel has stated that he is not involved in the present case. No other persons turned up for the cross-examination.

24.5 In subject matter, thus, sufficient opportunities were given for cross examinations of the persons as sought for by the noticee, following the direction of the Hon'ble CESTAT

given vide Order No. A/13491-13492/2017 dated 09.11.2017. However, the concerned persons, whom the noticee intended to cross examine, did not turn up for the cross examination and could not complete the formalities of cross-examination.

24.6 As the matter is pending for long time since the direction of the Hon'ble CESTAT has been received, I have no option except to take up the matter for a fresh adjudication.

25. I find that the present case has been booked by the Preventive officers of erstwhile Central Excise Commissionerate, Ahmedabad-II, on the basis of information passed on by the Income Tax Department that M/s. Excel Pump Industries and M/s. Umiya Pumps, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad, who were engaged in the manufacturing of Submersible Pumps falling under Chapter 8413 of the CETA, 1985, had made sales in cash without disclosing the details of such cash transactions and without maintaining any books of accounts for the purpose of Income Tax. It was also intimated by the Income Tax department that these units had disclosed additional income to the tune of Rs.1.28 crores for the year 2008-09 and 2009-10 and had paid Income Tax of Rs.37,74,500/-. Further, during the course of the investigation by the Income Tax department, it was declared by Shri Bikhhabhai K. Patel, Proprietor of M/s. Excel Pump Industries and by Shri Dineshbhai Patel, Proprietor of M/s Umiya Pumps that the additional income disclosed by them was generated through the sale of submersible pumps that they had manufactured during F.Y. 2008-19 and F.Y. 2009-10. It is pertinent to note that on the basis of the said information from Income Tax Department, a SCN F. No. V.84/15-25/OA/2013 dated 02.04.2013 was issued to M/s Excel Pump Industries, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad that was adjudicated vide OIO No.AHM-EXCUS-002-COMMR-053-13-14 dated 09.01.2014 by the Commissioner, Central Excise, Ahmedabad-II. Similarly, another SCN F. No. V.84/15-27/OA/2013 dated 12.03.2013 was issued to M/s Umiya Pumps, D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad that was adjudicated vide OIO No.37/ADC/2013/MRM dated 30.09.2013 by the Additional Commissioner, Central Excise, Ahmedabad-II. The common factor in SCN F. No. V.84/15-25/OA/2013 dated 02.04.2013 issued to M/s Excel Pump Industries & others, in SCN F. No. V.84/15-27/OA/2013 dated 12.03.2013 issued to M/s Umiya Pumps & Others and the instant Show Cause Notice issued to M/s Mexcel Engineering & Others, is that all these Show Cause Notices are based on the same set of intelligence conveyed by the Income Tax Department and are on the basis of searches carried out by the Preventive Officers of the erstwhile Central Excise, Ahmedabad-II Commissionerate on 12.01.2012 simultaneously, (i) at the factory premises situated at D-1/B, Diamohd Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad, (ii) at the residential premises of Shri Bikhhabhai K. Patel, Proprietor of M/s. Excel Pump Industries situated at 71, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmedabad and (iii) at the residential premises of Shri Dineshbhai Patel, Proprietor of M/s. Umiya Pumps situated at 69, Gangadhar Society, Near Bhadreshwar Colony, Hansol, Ahmedabad. Incriminating documents were recovered from the factory premises situated at D-1/B, Diamohd Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad and the residential premises of Shri Bikhhabhai K. Patel, Proprietor of M/s. Excel Pump Industries, based on which all the three aforementioned Show Cause Notices were issued.

26. The undisputed fact in this case is that the activity of manufacture and clearance of submersible pumps was being carried out from the same premises i.e. D-1/B, Diamohd Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad in the names of M/s Excel Pump Industries, M/s Umiya pumps and M/s Mexcel Engineering during different periods. It is also an undisputed fact that all these three units were proprietorship concerns and the proprietors are related to each other. The manufacturing activity was being carried out by using the same set of machineries and most of the buyers were common to all the three concerns. It is also an admitted fact on record that after the raid by the Income Tax Authorities, M/s Excel Pump Industries and M/s Umiya pumps had ceased functioning from January/February-2010, as admitted by Shri Bhikhabhai K. Patel. However, M/s Excel Pump Industries had been functioning even after January-2010 till October-2010 because from November-2010 onwards M/s Excel Pump Industries was renamed as M/s Mexcel Engineering and Shri Harshadbhai Patel became the new proprietor. Thus, M/s Mexcel Engineering started functioning at the same premises i.e. D-1/B, Diamohd Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad, from November-2010 onwards.

27. After the disclosure of additional income before the Income Tax authorities that was generated from the sale of submersible pumps manufactured at the factory situated at D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No.8, Ahmedabad, Shri Bhikhabhai K. Patel had continued the same activity of manufacture and clearance of submersible pumps from the same factory using the same set of machineries under the new name of M/s Mexcel Engineering with a new proprietor, Shri Harshadbhai C. Patel. In the new set up, Shri Harshadbhai C. Patel, proprietor did not have any major role in the day to day activities of the manufacture and clearances as Shri Bhikhabhai K Patel had assumed the role of authorized signatory and Shri Dineshbhai Patel, proprietor of M/s Umiya Pumps was looking after the technical details/workshop responsibilities of M/s Mexcel Engineering. This fact has been substantiated in the statement dated 03.02.2012 by Shri Bhikhabhai K. Patel. Further, Shri Ramesh Mithalal Shah, Accountant for M/s Mexcel engineering had corroborated these facts in his statement dated 12.01.2012 as brought out in paragraph 6.1 of the instant SCN, wherein he had made it clear that Shri Bhikhabhai K. Patel and Shri Dineshbhai Patel were brothers; that Shri Bhikhabhai K. Patel was responsible for the day to day running of M/s Mexcel Engineering is also evident from the fact that the application dated 26.08.2010 to BIS for change of name from EXCEL to MEXCEL; the acceptance scheme of testing and inspection dated 25.08.2010 and acceptance of rate of marking fee dated 25.08.2010 issued on behalf of M/s Mexcel Engineering all carry the signature of Shri Bhikhabhai K. Patel in the capacity as proprietor. By way of the statement of Shri Harshadbhai Patel, Proprietor of M/s. Mexcel Engineering dated 21.02.2013, investigation had succeeded in obtaining confessional and confirmatory admission that the entries in the delivery challan prepared by Shri R.M. Shah, the Accountant pertained to the sales/dispatches of submersible pumps manufactured and removed from the said factory premises. He had even explained that the sign MX on the challans meant that the same pertained to M/s Mexcel Engineering and the value mentioned on the challans were actually to be multiplied by 100 to arrive at the correct value. These facts were further corroborated by the statement dated 21.02.2013 of Shri H.C. Patel, proprietor of M/s Mexcel Engineering, wherein he had further confessed that the sales proceeds were always received in cash. He had also vividly explained in the entries in the delivery challans, accepting that the same

pertained to clearances of goods manufactured by M/s Mexcel Engineering and had confirmed that Shri Bhikhabhai Patel was his relative and was looking after all the government work of M/s Mexcel Engineering; that as he was not aware that Central Excise duty was payable; that he had not paid Central Excise duty on manufacture and clearance of submersible pump valued at Rs.3,68,86,927/- for the period from 25.12.2010 to 31.03.2011 and valued at Rs.375,79,100/- from 01.04.2011 to 09.01.2012 and was willing to pay the Central Excise duty on such admitted clearances. Further, by way of statements at the buyers end, the modus operandi of clearance of submersible pumps without proper invoices and the cash transaction of sales proceeds for which no records were maintained was further corroborated by the statements of buyers viz. (i) statement dated 05.02.2013 of Shri Durgesh C. Parmar, Manager & Authorized Signatory of M/s. Ratan India Traders, Hubli, (ii) statement dated 18.04.2012 of Shri Jitendra Dineshbhshi Patel, owner of M/s Patel Pump House, Solapur and (iii) statement of Shri Rajesh Thakur, Partner of M/s Sona Sales, Ujjain, all recorded under Section 14 of Central Excise Act, 1944. Further, the above facts were confirmed and corroborated by the statements of the transporters, viz. (a) statement dated 24.01.2012 of Shri Yogeshkumar K.Jain, Acctt. of M/s. Girnar Logistics Pvt. Ltd., Ahmedabad; (b) statement dated 25.01.2012 of Shri Harshad R Vyas, Manager of M/s. Super Roadlines, Ahmedabad and statement dated 24.01.2012 of Shri Pavankumar Sharma, Manager of M/s. Express Cargo Carriers Pvt. Ltd, Ahmedabad, all recorded under Section 14 of Central Excise Act, 1944 wherein they have confirmed and corroborated that the submersible pumps received from M/s Mexcel Engineering were always under the cover of kachha chits/challans without any invoice and accordingly, they had not maintained any ledger accounts for payments that were always received at the end of the buyers.

28. In agreement of evasion of Central Excise duty as demanded in the instant Show Cause Notice, M/s Mexcel Engineering has also voluntarily deposited an amount of Rs.5,00,000/- on 18.02.2012 towards evaded Central Excise duty during investigation of the subject case. It is further on record that M/s Mexcel Engineering had also filed a declaration to settle the dues as demanded under the instant SCN under the Sabka Vishvas Legacy Disput Resolution Scheme, 2019 (SVLDRS) but they failed to make payment within stipulated period, hence, subject dues were not settled under the SVLDR Scheme-2019.

29. The investigation has, thus, succeeded in establishing preponderance of probability by way of the inquiries and recording of statements detailed above that M/s Mexcel Engineering had indeed manufactured and cleared the impugned goods clandestinely without obtaining Central Excise Registration, without maintaining proper records, without following statutory provisions and without payment of duty thereon. In the case of Commissioner of Central Excise, Ludhiana Vs. C.L. Engineering Ltd.-2012(279) E.L.T. 262 (Tri. Del), it has been clearly held by the Hon'ble Tribunal that the criteria for establishing cases relating to economic offences is on the basis of *preponderances of probability*. Further, in the case of Bhagwati Steelcast Ltd. Vs Commissioner of Central Excise, Nashik-2013(293)E.L.T. 417 (Tri.-Mumbai), Hon'ble Tribunal have relied upon various case laws including the Apex Court rulings in the cases of Collector of Customs, Madras v. D. Bhoormul-1983(13) E.L.T.1546(S.C.) and State of Rajasthan v. Mohan Lal-2009 (237) E.L.T. 435 (S.C.) to decide that it was not necessary for the investigation to prove an offense with arithmetical precision once *preponderance of probability* was established. The relevant

portion of this case law is extracted below for a clear perspective:

"75.5 in the case of A.N.Guha & Co Vs Collector (1996(86) ELT 333), this Tribunal held that it is not necessary for the department to establish a fact with mathematical precision. Once the presumption as to the existence of a fact is raised against the assessee that the input has not been transported in the vehicle mentioned in the invoices, it is reasonable to say that the inputs were not received in the factory. In the case of R.V.E.Ventatachala Gounder V Arulmigu Vishwesaraswami & V.P., (order dated 08.10.2003 in Civil Appeal No.10585 of 1996) the Hon'ble Apex Court held as follows:

" Whether a civil or a criminal case, the anvil for testing of 'proved', 'disproved' and 'not proved', as defined in Section 3 of the Indian Evidence Act, 1872, is one and the same. A fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence to probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result, drawn by applicability of the rule, which makes the difference. "The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case BEST says; There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to be burden of proof, is a sufficient basis of decision; but in the latter especially when the offence charged amounts to reason or felony, a much higher degree of assurance is required. (BEST, S.95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases, the prosecution must prove the charge beyond reasonable doubt" (See Sarkar on Evidence, 15th Edition, pp.58-59). In the words of Denning L.J (Bater V.B.1950, 2 All ER 458, 459). 'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal case, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So, also in civil cases, there may be degrees of probability'. Agreeing with this statement of law, Hodson, LJ said 'Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others.' (Hornal V.Neuberger P Ltd, 1956 3 ALL ER 970, 977)".

75.6 In the case of Collector of Customs, Madras V D.Bhoormul cited supra (1983(13) ELT 1546 (SC), the Hon'ble Court further held as follows:

"It can not be disputed that in proceeding for imposing penalties, under Clause (8) of S.167 to which S.178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs, absolute certainty, is a myth, and as Prof Brett felicitously puts it all exactness is a fake" EL Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this workaday world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe, in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than prudent man's estimate as to the probabilities of the case. The other; cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in Batch V. Archer (I) "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, it not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying S.106, Evidence Act, the burden to establish those facts is cast on, the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or

the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn. Article 320, page 291), the "Presumption of innocence is, no doubt, presumption juris, but every day's practice shows that it may be successfully encountered by the presumption of built arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact – Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in this favour. However, this does not mean that the social or peculiar knowledge of the person proceeded against will believe the prosecution or the Department altogether of the burden of production some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

75.7 The concepts of "reasonable doubt" and "pre-ponderance of probability" have been lucidly explained by the Hon'ble Apex Court in the case of State of Rajasthan V Mohan Lal (2009 (237) ELT 435 (SC) as follows:-

"36. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from overemotional response. Doubts must be actual and substantial doubt as to the guilt of the accused persons arising from the evidence, or from the lack of it as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

37. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on robust common sense and ultimately, on the trained intuitions of the Judge.....

75.8 From the case laws cited above, the department need not prove the case with mathematical accuracy. So long as the department has established the case with such a degree of preponderance the existence of a fact, it is sufficient. In the instant case, the burden to establish eligibility to the credit is on the appellant-assessee and if they fail to establish or explain the facts established by the department, an adverse inference arises against them coupled with the presumptive evidence adduced by the department.

30. In view of the above, I find that the investigation has, thus, succeeded in establishing the present case with a high degree of preponderance to determine clandestine manufacture and clearance of excisable goods by the notice. The burden to prove that they were innocent was clearly on the notice and has miserably failed to do so.

31. The noticee has tried to pick holes in the investigation and contended that it was up to the department to prove that they had actually manufactured the impugned goods. They have also relied heavily on the retractions of confessional statement. It is on record that Shri Bhikhabhai K. Patel had reiterated his confessional statements tendered in January/February-2012 by way of his letter dated 11.02.2013. The statement dated 21.02.2013 of Shri Harshadbhai C. Patel, Proprietor of M/s Mexcel Engineering was recorded after the said retraction, where he had clearly explained that the entries in the impugned delivery challans are pertaining to clearances without invoices and confirmed that the sale proceeds were received by him in cash. Therefore, it is evident that the retraction of his confessional statement by Shri Bhikhabhai Patel was a clear after-thought. The Hon'ble Supreme Court in the case of Surjeet Singh Chhabra vs Union of India-1997 (89) E.L.T. 646 (S.C) have held that confessional statement made before a Superintendent of Customs, even if retracted within six days has got evidentiary value. The relevant extracts are as follows:

"3. It is true that the petitioner had confessed that he purchased the gold and had

brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witness who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witness as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witness before the authority takes a decision of proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner.”.

31.1 Further, the noticee has not put forth any explanation whatsoever regarding the incriminating documents like delivery challans, diaries etc. recovered from the factory premises as well as the residential premises of Shri Bhikhabai K. Patel, Without any explanation, a blanket retraction of the confessional statement is nothing but an afterthought. The evidentiary value of the statements relied upon in the instant SCN remains valid and forceful.

32. The noticee's argument, that the statements of the Partners and Accountant were recorded under duress, is baseless and unwarranted. In fact, the statements were recorded as per the convenience of the noticees concerned with the case in the languages known to them. I find that in the present case, statement dated 21.03.2013 of Shri Rameshbhai Mithalal Shah was recorded in Gujarati language. In some cases, the statements were recorded in English and Hindi based on their education and proficiency in a particular language. Further, at the end of each and every statement, it has been categorically admitted by the concerned that –

“My above statement has been recorded as per my say and version on the computer brought along by the officers with my consent. During the course of recording, no untoward incident took place and no duress, coercion, threat, temptation etc. have been applied on me. I have gone carefully through the contents of the statement and I admit the contents thereof are as per my say and narration only. In token of correctness, I put my dated signature on every page thereof”.

32.1 Therefore, the contention of the noticee, that there was duress, threat at the time of recording the statements, is untrue and an act of after-thought to divert attention of the Department from the original issue of Central Excise duty evasion. The noticee has only stated that the statements relied upon in the show cause notice are not reliable, not related to them and they were in no way involved in the present case. In fact, they have not challenged the total Central Excise duty evasion and the Central Excise duty amount worked out on the basis of various Diaries recovered during the course of search by the Officers of Preventive. In fact, I find that the Central Excise duty recoverable from the noticee

has been correctly worked out by the Preventive Officers of the Department as per various Annexures attached to the Show Cause Notice and I find that each and every source of duty amount worked out has been discussed in the Show Cause Notice.

33. The plea of the noticee that there was duplication of challans as the same pumps delivered were returned back again and again cleared to other buyers again and again, is not supported by an evidence in the form of any delivery challans or lorry receipts or any documents whatsoever, There is also no force in the argument that Shri Bhikhabhai K. Patel was not concerned with M/s Mexcel Engineering in view of the fact that it is proven by way of the various statements and the records recovered from his residence that he was the person actively involved in the activities of manufacture and clearance of submersible pumps from the factory located at D-1/B, Diamond park Industrial Estate, Opp. Gujarat Agro, N.H. No. 8, G.I.D.C. Naroda, Ahmedabad under the name of various proprietorship concerns at different periods.

34. As regards the contention of the noticee that they are eligible for exemption under SSI Notification No. 08/2003-CE, I find that the total value of clearance from the factory situated at same premises i.e. D-1/B, Diamond Park Industrial Estate, Opp. Gujarat Agro, N.H. No.8, G.I.D.C. Naroda, Ahmedabad, in the previous year i.e. F.Y. 2009-10, had exceeded the threshold limit of Rs.4 crores as stipulated under Notification No.8/2003-CE. It is also on record that M/s Mexcel Engineering had also exceeded clearance value of Rs. 4 crores during the Financial Year 2010-11. I, therefore, find that their claim that they are eligible for SSI exemption is not maintainable.

35. The noticee has contended that there is a mistake in the Annexure-A to the show cause notice and stated that the value for the year 2011-12 at column No.5 (4th column) is the value as per delivery challan and the amount mentioned is Rs.2,19,74,048/- whereas the value given at Annexure-A-7 giving the details of such delivery challans is Rs.1,71,89,714/-. The value of Rs.2,19,74,048/- is pertaining the value as per red diary. I find that the amount of Central Excise duty evaded to the tune of Rs.34,81,602/- has been worked out and it has been demanded vide the present show cause notice has been arrived at on the basis of Annexure-A and the details has been mentioned in para 17.1 of the show cause notice. The noticee has agreed with the Department and paid Rs.5,00,000/- towards the Duty liability. Therefore, I find that the show cause notice has been issued on the correct amount arrived at on the basis of investigation.

36. The noticee has also stated that the investigating officers had not inquired about the premises in which they said that the goods were manufactured in the said premises i.e. D-1/B, Diamond Park, Opp. Gujarat Agro, Naroda GIDC, NH No. 8, Naroda, Ahmedabad by M/s. Mexcel Engineering. In fact, the said premises was under the control of M/s. V.M. Industries and M/s. V. M. Industries was carrying out manufacturing activity and he is the actual manufacturer of the Submersible Pump but officers have not taken care to carry out the correct investigation. They produced details of Electricity bill issued to M/s. V. M. Industries right from the year 2004 to 2020 and also the copy of Ahmedabad Municipal Corporation Invoice which also supports that M/s. V. M. Industries was working there. I find that the noticee's contention is not maintainable as they failed to change the name in their

electricity bill. Simply because the electricity bill were in the name of M/s.V.M.Industries, it does not mean that they can not work from the premises. In fact, the noticee was working from the said premises and manufacturing, removing the Submersible pump, which has been admitted by Shri Bhikabhai K Patel, the authorised person for M/s.Mexcel Engineering during the search operation conducted at the premises on 12.01.2012. He has categorically admitted that Excel Pump Industries had ceased functioning w.e.f. January 2010 and thereafter M/s.Mexcel Engineering came into existence from November 2010, however only the name and the proprietor of the firm had been changed. Therefore, the claim of the noticee is not maintainable. Further, the investigating officers have thoroughly investigated the case and the role played by the noticee has been clearly brought out in the investigation of evasion of Central Excise duty by way of illegal removal of Submersible Pumps.

37. It is established in the present case that the notice had indulged themselves in clandestine manufacture and clearances of submersible pumps without obtaining Central Excise registration, without assessing and paying appropriate Central Excise duty within the stipulated period, without maintaining proper records and accounts of the finished goods, without issuing valid and proper invoices and without filing proper periodical returns. M/s Mexcel Engineering have, thus, contravened the provisions of Rule 4,6,8,9,10,11 and 12 of the Central Excise Rules, 2002. All these acts of contravention constitute an offence of the nature and type as described in clauses (a), (b), (c), & (d) of Rule 25 of Central Excise Rules, 2002. Therefore, M/s Mexcel Engineering has rendered themselves liable for penalty equal to evaded duty under Section 11AC of Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002. Further, I find that it is a clear case of suppression of facts and contravention of provisions of the Central Act, 1944 and ruled made there under with intent to evade Central Excise duty and, hence, the extended period of limitation is correctly invoked in the present case.

38. In view of the above, I confirm the demand of Central Excise duty amounting to Rs.34,81,602/- under Section 11A(1)/11A(4) of the Central Excise Act, 1944, invoking the extended period of limitation. Further, an amount of Rs.5,00,000/- already paid by them during investigation is required to be appropriated against said demand of evaded duty. I also hold that M/s Mexcel Engineering is also liable to pay interest at appropriate rate on above evaded duty under Section 11AB/11AA of the Central Excise Act, 1944.

39. The noticee, being a proprietorship concern, simultaneous personal penalty upon the proprietor, Shri Harshadbhai C. Patel, is not warranted for which I place reliance upon the case law of Minocha Metals (P) Ltd.-2010 (256) E.L.T. 158 (Tr.-Del.).

40. As regard the proposal for personal penalty upon Shri Bhikhabhai K. Patel, I find that it has been clearly brought out by the investigation that he was directly involved in the activities at said factory premises right from the inception. Shri Bhikhabhai Patel was the architects in the whole gamut of evasion of Central Excise duty on submersible pumps that were manufactured and cleared from the factory premises of M/s Mexcel Engineering and that he had knowingly indulged and involved himself in clearing submersible pumps that were manufactured on the machineries installed in their said factory illicitly to various buyers across India on kachcha chits/delivery challans without preparing invoice and without paying VAT and Central Excise duty and that he has not maintained any records for

the production. The involvement of Shri Bhikhabhai Patel was further compounded by the fact that he was looking after the day to day work of purchase of raw material without bill and without transporter's documents, for making payments for purchase of raw material in cash, for inspection of quality of raw material, for booking of raw material on telephone, for not entering the details of raw material in the records, for the day to day planning and scheduling of the manufacture of submersible pumps and taking order from buyers on telephone, for not maintaining records for day to day production of submersible pump and

clearing the same under kaccha chits/delivery challan without preparing invoices and the delivery challans/kaccha chits were destroyed by the buyers immediately on receipt of submersible pumps in their factory and for receiving the payments in cash for such clearance of submersible pumps. In order to continue with such duty evasion, he himself had made the application for changing the name of the firm from M/s Excel Pump Industries to M/s Mexcel Engineering with the Director, Bureau of Indian Standards after the Income Tax raid and also had made the correspondence with BIS authorities in respect of the "ACCEPTANCE OF SCHEME OF TESTING AND INSPECTION", ACCEPTANCE OF RATE OF MARKING FEE" and APPLICANTS/ LICENSEE'S DECLARATION OF BRAND NAME/ TRADEMARK PROPOSED TO BE COVERED UNDER CERTIFICATION" all dated 25.08.2010 etc. in the capacity of Proprietor of M/s Mexcel Engineering. Shri Harshadbhai C. Patel in his statement dated 21.3.2013 had stated that Shri Bhikhabhai Patel was not an authorized signatory of M/s. Mexcel Engineering and he was just the proprietor of the firm. The documents related to the firm M/s Mexcel Engineering withdrawn from the residential premises of Shri Bhikhabhai C. Patel also confirmed the fact that Shri Bhikhabhai C. Patel was the person who was behind all the illegal activities of M/s. Mexcel Engineering. Thus, he has clearly dealt with goods that he knew were liable for confiscation, with the intent to evade duty. I, therefore, hold that Shri Bhikhabhai C. Patel is liable to personal penalty under Rule 26(1) of the Central Excise Rules, 2002.

41. I find that the co-noticees representing buyers in the case cannot be held to have had reason to believe that the goods bought by them were dutiable or were liable to confiscation as the noticee was a small scale unit and they would not know at what point of time would the noticee have crossed the threshold limit of exemption, especially because in the present case the exemption under Notification No. 8/2003-CE dated 01.03.2003 is denied to the noticee on the ground that the total value of clearances from the factory premises had exceeded the stipulated limit the previous years. I, therefore, find that the buyers cannot be held to have partnered or connived in any manner in the clandestine manufacture and clearance by the noticee. Accordingly, I drop the proposal to impose personal penalties on three buyers viz. (a) Shri Durgesh C. Parmar, Manager & Authorised Signatory of M/s. Ratan India Traders, Opp. Durgadevi Temple, Dajibanpeth, Hubli-580 028 (ii) Shri Rajesh Thakur, Son of Shri Kanhyai alal Thakur, 112, Nai Sadak, Ujjain, Partner of M/s. Sona Sales, Ujjain and (iii) Shri Seventilal Shah, Son of Shri Tribhovandas Shah, Proprietor of M/s. Seventilal & Co, 1, JK Building, Hamidia Road, Bhopal.

42. The noticee has also relied upon various case laws in their defence submission dated 08.01.2021, stating that the demand is not sustainable, no interest is payable by them and also penalty may not be imposed on them. I find that the facts and the


circumstances of the present cases are different and cannot be compared with those case laws cited by the noticee and therefore, not maintainable.

43. In view of the above discussion and my findings, I pass the following order:

ORDER

- (I) I confirm the demand of Central Excise duty amounting to **Rs.34,81,602/- (Rupees Thirty Four Lakhs Eighty One Thousand Six Hundred and Two only)** under Section 11A(2)/ Section 11A(4) of the Central Excise Act, 1944.
- (II) I order to appropriate an amount of **Rs.5,00,000/- (Rupees Five Lakhs only)** already paid by the noticee towards the confirmed demand of duty as above.
- (III) I order M/s.Mexcel Engineering, Ahmedabad to pay up the interest on the amount of Central Excise duty confirmed above in terms of Section 11AB/ 11AA of the Central Excise Act, 1944.
- (IV) I impose a penalty of **Rs.34,81,602/- (Rupees Thirty Four Lakhs, Eighty One Thousand, Six Hundred and Two only)** on M/s.Mexcel Engineering under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002.
- (V) I impose a personal penalty of **Rs.5,00,000/- (Rupees Five Lakhs only)** upon **Shri Bhikhabhai K.Patel** under Rule 26(1) of the Central Excise Rules, 2002.
- (VI) I drop the personal penalties proposed under Rule 26(1) of the Central Excise Rules, 2002, upon:
- (i) Shri Harshalbhai C.Patel, Proprietor of M/s Mexcel Engineering;
 - (ii) Shri Durgesh C Parmar, Manager & Authorized Signatory of M/s.Ratan India Traders, Opp. Durgadevi Temple, Dajibanpeth, Hubli 580 028;
 - (iii) Shri Rajesh Thakur, Son of Shri KanhaiyaLal Thakur, 112, Nai Sadak, Ujjain, Partner of M/s.Sona Sales, Ujjain;
 - (iv) Shri Seventilal Shah, Son of Shri Tribhovandas Shah, Proprietor of M/s.Seventilal & Co, 1, JK Building, Hamidia Road, Bhopal.

44. The **Show Cause Notice No.V.84/15-106/OA/2013** dated **03.01.2014** is disposed of in the aforesaid manner.


(M.L.Meena)
Additional Commissioner
Central GST & Central Excise
Ahmedabad North

F.No.V.84/15-106/OA/2013-Pt.II

Dtd. 26.03.2021.

By SPPED POST/ Regd.A.D.

To

1. M/s.Mexcel Engineering,
D-1/B, Diamond Park, Opp. Gujarat Agro,
Naroda GIDC, NH No.8, Ahmedabad.
2. Shri Harshilbhai C.Patel, Proprietor
M/s.Mexcel Engineering,
D-1/B, Diamond Park, Opp: Gujarat Agro,
Naroda GIDC, NH No.8, Ahmedabad.
3. Shri Bhikhabhai Patel,
Proprietor, M/s.Excel Pump Industries,
D-1/B, Diamond Park, Opp: Gujarat Agro,
Naroda GIDC, NH No.8, Ahmedabad
4. Shri Durgesh C Parmar,
Manager & Authorized Signatory
M/s.Ratan India Traders
Opp. Durgadevi Temple, Dajibanpet,
Hubli (Karnataka)- 580 028.
5. Shri Rajesh Thakur Son of Shri Kanhaiyalal Thakur,
112, Nai Sadak, Ujjain, Partner of M/s.Sona Sales, Ujjain
6. Shri Seventilal Shah, Son of Shri Tribhovandas Shah,
Proprietor of M/s.Seventilal & Co, 1, J K Building,
Hamidia Road, Bhopal.

Copy to:

- 1) The Commissioner, Central GST & Central Excise, Ahmedabad North
- 2) The Deputy/Assistant Commissioner, CGST & Central Excise, Division-1,
Ahmedabad North.
- 3) The Superintendent, CGST & Central Excise, Range II, Division-1, Ahmedabad
North.
- 4) Guard File.

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