OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHAYAY MARG,
BHAVNAGAR - 364 001.

F. No. V/15-51/DEM/HQ/2009

Date of order : 12.09.2011
Date of issue : 22.09.2011

Passed by Shri Harcharan Singh, Additional Commissioner

Order-in-Original No. 09/BVR/ADC/2011

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

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy or the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Subject:- Show Cause Notice Number F. No. V/15-51/Dem/HQ/2009 dated 03.08.2009 demanding Central Excise duty of Rs.5,80,220/-. Reg-

Brief facts:

M/s Rawmin Mining & Industries Pvt. Ltd, Village Palakhada, Taluka and District **(hereinafter referred to as Noticee),** an 100% Export Oriented Unit, holding Central Excise Registration No. AABR3228DXM001 is engaged in the manufacture of excisable goods viz. Beneficiated Bauxite falling under CETH No. 26060010 of 1st Schedule to the Central Excise Tariff Act, 1985. The Noticee had obtained licence for Private Bonded Warehouse under Section 59 and permission for In-bond manufacturing under Section 65 of the Customs Act, 1962 **(hereinafter referred to as CA)** granted by the Assistant Commissioner, Central Excise Division, Junagadh and had executed B-17 Bond with the said Assistant Commissioner undertaking to observe all the procedures of the CA as well as Central Excise Act, 1944 **(hereinafter referred to as CEA)** and CER & Regulations made thereunder, failing which they have undertaken to pay the Customs and Central Excise duty along with interest on the same on demand being made.

2. The Noticee filed Monthly Return in Form ER-2 as per the provisions of Rule 17 of Central Excise Rules, 2002 showing the details of the excisable goods manufactured and clearance made to DTA and export during the month of January, 2009 to the Jurisdictional Superintendent of Central Excise Range, who during the course of scrutiny of the said monthly return ER-2, observed that the Noticee have shown quantity of 45160.74 MT Beneficiated Bauxite as Deemed Export under para 6.9 Foreign Trade Policy (FTP) in the respective column, however, the value of this same was not shown anywhere. Further, the Noticee did not submit the documents evidencing such export to the Jurisdictional Range Superintendent, as such, the Noticee was requested by the Jurisdictional Range Superintendent to furnish all the documents relating to removal of the said goods from the factory.

3. The Noticee vide its letter No. Nil dated 27.04.2009 informed that due to an oversight, they have shown the quantity of 45160.74 MT in Column No. 9 i.e. under "Deemed Export" as per para 6.9 of FTP and it should have actually been shown under "Exports", as per para 6.10 of FTP-i.e. "Export through others.....". The Noticee have also provided documents such as invoice, details of payment received by them, copies of Bill of Lading.

4 The above documents were scrutinized for the purpose of verification of the genuineness of the Noticee's claim as "Export through Others" and it was observed that :-

(a) Goods were sold to three different domestic buyers as per details given in the table hereinbelow :

Sr. No.	Commercial Invoice No.	Date	Name of the Buyer	Quantity (Metric Tonne	Value (in Rs)
1.	RMIPL/BXT/2008-09/02	8.5.2008	M/s Shivam Mines &Minerals Ltd.,	21,000.00	1,76,80,000/-
2.	RMIPL/BXT/2008-09/04	4.7.2008	M/s Swati Energy & Projects (P.) Ltd.,	853.00	6,82,400
3.	RMIPL/BXT/2008-09/06	22.1.2009	M/s Jivraj Enterprise,	(22207.740 wet MT less 333.16 Ton Moisture)=21874.624 Dry MT	1,31,24,774/-,

(b) Goods were removed under the cover of commercial invoices and not under the cover of excisable invoices and without preparing ARE-I for export;

(c) Shipping Bills & Bills of Lading submitted by the Noticee in support of his claim as "Export through others" were filed by M/s Shivam Mines & Minerals and M/s Jivraj Enterprise and did not reflect their (noticee) name as well as the quantity shown in said Shipping Bills & Bills of Lading did not tallied with the quantity mentioned in the invoices raised by the Noticee in favour of these buyers.

(d) Export Documents in respect of the goods sold to M/s Swati Energy & Projects (P) Ltd. were not submitted;

(e) Payment for the removal of said goods was received in Indian currency by the Noticee

(f) Though the Noticee informed vide its letters dated 27.04.2009 & 17.04.2009 that they will provide copies of their correspondence with the Customs Department as a token of proof of export, but the same were not provided, instead, the Noticee have provided copy of correspondence made with the buyer;

(g) Noticee did not produce copies of Agreements / Contracts made by them with the buyer which were asked for by the Jurisdictional Range Superintendent of Central Excise vide letter dated 22.04.2009. Noticee vide letter dated 21.05.2009 informed that the goods were sold by them to there parties for further export through a manually acceptable verbal agreement. Further, the invoice issued to M/s. Jivraj Enterprise by the Noticee indicate that the goods were sold as per the Agreement dated 3rd Jan., 2009 which itself is a contradiction.

5. The various provisions under Foreign Trade Policy time being in force as well as the Central Excise Act, 1944 in this regard, are reproduced hereunder:-

i) As per para 6.10 of Foreign Trade Policy, "An EOU/ EHTP/ STP/BTP unit may export goods manufactured / software developed by it through another exporter of any other EOU/EHTP/STP/SEZ unit subject to conditions mentioned in para 6.19 of Handbook".

ii) It appeared that as per the condition stipulated in the Hand Book of Procedure (Vol.1) Para 6.19: **Export through other exporters** ".....(c) The export orders so procured shall be executed within the parameters of EOU/EHTP/STP/BTJP schemes and goods shall be directly transferred from unit to port of shipment."

iii) As per DGFT Policy Circular No. 16 (RE-2002)/2002-07, dated 24.12.2002 issued under Foreign Trade Policy it is clarified that " .....third Party Exports are intended to service the manufacturer exporters who may not be able to export directly and would therefore avail of the services of a third Party namely merchant exporters. The third party thus in effect acts a marketing wing in the entire export transaction and the intention of the policy is to remit/exempt duty on the input used in the export product. Both the provisions under paras 2.34 and 9.55 of the Exim policy clearly imply that third party exports are applicable for all the export promotion schemes of the Exim policy provided the name of the manufacturer and the third party are mentioned on the shipping bill"

iv) As per DGFT Policy Circular No. 19(RE-2006)2004-2009 dated 11.09.2006 issued under Foreign Trade Policy, **DTA sale on third party exports by EOU. , clarifies that**

".....(ii) the facility of DTA sale to EOU is available against physical export of goods manufactured in EOU and earning positive net Foreign exchange. Exports effected through third party and foreign exchange realized in the name of the third party for those goods which have been manufactured in the EOU and are directly transferred from the unit to the port of shipment are eligible and this export is also counted for the purpose of fulfillment of export obligation of EOU. The EOU is, therefore, eligible to get DTA sale benefits on exports effected through the third party. The Shipping Bills must indicate the name of both the manufacturer and third party. While indicating the name of the manufacturer in such cases, the status of the unit i.e. export oriented unit must be clearly indicated."

v) As per the procedure laid down under Notification No. 42/2001-C.E. (N.T.) dated 26.06.2001 issued under Central Excise Act, 1944, The Merchant Exporter shall procure CT-1 Certificate from the Jurisdictional Superintendent of Central Excise /against which he can procure the duty free goods from the manufacturer for subsequent export. The ARE-1, Shipping Bill &Bill of Lading should have the Names of both the exporter and the manufacturer.

vi) It is clearly provided in the Central Excise Rules, 2002 under "**Rule 11, the relevant portion of which is reproduced for ease of reference " Goods to be removed on invoice:** that " **(1)** No excisable goods shall be removed from a factory of a warehouse except under an invoice signed by the owner of the factory of authorized agent.....

[(2) The invoice shall be serially numbered and [shall contain the registration number, address of the concerned central Excise division,] name of the consignee, description, classification, time and date of removal, mode of transport and vehicle registration number, rate of duty, quantity and value, of goods and duty payable thereon.]

(3) Then invoice shall be prepared in triplicate in the following manner, namely;-
(i) the original copy being marked as **ORIGINAL FOR BUYER;**
(2) the duplicate copy being marked as **DUPLICATE FOR TRANSPORTER/**
(3) the triplicate copy being marked as **TRIPLICATE FOR ASSESSEE.**

(4) Only one copy of invoice book shall be in used at a time, unless otherwise allowed by the Assistant Commissioner of Central Excise, of the Deputy Commissioner of Central Excise, as the case may be, in the special facts and circumstances of each case.

(5).....

(6) Before making use of the invoice book, the serial number of the same shall be intimated to the Superintendent of Central Excise having jurisdiction."

6. From the above, it was found that the notice had removed the goods from factory under the cover of commercial invoices, as informed by the Noticee vide its letter No. Nil dated 31.05.2009, which is not a valid Central Excise document in terms of the Rule 11 of Central Excise Rules, 2002. Further, the first consignment was sold in the month of May, 2008 and second was sold in the month of July, 2008 by the Noticee but the fact of such clearance was not mentioned in the monthly ER-2 returns of relevant period. The Noticee declared the details of sale of first two consignments together with the third consignment in the month of January, 2009. Moreover, neither export invoices nor ARE-1 were prepared by the Noticee though mandatory for clearance of any kind of goods for export. Apart from the above, Bills of Lading and Shipping Bills provided by the Noticee as 'proof of export' did not show their names and were related to only for the two exporters and quantity exported was not found tallied with the same sold to buyers by the Noticee.

7. It appeared that as per proviso to Section 3 of Central Excise Act, 1944, the duties of Central Excise levied and collected on any excisable goods produced of manufactured by a 100% EOU and brought to any other place in India shall be an amount equal to the aggregate of the duties of customs which are leviable under the Customs Act, 1962, or any other law for the time being in force on like goods produced of manufactured outside India as if imported into India and where said duties of customs are chargeable are reference to their value, the value of such excisable goods shall not withstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and Customs Tariff Act, 1975. Thus, the said notice was required to pay Central Excise duty equivalent to the aggregate of the duties of the Customs leviable under the Customs Act, 1962 along with interest thereon.

8. From the above, it appeared that the Noticee had illicitly cleared the Beneficiated Bauxite (Finished goods) manufactured under Customs Bonded Warehouse, weighing 45160.74 MT valued at Rs. 33,14,87,174/-,(Rupees Thirty three crores, fourteen lacs, eighty seven thousand, one hundred and seventy four only) involving Central Excise duty equivalent to all duties of Customs amounting to Rs. 5,80,220/- (Rs Five lacs, eighty thousand, two hundred & twenty only), by way of selling it to three domestic buyers (1) M/s. Shivam Mines & Minerals Ltd, "Ashutosh", Ghanshyam Nagar, Bhuj-Kuch, (2) M/s Swati Energy & Projects (P) Ltd, 207, Bhavanagar Complex, Vidyavihar (West), Mumbai & (3) M/s Jivraj Enterprise, Porbandar; thereby, the said Noticee had contravened the provision of section 68, 69 and 71 of the Customs Act, 1962 in as much as they manufactured the excisable goods, in bond and cleared their final product without payment of Central Excise/Customs duty against the conditions of the bond. As goods had been cleared by the said Noticee without payment of any duties and without cover of valid Central Excise documents, therefore the said Noticee have contravened the provision of Rules 4, 8, 11, 17 and 20 of Central Excise Rules, 2002 and with malafide intention of evasion of Central Excise Duty/Customs Duty, thereby, the said Noticee rendered themselves liable to Penal action under Rule 25 of the Central Excise Rules, 2002.

9. It further appeared that the said Noticee removed the finished goods illicitly from the factory premises, therefore, the duty is required to be recovered from them under proviso to Section 11A(1) of the Central Excise Act, 1944 and also in terms of condition of B-17 Bond furnished by them along with interest at the appropriate rate on the delayed payment of duty under Section 11AB of the Central Excise Act, 1944. All these acts of contravention on their part appear to have constituted an offence of the nature described under Rule 25 of the Central Excise Rules, 2002 and under Section 11 AC of Central Excise Act, 1944. Thus, the Noticee was liable to penal action under Rule 25 of the Central Excise Rules, 2002 read with section 11AC of The Central Excise Act, 1944.

10. Therefore, a notice was issued proposing to

(a) Demand of the duty of Central Excise, equivalent to aggregate of all customs duty amounting to Rs. 5,80,220/- (Rs. Five lacs, eighty thousand, two hundred & twenty only) under proviso to section 11A(1) of the Central Excise Act, 1944 as well as in terms of B-17 Bond.

(b) Demand of the interest at the appropriate rate leviable on the delayed payment of the evaded duty under section 11AB of the Central Excise Act, 1944 and in terms of conditions of B-17 Bond.

(c) Impose penalty under Rule 25 of the Central Excise Rule, 2002 and section 11AC of the Central Excise Act, 1944;

(d) Impose penalty under Rule 26 of the Central Excise Rule, 2002 for contravention of the provisions of Rule 11 of the Central Excise Rules, 2002.

Defense :

11. Noticee submitted written reply to the notice vide its letter dated 14.09.2009 stating therein that the Noticee is an 100% EOU and having been permitted/licensed/registered with various Authorities like the Development Commissioner, KSEZ / the Central Excise authorities / the Customs Department as regards to their factory premises and the private bonded warehouse.

12. The goods for which the demand is raised against them were also shown in ER-1 Return of January, 2009 and thus, sale and clearance of these goods from their EOU were also reported to the Central Excise authorities. The demand of duty under proviso to Section 3(1) of the Central Excise Act is however, raised on the basis that various documents like shipping bills and bills of lading with our name, CT-1 Certificates, Export Invoices etc. were not submitted by them though they had reported that these goods were exported through others, and not directly. The demand raised against them only on the basis that documentation as stipulated under para 6.19 of the Handbook of Procedure read with DGFT Policy Circulars dated 24.12.2002 and 11.9.2006 was not submitted by them is however, unjustified.

13. At the outset, they clarified that out of the total quantity of 44060.74 MTs of Beneficiated Bauxite, they had sold 853 MTs to M/s Swati Energy & Projects (P) Ltd, but these goods are lying at Porbandar Port and are not exported; and therefore, these goods shall be exported by it in a short time and thereupon, the documents for export of 853 MTs of above goods shall also be submitted by them. However, for the remaining quantities of 21000 MTs sold to M/s Shivam Mines & Minerals Ltd and 21874.624 MTs of the said goods sold to M/s Jivraj Enterprises, the dispute raised by the Department is not justified and tenable. In this regard, they requested to consider the following factual and legal position because it would be clear there from that these goods have been exported by these two customers.

(1) The bills/invoices raised by them to these customers show under "Remarks" portion of the bills/invoices that the sale was against Form 'H'. Form 'H' is a document under the Sales Tax laws for sale of goods for export, and therefore, it is clear from these bills/invoices also that the goods were sold by them to these buyers for export purpose.

They enclosed copies of 'H' forms against which these goods were sold and which were marked as Annexure-'I' collectively. They also placed reliance on a decision of the Appellate Tribunal in case of Benara Bearings Pvt. L td. reported in **1999 (105) ELT 398** wherein the Tribunal has referred to a Trade Notice No. 112/90 dated 25.7.90 and held that 'H form was a document issued by the Central Sales Tax authorities to a merchant exporter and 'H' form could be accepted as proof of export. In case of Vaishnow Shoes reported in **1999 (106) ELT 124** also, the Appellate Tribunal has held that production of 'H' form for proof of export was acceptable by the Central Excise authorities. In another case of Rajindra Forge Pvt. Ltd. reported in **1999 (111) ELT 744** also, the Appellate Tribunal has examined relevance of 'H' forms issued by the Sales Tax authorities and observed that 'H' forms submitted before the Authorities for export was sufficient compliance for proving export of goods. In a recent decision in case of Vadapalani Press reported in **2007 (217) ELT 248** also, the Appellate Tribunal has held that certificate in form 'H' issued by a merchant exporter was acceptable as proof of export.

'H' forms against which goods were sold by them to above customers are documents which could be accepted as proof of export, therefore, 'H' forms submitted by the buyers to them and also in view of other collateral documents referred to hereunder, it is clear that the goods in question were sold for export and are exported also (except in case of Swati Energy & Projects (P) Ltd.).

(2) M/s Shivam Mines & Minerals Ltd and M/s Jivraj Enterprises had exported the goods also and the documents like shipping bills and bills of lading have also been submitted by them before the Excise authorities. There may be some discrepancies or deficiencies in these export documents, but it is clear from the Certificate of Messrs Jivraj Enteprises that a quantity of **22207.740** MTs of the above goods were exported by them to Kuwait and that these goods were a part of the larger quantity of 36491 MTs exported under Shipping Bill No. 245 dated 6.1.2009 and Bill of Lading No. 2/PAUGERA dated 13.1.2009. They enclosed and marked as **Annexure-'II'** a copy of Certificate dated 16.6.2009 given by M/s Jivraj Enterprises in this regard.

Thus, export of 22207.740 MTs (equal to 21874.624 DMT) of Beneficiated Bauxite stands proved by virtue of above documents namely shipping bill and bill of lading as well as the certificate of M/s Jivraj Enterprises above referred.

(3) A similar certificate of M/s Shivam Mines & Minerals Ltd shall also be submitted by them at the time of hearing of this show cause notice, and it would be clear that the goods sold by them to aforesaid party had also been exported by the said buyer.

(4) Department has not caused any enquiry with the above referred three buyers to whom they have sold the goods in question. The payments had been received by them from these buyers and even otherwise, the transactions of sale by them to these three buyers are not disputed by the Revenue. Therefore, it was incumbent upon the Revenue to have verified with these buyers whether the goods purchased by them were exported or not. However, the issue is raised against them only on the basis of certain irregularities or procedural infirmities in the documents submitted by them for proving export of these goods, but without verifying with the buyers whether the goods were actually exported by them or not.

They further submitted that the entire controversy raised against them is based on assumptions and presumptions, which are in turn based on certain irregularities or deficiencies in the documents like shipping bills and bills of lading; but there is no evidence that the Revenue has led to show that the goods were actually not exported but were sold away in the open market in India. The demand of duty thus, raised on assumptions and presumptions is not sustainable.

(5) Even if the documents as referred to in the Exim Policy or a particular circular issued by the DGFT may not be available in a given case, but if export of goods could be proved by other evidence, then no demand of duty of excise would be sustainable for such goods. In case of American Dry Fruits Stores – **1992 (61) ELT 709**, the Tribunal has held that even when the goods were manufactured without a licence and cleared without any procedure having been followed, demand of duty was not justified because the goods were established to have been exported by the manufacturer. In another case of Alpha Garments – **1996 (86) ELT 600** also, it is held by the Tribunal that when goods were exported even though without following procedure and without obtaining any Central Excise licence or without issuing gate passes, excise duties could not be demanded and the procedural lapses ought to have been condoned when the goods were exported. Thus, what is important and relevant is whether the goods were actually exported or not, and it not relevant or important as to whether a particular type of document was submitted by an assessee or not. Export of goods could also be verified and established by virtue of collateral evidence, and only because the documents like shipping bills or bills of lading with names and endorsements about the manufacturer were not available though these documents were otherwise submitted by the merchant exporters, the Department cannot come to a conclusion that the goods were not exported but were sold in India entailing liability of excise duty. Something more by way of evidence would be required in such a

case because the Revenue would have to establish by evidence that the goods were actually sold away in India, but there being no such evidence on record of this case and there being no specific allegation also in this case that they had sold away the above referred goods in the domestic market thereby evading payment of Central Excise duty, the whole controversy raised against them deserves to be dropped in the interest of justice.

14. They emphasized that it is not the case of the Revenue that 44060.74 MTs of the goods in question were sold by us in India, but the case of the Revenue is that the documents submitted by us for showing that these goods were exported through others were not acceptable because they were deficient in certain particulars. On the basis of such deficiencies in documents like shipping bills and bills of lading, a serious charge of clandestine removal of goods cannot be raised against an assessee.

15. They submitted that there is no evidence of clandestine manufacture and illicit removal of excisable goods from their factory without payment of duty as alleged in the show cause notice. The entire case of the Department is based only on assumptions and presumptions about removal of goods in clandestine way without payment of duty. The whole case is in the realm of uncertainties and hence, a serious charge of clandestine manufacture of excisable goods and removal thereof in illicit manner cannot be held to have been proved in absence of any cogent and reliable evidence.

16. It is a settled legal position that absolutely reliable and cogent evidence has to be adduced by the Revenue to prove clandestine manufacture and illicit removal of excisable goods. The decisions in the cases like TGL Poshak Vs. Commissioner of C. Ex., Hyderabad - 2002 (140) ELT 187, M.T.K. Guruswamy Vs. Commissioner of Central Excise, Madurai - 2001 (130) ELT 344, Commissioner of Central Excise, Chandigarh V/s Deshmesh Casting (P) Ltd. - 2000 (40) RLT 1077, Punjab Oil & Silicate Mills Vs. Collector of Central Excise - 1993 (65) ELT 268, Suvarna Polymers Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad - 2000 (120) ELT 148, Rishab Refractories Pvt. Ltd. Vs. Commissioner of C. Ex., Chandigarh - 1996 (87) ELT 93, Kirtibhai Maganbhai Patel Vs. Commissioner of Central Excise, Nagpur - 2000 (36) RLT 211, Deena Paints Vs. CCE, New Delhi - 2001 (43) RLT 805, Ebenzer Rubbers Ltd. Vs. Collector of Central Excise, Ahmedabad - 1986 (26) ELT 997, Shakti Chemical Industries Vs. Collector of Central Excise, Baroda - 1995 (76) ELT 410, Kashmir Vanaspati (P) Ltd. Vs. Collector of Central Excise- 1989 (39) ELT 655, Ashwin Vanaspati Industries Pvt. Ltd. Vs. Collector of Central Excise, 1992 (59) ELT 175, Gurpreet Rubber Industries Vs. Collector of C. Ex., Chandigarh - 1996 (82) ELT 347 and T.M. Industries Vs. Collector of Central Excise - 1993 (68) ELT 807 may be referred to and relied upon in this regard because by virtue of the above referred case law, it is clear that the Department must adduce evidence regarding actual clandestine removal or illicit clearance of goods, and also illicit sale to the buyers by identifying the buyers to whom the goods were illicitly sold, the money that the manufacturer must have received by illegal means from the customers, etc.

In the present case, admittedly, no such evidence as discussed in the above referred decided cases is brought on record by the Department. In this view of the matter, a serious charge of clandestine manufacture of excisable goods and removal thereof in illicit manner cannot be held to have been proved in absence of any cogent and reliable evidence.

17. In the above premises, they submitted that the demand of duty raised against them on the basis that the above quantity of Beneficiated Bauxite was not exported is incorrect and unsustainable. However, extended period of limitation is also invoked in this case alleging that they had removed their finished goods illicitly from the factory premises. This allegation is however, not true because they have issued bills/invoices for sale of these goods and these transactions have been duly recorded in our books of accounts also. Payments have been received from the customers through cheques and payments have also been duly accounted for. Further, it is also an admitted fact that these three transactions of sale have been reflected in ER-2 return of January, 2009 also, and therefore, how could there be any allegation of illicit removal of these goods by us ? Instead of showing the clearance of these goods in the returns of May, 2008 and July, 2008 when two invoices/bills were raised on M/s. Shivam Mines & Minerals Ltd, and M/s Swati Energy & Projects (P) Ltd they have shown all the three sales and clearances

in January, 2009 when third invoice was issued on M/s Jivraj Enterprises but notwithstanding this procedural irregularity and lapse on their part, the fact remains that they have declared all these three transactions to the Department in ER-2 return of January, 2009 and they have also accounted for these transactions in their books, ledger, etc. Therefore, there is no illicit removal of these goods for which extended period of limitation could be invoked by the Department against us.

The law about invocation of extended period of limitation is well settled. Only in a case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts. When the Excise Officers called for certain information and the assessee did not disclose the same or deliberately disclosed wrong information that would be a case of willful mis-statement. Even in cases where certain information was not disclosed as the assessee was under a bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court in the landmark cases of Padmini Products and Chemphar Drugs & Liniments reported in **1989 (43) ELT 195 (SC)** and **1989 (40) ELT 276 (SC)** respectively.

What is "suppression" is once again considered by the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in **2007 (216) ELT 177 (SC)**, and it is held by the Hon'ble Supreme Court with regard to the proviso to Section 11A of the Central Excise Act, 1944, that mere omission to give correct information was not suppression of facts unless it was deliberate and to stop the payment of duty. In the previous case like Messrs Jaiprakash Industries Ltd. reported in **2002 (146) ELT 481 (SC)** also, the Hon'ble Supreme Court has held that a bonafide doubt as to non-dutiability of goods was sufficient for the assessee to challenge the demand on the point of limitation. Thus, it is a totally settled legal position that extended period of limitation by invoking proviso to the main Section for demanding duty or tax beyond the normal period of limitation would be justified only when the assessee knew about the duty/tax liability and still however, he did not pay the duty/tax and deliberately avoided such payment, and it was only in such a situation where suppression of facts on part of the assessee could be justifiably alleged by the Revenue. However, mere failure in giving correct information would not be a case where the Revenue can invoke extended period of limitation.

In fact, the present case is the case where all the facts discussed in the show cause notice issued to them were within the knowledge of the Department right from day one. Under these circumstances, the show cause notice issued to them is barred by limitation and there is no justification in the action of invoking extended period of limitation against them in these facts of the case.

There being no contravention by way of suppression of facts with intent to evade payment duty on our part, the invocation of extended period of limitation against them is illegal and unjustified in the facts of this case.

18. The proposal for imposition of penalty invoking the provisions of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 also deserves to be vacated as there is no justification in demand of duty leveled against them in this case. There is no cogent and reliable evidence in support of the charges leveled in the show cause notice and therefore, no penalty would be justified on the basis of charges so leveled, merely on assumptions and presumptions. Penalty is quasi-criminal in nature and therefore, it cannot be imposed on mere assumptions and presumptions or hearsay. Neither the facts of the case justify or warrant imposition of any penalty, nor a specific allegation is made in the show cause notice for imposing penalty on them. They have not acted dishonestly or contumaciously and therefore, not even a token penalty would be justified. The present one is not a case where we had committed contravention of any of the Rules with an intent to evade payment of duty. There is no violation of any nature committed by us. We have also not committed breach of any Rules with an intent to evade payment of duty. In this view of the matter, no penalty or interest could be justifiably imposed on them in law.

19. The proposal to charge interest under Section 11AB of the Central Excise Act, 1944 is also without any authority in law in as much as the provision of section 11AB is not attracted in

the instant case. Section 11AB provides for interest in addition to duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment duty. In the instant case, there is no short levy or short payment or on-levy or non-payment of any excise duty. Therefore, the proposal to charge interest under Section 11AB of the Act is also not maintainable in the present case.

20. In the above premises, we state that there is no justification in the show cause notice and the proposals leveled therein, and therefore, they have requested to withdraw this show cause notice in the interest of justice.

They also requested for personal hearing before passing any final order on this show cause notice, in the interest of justice.

Discussion & Findings:

I have carefully gone through the notice and records of the case as well as the submissions made by the Noticee.

21. This notice has been issued denying the exemption availed by the Noticee on the goods cleared for export. The Noticee is an 100% EOU and exporting their goods directly as well as through others without payment of duty. I find that Rule 19 of the Central Excise Rules, 2002 which governs the exports of the goods without payment of duty provides that such exports shall be subject to the conditions, safeguards and procedure as may be specified by the Board. The Notification No. 42/2001-CE (N.T.) specifies the conditions and procedure referred to in the said Rule 19. Perusal of these conditions and procedures reveal that the same are prescribed in order to ensure that the goods which are being manufactured and removed from the factory/warehouse are exported in other words the procedures and conditions of the notification enables the correlation between the goods removed from the factory. Therefore, these conditions and procedures are not empty formalities but are vital to curb diversion of goods and mis-utilisation. Moreover, this notification assumes that the goods shall be exported and the observance of the specified procedure is mandatory for removing the goods without payment of duty. Hence non-observance of the mandatory procedures would disentitle the clearance for exemption-removal without payment of duty.

Hon'ble supreme Court in case of **COMMISSIONER OF C. EX., NEW DELHI Versus HARI CHAND SHRI GOPAL** reported at **2010(260) ELT 3(S.C.)** have taken similar view and held that

" Exemption under Notification No. 121/94-C.E. claimed on grounds of 'intended use' and 'substantial compliance' of Chapter X procedure of erstwhile Central Excise Rules, 1944 - Show cause notices for clandestine removal of Kimam for manufacture of chewing tobacco - Purpose and object of notification ibid was to exempt specified intermediate goods and not to exempt or absolve respondents from following statutory requirements for manufacture of intermediate excisable goods - Substantial compliance doctrine invocable if requirements relating to "substance" or "essence" of notification strictly adhered to - Details to be furnished in Form No. 1 as per Rule 192 ibid and declaration to be made relate to "substance" and "essence" of Chapter X - Registration Certificate in R-2 also pre-requisite to obtain CT-2 certificate - Execution of bond as provided in Chapter X not an empty formality for obtaining duty free excisable goods - Form RG-16 Register and details in Form RT-11 relate to "substance" and "essence" of Chapter X - Similarity of columns and details furnished in some register not a substitute for not maintaining RG-16 Register prescribed for receipt of duty free inputs - Registration not obtained and no records maintained at suppliers end - Recipients legally obliged to give declarations to claim exemption and the same not given - Non-compliance with conditions in rules and non-furnishing of statutory forms fatal to plea of substantial compliance and intended use - Plea not established on facts of the case to claim exemption - Section 5A of Central Excise Act, 1944.

Exemption under Notification No. 48/94-C.E., dated 1-3-1994 whether admissible to populated printed circuit board - Tribunal order holding exemption not admissible due to non-compliance

with procedure in Chapter X of erstwhile Central Excise Rules, 1944 - Filing application in Form AL-6, obtaining L-6 license and other procedures mandatory requirements to claim exemption - Impugned Tribunal order upheld - Section 5A of Central Excise Act, 1944

Exemption under Notifications No. 3/2001-C.E. and No. 6/2001-C.E. held as admissible by Tribunal irrespective of following Chapter X procedures of erstwhile Central Excise Rules, 1944 or not - Reasoning in Tribunal order that Chapter X procedure meant to be followed only to establish receipt of goods by recipient unit and their utilisation, not sustainable - Tribunal completely overlooked object and purpose of Chapter X procedure.

Chapter X procedure under erstwhile Central Excise Rules, 1944 for obtaining duty free goods - Goods manufactured at suppliers' end being excisable goods, party seeking remission of duty required to follow certain pre-requisites - Object of such pre-requisites to ensure that goods are not diverted or utilised for some other purpose under the guise of exemption - Detailed procedures laid down in Chapter X to curb diversion and misutilisation of goods"

22. Now, I shall discuss the submissions of the Noticee.

The Noticee submits that the entire basis of issuing notice is that the goods were removed in the DTA and that the department has failed to substantiate that the goods were intended for sale in the DTA. As discussed earlier, the non-compliances of substantial procedures like removing goods without preparation of ARE-I, shipping bill does not mention the name of the Noticee would disentitle the Noticee to clear these goods without payment of duty. Hence, the demand of duty arises once the mandatory procedures are not followed.

23. The Noticee further contends that the goods were removed for export purposes can be established from the fact that the clearances were against Form "H" which were submitted before the authorities, submissions of the shipping bills from the exporters, undertaking from the exporters etc. They had also relied upon the decisions of the Tribunal in cases of Benara Bearings Pvt. Ltd. reported in **1999 (105) ELT 398**, Vaishnow Shoes reported in **1999 (106) ELT 124,** Rajindra Forge Pvt. Ltd reported in **1999 (111) ELT 744** and Vadapalani Press reported in **2007 (217) ELT 248** in support of their above submissions. I find that these decisions are applicable in those cases where the other procedures relating to export of the goods were followed and it was possible to correlate the goods removed from the factory/warehouse and the ones exported. In the instant case, formalities and mandatory procedures to be followed in case of said clearances for export were not complied with, therefore, Noticee cannot claim benefit of these decisions.

24. The Noticee further submits that the department has not caused any inquiry with the exporters and that the export of the goods has not been denied by the department. They have relied upon the decisions in case American Dry Fruits Stores – **1992 (61) ELT 709**, and Alpha Garments – **1996 (86) ELT 600** to buttress their contention that excise duty cannot be collected in cases of technical infringement if the goods are ultimately exported. This contention is not tenable as in present case, the Noticee has not been able to establish that the goods mentioned in the shipping bills are the ones removed from their factory and they have not followed the prescribed mandatory procedures required under the law. Therefore, in view of the law laid down by the Hon'ble Supreme Court in case discussed in para supra, I am not inclined to accept the contention of the Noticee.

25. The Noticee had challenged charges of suppression of facts on the grounds that goods cleared to all three parties were recorded in ER-2 return for the month of January, 2009 and the invoices were raised in respect of all transactions. Moreover, these transactions have been recorded in the books of the Noticee. It is true that that the invoices were prepared and books reflected these transactions but when the statute requires preparation of specific documents and observance of prescribed procedures, therefore, it is not open for the Noticee to claim transparency when such procedures are not followed and prescribed documents are not prepared and submitted to the department. The documents prepared by the Noticee in respect of these transactions are not prescribed documents and were submitted only when asked to do so. These are not hollow formalities. These procedures and formalities have been devised to correlate the

goods removed from the factory with the goods exported to safeguard the revenue. Therefore, failure to prepare these documents and follow mandatory procedures would tantamount to suppression of facts. The case laws cited by the Noticee pertain to cases of clandestine removal etc and none where mandatory documents and procedures were not followed, hence these are not relevant.

26. Moreover, the demand is not barred by limitation as contended because these clearances were declared to the department only in ER-2 of January, 2009, therefore; even if the larger period is not invoked, the notice which was issued on 03.08.2009 is well within the stipulated normal time limit of one year.

In view of the above, I pass the following order:

ORDER

(a) I confirm Central Excise, equivalent to aggregate of all customs duty amounting to Rs. 5,80,220/- (**Rupees Five lacs, eighty thousand, two hundred & twenty only**)leviable on 44060.74MT Beneficiated Bauxite (finished Product), valued at Rs. 33,14,87,174/- under proviso to section 11(1) of the Central Excise Act, 1944 as well as in terms of B-17 Bond furnished by them and the same shall be recovered alongwith the interest at the appropriate rate under section 11AB of the Central Excise Act, 1944 from the Noticee

(b) I impose penalty of Rs. 5,80,220/- (**Rupees Five lacs, eighty thousand, two hundred & twenty only) upon the Noticee** under Rule 25 of the Central Excise Rule, 2002 read with Section 11AC of the Central Excise Act, 1944.

(c) I impose penalty of Rs. 1,00,000/- (Rs One lac only) upon the Noticee under Rule 26 of Central Excise Rule, 2002.

The Noticee shall forthwith pay the aforementioned amount.

Sd/-
(HARCHARAN SINGH)
ADDL. COMMISSIONER

To,
M/s. Rawmin Mining And Industries Pvt. Ltd,
East Kadia Plot,
Porbandar

Copy to:
1. Commissioner, Central Excise, Bhavnagar.
2. Assistant Commissioner(AE), Central Excise, HQ, Bhavnagar.
3. Assistant Commissioner, Central Excise Division, Junagadh.
4. Superintendent of Central Excise, AR- Porbandar.
5. Superintendent, Central Excise, RRA Section, Bhavnagar.
6. Guard file.

22/2/2011
ADDL. COMMISSIONER