

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

F. No. V/15-103/DEM/HQ/2007

Date of order: 22.1.2013
Date of issue: 24.1.2013

Passed by Shri Harcharan Singh, Additional Commissioner.

ORDER-IN-ORIGINAL NO.38/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner, Central Excise (Appeals), Central Excise Bhavan, Race Course road, Rajkot 364 001 within three months from the date of receipt of the decision or order of adjudicating authority. 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 Appellants in accordance with the provisions of sub-rule (2) of Rule of the Central Excise (Appeals) Rules, 2002.

It should be accompanied with the following: -

1. Copy of appeal in duplicate.
2. Copies of the order in duplicate, one of which shall be certified copy of the order must bear a Court Fee stamp of Rs. 2.50 paise as per Schedule I to the Article of the Court Fee Stamp Act, 1870.
3. Proof of payment of Central Excise duty, penalty, interest etc.

Sub: - Show Cause Notice No.V/15-103/DEM/HQ/2007 dated 7.4.2008.

Brief facts: -

1. M/s M. M. Fasteners, Block No.11, Sadguru Industrial Estate, Post Ukharala, Taluka Ghogha, District Bhavnagar (hereinafter referred to as the "Noticee") are engaged in the manufacture of excisable goods i.e. M.S. Bolts and Nuts falling under Chapter Sub Heading 7318 15 00 of the First Schedule to the Central Excise Tariff Act, 1985. The Noticee were also availing the benefit of SSI exemption as contained in Notification No.8/2003-CE dated 01.03.2003 as amended upto an aggregate value of clearance of Rs 100 lac in a Financial year. The Noticee were not holding Central Excise Registration.

2. Intelligence gathered by the Anti-evasion branch of Central Excise Commissionerate, Hqrs. Bhavnagar that the Noticee were engaged in indulging in evasion of Cenvat by suppressing the production of excisable goods and mis-declaring the value of clearances of excisable goods manufactured by them, therefore, a search was carried out in the factory premises on 01.02.2006. During the search, certain incriminating documents indicating that during Financial year 2003-04, 2004-05 and 2005-06, the Noticee had crossed exemption limit of value of clearances of excisable goods of Rs 100 lac for an SSI unit, accordingly the documents were placed under seizure under a Panchnama dated 01.02.2006 for investigation. The excisable goods viz. Nuts and Bolts weighing 4,650 kg valued at Rs 1,48,000/- involving Cenvat amounting to Rs 23,808/- were also placed under seizure. The seized goods were handed over to the Noticee under a Supra tnama dated 01.02.2006 for safe custody.

3. A similar search operation was carried out in the business premises of M/s Vijay Sales Corporation, Bhavnagar, a sister concern of the manufacturer in the presence of Shri Vijaybhai J. Parekh, Power of Attorney of the firm from where certain incriminating documents found were placed under seizure under a Panchnama dated 01.02.2006.

4. A statement of Shri Saradbhai J. Parekh, Power of Attorney holder of the Noticee firm was recorded under Section 14 of the Central Excise Act, 1944 on 01.02.2006 wherein he, inter alia, stated that M/s M.M. Fasteners, are a partnership firm having three partners, were engaged in

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manufacturing of Nuts and Bolts and trading of Round Bars of Iron and Steel; that he was looking after production and sale of the firm; that they were using Round Bars for manufacturing of Nuts and Bolts; that the manufacturing involved drawing of Round Bars reduced to different sizes and cut in header machine and the resultant product was cut piece with head which was trimmed, hexed and threaded and some of Nuts and Bolts were galvanised; that 80% of production was sold through M/s Jay Sales Corporation; that 20 to 25% waste was generated; that their sales invoices and other records showed sale of Round bars, in fact the goods were Nuts and Bolts; that the entire sales made to M/s Jay Sales Corporation and local blacksmiths and hardware stores were of Nuts and Bolts, they prepared invoices/bills for Round bars; that the entire quantity of waste and scrap generated was sold without accounting for in their records and without raising invoices/bills; that he provided approximate value of Nuts and Bolts manufactured and sold as under :

2000-01	Rs 55 lacs.
2001-02	Rs 65 lacs.
2002-03	Rs 95 lacs
2003-04	Rs 1.45 Crores out of which sales of Rs 1.10 Crores to M/s Jay Sales Corporation for Nuts and Bolts and rest of Rs 35 lacs was of MS Round.
2004-05	Rs 1.95 Crores out of which sales of Rs 1.51 Crores to M/s Jay Sales Corporation though it included invoices /bills of MS Round Bars but were Nuts and Bolts.
2005-06	Rs 1.72 Crores out of which sales to M/s Jay Sales Corporation is to be worked out, however entire sales was of Nuts and Bolts though they issued bills of MS Round Bars.

He also stated that at the time of dispatch of goods from factory invoices of M/s Jay Sales Corporation were raised and not of M/s M.M. Fasteners; that they had not obtained Central Excise Registration for manufacture of Nuts and Bolts even though their clearances exceeded Rs 1 Crore during last two Financial Years and confessed that it was an offence under Central Excise Act, 1944 but it was due to competition in business which led to this type of malpractice.

5. A further statement of Shri Saradbhai J. Parekh was recorded on 02.02.2006 and on 08.02.2006 wherein he confirmed the contents of his earlier statement dated 01.02.2006 and had produced following documents :

1. Photocopy of Audit Report of F.Y. 2001-02, 2002-03 of the firm ;
2. Copy of Power of Attorney ;
3. Copies of Electricity bills for the year 2005-06 ;
4. Sales invoices of M/s M.M. Fasteners for year 2003-04 (Sr no 1n to 117);
5. Sales invoices of M/s M.M. Fasteners for year 2004-05 (Sr no 1 to 135 except Bill no 24 and 25 which were not issued due to numbering mistake) ;
6. Sales invoices of M/s M.M. Fasteners for year 2005-06 (Sr no 1 to 100 except Bill no 40 produced later on) ;
7. Photocopies of Sales Register for year 2003-04, 2004-05;
8. Photocopies of Purchase Registers for year 2003-04, 2004-05 and 2005-06 upto 31.01.2006 ;
9. Copy of summary of Sales Register for year 2005-06.

For sales invoices of waste and scrap, he stated that the same was sold to local buyers without issuing bills however, he would produce the same for the period from 28.10.2005 to 31.01.2006 and purchase invoices for 2003-04 and 2004-05; that it was mistake of his Chartered Accountant where he has shown in balance sheet manufacturing and trading of Nuts, Bolts and hooks whereas the Sales invoices were of bars; that they had sold manufactured Bright Pins and Bright Bars in retail; that most of sales of Nuts, Bolts and Pins was to M/s Jay Sales Corporation; that details mentioned in the registered were of production and sales of Nuts, Bolts and Bright Pins; that the scrap generated was sold @ Rs 6/- per Kg.

6. A statement of Shri Vijaybhai. J. Parekh, an authorised signatory of M/s Jay Sales Corporation, Bhavnagar was also recorded on 01.02.2006 wherein he stated that they were engaged in trading of Nuts, Bolts and other goods; that he confirmed that he was present through out the search proceedings and the facts narrated in Panchnama dated 01.02.2006 were true and correct. He stated that Shri Mukundbhai J. Parekh his brother is proprietor M/ s Jay Sales Corporation and was one of the partners of M/s M. M. Fasteners amongst two other women partners; that they were selling Nuts, Bolts manufactured by M/s M.M. Fasteners; that in invoices of M/s M.M. Fasteners, the goods

were described as Nuts, Bolts and Pins but actually they were Nuts and bolts and that they had sold directly from the godown of M/s M.M. Fasteners.

7. During the follow-up of investigation, a statement of Shri Chandrakant Gunvantrai Shah, a proprietor of M/s Chandrakant and Co, Bhavnagar was recorded on 21.03.2006 wherein he had stated that they were engaged in trading of Buts, Bolt and hardwares; that he produced the purchase bills of 2004-05 and 2005-06 and a copy of payment details of their account and photocopies of their corresponding Sales challans raised in favour of their customers and two delivery challans for the month of March 2006 for Nuts and Bolts of M/s Jay Sales Corporation; that they had directly given delivery from the factory and at that time no one from them was present; that they had purchased Bright bars under all the bills and informed their customers to take delivery directly from factory at Mamsa village, however, due to mistake they had shown M.S. Bars (Round) in their sales challans; that he had inquired to purchase Nuts and Bolts from M/s M.M. Fasteners who had informed that they were ready to give Buts and Bolts but they would raise bills of M.S. Bright bars or Round (Rod) so he had not purchased Nuts and Bolts; that he had never purchased anything else except Nuts and Bolts from M/s Jay Sales Corporation.

8. A further statement of Shri Saradbhai J. Parekh was recorded on 03.05.2006 wherein he stated that he had not maintained any register during the period 2003-04; that he produced the electricity consumption for the period 2003-04 (except March 2004), 2004-05 (except August 2004) and 2005-06.

9. A statement of Shri Jivabhai Bhikhabhai Mori a partner of M/ Ganga Traders, village Budhel, Taluka and District Bhavnagar wherein he had deposed that they were engaged in business of Cement, Building materials, Articles of plumbing, hardwares etc; that another partner of his firm is Shri Devrajibhai Madhabhai Jetani; that he was looking after the entire business; that they had not purchased or sold CTD bars and Round Bars at any time; that they never purchased nor sold bright bars; that they had purchased Nuts and Bolts of various sizes from M/s M. M. Fasteners and they had adjusted the payments against the payments of Cement which were supplied by us and they had only purchased Nuts and Bolts of iron from them of the amount which they had to recover for sale of cement; that on perusal of bills he stated that he had never purchased the goods as shown in bills but had only purchased Nuts and Bolts of iron; that he was staying in village Budhel from his birth and he was Vice president of Gram Panchayat during 1992-93; that there was no person in name of Shamjibhai Luhar in his village and there was no other firm in the name of M/s Ganga Traders in Budhel.

10. A statement of Shri Vijaybhai Govindbhai Mori, proprietor of M/s Shiv Shakti traders, opp State Bank of Saurashtra, Talaja road, Budhel was recorded on 12.07.2006 wherein he stated that he was engaged in business of cement, fertilizer and hardwares for the last 14 years; that there was no firm in the name of M/s Vijay Traders or M/s Vijay Hardware was handled by him in village Budhel; that he was handling business of MS bars in the name of M/s Mahavir Marketing and Builders and his wife Mrs Vasantben Vijaybhai Mori was the proprietor of the firm; that they never purchased MS bars from that trader but had always purchased directly from the manufacturer i.e. rolling mills; that they never purchased MS bars from M/s M.M. Fasteners and that there was no person in the name of Shri Shamjibhai Luhar in his village.

11. A further statement of Shri Saradbhai J. Parekh was recorded on 19.07.2006 wherein he endorsed his earlier statements and on perusal of register seized on 01.02.2006 stated that register pertained to their factory and was maintained by a person of M/s Mann Security as his directions from 25.09.2005 to 31.01.2006; that it contained day to day entry and departure of labours in factory, receipt of raw materials and despatch of the manufactured goods; that all purchases were made with regular invoices; that all despatches of Nuts and Bolts were made under sales invoices or of M/s Jay Sales Corporation; on perusal of 9 delivery challan books of M/s Jay Sales Corporation for the period 2005-06 he stated that they had kept them in their factory for despatching the goods manufactured in their factory on behalf of M/s Jay Sales Corporation, however 7% to 8% goods were purchased from other manufacturer/trader such as M/s Shinku Trader, Ludhiana and M/s Seven Steels, Ludhiana amounting to Rs 1,33,000/-; that they had prepared sales invoices of M/s Jay Sales Corporation in respect of all the dispatches; that he had no further details of their customers whose names appeared in cash memo.

12. A further statement of Shri Saradbhai J. Parekh was recorded on 19.03.2006 wherein on perusal of a computerised worksheet of M/s Jay Sales Corporation, Bhavnagar he stated that it was

correctly prepared and he had compared with the delivery challans and it showed the clearance of Nuts and Bolts to M/s Jay Sales Corporation; that he had not issued sales invoices for all the quantity cleared to M/s Jay Sales Corporation under delivery challans; that for some portion of Nuts and Bolts M/s M.M. Fasteners had issued bills of Bright bars, Pins and some quantity had been removed without any invoice.

On perusal of work sheet (Annexure A) and Annexure B (sales to M/s Jay Sales Corporation) to his statement, for the period 2003-04, 2004-05 and 2005-06 he stated that it was correctly prepared. As per Annexure A, M/s Jay Sales Corporation had cleared 6,15,298 kgs of Nuts and Bolts in 2005-06 whereas M/s M.M. Fasteners had sold 4,67,137 kgs of Nuts and Bolts and Bright bars to M/s Jay Sales Corporation in the guise of Bright bars and there was a difference of 1,48,16 kgs in 2005-06; that he confirmed that this quantity was illicitly removed without preparing invoices in 2005-06 and its value would be Rs 53,33,796/- at Rs 36/- per kg as per invoice issued to M/s Jay Sales Corporation and was sold in cash.

13. After conclusion of investigation it appeared that Noticee :

- (i) Was engaged in manufacturing of MS Nuts and Bolts using MS round /CTD bars as raw materials in their factory and were availing exemption under Notification No 08/2003-CE dated 01.03.2003;
- (ii) Have issued invoices (Annexure I) in respect of various excisable goods cleared from their factory during the period 2003-04 to 2005-06 and goods described in such invoices included MS nuts and Bolts, pins, bright bars and MS rounds etc. The value of clearance as per invoices was as under :

2003-04	Rs 1,52,41,176/-
2004-05	Rs 1,93,54,551/-
2005-06	Rs 1,63,82,784/-
- (iii) Had cleared only MS Nuts and Bolts manufactured in their factory to M/s Jay Sales Corporation, Bhavnagar however, the invoices were issued describing goods as MS Nuts/Bars/Bright bars/Pins etc. but in fact only Nuts and Bolts were cleared, the value of clearance thereof to M/s Jay Sales Corporation as per invoices was as under : (Annexure II)

2003-04	Rs 91,55,231/-
2004-05	Rs 1,47,75,401/-
2005-06	Rs 1,50,17,606/-
- (iv) Were dispatching MS Nuts and Bolts on behalf of M/s Jay sales Corporation directly to customers from their factory under delivery challans of M/s Jay sales Corporation (Annexure III) which were used for dispatching Nuts and Bolts and clearance value for 2005-06 was 2,21,50,728/- out of which invoices were issued in respect of Nuts and Bolts valued at Rs 1,68,16,932/- therefore, the goods amounting to Rs 53,33,796/- appeared to have been removed without invoices and without accounting for in records;
- (v) Have wrongly availed exemption under Notification 08/2003-CE dated 01.03.2003 even though the aggregate value of clearance of excisable goods during the period 2003-04, 2004-05 and 2005-06 had exceeded the exemption limit of Rupees one crore;
- (vi) Have issued certain invoices in the name of customers to whom either they have not sold any goods or have issued invoices describing the goods as MS rods/Bars but in fact MS Nuts and Bolts were sold;
- (vii) Did not account for the waste and scrap generated during the manufacture of MS nuts and Bolts and had sold without issuing any invoices at Rs 6/- per kg. Considering the 20-25% generation of waste and scrap, the value thereof during the period 2003-04, 2004-05 and 2005-06 arrives at Rs 8,44,846/-, Rs 7,80,137/- and Rs 6,31,273/- (Annexure VI);
- (viii) Have cleared MS Nuts and Bolts under the guise of MS rounds/Bright bars /Pins etc. to M/s Jay Sales Corporation, local blacksmith and hardware stores and clearance value for the period 2003-04, 2004-04 and 2005-06 arrived to Rs 3,78,422/-, Rs 3,28,775/- and Rs 4,19,720/- respectively.

14. After conclusion of investigation, it appeared that the Noticee have contravened the following provisions of Central Excise Act, 1944 and the Rules framed there under :

- (i) The Noticee have not paid Cenvat amounting to Rs 28,74,897 on excisable goods cleared during the period 2003-04, 2004-05 and 2005-06 ;
- (ii) The Noticee have contravened following provisions of Central Excise Rules, 2002 :
 - (a) Rule 9 of the Central Excise Rules, 2002 inasmuch as they failed to get the Registration;
 - (b) Rule 10 of the Central Excise Rules, 2002 inasmuch as they failed to maintain Daily Stock Account of excisable goods manufactured and removed by them ;
 - (c) Rule 11 of the Central Excise Rules, 2002 inasmuch as they failed to issue proper invoices as required for removal of excisable goods manufactured by them ;
 - (d) Rule 4 and 8 of the Central Excise Rules, 2002 inasmuch as they failed to discharge Cenvat leviable on the excisable goods manufactured and removed by them.

15. Therefore, Additional Commissioner, Central Excise Commissionerate, Bhavnagar issued a show cause notice No. V/15-103/DEM/HQ/2007 dated 07.04.2008 to the Noticee proposing following actions :

- (i) Recovery of Cenvat amounting to Rs 28,74,897/- (Rupees twenty eight lac, seventy for lac, eight hundred and ninety seven only) (16% BED +2% EC) leviable on the clandestine removal of excisable goods under Section 11A of the Central Excise Act, 1994 along with interest under Section 11AB of the Act ;
- (ii) Imposition of penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.
- (iii) Imposition of penalty under Rule 26 of the Central Excise Rules, 2002 on Shri Saradhbhai J. Parekh, authorised signatory of the Noticee and Shri Vijaybhai J. Parekh proprietor of M/s Jay Sales Corporation, Bhavnagar.

16. Defence Relay and personal hearing :

16.1 The Noticee filed their defence reply dated 22.05.2012 mainly stating as under :

- (i) Duty demanded to be abated from the cum-duty price actually received :
Noticee submitted that the price on which the MS Nuts and Bolts and Waste and Scrap had been sold should be considered to be cum duty price and the assessable value should be determined after deducting the element of excise Duty. The sale price which is charged is deemed to be the value for the purpose of levy of excise duty but the element of excise duty, sales tax or other taxes which are included in the sale price are to be excluded in arriving at the assessable value. The cum-duty price when charged then in arriving at the excisable value, the element of duty which is payable has to be excluded. They submitted that they had sold the MS Nuts and Bolts and waste and Scrap and the purchaser was not liable to pay any amount in addition thereto and it is for this reason to consider all these transactions as being cum-duty price;
- (ii) The Noticee submitted that Section 4 of the Central Excise Act, 1944 provides for valuation of excisable goods for purposes of charging of duty of excise. Under Section 4(1), the duty of excise is chargeable on any excisable goods with reference to the value which is deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer where the buyer is not a related person and the price is the sole consideration for the sale. Explanation of Section 4(1) states that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and such price-cum-duty excluding sales tax and other taxes if any, actually paid on such goods is also to be allowed as deduction;
- (iii) A reading of the aforesaid Section clearly indicates that the price-cum-duty which is charged is deemed to be the value for the purpose of levy of excise duty but the element of excise duty, sales tax or other taxes which is included in the price is to be excluded in arriving at assessable value. This Section has been constructed by the Hon'ble Supreme Court of India in case of Assistant Collector of Central Excise and ors Vs Bata India Ltd. -1996 (84) ELT 164 (SC) = 1996 (4) SCC 563 and it is thus

clear that when cum-duty price is charged then in arriving at the excisable value of the goods, the element of duty which is payable has to be excluded. Therefore, the amount realised by us from the sale of excisable goods MS Nuts and Bolts and waste and Scrap has to be regarded as a price-cum-duty and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price must be excluded. There is nothing to show that once the demand was raised by the Department, they sought to recover the same from the purchaser of excisable goods. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and the said taxes on the goods sold are to be deducted under Section 4(1) of the Act and this was precisely decided by the Tribunal in many cases.

- (iv) For this argument, they relied on the observation of Hon'ble Supreme Court of India in Hindustan Sugar Mills Vs State of Rajasthan and Others 1978 (4) SCC 271 at page 280 as follows:

"Take for example, excise duty payable by a dealer who is a manufacture. When he sells goods manufacture by him he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability; statutory or otherwise, under which the purchaser would be liable to pay the amount of excise duty to the dealer. And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'...."

- (v) The example given in the aforesaid decision is clearly applicable in the present case. The sale price realised by us has to be regarded as the entire inclusive of excise duty because we by necessary implication taken on the liability to pay all taxes on the goods sold and has not sought to realise any sum in addition to the price obtained by it from the purchaser. The purchaser was under no obligation to pay any amount in excess of what had already been paid as the price of excisable goods.
- (vi) They further submitted that abatement may please be given to us in terms of the ratio of larger Bench judgement rendered in the case of Srichakra Tyres Ltd Vs CCE, Madras - 1999 (108) ELT 361 (T).
- (vii) Cenvat credit benefit may please be given. They submitted that they are also entitled to Cenvat credit while confirming the duty since Cenvat credit has to be extended if there are documents to show that duty was paid on the inputs used in the manufacture of final products because substantive benefits of Cenvat credit cannot be denied. Therefore, to get the benefit of the Cenvat credit we have calculated the same and we enclose herewith Annexure for the same. They requested for allowing the Cenvat credit totally of Rs 12,31,716/- .
- (viii) They relied on the judgement of West Zonal Bench of the Tribunal, Bombay in the matter of Gujarat Ambuja Cement Vs CCE, Rajkot 1996 (85) ELT 154 (T). They also relied on the judgement rendered by the Princial Bench, New Delhi in the matter of Chamundi Steel Re-rolling Mills Vs CCE, Bangalore, 1996 (81) ELT 563 (T).
- (ix) They submitted that the benefit of Cenvat credit on the duty paid inputs may please be allowed and also allow abatement of duty on cum-duty price.

(x) Finally, the Noticee requested for an opportunity to be heard in person.

16.2 M/s Jay Sales corporation, Bhavnagar filed their reply dated 13.09.2012 mainly contending as under:

(i) They had not purchased the alleged quantity illicitly from M/s M.M. Fasteners, Mamsa. They had purchased MS Nuts and bolts from them. They were bona fide buyer and they had no knowledge that the goods purchased were cleared by the manufacturer without payment of Central Excise duty. They had purchased the goods in question in the open market. It is beyond one's imagination that the goods were being sold without payment of Central excise duty in the open market. No knowledge can be attributed to us as provided under Rule 26 of Central Excise Rules, 2002 merely because they had purchased the goods under proper invoice of Central Excise documents. Under the circumstances, imposition of penalty is not justified. They relied on the following judgements in support of our case :

- (i) Sterlite Optical Technologies Ltd. Vs CCE, Aurangabad – 2005(188) ELT 210 (Tri. Mum);
- (ii) Rakesh Navinbhai Shah Vs CCE, Mumbai-I -2005(187) ELT 211 (Tri. Mum).

They submitted that proposal to invoke penalty provision under the above quoted rule is totally unwarranted and totally illegal on plain reading of the rules quoted therein.

16.3 No evidence regarding we were one of the beneficiaries.

M/s Jay Sales Corporation submitted that no penalty should be imposed on them. They submitted that Shri Vijaybhai J. Parekh is the authorised signatory of M/s Vijay Sales Corporation and had not acted with any personal motive or benefit and thereby the question of any personal penalty upon him is not proper. Moreover, a penalty could be imposed on a person who acquired possession of or otherwise physically dealt with any excisable goods which according to his belief or knowledge was liable to confiscation. The department has no case that the appellant had a belief or knowledge that the goods were liable to confiscation. Hence, Rule 26 was not invokeable against them. It is settled law that personal penalty on authorised signatory in addition to the firm is not imposable. They relied on the following judgements of Hon'ble Tribunal :

- (i) Bright Brothers Ltd. Vs Commissioner of Central Excise, Thane-II reported in 2006 (199) ELT 69 (Tri. – Mum) : No penalty leviable on Manager and Managing Director when neither goods confiscated nor there was any allegation that any goods were liable to confiscation;
- (ii) National Plastics (I) Ltd. Vs Commissioner of Central Excise, Surat reported in 2004 (466) ELT 488 (Tri. Mum): Personal penalty – Not imposable on Director and Excise signatory under Rule 209A of erstwhile Central Excise Rules, 1944 when confiscation of goods not upheld - Rule 26 of Central Excise Rules, 2002;
- (iii) Kamdeep Marketing Pvt Ltd. Vs Commissioner of Central Excise, Indore reported in 2004 (165) ELT 206 (Del. Tri);
- (iv) Shri Selvakumar Textiles Vs Commissioner of Central Excise, Coimbatore reported in 2005 (188) ELT 334 (Tri. Chennai).

16.4 They submitted that there is no evidence on record to show the movement of the co- Noticee No 3 in the evasion of duty or was one of the beneficiaries. As held by the Tribunal in case of Keshav Kumar Tharad Vs Commissioner Kolkotta-I Reported in 2003 (156) ELT 211 (Tri Kol), penalty cannot be imposed.

Finally, they requested to drop the SCN and to allow an opportunity to be heard in person.

16.5 Personal hearing was fixed on 23.10.2012, 17.12.2012 wherein Shri Saradbhai J. Parekh, a Power of Attorney of the Noticee, and Shri Vijaybhai J. Parekh of M/s Jay Sales Corporation, Bhavnagar appeared before adjudicating authority on 28.12.2012 and submitted as under:

- (i) Shri Saradbhai J. Parekh, Power of Attorney holder of Noticee submitted a copy of Power of Attorney and stated that they were ready to pay the duty provided value is arrived at by deducting all taxes paid by and Cenvat benefit be given to them;
- (ii) Shri Vijaybhai J. Parekh, proprietor of M/s Vijay Sales Corporation stated that he is only a trader and had purchased the goods from the Noticee against invoices.

17. Discussion and findings:

17.1 I have carefully gone through the facts of the case, defence reply filed by the Noticee No 1 and No 3 and all the relevant documents placed in the file. On going through the facts of the case, I find that the Department has issued a show cause notice dated 07.04. 2008 after completion of investigation for recovery of Cenvat amounting to Rs 28,74,897/- under Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB of the Act on the clearance of goods exceeding rupees one crore under SSI exemption Notification No 08/2003-CE dated 01.03.2003 for the period 2003-04, 2004-05 and 2005-06. The notice has also proposed imposition of penalty on the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 and on Shri Saradbhai J. Parekh, Power of Attorney holder of the Noticee and on Shri Vijaybhai J. Parekh, an authorised signatory of M/s Jay Sales Corporation under Rule 26 of the Central Excise Rules, 2002.

17.2 I find that the Noticee are engaged in the manufacture of Nuts and Bolts falling under sub Heading no.7318 15 00 of the First Schedule to the Central Excise Act, 1985 and were availing SSI exemption as contained in Notification no. 08/2003-CE dated 01.03.2003 as amended up to an aggregate value of clearance of Rs 100/- lac in a financial year from 2000-01 onwards and were not holding Central Excise Registration. The investigation conducted by the Anti-Evasion branch of Central Excise Commissionerate, Hqrs , Bhavnagar revealed that the Noticee had crossed exemption limit of Rs 100/- lac in the year 2003-04, 2004-05 and 2005-06 by resorting to suppression of production of the excisable goods. The scrutiny of the documents seized during the investigation have revealed that the Noticee had achieved clearance of Nuts and Bolts including waste and scrap (Annexure VII to SCN) as under :

2003-04	Rs 1,52,41,179/-
2004-05	Rs 1,93,54,551/-
2005-06	Rs 2,01,15,426/-

The Noticee have contended that the clearance figures arrived at by the investigation included the sales clearance figures of trading activities which covered sales of MS Round bars, Plates and Nuts and clearances figures of Bright bars, Bright pins and Bolts manufactured and cleared by them. They have submitted that they were not manufacturing Nuts of any type but were engaged in sales of Nuts. The Noticee have submitted the clearance value of their trading activities and clearance value of finished excisable goods i.e. Bright bars, Bright pins and Bolts and value of scrap generated and have also submitted the value of purchase of raw materials based on the audited balance sheets as under :

	2003-04 (in Rs)	2004-05 (in Rs)	2005-06 (in Rs)
Clearance value			
-Trading			
-MS Round bars	65,72,395/-	78,45,552/-	52,94,526/-
-MS Plates	6,46,087/-	28,87,552/-	NIL
-Nuts	57,390/-	19,261/-	1,50,000/-
Total	72,75,872/-	1,07,52,365/-	54,44,526/-
Clearance value			
-Manufacturing			
-Bright bars	6,49,648/-	25,82,371/-	42,24,562/-
-Bright pins	48,27,005/-	24,93,020/-	73,12,588/-
-MS Bolts	20,30,000/-	35,29,709/-	31,33,750/-
-Scrap	8,44,846/-	7,80,137/-	6,31,273/-
Total	83,51,499/-	93,85,237/-	1,53,02,173/-

Value of Raw materials purchased			
-Raw materials	88,81,207/-	1,27,35,169/-	1,35,59,385/-
-Raw materials	23,83,701/-	8,93,980/-	11,82,597/-
-Cex Duty involved	13,24,418/-	14,83,593/-	22,12,565/-
-Sales Tax involved	4,08,882/-	5,89,249/-	6,30,794/-
Total	1,29,98,198/-	1,61,81,877/-	1,75,83,341/-

17.3 I find that the MS Round bars fall under Chapter 72 of the First Schedule to the Central Excise Act, 1985 and selling and re-selling does not amount to manufacture under Section 2(f) of the Central Excise Act, 1944. The conversion of MS Round bars into Bright bars i. e. drawing and redrawing did not amount to manufacturing process under Chapter 72 or under Section 2(f) of Central Excise Act, 1944 until 2006-07. As per Chapter Note 4 of Chapter 72, the drawing and re-drawing of Round bars into Bright bars amounted to 'manufacturing' from 01.03.2006 onwards. Similarly, cutting of Bright bars into small pieces called Bright Pins, manufacturing of MS bolts and generation of Waste and scrap amounted to manufacturing process as new identifiable goods i.e. Bright pins as emerged which were classifiable under Chapter 73 for the relevant period. The show cause notice alleges that the Noticee have crossed the exemption limit of rupees one crore of excisable goods i.e. Bolts and Nuts cleared under the guise of MS Round bars, Bright bars and Bright pins during each financial year, but no evidence is forthcoming in support of the allegation. I find that the clearance value of trading activities of MS Round bars, Plates and Nuts and the clearance value of manufactured goods i.e. Bright bars, Bright pins, MS Bolts and Waste and scrap were taken for computing the clearance value of all goods for the above period and it is alleged that the Noticee had exceeded the clearance value of Rupees one crore which not the correct position. I find from the above that for the purpose of computing the aggregate value rupees one crore of excisable goods requires to taken as per audited balance sheet excluding the value of trading of goods under SSI exemption Notification No 08/2003-CE dated 01.03.2003 for each relevant financial year.

17.4 From the above, I hold that the value of clearance of excisable goods for the above period was as under :

	2003-04	2004-05	2005-06
Clearance Value (in Rs)	83,51,499/-	93,85,237/-	1,53,02,173/-

The Noticee have contended that above clearance value of the excisable goods is based on audited balance sheet for the relevant period and it reflected cum-duty price. They submitted that Section 4 of the Central Excise Act, 1944 provides for valuation of excisable goods for purpose of charging of duty of excise and is chargeable on excisable goods with reference to the value which is deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer, where buyer is not a related person and the price is the sole consideration, therefore, the elements of excise duty, sales tax and other taxes which are included in the sales price are to be excluded in arriving at the assessable value considering these transactions as being price-cum-duty. I find that the Explanation to Section 4(1) of the Act provides that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods and such price-cum-duty excluding sales tax and other taxes if any, actually paid, shall be deemed to include the duty payable on such goods.

Accordingly, I hold that the clearance value for the excisable goods i.e. Bolts and Waste and Scrap sold by the Noticee to be taken as price-cum-duty excluding elements of excise duty, sales tax or other taxes. For this I rely on the decision of Hon'ble Supreme Court of India in the case of Assistant Collector and others Vs Bata India Limited reported in 1996 (84) ELT 164 (SC) and a Larger Bench decision in case of Sri Chakra Tyres Ltd Vs CCE, Madras reported in 1999 (108) ELT 361 (T).

The clearance value of the excisable goods for the period requires to be taken excluding the element of excise duty i.e. 16% BED + 2% Edu. Cess for the financial year 2005-06 as under:

	2003-04	2004-05	2005-06
Clearance value Rs	83,51,499/-	93,85,237/-	1,46,87,121/-

And duty after crossing the exemption limit of Rupees one crore as contained in Notification No 08/2003-CE dated 01.03.2003 as amended arrives at Rs 6,15,052/-for the period 2005-06 which is recoverable under the provisions of Section 11A of the Central Excise Act, 1944 after extending the extended period of limitation .

17.2 The Noticee have contended that they are entitled to Cenvat credit. Cenvat credit may be extended if there are documents to show that duty was paid on the inputs which are used in the manufacture of their final products. I find that the Noticee have crossed the exemption limit of rupees one crore for the period and 2005-06 as provided under Notification no. 08/2003-CE dated 01.03.2003 as amended, they are liable to get the registration and pay the Central Excise duty after crossing the clearance value of rupees one crore of the finished excisable goods. Similarly, on the input side, the Noticee are eligible to avail the benefit of Cenvat credit of the duty paid on inputs lying in stock or in process or inputs contained in the final products lying in stock on the date on which goods manufactured ceased to be exempted goods and become excisable during the period 2005-06 onwards as provided in Rule 3(3) of the Cenvat Credit Rules, 2004 after crossing the exemption limit of clearance value of Rupees one crore of finished excisable goods as the Cenvat benefit is a substantive benefit provided by a statute. For this, I rely on CESTAT, Ahmedabad decision in case of CCE Vapi Vs DNH Spinners reported in 2009 (244) ELT 65 (Tri. Ahd).

17.3 The show cause notice has also proposed imposition of penalty on Shri Sharadbhai J. Parekh, an authorised signatory of the Noticee and on Shri Vijaybhai J. Parekh, an authorised signatory of M/s Jay Sales Corporation, Bhavanagar under Rule 26 of the Central Excise Rules, 2002. I find that the Noticee have contravened provisions of Rules as levelled in the show cause notice as follows:

- (a) Rule 9 of the Central Excise Rules, 2002 inasmuch as Noticee failed to get the Registration;
- (b) Rule 10 of the Central Excise Rules, 2002 inasmuch as the Noticee have failed to maintain Daily Stock account for excisable goods manufactured and cleared;
- (c) Rule 11 of the Central Excise Rules, 2002 inasmuch as the Noticee have failed to issue proper invoices for removal of excisable goods;
- (d) Rule 4 and 8 of the Central Excise Rules, 2002 inasmuch as the Noticee have failed to discharge Cenvat leviable on the goods manufactured and removed.

I find that the Noticee have contravened above provisions of Central Excise Rules, 2002 therefore, they are liable to penalty under Section 11AB of the Central Excise Act, 1944.

17.4 Similarly, Shri Saradbhai J. Parekh, an authorised signatory being a Power of Attorney holder of the Noticee, during the course of investigation and in his statements has confirmed that they had not obtained Central Excise registration, sold the excisable goods i.e. Bolts (manufactured) and trading of MS Round bars, Plates and Nuts to M/s Vijay Sales Corporation, Bhavnagar without raising sales invoices and without accounting in their records. Therefore, he is liable to penalty under Rule 26 of the Central Excise Rules.

17.5 Investigation conducted and statement of Shri Vijaybhai J. Parekh, an authorised signatory of M/s Vijay Sales Corporation, Bhavnagar recorded on 01.02.2006 he has affirmed that he is only a trader and had purchased goods with invoices from M/s M.M. Fasteners the goods were described as Nuts, Bolts and Pins but actually they had received Nuts and Bolts directly from the godown of M/s M.M. Fasteners. Similarly, Shri Saradbhai J. Parekh, an authorised signatory of the Noticee in his statement dated 19.03.2006 has affirmed that they had not issued sales invoices in respect of all the quantity of Nuts and Bolts cleared to M/s Jay Sales Corporation but had issued delivery challans only and had admitted that for the sale of some portion of Nuts and Bolts they had issued bills of Bright bars / Pins and some quantity was removed without any invoices. This fact proves that Shri Vijaybhai J. Parekh has abated the Noticee in removing, keeping, selling and depositing the excisable goods, therefore, he also liable to penalty under the provisions of Rule 26 of the Central Excise Rules, 2002.

17.5 I find that the Noticee had obtained Registration on No 08.03.2006 and have deposited Rs 1,02,000/- during the course of investigation under challan No 01 and 02 both dated 13.02.2006 and 16.02.2006 which requires adjustment at the time of payment of Central Excise duty.

In view of the facts, evidence, discussion and findings I pass the following orders.

ORDER

1. I confirm the Central Excise duty amounting to Rs 6,15,052/- (Rupees six lacs, fifteen thousand and fifty two only) under the provisions of Section 11A of the Central Excise Act, 1944 along with interest thereon under the provisions of Section 11AB of the Central Excise Act, 1944. I also appropriate an amount of Rs 1,02,000/- paid vide challan No 01 and 02 dated 13.02.2006 and 16.02.2006 respectively towards Central Excise duty.
2. I impose of Rs 6,15,052/- (Rupees six lacs, fifteen thousand and fifty two only) on M/s M. M. Fasteners, Bhavnagar, Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.
3. I Impose penalty of Rs 15,000/- (Rupees fifteen thousand only) on Shri Saradbhai J. Parekh, Power of Attorney holder and authorised signatory of M/s M.M. Fasteners, Bhavnagar under Rule 26 of the Central Excise Rules, 2002.
4. I impose a penalty of Rs 15,000/- (Rupees fifteen thousand only) on Shri Vijaybhai J. Parekh, an authorised signatory of M/s Jay Sales Corporation, Bhavnagar under Rule 26 of the Central Excise Rules, 2002.

ND
24/11/2013
H/C (HARCHARAN SINGH)
ADDL. COMMISSIONER

By Registered Post A.D.

To,

M/s M.M. Fasteners,
11, Sadguru Industrial Estate,
Mamsa Patia,
Village Ukharala,
Taluka Ghogha,
District Bhavnagar.

Shri Sharadbhai Jashwantra Parekh,
Authorised Signatory of M/s M.M. Fasteners,
11, Sadguru Industrial Estate,
Mamsa Patia,
Taluka Ghogha,
District Bhavnagar.

Shri Vijaybhai J. Parekh,
Authorised Signatory of M/s Vijay Sales Corporation,
Bhavnagar.

Copy to:

1. Commissioner, Central Excise and Service Tax, (RRA), Hqrs, Bhavnagar.
2. Assistant commissioner (A.E.), Central Excise, Hqrs, Bhavnagar.
3. Assistant Commissioner, Central Excise Division, Bhavnagar. (Suvendra Kumar Singh)
4. Superintendent, Central Excise, A.R. II, Bhavnagar.

29/11
24/11/2013
H/C
ADDL. COMMISSIONER.

Received. order original
21/12/12 21/12/12
For Sr. No. 122
DT 29-1-2013