IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal Nos. 517-519 of 2011

(Arising out of Order-in-Original No. CCE/BBSR-II/No.06/Commissioner/2010 dated 16.03.2011 passed by Commissioner of Central Excise, Customs, Bhubaneswar-II.)

1. **Attitude Alloys (P) Ltd.,**
2. **Shri Arun Kadmawala, Director of M/s Attitude Alloys (P) Ltd.,**
3. **Shri Sitaram Agarwal, Director of M/s Attitude Alloys (P) Ltd.,**

Y, 11-A, Civil Township, Rourkela, Dist.-Sundergarh.

...Appellant (s)

VERSUS

Commissioner of Central Excise, Bhubaneswar-II.
Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.

. ..**Respondent(s)**

APPERANCE :
Shri Kartick Kurmy, Advocate for the Appellant
Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...77314-77316/2023
DATE OF HEARING : 18.09.2023

DATE OF PRONOUNCEMENT: 16.10.2023

PER K. ANPAZHAKAN :

The present Appeals are filed against the impugned Order-in-Original dated 16-03-2011 passed by the Ld.Commissioner, Central Excise, Bhubaneswar-II Commissionerate. By the impugned Order, the Ld.Commissioner has confirmed Central Excise duty demand of Rs.1,82,39,247/-, including Cess along with interest, on the ground that the Appellant Company, M/s Attitude Alloys (P) Ltd. (AAPL in short) has clandestinely cleared 3474.950 MT of "Ferro Silico Manganese valued Rs.11,10,61,111/- without payment of duty. Penalty of Rs.1,82,39,247/- was also imposed under section 11AC of the said Act on the Company. Penalty of Rs.10,00,000/- imposed on Shri. Sitaram

Agarwal, and Rs. 10,00,000/- on Shri. Arun Kumar Kadmawala, both Directors of the Company under Rule 26 of the Central Excise Rules, 2002. Aggrieved against the impugned order, the Appellant Company and both the Directors filed appeals before this Tribunal.

2. Briefly stated facts of the case are that on 23-11-2007, simultaneous search was conducted by the DGCEI Officers at the factory and office premises of the Appellant company. In the course of search at Office, one USB Drive (Pen Drive) was recovered from one of the "Computer Table Drawer", which was being used by Shri Ajay Kumar Behera, Computer Operator. The said pen drive contained a Tally package, which was in locked condition with a User Name and Password. The Tally package was opened with the User ID and Password revealed by Shri. Ajay Behera. The Data available in the pen drive were for the period from June 2005 to March 2007. From the data available in the pen drive, Print outs of Sales Registers and Purchase Registers were obtained in the presence of Shri. Ajay Behera and Shri. Ajay Kumar Kadmawala, Director. All the printed pages were signed by Shri. Behera and certificates were given by him certifying that the said retrieved data and printed sales and purchase Registers were related to M/s.AAPL.

3. During the course of search, the data available in their office computers were also opened and scrutinized. Printouts from the USB Drive/Pen Drive and Computer when compared with the statutory records revealed unaccounted production and clearances of 3474.950 M.T of Silico Manganese. The demand of Central Excise of Rs.1,82,39,247/-, including Cess has been raised in the Notice based on the Data available in the printouts taken from the pen drive.

4. Shri. Ajay Kumar Behera, in his statement revealed that the said pen drive belongs to the company and has made entries of most of the data available in the pen drive, as directed by the Directors of the company and Shri. Sujit Pruseth, Accountant of the Company.

5. In his Statement, Shri. Sitaram Agarwal, one of the Directors of the company confirmed that the printed sales and purchase registers have been retrieved from their office pen drive and computer. He has also admitted that the data retrieved contains both sales made on payment

of duty and without payment of duty. He assured that they would conduct necessary verification and if they found there were unauthorized sales, then they would pay appropriate Central Excise duty.

6. In his statement Shri. Arun Kadmawala, another Director of AAPL, endorsed the statement of Shri. Sitaram Agarwal and confirmed the recovery of records from their office, in his presence.

7. Shri. Sujith Pruseth, in his statement explained that the Voucher Type and Voucher No are generated in Tally Package, by default. However, it can be customized as per requirement. Thus, he explained that even if data entry is made by default settings in the Tally package, the Voucher Number will be generated automatically and chronologically.

8. The investigating officers have taken the print outs of the Journal registers and cash registers of the companies, from the computer. The receipts and payments through cheques as reflected in the journal registers were found to be tallied with the bank statements of AAPL received from State Bank Of India and HDFC Bank. However, numerous cash transactions, as reflected in the journal registers were not tallied. On verification, it was found that cash was mostly received from buyers of Silico Manganese, which the officers considered as un accounted sales and demanded duty on the same.

9. In support of their contention against the confirmation of the demands in the impugned order, the Appellants made the following submissions:

(i) Pen drive printouts cannot be relevant piece of material and cannot be admitted into evidence without complying with Section 36B(2)/36B(4). hence, cannot be admitted into evidence and cannot be relied upon as evidence. The Pen drive is not accompanied with Certificate as mandated under section 36B(4) containing the following details:

(a) Describing the manner in which the pen drive data (electronic record) was produced

(b) the certificate must furnish the particulars of the device involved in the production of that record(the computer with which the pen drive was used for production of electronic record).

(ii) In the instant case, the Pen drive was seized from table drawer. Investigation is silent with which computer it was used. Pen drive is a floating device and there was no enquiry as to data contained therein was fed in which computer and whether that computer was owned by the Appellant or not.

(iii) Shri Ajay Kumar Behera, Computer Operator, joined service only on 12-04-2007. Further, he has not made all the entries in the pen drive but some other person have also made it. In the impugned Order, the Ld. Commissioner has accepted that Sri Ajay Kumar Behera, Computer Operator, was only feeding data and he had no personal knowledge of clandestine removal as he was never directly involved in the commission of the offence. Hence, any certificate by Sri Ajay Kumar Behera, Computer Operator would not meet the requirement of Section 36B(4). Further, oral statement of Sri Ajay Kumar Behera, Computer Operator cannot prove correctness of Computer/Pen drive Printout as held by the Hon'ble Orissa High Court in the case of *CCE Vs. Shivam Steel Corp. (2023) 2 CENTAX 259 (Ori.)* that Computer Printout/Electronic record cannot be proved by oral evidences. The conditions of Clause (a), (b), (d) of Section 36B(2) are not satisfied in as much as there is no trace of the computer from which printout was taken, there is no evidence/allegations that the information was supplied to the said computer in the ordinary course of said activities and the computer printout/pen drive printout are taken from the said computer. The Appellant further relies on the decision of this Tribunal in the case of *M/s Jai Balaji Industries Ltd. Vs. CGST reported in 2023-VIL-771-CESTAT-KOL-CE to drive home the point that the data recovered from pen drive is not a reliable evidence to raise demand of duty* . In the said decision, it has been held that Pen drive is a floating device and unless the computer from which the electronic record was produced is identified, the data recovered from the pen drive cannot be admitted as evidence.

(iv) Certificate as mandated U/s 35B(4) has to be given by the person "occupying a responsible official position in relation to the operation of the relevant device". Statement of Directors Sri Sitaram Agarwal and Sri Arun Kumar Kadmawala is irrelevant as they were not occupying a responsible official position "*in relation to the operation of the relevant device*".

(v) Shri Sitaram Agarwal, Director in his statement dated 23-11-2007 categorically denied having engaged in clandestine activities and also categorically stated that he is not aware whether the print outs taken out from the Pen drive and Computer relates to the Appellant Company or not . Thus, there is no confession of guilt.

(vi) Shri Arun Kadmawala, Director in his statement dated 20-10-2008 stated that the sales relating to 2005-06, 2006-07 and 2007-08 which is 2 $^{1}/_{2}$ year old and he is not in a position to comment upon it. Thus, There is no confession of guilt.

(vii) Shri Ajay Kumar Behera, Computer Operator in his statement dated 23-11-2007 stated that he was not the accountant and he only makes entry on the basis of records, papers, information etc. made available to him by Sri Sujit Pruseth, Accountant & Director, hence, he has no knowledge of any clandestine activities. He further stated that he joined the company w.e.f. 12-04-2007, hence, cannot say anything prior to that. The period of dispute in this case is 2005-06 to 2007-08 (upto November, 2007). Thus, there is no confession of guilt.

(viii) Sri Sujit Pruseth, Accountant on 03-12-2008 in his statement did not accept clandestine purchase, manufacture or sale by the Appellant Company. He stated that he did not provide any information to Sri Ajay Kumar Behera for making entry into pen drive/computer. There is no confession of guilt by him.

(ix)Oral Statements cannot be relevant piece of material without testing the same under Section 9D. The provisions of Section 9D of the Act is mandatory and unless the prescriptions of Section 9D are complied, the testimony of witness cannot be treated as relevant piece of material as mandated under Section 9D In the instant case, the statements recorded from Shri Sitaram Agarwal, Director, Shri Arun Kadmawala, Director, Sri Sujit Pruseth, Accountant and Sri Ajay Kumar Behera,

Computer Operator are all not tested in accordance with Section 9D of the Act, and hence these statements are not relevant piece of material and cannot be admitted as evidence.

(x) Private records (Computer Printout) without further corroboration is not sufficient to sustain charge of clandestine removal. The allegation of unaccounted production and clearances of 3474.950 M.T of Silico Manganese should have established with corroborative evidence regarding purchase of raw materials, deployment of labour, arrangement of transportation, receipt of the clandestinely cleared goods by the customers and financial transactions, receipt of money etc. In the instant case, no such corroborative evidence is available. There is no recovery of parallel invoices showing clandestine clearance of finished goods. The conclusion of clandestine clearance has been drawn from the data recovered from the pen drive. The clandestine clearance is only based on assumptions and presumptions, which vitiates the entire proceedings. In support of this contention, the Appellant relied on the following decisions:

(i) Hi Tech Abrasives Ltd. Vs. CCE reported in 2018 (362) ELT 961 (Chha.) (Para 9.2,9.3,9.4,9.5 Page 166 of Compilation)];

(ii) M/s Jai Balaji Industries Ltd. Vs. CCE [2023-VIL-771-CESTAT-KOL-CE (Para 13.14, Page 73 of Compilation)];

(iii) Govinda Das Vs. CC (Prev.) Kol [2023 (385) ELT 722 (Tri.Kol.) (Para 23, Page 120 of Compilation)].

(xi) Electricity Consumption cannot be the basis for alleging clandestine production. The electricity consumption varied from 3816 units 10226 units during the period from April 2005 to October 2007. A project Report prepared by them projected electricity consumption of 3800 units per MT. The Appellant contented that it is a project report and not a report of actual performance. Electricity consumption vary on account of several parameters such as quality of raw materials, load factor, power failure, machinery break down etc. Thus, they contended that the allegation of clandestine clearance cannot be on the basis of excess consumption of electricity. In support of this contention, the Appellants relied on the decision in the case of *CCE Vs. R.A. Casting P. Ltd.*

reported in 2012 (26) STR 262 (All.) which was affirmed by the Hon'ble Supreme Court vide 2011 (269) ELT A108 (SC).

(xii) The Appellants submits that the dispute in the instant case relates to the period from 2005-06 to 2007-08 (upto November'2007) and search was conducted on 23-11-2007 while the Show Cause Notice was issued on 08-04-2010 i.e. after expiry of more than 29 months, hence, the demand is barred by normal period of limitation of one year. In the above facts and circumstances of the case, the demand is entirely barred by normal period of limitation. For the same reason, the imposition of penalties under Sections 11AC and Rule 26 are not sustainable.

(xiii) In view of the above, the Appellants prayed for setting aside the impugned order and allow their appeals.

10. The Ld. A.R. submits that the data relating to sale and purchase of goods maintained under the 'Tally Package' was de-coded with the user ID as 'bajaj' and Password No. 0292 which was revealed by the computer operator Shri Ajay Kr. Behara. A detailed analysis of the data contained in the Pen drive indicated that the data were maintained in the usual course of business from June, 2005 onwards. On a comparison between the data relating to sale of goods and with the daily stock account register maintained by the Applicant company, unaccounted clearances were noticed and accordingly demand was confirmed against the Applicant. The Ld. A.R. submits that once the primary evidence in the form of documents are available then it is not necessary to go for secondary evidences like collection of movement of goods by transports and statement of purchasers etc. The Ld. A.R. further submits that when the print outs containing data was placed before the Director Shri Sitaram Agarwal on 23.11.2007, the Director did not out rightly deny that it does not belong to them, but sought time for further verification. The other Director Shri Arun Kadmawala also endorsed the views of Shri Agarwal. The Ld. A.R. further submits that the adjudicating authority has analyzed all the evidences in detail and arrived at a categorical finding on the basis of the statement and the computerized data that the Appellant had indulged in clandestine manufacture and clearance of goods from their factory. The Ld. A.R.

submits that besides the aforesaid evidences, the Ld. Adjudicating authority has also analyzed the corroborative evidence viz. consumption of electricity, wherein, the consumption of electricity per M.T. varied from 3,800 units to 10,226 units against normal consumption of 4,500 to 5,000 units for production of 1 M.T. of Silico Manganese. He further submitted that the Directors are responsible for the said clandestine removals and accordingly personal penalty has been rightly imposed on them.

11. Heard both sides and perused the appeal records.

12. We find that the allegation against the Applicant Company is manufacture and clandestine clearance of Silico Manganese from their factory for the period from 2005 to November, 2007, without payment of appropriate duty. The demand is confirmed on the basis of computerized data maintained by the Computer Operator of the Applicant Shri Ajay Behera which has been retrieved from a Pen drive recovered from one of the office table drawer of Shri Behera, during the course of search of office premises on 23.11.2007 by the officers of D.G.C.E.I. The demand has been raised based on the date retrieved from the pen drive and other computers available in the office as well as various statements recorded from the responsible persons of the Appellant. The abnormally high consumption of electricity for manufacture of Silico Manganses for the years 2005-06 and 2006-07 has also been cited as evidence of manufacture and unaccounted clearance of Silico manganese during the period under dispute.

13. Thus, we observe that the issues to be decided in the present appeals are:

(i) Whether evidences available on record substantiate that the data retrieved from the pen drive and other computers belonged to the Appellant's company and the data can be relied upon as evidence to demand duty?

(ii) Whether the conditions mentioned in Section 36B has been followed in this case or not, to rely upon the computer printouts as evidence?

(iii) Whether the procedure as set out in Section 9D of the Central Excise Act, !944 was followed in this case or not? If not followed, then whether the statements recorded under Section 14 of the Central Excise Act, 1944 can be relied upon to demand duty ?

(iv) Whether the allegations of clandestine clearance of finished goods by the Appellants are substantiated with corroborative evidence?

(v) Whether high consumption of electricity during the years 2005-06 and 2006-07 can be relied upon to allege clandestine manufacture and clearance to demand duty during the relevant period

(vi) Whether the demands confirmed in the impugned order on clandestine clearance of finished goods is sustainable in the absence of any evidence of procurement of the major raw materials for manufacture of Silico Manganese, without invoices?

(vii) Whether penalty is imposable on the Appellant company and it's Directors, on the basis of the evidences available on record?

14. (i) Whether evidences available on record substantiate that the data retrieved from the pen drive and other computers belonged to the Appellant's company and the data can be relied upon as evidence to demand duty?

(ii) Whether the conditions mentioned in Section 36B has been followed in this case or not, to rely upon the computer printouts as evidence?

14.1. We observe that during the course of search at the office of the Appellant, one USB Drive (Pen Drive) was recovered from one of the "Computer Table Drawer", which was being used by Shri Ajay Kumar Behera, Computer Operator. The said pen drive contained a Tally package, which was in locked condition with a User Name and Password. The Tally package was opened with the User ID and Password revealed by Shri. Ajay Behera. The Data available in the pen drive were for the period from June 2005 to March 2007. From the data

available in the pen drive, Print outs of Sales Registers and Purchase Registers were obtained in the presence of Shri. Ajay Behera and Shri. Ajay Kumar Kadmawala, Director. All the printed pages were signed by Shri. Behera and certificates were given by him certifying that the said retrieved data and printed sales and purchase Registers were related to M/s.AAPL. The data available in their office computers were also opened and scrutinized. Printouts from the USB Drive/Pen Drive and Computer when compared with the statutory records revealed unaccounted production and clearance of 3474.950 M.T of Silico Manganese. The demand of Central Excise of Rs.1,82,39,247/-, including Cess has been raised in the Notice based on the data available in the printouts taken from the pen drive.

14.2. Shri Ajay Kumar Behera, Computer Operator in his statement dated 23-11-2007 stated that he was not the accountant and he only makes entry on the basis of records, papers, information etc. made available to him by Shri Sujit Pruseth, Accountant & Director, hence, he has no knowledge of any clandestine activities. He further stated that he joined the company w.e.f. 12-04-2007, hence, cannot say anything prior to that. The period of dispute in this case is 2005-06 to 2007-08 (upto November, 2007). Shri Sujit Pruseth, Accountant on 03-12-2008 in his statement did not accept clandestine purchase, manufacture or sale by the Appellant Company. He stated that he did not provide any information to Sri Ajay Kumar Behera for making entry into pen drive/computer. Shri Sitaram Agarwal, Director in his statement dated 23-11-2007 categorically denied having engaged in clandestine activities and also categorically stated that he is not aware whether the print outs taken out from the Pen drive and Computer relates to the Appellant Company or not. Shri Arun Kadmawala, Director in his statement dated 20-10-2008 stated that the sales relating to 2005-06, 2006-07 and 2007-08 which is 2 $^{1}/_{2}$ year old and he is not in a position to comment upon it.

14.3. We observe that the entire case has been buit up on the basis of the data retrieved from the pen drive and the subsequent statements recorded from the responsible persons. Thus, authenticity of the data is very essential to substantiate the allegations. The pen drive has been

recovered from Shri. Ajat Kr. Behera and hence his statement is very crucial regarding the data available in the pen drive. It is a fact on record that Shri Ajay Kr. Behara has been employed only 4-5 months earlier to the date of recovery of the said data. Hence, the evidentiary value of his statement with respect to the data for the earlier period does not carry any weight.

14.4. Pen drive is a floating device and unless the computer from which the electronic record was produced is identified, the data recovered from the pen drive cannot be admitted as evidence. In the instant case the data recovered from the pen drive pertains to the period 2005-06, 2006-07 and 2007-08. Shri Ajay Kumar Behera, Computer Operator has joined in the company only on 12.04.2007. His statemnt has been relied on to validate the data available in the pen drive for the period 2005-06 and 2006-07 also. No effort has been made to identify the person who has entered the data for the period prior to 12.04.2007.

14.5. The Appellant has relied on the decision of this Tribunal in the case of *M/s Jai Balaji Industries Ltd. Vs. CGST reported in 2023-VIL-771-CESTAT-KOL-CE to drive home the point that the data recovered from pen drive is not a reliable evidence to raise demand of duty, when the person who entered the data is not identified.* The relevant part of the said decision is reproduced below:

> "12.4. Section 36B (4) mandates that any computer printout has to be signed by a person occupying a responsible official position in relation to the operation of the relevant device and a certificate is to be given to that effect. This is required to establish the ownership of the data recovered from the computer device. In the present case, we observe that neither the mandatory conditions of Section 36B(2) have been complied with nor there is any certificate on record as mandated under Section 36B(4). During the course of panchnama dated 17-07-2014 drawn at the premises of JBIL-III, Shri Sushil Kumar Roy was found working on the computer located in the dispatch section and the device on

which the data was being stored was the 8 GB pen drive. The other pen drive was also recovered from the pocket of Shri Sushil Kumar Roy. We observe that the adjudicating authority has wrongly presumed that the computer in which Shri Sushil Kumar Roy was working was the source of all data and the requirement of Section 36B (4) stand satisfied . A pen drive is a floating device. It cannot be assumed that the company's data was not being stored in the company's computer hard-drive but was being stored in a pen drive. In his statement dated 17.07.2014, Shri Sushil Kumar Roy categorically stated that Shri. Gautam Banerjee, the other Associate of the company also makes entry in the computer, but no statement was recorded from him. There is no statement from any Director either of JBIL-III or JBIL-IV accepting the authenticity of the said data. Even on the date of search Shri Gaurav Jajodia, Director of JBIL-III was present whose signature was obtained on the panchnama but his statement was never recorded.

12.5 We observe that JBIL-III and JBIL-IV have vehemently denied ownership of these two pen drives and the authenticity of the data therein. Only two statements of Shri Sushil Kumar Roy, Associate (Commercial) of JBIL-III and one statement of Shri Kanhaiya Agarwal, weighbridge in-charge of JBIL-III were recorded. The statement of Shri Sushil Kumar Roy regarding clandestine clearances in respect of entries in the computer printouts was not categorical. He had stated that in the computer printouts, when tax invoice number was not given some of them 'might be' without bill despatches because in some of such cases

bills might have been issued from JBIL IV but entries were made in the pen drives only to keep account. In his statement, Shri. Sushil Kumar Roy only says that the entries without tax invoice number might be meant for despatches without bill. There was no categorical admission by him. He also says that inrespect of some of such cases bills might have been issued from JBIL IV, but entries were made in the pen drives only to keep account. This statement was given on the date of search om 17.07.2017. However, we observe that this averment of Shri Sushil Kumar Roy was not probed further.

12.6. In support of their contention that the computer printouts resumed from the pen drives is not an admissible evidence, unless the mandatoty procedure prescribed in Section 36 B is followed, the Appellants cited various decisions. In the case of **Ambica Organics Vs Commissioner of C.Ex& Cus, Surat-I reported in 2016(334)ELT 97(tri-Ahmd),** It has been held as under:

> *"7. After hearing both the sides and on perusal of the records, I find that the Central Excise officers while visiting the factory of the appellant, recovered a USB drive in the appellant's premises. The USB drive was connected with computer and a printout was taken by the computer expert accompanied with the Central Excise officers. The printout gives the details of the certain sales (date-wise) commencing from 1-4-2005. The delivery challans for various chemicals for the month of December, 2005 and January, 2006 were found and seized during the search. The appellants disowned the contents of the printout and stated that it has manipulated the data base with motive, to take revenge from the partner and the firm for the refusal of the loan of Rs. 1 lakh sought by the Computer Operator.*

The appellant filed an affidavit disclosing this fact on 13-2-2006 i.e. immediately after the raid and a copy of the affidavit was also given to the investigating officer. The Central Excise officers attempted to corroborate the contents of the printout with the statements of 30 persons viz. buyers, transporters etc. The appellants requested for cross-examination of 30 persons which was rejected by the Adjudicating authority. The appellants contended that the statements are pre-drafted computer statements and it cannot be voluntary nature. After considering the submissions of the appellant, the Commissioner (Appeals) allowed the cross-examination of 4 persons randomly selected. Three of them stated that they were made to sign the pre-drafted statements on a promise that no action shall be taken against them.

8. *For the purpose of proper appreciation of the case, the relevant portion of the findings of the Commissioner (Appeals) is reproduced below : -*

"4.5 Another contention of the appellant is that department has brought artificial evidence in the form of 30 statements from the buyer parties. The appellant stand is that the statements of the 30 parties are pre-drafted computer statements and involuntary. Four of the buyers (randomly selected) deposed before me. Three of them stated before me that they were made to sign a pre-drafted statement on a promise that no action shall be taken against them. One of them stated that his statement was voluntary. In the statements it has been recorded that these person stated that they received the textile auxiliary chemicals without invoice and against cash payments. Statement of these 30 persons (most of them Processors) are against their own interest as it makes them liable for penal action for purchasing dutiable goods on which duty was not paid. However, no show cause notice is given to these persons who have admitted to have received the impugned goods without bills. This fact gives credence to the allegations made by the appellant that the statements were not voluntary. It is apparent

that the thirty statements have been recorded under a promise that no action shall be taken against them. Under these facts and circumstances, the evidentiary value of these thirty statements is considerably weakened. However, the solid evidence in the form of electronic records (USB Drive) and the computer printout from the same are sufficient to nail the appellant."

9. *The Commissioner (Appeals) observed that the evidence in the form of electronic record (USB drive) the computer printout are strong evidence to establish the clandestine removal of the goods. It is seen that the said printout of the data in the USB drive contained the details of raw material and finished goods along with the names and addresses of the suppliers and the purchasers of the finished goods. It is seen that the statements were recorded to corroborate the contents of the printout and the Commissioner (Appeals) had held that the said statements has no strong evidentiary value. Shri Anil Gupta, Partner of the appellant firm had stated that he was not aware of the details contained in the USB drive.*

10. *Learned Advocate submitted that the clandestine manufacture and removal of the goods cannot be upheld based on the printout of the data contained in the USB drive without following the requirement of condition of Section 36B of the Central Excise Act, 1944. Section 36B of the said Act provides admissibility of microfilms, facsimile copies of documents and computer printouts as documents and as evidence. Clause (c) of Section 36B(1) states that the statement contained in a document and included in a computer printout would be an evidence if the condition mentioned in the sub-section (2) and other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be the document for the purpose of this Act and the rules made thereunder and can be admissible in proceedings. Sub-section (2) of Section 35B provides the condition referred to in sub-section (1) in respect of the computer printout shall be the following viz.*

"(a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operational properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied, to the computer in the ordinary course of the said activities."

Sub-section (4) of Section 36B requires issue a certificate in this behalf by a person occupying the responsible official position in relation to the operation of the relevant device or the management of the relevant activity (whichever is appropriate) shall be evidence in any matter stated in the certificate and for the purpose of the sub-section, which shall be sufficient for a matter to be stated to the best of the knowledge and the belief of the persons stating it. In the present case, the data was not stored in the computer. It is stated that the computer expert accompanied with the Central Excise officers had taken the printout from the USB drive by connecting to the computer. The officers had not obtained any certificate as required under Section 36B of the said Act. It is also noted that none of the conditions under Section 36B(2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the

clandestine removal of the goods. It is noted that the requirement of certificate under Section 36B(4) is also to substantiate the veracity of truth in the operation of electronic media. In the case of M/s. Premier Instrument & Controls Ltd. (supra), the Tribunal has held that the printout of the personal computer of the company's officer, had not fulfilled the statutory condition laid down under Section 36B(2) of the Act and the demand is not sustainable. The relevant portion of the said decision is reproduced below : -

"9. On the demand of duty on waste and scrap, again the appellants have made out a strong case on merits. The demand covering the period November, 1993 to September, 1998 is based on certain computer printout relating to the period February, 1996 to September, 1998. These printouts were generated from a personal computer of Shri G. Sampath Kumar, a junior officer of the Company, whose statements were also recorded by the department. Admittedly, whatever facts were stated by Shri Sampath Kumar, in his statements, were based on the entries contained in the computer printouts. The statements of others, recorded in this case, did not disclose any additional fact. Therefore, apparently, what is contained in the computer printout is the only basis of the demand of duty on waste and scrap. The question now arises as to whether these printouts are admissible as evidence, in this case. Ld. Sr. Counsel has pointed out that the computer print-outs did not satisfy the statutory conditions. He has referred to the relevant provisions of Section 36B of the Central Excise Act which deals with admissibility of computer printouts etc. as evidence and says that the statement contained in a computer printout shall be deemed to be a document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. Sub-section (2) reads as under : -

"2. The conditions referred to in sub-section (1) in respect of the computer printout shall be the following, namely : -

(a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly, carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was in operation properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities."

Ld. Sr. Counsel has argued that the above conditions were not fulfilled in respect of the computer printout taken from the personal computer of Shri Sampath Kumar. It appears from the statement of Shri Sampath Kumar and the averments in the memorandum of appeal that it is an admitted fact that Shri Sampath Kumar was the person having lawful control over the use of the computer. The computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the company. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the Company to the personal computer of Shri Sampath Kumar in the ordinary course of activities. Again, it was not shown that, during the

relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. We have considered the Tribunal's decision in International Computer Ribbon Corporation v. CCE, Chennai (supra). In that case, as in the instant case, computer printouts were relied on by the adjudicating authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that the printouts were neither authenticated nor recovered under Mahazar. It was also found that the assessee in that case had disowned the printouts and was not even confronted with what was contained therein. The Tribunal rejected the printouts and the Revenue's finding of clandestine manufacture and clearance. We find a strong parallel between the instant case and the cited case. Nothing contained in the printouts generated by Sampath Kumar's PC can be admitted into evidence for non-fulfilment of the statutory conditions. It is also noteworthy that the computer printouts pertained to the period February, 1996 to September, 1998 only but the information contained therein was used for a finding of clandestine removal of waste and scrap for earlier period also, which, in any case, was not permissible in law. In the result, we hold that the entire demand of duty on waste and scrap is liable to be set aside."

11. *Taking into consideration the overall facts and circumstances of the case, I find that the entire case was made out on the basis of statements of the buyers and the computer printout. Commissioner (Appeals) already held that the evidentiary value of the statements is weak. It is also noted that the statements of the 30 persons were mostly similarly pre-drafted. The investigating officers failed to comply with the conditions of Section 36B of the Act in respect of relying upon this computer printout. There is no adequate material*

available on record to establish the clandestine removal of goods. Therefore, the demand of duty solely on the basis of these materials cannot be sustained. Hence, as the clearance value was within the SSI exemption, the confiscation of the goods cannot be sustained. So, the imposition of penalties are not warranted"

12.7. In the case of ***Anvar P.V. Vs. P.K. Basheer reported at 2017 (352) ELT 416 (SC), The Hon'ble Supreme Court has held as under:***

13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a *non obstante clause*. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act :

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

> (a) There must be a certificate which identifies the electronic record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;
>
> (c) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
>
> (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.
>
> **15.** It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.
>
> **16.** Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.
>
> ***17.*** *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.*

12.8. Section 65B of Evidence Act is parimateria with Section 36B of the Central Excise Act, 1944. From the above observation of the Hon'ble Apex Court, we find that unless the conditions of Section 65B(2) of the Evidence Act, which is parimateria with Section 36B(4) of the Central Excise Act are complied with, no reliance can be placed on any computer printouts . Admittedly, the procedure set out in Section 36B has not been followed in this case. Thus, following the judgement of the Hon’ble Apex Court

and the other decisions cited above,we hold that the data resumed from the computer print out alone cannot be relied upon to demand duty, without any corroborating evidence. "

14.5. We observe that in the present case the author of entry of data has not been identified only for the period prior to 12.04.2007. For the period after 12.04.2007 also, the data available in the pen drive has not been accepted by the Accountant Shri. Sujit Pruseth who is responsible for the data or the Directors. Thus, relying on the decisions cited above, we answer to the questions (i) and (ii) raised at Para 13 supra in the negative.

15. **(iii)Whether the procedure as set out in Section 9D of the Central Excise Act, !944 was followed in this case or not? If not followed, then whether the statements recorded under Section 14 of the Central Excise Act, 1944 can be relied upon to demand duty ?**

15.1. The Appellant contended that Statements recorded during the course of investigation cannot be relevant without testing the same under Section 9D. The provisions of Section 9D of the Act is mandatory and unless the prescriptions of Section 9D are complied, the testimony of witness cannot be treated as relevant piece of material as mandated under Section 9D. In the instant case, we observe that the statements recorded from Shri Sitaram Agarwal, Director, Shri Arun Kadmawala, Director, Sri Sujit Pruseth, Accountant and Sri Ajay Kumar Behera, Computer Operator are all not tested in accordance with Section 9D of the Act, and hence these statements are not relevant piece of material and cannot be admitted as evidence.

15.2. The Appellant relied on the decision of this Tribunal in the case of *M/s Jai Balaji Industries Ltd. Vs. CGST reported in 2023-VIL-771-CESTAT-KOL-CE in support of their contention that the statements recorded in this case cannot be relied upon as the provisions of section 9D are not followed.* In the case of G-Tech Industries Vs Union Of India reported in 2016(339) ELT 209 (P&H), the Hon'ble Punjab and Haryana High Court has given an elaborate findings regarding the procedure to be followed under Section 9D. The relevant Part of the judgement is reproduced below:

> ***"3.*** *The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ` 7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.*
>
> ***4.*** *In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*
>
> ***"9D. Relevancy of statements under certain circumstances.*** *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
>
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by*

the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5. *A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.*

6. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.) = 2011 (22) S.T.R. 225 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

7. *There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.*

8. *As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by*

evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

9. *The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

10. *Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.*

11. *Clause (a) of Section 9D(1) refers to the following circumstances :*

(i) when the person who made the statement is dead,

(ii) when the person who made the statement cannot be found,

(iii) when the person who made the statement is incapable of giving evidence,

(iv) when the person who made the statement is kept out of the way by the adverse party, and

(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

12. *Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 21831/1994, dated 3-1-1995 [since reported in 1995 (75) E.L.T. A177 (S.C.)], wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear*

that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

13. *If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

14. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

15. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

16. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the*

statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

18. *It is only, therefore,-*

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

19. *Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

20. *Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

21. *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v. C.C., 2001 (137) E.L.T. 637 (T).*

22. *It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.*

23. *The said Order-in-Original, dated 4-4-2016, passed by Respondent No. 2 is, therefore, clearly liable to be set aside.*

24. *In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No. 2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No. 2 for adjudication de novo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural justice in the following manner :-*

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine

them in chief before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).

25. *The writ petition is allowed in the aforesaid terms."*

15.3. Shri. Ajay Behera in his statement dated 23.11.2007 stated that he is not an Accountant and he made entry on the basis of records, papers, information provided by Shri. Pruseth Accountant and Director. But, Shri Pruseth in his statement denied to have provided any such information to Shri. Behera. Therefore, we observe that the statement

of Shri. Behera cannot be taken as voluntary. Further, the adjudicating authority has not permitted the cross examination of Shri. Behera to bring out the truth. In his statement dated 23.11.2007, the Director Shri. Sitaram Agarwal has denied his involvement in the activity of clandestine clearance. But, in the Notice it has been alleged that he has accepted clandestine removal of finished goods. Had the adjudicating authority followed the provisions of Section 9D and examined the witnesses who have given the statements, the truth in this statement could have come out. Thus, we hold that the statements recorded in this case has lost its evidentiary value by not following the provisions of Section 9D. Thus, we find that Procedure set out in Section 9D has not been followed in this case. Accordingly, we answer to the question (iii) at Para 13 supra in the negative.

16. (iv) Whether the allegations of clandestine clearance of finished goods by the Appellants are substantiated with corroborative evidence?

16.1. Duty has been demanded in the impugned order on account of clandestine clearance of Silico Manganese manufactured by the Appellants. The adjudicating authority has mainly relied upon evidence of the data recovered from the pen drive on the date of search to confirm the demands in the impugned order. We observe that no inquiries were conducted with regard to the alleged clandestine removal on the basis of the aforementioned records recovered. The sales records shows cash receipts of Rs. 7 crores, which the Revenue alleges that sales proceeds of clandestinely cleared silico manganese in cash. However, no verification was done to ascertain this. The Appellants cited many judgments wherein it has been categorically laid down that when the names of the buyers were available in the seized records it

would be incumbent on the investigation to make inquiries from the buyers for establishing clandestine removal.

16.2. In the case of Kumar Cotton Mills (P) Ltd. Vs Commissioner of Central Excise, Ahmedabad, reported in 2008(229) ELT 273 (Tri-Ahmd), it has been held that demand of duty cannot be held merely on the basis of some entries available in the private registers. Positive, tangible evidences are required to confirmed demands on clandestine removal. The demands cannot be made on assumptions and presumptions. The relevant portion of the decision is as under:

(i) ***"6.*** *After considering the submissions made by both sides and after going though the impugned order, we find that the demand stand confirmed against the appellant on the basis of entries made in the so-called lot register read with statement of the Director, though the appellants have denied that such lot register belong to them, in as much as they used the letter 'K' for allotting lot number and the word 'W' was never used by them, we find that said lot register, in any case, is a private document. We have seen the said lot register giving details of the clearances along with the name and address of the buyer. Surprisingly enough, neither of the buyers, whose names and addresses were available in the said register, stand contacted by the Revenue and no efforts have been made by them to find out and ascertain the correct position from the said buyers, by investigating them and by recording their statements. This failure on the part of the officers definitely act as fatal to the Revenue's case, in as much as it is well settled law that the entries in the private record cannot be made the sole basis for upholding the allegations of clandestine removal unless there is a corroborative independent evidence on record. Similarly, statement made by the Director does not stand corroborated in any material particular from any other independent source. The gist of all the decisions relied upon by the learned advocate is to the effect that the allegations of clandestine removal are required to be established beyond doubt, by production of positive, tangible and independent corroborative evidence and such findings should not be arrived at on the basis of assumptions and presumptions. As we have already observed that inspite of the availability of names and addresses of the buyers, the officers have not bothered to conduct investigations at their end, so as to establish the Revenue's case,*

we are of the view that the sufficient evidence does not exist in the present case, so as to uphold the findings of clandestine activity against the appellant."

(ii) the appellant has relied upon the decision *CCE Vs. R.A. Casting P. Ltd. reported in 2012 (26) STR 262 (All.)*

> **22.** The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :
>
> (i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;
>
> (ii) Utilization of such raw material for clandestine manufacture of finished goods;
>
> (iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;
>
> (iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transportersô documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;
>
> (v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.
>
> In the instant case, no such evidences to the above effect have been brought on record.ò

16.3. In the instant case we find that the investigation has not brought in any corroborative evidence to substantiate the allegation of clandestine removal. In view of the above findings, we hold that the investigation has failed to establish the alleged clandestine clearance of goods by the Appellants and hence the demands confirmed in the impugned order are not sustainable. Accordingly, answer to the Question (iv) in para 13 supra is in the negative.

17. (v)Whether high consumption of electricity during the years 2005-06 and 2006-07 can be relied upon to allege clandestine

manufacture and clearance to demand duty during the relevant period

17.1. It is observed from the Project Report of the Appellant that electricity required for production of 1 MT of Silico Manganese is 3800 units. As against this, the Appellant has consumed 7900 and 5564 units per MT during the years 2005-06 and 2006-07 respectively. We observe that there was widespread variation in consumption of electricity between months. For Example in the month of April 2006, the electricity consumption per month comes to 28000 to 31000 units per MT.

17.2. In their submissions the Appellant stated that the consumption of electricity depends upon the grades of raw materials and weight of charge. Normally they consume 4500 to 5000 units for production of one MT of Silico Manganese. We observe that the actual consumption of electricity per MT was 7900units and 5564 units for the years 2005-06 and 2006-07, which is much more than their projection.

17.3. We find that the appellant has relied upon the decision *CCE Vs. R.A. Casting P. Ltd. reported in 2012 (26) STR 262 (All.) , which has been affirmed by Hon'ble Supreme Court 2011 (269) ELT A108 (SC), in support of their contention that electricity consumption cannot be the basis for demanding duty.The relevant portion of the decision is reproduced below:*

> **"19.** The main question to be decided in the instant appeals here is whether the appellants during the period December 2001 to March, 2005 have actually manufactured M.S. Ingots in excess of what has been recorded in their statutory records and removed the said quantity clandestinely from their factory without payment of duty. The excess production has been worked out on the basis of electricity consumption for which the standard norms are imported from the report of late Mr. N.K. Batra, Professor of Material and Metallurgical Engineers, IIT Kanpur.
>
> **20.** We find that the following reports have been referred to either by the appellants or the Revenue laying down the norms for the consumption of electricity for the manufacture of one MT of steel ingots :
>
> (i) 555 to 1046 (KWH/T) as per Dr. Batraôs report;

(ii) 1800 KWH/T as per the report by Joint Plant Committee constituted by the Ministry of Steel, Government of India;

(iii) 1427 KWH/T as per the report of NISST, Mandi, Gobindgarh given in June-July, 2006;

(iv) 650 units to 820 units/MT as per the Executive Director, All India Induction Furnace Association, New Delhi;

(v) 851 units/MT in the case of *Nagpal Steel* v. *CCE, Chandigarh* reported in 2000 (125) E.L.T. 1147.

20.1 From the perusal of these reports, we find that wide variations in the consumption of electricity have been reported for the manufacture of one MT of steel ingots. This renders the norm of 1046 units adopted by the Revenue as arbitrary. Why not adopt the norm of 1800 KWH/T or 1427 KWH/T or 650 to 820 units/MT or 851 units/MT as per various reports referred to above or why not adopt some figure between 555 to 1046 units as norm as per Dr. Batraôs report?

20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates widly depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. The reasons for high consumption of electricity in the case of the appellantsô factories have not at all been studied and analysed by the Revenue

independently. Instead, the norm of 1046 units fixed as per Dr. Batraôs report has been blindly applied to the appellantsô cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations.ò

17.4. In view of the discussions and by relying on the decisions cited above, we hold that excess electricity consumption alone cannot be an evidence to substantiate the allegation of clandestine clearance. Accordingly, answer to the question (v) in para 13 supra is negative.

18. (vi) Whether the demands confirmed in the impugned order on clandestine clearance of finished goods is sustainable, without verification at the buyer's end? Also, in the absence of any evidence of procurement of the major raw materials for manufacture of silico Manganese, without invoices, whether demand is sustainable?

18.1. We observe that the allegation of the department is that most of the unaccounted clearances of Silico Manganese were sold in cash. As per the cash register, Rs.7crores were received as cash during the

relevant period. The Sales Register retrieved from the computer printout recovered from the office contained many entries with cash transaction. However, investigation was conducted only one of the office premises of M/s. Omkar Steels (P) Ltd. where it was found that no invoice was issued for the sale of 3 MT of Silico Manganese sold by the Appellant. On the basis of this single verification, the investigation concluded that the Appellant has suppressed clearance of Silico Manganese from their factory in respect of entire sale value mention as cash sales in the Register. It may not be possible to verify each and every transaction in cash, But, out of so many entries of sales in cash verification of only one entry and generalising the result for all other entries available in the sales register is not acceptable .

18.2. We observe that the revenue has failed to corroborate unaccounted clearance available in the data retrieved from the pen drive by verification at the customer's end. Since we have already held that the data recovered from the pen drive does not have any evidentiary value, the conclusion arrived at by the investigation with one verification cannot be considered as corroborative evidence for the clandestine clearance of entire 3474.950 MT of Silico Manganese alleged to have been cleared through cash transaction. Hence, answer to question No (vi) in para 13 is in negative..

19. (vii)Whether penalty is imposable on the Appellant company and it's Director, on the basis of the evidences available on record?

19.1. Regarding, penalty of Rs.10, 00,000/- each imposed on the Directors, the adjudicating authority held that the Directors cannot absolve themselves for such clandestine manufacture and clearances. However, we find that no evidence has been brought on record to establish that the Directors are involved in clandestine manufacture and clearance of the goods. As the evidence available on record does not establish the cllandestine manufacture and clearance, we hold that the penalty imposed on the Directors is not sustainable. Accordingly, we set aside the same. Accordingly, the answer to question No (vii) in para 13 is in the negative.

20. From the above discussions, we find that answer to all the questions raised in Para 13 supra are in the negative. Accordingly, the demands of duty confirmed in the impugned order are liable to be set aside. When the duty demand itself is not sustained, the question of demanding interest and imposing penalty does not arise.

21. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellants

(Pronounced in the open court on…16.10.2023…)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar