

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 3704 of 2006 (DB)

(Arising out of order-in-original No. 38/COMM(ADJ)/ RPR/2006 dated 31.03.2006 passed by the Commissioner (Appeals), Customs & Central Excise, Raipur).

**Commissioner, Customs & Central
Excise ,** Central Excise Building
Tikarapara,Raipur (C.G.)-492001. **Appellant**

VERSUS

M/s Prakash Industries Limited **Respondent**
Champa, District – Raipur
Chhattisgarh.

APPEARANCE:

Shri Sanjay Kumar Singh, Authorised Representative for the appellant
Shri Rohit Choudhary & Ms. Preeti Khiwani, Advocates for the respondent

CORAM:

**HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

FINAL ORDER No. 50407/2022

**DATE OF HEARING: 01.12.2021
DATE OF DECISION: 10.05.2022**

ANIL CHOUDHARY:

The dispute in this appeal relates to dropping of demand of Rs. 9,94,65,997/- by the Id. Commissioner out of the total proposed demand of Rs. 11,46,10,423/- in the show cause notice. The Commissioner has confirmed the balance demand of Rs.1,51,44,426/- along with equal penalty under Section 11AC of the Act. As the said amount of duty confirmed stood appropriated from the amount paid /debited during the course of investigation, it was further ordered the appellant shall be entitled to deposit reduced penalty of Rs.37,86,107/-, if they deposit the interest payable under

Section 11AB within thirty days of service of the order. Further, penalty of Rs.50 lakhs was imposed on the appellant under Rule 25 of Central Excise Rules, 2002.

2. Further, the confiscation, of land, building, plant and machinery of the appellant, was ordered under Section 173Q of Central Excise Rules, 1944 read with Rule 25 of Central Excise Rules, 2002 with option to redeem on payment of fine of Rs.25 lakhs.

3. The amount of Rs. 44,45,000/- in cash was seized from sister unit - namely M/s Prakash Industries Limited, Ring Road No. 2, Raipur, was ordered to be released along with interest earned on it. However, penalty of Rs. 5 lakhs was imposed on Shri N. K. Gupta, Vice President of M/s Prakash Industries Limited, New Delhi under Rule 26 of Central Excise Rules, 2002. The proposed penalty on Shri V. K. Gupta, Vice President of M/s Prakash Industries Limited, Raipur was dropped.

4. Being aggrieved, the appellant – assessee had filed appeal before this Tribunal being Appeal No. E/2287/2006-EX(DB) against confirmation of duty amount of Rs. 1,51,44,426/- as well as penalty and confiscation. The Director Shri N. K. Gupta also filed Appeal No. E/2292/2006-EX(DB) challenging the imposition of penalty.

5. Revenue also filed Appeal No. E/3704/2006-EX(DB) assailing the order-in-original against dropping of demand of Rs.9,94,65,997/- for alleged clandestine removal of 67170.156 MT of finished goods, which have been proposed in the show cause notice

on the basis of third party record being the 'bilty nakal register' (a sort of daily book) and on the basis of copies of GRs recovered from the transporters alleged to be corroborated with photocopies of GR notes etc. provided by a source/ complainant.

6. Vide common Final Order No. 52332 – 52334/2017 dated 15.03.2017, this Tribunal allowed the appeal of Revenue by way of remand to decide the issue *denovo* in the light of observation by the Tribunal, by giving fresh opportunity of hearing and submission of documents etc. by both the sides. In the appeal by the appellant-assessee, this Tribunal had observed that there is no scope to interfere as regards the amount of duty confirmed alongwith penalty under Section 11AC. So far penalty of Rs.50 lakhs imposed under Rule 25 of Central Excise Rules, 2002, the same was reduced to Rs.15, 14,422/- (10% of the duty confirmed). The order of confiscation was upheld. However, redemption fine was reduced from Rs. 25 lakhs to Rs. 6.25 lakhs and the appeal of Vice President Shri N. K. Gupta, the amount of penalty was also reduced to Rs. 1 lakh.

7. Being aggrieved, the appellant – assessee & Revenue preferred appeals before the Hon'ble High Court of Chhattisgarh in Appeal No TAXC No 164/2017 and another Appeal No TAXC No 167/2017. The Vice President Shri N. K. Gupta also filed appeal No TAXC No. 165/2017.

8. The Hon'ble High Court vide common order/ judgment dated 09.08.2018, was pleased to uphold the confirmation of demand of Rs.1,51,44,426/-.

9. As regards the amount of duty in dispute of Rs.9,94,65,997/- observed that there is nothing in the finding of the Tribunal, that any of the parties were not afforded an opportunity of proper hearing to lead oral or documentary evidence. The Tribunal had also directed for necessity of collection of new evidence by granting opportunity to the parties before the Adjudicating Authority. The Hon'ble High Court observed that it does not find any occasion for remand arose before this Tribunal, neither the assessee nor the Revenue came out with some new evidence in the form of oral and/or documentary evidence necessitating, in the interest of justice, a *denovo inquiry*. Thus, what the Tribunal has done is to remand the case with the direction to the Adjudicating Authority to review its own order and nothing else. In the opinion of the High Court, this course of action in the facts and circumstances of the case was not available. It was also observed that the power of remand cannot be taken recourse to only for the purpose of directing the Adjudicating Authority to review its own order by entering into re-appreciation of oral and documentary evidence, which was already appreciated by it. It was further observed that if the Tribunal required more evidence, it could have called for the same. It was further observed that it was for the Tribunal to examine the legality and validity of the findings on the grounds raised by Revenue and arrive at its own finding, as to whether the Adjudicating Authority was correct in law and on facts in reaching upon the conclusion that demand of duty of Rs.9, 94, 65,997/-, was liable to be dropped.

10. As regards to the admissibility of the statements recorded during investigation, the Hon'ble High Court observed that such issue has been considered in its preceding judgment in the case of **Hi Tech Abrasives Limited vs. The Commissioner, Central Excise and Customs, Raipur**, wherein Hon'ble High Court has held – that unless the person, whose so called admission is said to be recorded during investigation, is examined by the Adjudicating Authority and Adjudicating Authority forms an opinion that the statement should be admitted in evidence, in the interest of justice, such a statement would not be admissible. In the present case, however, the admitted facts are that the statement of the two Assistant General Managers of the assessee company namely Shri R. K. Bhadaria, AGM (Logistics) and Shri S. N. Jha, AGM (Excise), which were recorded during investigation and the investigator used (the statements) as their admission of clandestine removal, had retracted their statement by filing their respective affidavit also. The order passed by the Adjudicating Authority shows that both of them were cross-examined also. However, we do not find any satisfaction recorded by the Adjudicating Authority in terms of statutory requirement of Section 9D(1)(b) of the Act. No doubt, the two persons had filed affidavit (of retraction) and they were also examined, but there is no satisfaction recorded by the Adjudicating Authority, that in the circumstances of the case, it should be admitted in the interest of justice. Further, observed that the Adjudicating Authority and the Tribunal both have proceeded to take such statement as admission of clandestine removal. Therefore, we are of the view that the statement of the two

AGMs namely Shri R. K. Bhadaria and Shri S. N. Jha cannot be treated as admissible or clandestine removal.

11. Hon'ble High Court further observed – we find that the finding recorded by the Adjudicating Authority and confirmed by the Tribunal, is not solely based on the so-called admission, but based on other evidence on record, which were taken through during the course of argument.

12. Hon'ble High Court further observed that apart from the statement recorded during investigation, there were other incriminating evidence and circumstances relied upon by the Adjudicating Authority as well as the Tribunal to confirm the demand of duty of Rs.1,51,44,426/-. Accordingly, the said demand was confirmed.

13. The Hon'ble High Court had for the sake of convenience clubbed the appeals together and had framed the following two substantial question of law:-

"(i) Whether the Tribunal has committed an error of law by remitting the matter back to the Commissioner for *denovo* inquiry on the issue concerning evasion of duty amounting to Rs.9,94,65,997/- without discussion of evidence available on record which prevailed upon the Commissioner to drop this part of the demand?

(ii) Whether the Tribunal is justified in relying upon the admission made by the AGM of the assessee company to sustain the order of imposition of duty to the tune of Rs. 1, 51, 44,426/- more so when this part of the demand was also based on the same set of evidence on which the demand of Rs.9,94,65,997/- was dropped by the Commissioner?"

14. So far the first question is concerned, the same was held against the Revenue and in favour of the appellant –assessee.

15. So far the second question is concerned, the same was held against the appellant-assessee and in favour of Revenue.

16. So far the appeal of Shri N. K. Gupta against confirmation of reduced penalty is concerned, the said appeal was dismissed.

17. The Hon'ble High Court held – Revenue's appeal (No. TAXC 167/2017) is allowed and the order of the Tribunal to the extent it directed remand, is set aside and the appeal of Revenue before the Tribunal is restored to its original number. The Tribunal shall consider all the grounds raised by the Revenue to assail the order of the Adjudicating Authority in dropping the demand of Rs.9,94,65,997/-, and decide the same on its own merit.

18. Accordingly, the Excise Appeal No. 3704/2006 by Revenue before this Tribunal has been restored. Both the parties have been heard at length and the written submissions have been filed by both sides, have been considered.

19. We find from the perusal of the show cause notice that with respect to the proposed demand of Rs.9,94,65,997/-, the said demand is mainly based on 'bilty nakal register' seized from transporters (M/s Kamal and M/s Bajrang), containing details of transportation of goods cleared by the assessee - PIL, Champa. The said register contains details of despatches like date, destination, name of consignee, truck number, weight, rate per MT (transport charges), details of goods, bilty number and invoice number. Revenue compared this detail with details of goods manufactured and cleared by the appellant on payment of duty, as evident from the RG-

1 register and related invoices and also with the copies of invoices/LRs submitted by the source (informer). On comparison, it appeared that the said 'bilty nakal register' contained both type of clearances i.e. on payment of duty as well as without payment of duty. It further appeared that this fact was admitted by Shri R. K. Bhaduria, AGM (Logistics) in his statement dated 30.04.2002 and also by Shri S. N. Jha, AGM (Excise) of the appellant. A large number of entries in the said register were found, against which no invoices were found to have been issued. Some of the invoices were not found pertaining to the goods cleared, as described in the 'bilty nakal register'. A tabulation of such entries were prepared as chart 'A' and relied upon as Annexure-30 to the show cause notice. Some entries in respect of clearance of goods as per the 'bilty nakal register' were found to be tallied with the details as mentioned in the copy of parallel invoices made available by the source. Such entries were tabulated in chart 'C' to the show cause notice. Rest of the entries in respect of goods found to be cleared on payment of duty and issue of proper invoices were tabulated in chart 'B' to the show cause notice. Accordingly, it appeared that the goods listed in chart 'A' were clandestinely removed without payment of duty and the same appears to have been done under the cover of parallel invoices, which appeared to have been destroyed later on. Similarly, finished goods, listed under chart 'C', were also clandestinely removed under the cover of parallel invoices. The copies of such parallel invoices were provided by the source. The clandestine removal of the alleged goods appeared to be evident from the copy of LRs recovered from M/s Kamal Transport. Statement dated 30.04.2002 of Shri A. Pandey, incharge of M/s

Bajrang, statement dated 30.04.2002 of Shri Kamal Kumar Agrawal, Proprietor of M/s Kamal Transport and statement dated 30.04.2002 of Shri Narayan Singh, employee of M/s Kamal Transport, who confirmed that the photocopy of LRs shown, were prepared by them in respect of transportation of goods manufactured by the appellant. Further, the fact of removal, both on invoices and without invoices were admitted by Shri S. N. Jha, AGM (Excise). Thus, it appeared that the appellant have clandestinely manufactured and cleared 67,170.156 MT of finished goods without payment of duty (excluding the entries in chart 'C' for which duty have been separately worked out). Such finished goods included semi-finished goods of steel like, M.S. billets, M. S. Bloom, M.S. Ingots etc. valued at Rs.62, 16, 62,483/- (taking average rate of such goods cleared, on payment of duty, as shown in chart 'B', which works out to Rs.9,439.08/- PMT) and thus evaded Central Excise duty amounting to Rs. 9, 94, 65,997/- (as calculated in Annexure 'A-5' to the show cause notice).

20. It also appeared to Revenue that the appellant was resorting to suppression by recording less production in the RG-1 register. As some private records were seized for the period 11.04.2002 to 28.04.2002, from which it appeared that during such period the appellant have suppressed the production of 1,389.740 MT of ingots. Thus supports the allegation of clandestine removal. This allegation is also supported by the fact that during the period 12.04.2002 to 28.04.2002, there are details of 1389.740 MT ingots transported clandestinely by M/s Kamal Transport and M/s Bajrang Transport collectively.

21. The appellant had disputed the charge, by Revenue of alleged evasion of duty of Rs.9,94,65,997, before the learned Commissioner, inter alia, on the grounds that, there is no cogent evidence to sustain the allegation, the documents of third party are not admissible evidence, that there is no evidence showing clandestine receipt or purchase of raw materials and use of extra electricity and other factors of production. There is no seizure of a single truck load in the course of transport, establishing clandestine receipt of raw materials and clandestine despatch of finished goods. Further, there is no corroboration from the alleged recipient of the finished goods as recorded in the 'bility nakal register', relied upon by the Revenue. The appellant also relied upon several case laws in their favour on the proposition that such suspicion- cannot take the place of evidence. It was also urged that the reliance placed on the statement of the officers/ staff of the appellant is bad, as such statements were recorded under duress and pressure and further the concerned officer of the appellant have filed affidavit of retraction soon thereafter. It was also urged that the investigating agency have mainly relied upon the records and statement of transporters namely M/s Kamal and M/s Bajrang, which are third party records and cannot be relied upon to fasten duty liability, in the absence of corroborative evidence. It was also urged that - to manufacture the alleged 67,170.156 MT of finished goods, M/s PIL would have required 79,000 MT of raw material and 5.73 crore units of electricity and there would have been receipt of sale proceeds amounting to Rs.62.17 crore approximately. However, no such evidence has been brought on record.

22. It was further pointed out that the appellant engages about seven transporters situated at Champa for their day-to-day requirement. The Revenue had also investigated as regards record of despatches mentioned in the 'bilty nakal register' from one of the named recipient namely M/s Jabalpur Ispat Re-rolling Mills, Jabalpur, but no confirmation or corroboration was found.

23. It was further urged that about 14 bilty books were recovered from the premises of M/s Bajrang Transport for the period related to February, 2002 to March, 2003, wherein only one bilty register was relied upon. Further, it indicates that others bilty register were not corroborating the allegation of Revenue. Further, if the theory of clandestine removal as alleged by Revenue is believed, the 'bilty nakal register' was seized on 30.04.2002 at 1200 hrs containing entries up to 29.04.2002. This register shows transport of three consignments of bloom /ingot where the quantity and truck number was mentioned from PIL, Champa to PIL, Gogaon, this material should have reached PIL, Gogaon, Raipur on 29.04.2002 or 30.04.2002. As search operation was taking place also at PIL, Gogaon, but as per the Panchnama no such goods or the said truck were found in neither the factory nor any efforts made to look for discrepancy in the stock at Gogaon.

24. Similarly, in the said 'bilty nakal register' there were entries for transportation of 17.600 and 16.950 MT of ingots to M/s Jabalpur Ispat Re-rolling Mills and transportation of 18.260 MT of ingots to M/s Singhal Re-rolling Mills, Jabalpur and 11.89 MT of ingots to M/s Amar Re-rolling Mills, Raipur. Thus, as per the entries, these

consignments were either on their way to the mentioned destination and would have reached the destination on 30.04.2002. Such entries were verifiable on the date of search or soon thereafter, but no efforts were made to check the same. Further, all the witnesses who were cross-examined, who had earlier admitted the allegation of clandestine removal, have retracted from the statement at the time of cross-examination and have stated that the earlier statement were recorded under pressure / duress, including threat of arrest.

25. It was further urged that there is no other corroborative evidence in support of the allegation of Revenue. As such the proposed demand cannot be confirmed based on the unsubstantiated third party record.

26. Learned Commissioner refers to several judicial rulings relied upon by the assessee, which are as follows:-

- (a) Essvee Polymers (P) Ltd., vs. CCE -2004 (165) ELT 291 (T).
- (b) CCE vs. Velavan Spinning Mills -2004 (167) ELT 91 (T)
- (c) Ambika Chemicals vs. CCE -2002 (148) ELT 101 (T)
- (d) Valan Bidi Works vs. CCE -2004 (166) ELT (T)
- (e) CCE vs. Minakshi Steels -2005 (190) ELT 395 (T)
- (f) SKV Chemicals vs. CCE -2006 (193) ELT 212 (T)
- (g) Durga Trading Co. -2002 (148) ELT 967 (T)
- (h) Emmtex Synthetics Ltd. vs. CCE -2003 (151) ELT 170 (T)
- (i) CCE vs. Supreme Fire Works Factory -2004 (163) ELT 510
- (j) CCE vs. Shree Narottam Udyog (P) Ltd., -2004 (158) ELT 40
- (k) Jagatpal Premchand Ltd., vs. CCE -2004 (178) ELT 792 (T)
- (l) Jangra Engg. Works vs. CCE -2004 (177) ELT 364 (T)
- (m) Premium Moulding & Pressings Pvt. Ltd., vs. CCE -2004 (177) ELT 904 (T)
- (n) CCE vs. Sangamitra Cotton Mills -2004 (163) ELT 472 (T).

27. Taking notice of the aforesaid rulings, the learned Commissioner observed that the allegation of clandestine manufacture and clearance has to be established with the evidences relating to clandestine receipt of raw material, etc., consumption of electricity, transportation of the goods, receipt of the despatched finished goods by the buyers and evidence of receipt of flow back of sale proceeds of the alleged clandestine sales. Thus, suppression of production is required to be established first to establish clandestine removal of goods, as production is the first step for removal.

28. Learned Commissioner examined the evidences relied upon by Revenue in support of the allegation which are as follows:-

- (a) Statement of Shri S. N. Jha, AGM (Excise) wherein it was admitted that against some entries found in the register of M/s Kamal and M/s Bajrang, Central Excise duty was paid, while against some entries no duty was paid.
- (b) Statement of Shri R. K. Bhadaria, AGM (Logistics) dated 30.04.20002, wherein he has also admitted that on some invoices duty was paid and on certain other invoices no duty was paid. These invoices are entered in the register recovered from M/s Kamal and M/s Bajrang.

29. Learned Commissioner observed – therefore the allegation is solely based on the 'bilty nakal register' of the two transporters and statement of some persons as mentioned above. No other evidence in form of clandestine receipt of raw material, consumption of electricity, manufacture of goods, transportation of

goods, receipt of goods by the consignee and/or receipt of sale proceeds etc. has been brought on record.

30. Further, Learned Commissioner took notice that for manufacture of the alleged quantity removed clandestinely, 79,000 MT of raw materials and 5.73 crores units of electricity would have been required, as well as the assessee would have received cash flow of Rs.62.17 crores approx. against alleged clandestine removal. But no evidence of clandestine purchase or receipt of raw material and consumption of electricity or receipt of sale proceeds have been brought on record. It was further observed that in the 'bilty nakal register' relied upon by Revenue, contains details like vehicle number, name of the consignee, date, item despatched etc., but not a single transaction mentioned in the said register have been investigated and established. The investigation is therefore lacking on the most vital aspect of the case.

31. Learned Commissioner also took notice that the assessee – M/s PIL have a staff consisting of seven persons to prepare the invoice on computer as per the oral instructions or written instructions received from Shri N. K. Gupta, Vice President (Commercial) at Delhi. Further, it is evident from the Panchnama, that a large number of computer floppy disc relating to the period 2002 to April, 2002, containing details of despatches etc. were recovered from the factory premises. But such floppy disc have not been scrutinised as to the data contained in them.

32. Learned Commissioner also observed that the entries in the, 'bilty nakal register' of the two transporters, is not a conclusive evidence in itself but only a source of suspicion. Further, observed that it is settled law that suspicion however strong cannot take place of evidence. It was also noticed that although Revenue has investigated few of the named receiver / consignee of the goods in the register, but no evidence in this regard have been brought on record. Learned Commissioner also observed that in the course of search at the transporter – M/s Bajrang, as per Panchnama fourteen bilty books relating to the period under dispute were recovered and seized but none of the said bilty are relied upon. Thus, it indicates that the entries made in the 'bilty nakal register' were not corresponding with the bilties / GRs issued by M/s Bajrang. Thus, it creates a doubt about authenticity and correctness of the entries made in the 'bilty nakal register'.

33. Learned Commissioner also took notice that the 'bilty nakal register' were recovered and seized on 30.04.2002 at about 1200 hrs wherein entries were made upto 29.04.2002. Such entries contain details of despatch made on 29.04.2002. But investigation have not attempted to trace or intercept such despatches which must have been either in the course of transport or at the destination on 30.04.2002, as three such consignments were despatched within Raipur district. Revenue has neither traced the truck numbers which is mentioned in the 'bilty nakal register' nor at the premises of the said consignee.

34. Learned Commissioner also took notice that number of searches were conducted at various premises and records were withdrawn from the premises such as M/s PIL, Champa, M/s PIL, Raipur, M/s PIL, Head Office Delhi, M/s Gupta Sales Corporation, M/s R. K. Sales etc., no discrepancies have been found in the various records resumed from these premises, as no evidence has been relied upon or brought on record. It is further noticed that in the circumstances, 'bilty nakal register' of M/s Kamal and M/s Bajrang, and some bilties of M/s Kamal, which are third party documents are not evidence of clandestine removal because these are not supported by corroborative evidence. Reference was made to the precedent case of **Kothari Pouches Ltd., vs. CCE – 2001 (135) ELT 531** wherein it has been held that documents of transportation relied upon by the Department to prove clandestine removal, without any independent corroborative evidence is not sufficient to prove the charge of clandestine removal.

35. Learned Commissioner also relied upon the decision of the Hon'ble supreme Court in the case of **Oudh Sugar Mills vs. Union of India -1978 (2) ELT 517**—wherein it has been held that no show cause notice or charges can be based on assumption and presumption. The finding based on such assumption and presumption without any tangible evidence, is vitiated by error of law. Learned Commissioner also observed that it was for the Revenue to establish that there was excess production, than the one entered in their statutory record, and removal of the same in a clandestine manner without payment of duty, during the period under dispute.

36. Learned Commissioner has held that the allegation of evasion of duty of Rs.9,94,65,997/- based on the 'bilty nakal register' of M/s Kamal and M/s Bajrang, and some bilties of M/s Kamal, is not established due to improper investigation and lack of evidence. Accordingly, he was pleased to drop the proposed demand.

37. As regards the ground of limitation, it was held that the extended period of limitation have been rightly invoked in the facts and circumstances.

38. Being aggrieved, the Revenue is in appeal against the part of the order of the learned Commissioner, dropping the proposed demand of Rs. 9, 94, 65,997/- along with penalty, inter alia, on the grounds mentioned in the appeal memorandum.

38.1. Learned Authorised Representative Shri Sanjay Kumar Singh appearing for the Revenue, inter alia, urges that the learned Commissioner had confirmed total demand of Rs. 1,51,44,426/- (Rs.79,57,994/- + Rs.60,45,267/- + Rs.6,45,427/- + Rs.4,95,738/-) and further the said amounts have also been upheld by this Tribunal, rejecting the appeal of the assessee. Thus, it is already established that the appellant have been indulging in clandestine removal and suppression of production. Further, the said amount of Rs.1, 51, 44,476/- also stood confirmed by the Hon'ble Chhattisgarh High Court by its order dated 09.08.2018.

38.2. It is further urged that the 'bilty nakal register' is not the only evidence. 'Bilty nakal register' may or may not be sufficient evidence of clandestine removal in the facts of the present case for

the period in dispute. However, in the facts of the present case the 'bilty nakal register' was filling up some gaps, for the entire gamut of evidence. The investigation has been conducted on one principal offender/ respondent which covers a given period of time. There are various types of evidence adduced by the Revenue. The Adjudicating Authority has clearly erred in examining the different types of evidences, as if they belong to water tight compartments. Learned Commissioner have failed to consider that it have been established that the respondent -assessee have been indulging in the evasion of duty, during the given period, the only thing left is to arrive at the quantum of duty evasion. The 'bilty nakal register' in this case is definitely a cogent evidence for quantification. Further, the 'bilty nakal register' contains the details of both clearances of duty paid goods as well as clandestinely cleared goods. The said register seems to have been maintained in the regular course of business by the transporter, wherein some of the clearance have been found to be tallying with the records of the respondent -assessee. In such circumstances, the rest of the entries cannot be discarded or not relied upon.

38.3 So far the defence taken by the assessee as regards retraction of the statement of their employees/ officers, is of no avail as the allegation of evasion of duty to the tune of Rs. 1.51 crores have been upheld.

38.4. As regards the argument of the respondent -assessee that there is no evidence of receipt of matching inputs or excess use of electricity, or evidence of manufacture, such factors were taken

notice by the Adjudicating Authority, and under such facts have been pleased to uphold the duty evaded to the tune of Rs. 1.51 crores. Thus, such defence taken is fit to be discarded with respect to the alleged evasion.

38.5. It is further urged that few case laws relied upon by the respondent –assessee, where transport documents alone were not considered sufficient evidence to establish the allegation of clandestine removal, cannot work under the facts and circumstances of this case.

38.6. Further he urged that in spite of the Hon'ble Chhattisgarh High court holding that the statements of Shri R. K. Bhadaria, AGM (Logistics) and Shri S. N. Jha, AGM (Excise) are not reliable piece of evidence, the statement of other persons which were recorded are still valid evidence, and urged that these should be considered in support of charge of clandestine removal. Accordingly, he prays that the part of original-in-original dropping the demand of Rs.9,94,65,997/- along with equal penalty be modified and the demand be confirmed under Rule 25 of Central Excise Rules, 2002.

Learned AR also places reliance on the following rulings:-

(i) Gulabchand Silk Mills Pvt. Ltd., vs. CCE, Hyderbad 2005 (184) ELT 263 (Tri. Bang.) – wherein it was held that “in any type of clandestine activity the persons try their level best not to leave any evidences. We cannot expect persons indulging in clandestine clearance to faithfully put the details of all such clearances in some register and append their signatures. This is never done. Hence, clandestine activity at best can be established only by circumstantial evidences.”

(ii) Commissioner of Customs, Madras vs. Bhoormull -1983 (13) ELT 1546 (SC) held that – “the department is not required to prove its case with mathematical precision but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue.”

(iii) Siemens Ltd., vs. Collector of Central Excise, Calcutta – 1994 (70) ELT 305 has held that “the whole circumstances of the case appearing in the case records as well as other documents are to be evaluated and necessary inferences are to be drawn from these facts as otherwise it would be impossible to prove everything in a direct way”

(iv) Madras Chemicals -1986 (24) ELT 308 (T)- The Tribunal observed – “the Eldora do of absolute proof being unattainable, the law accepts for its, probability as a working substitute in this work-a-day world. In fine, legal proof is not necessarily a perfect proof but only a prudent man’s estimate as to the probabilities of the case.”

38.7. He also urges that in the course of investigation, it was found that during the brief period w.e.f. 11.04.2002 to 28.04.2002 (18 days), the respondent assessee was found to have clandestinely manufactured and removed finished goods without payment of duty to the tune of Rs. 60, 45,267/-, it was based on recovery of private record maintained for this period of actual production, as compared with the RG-1 register. Thus, under such circumstances, the allegation of clandestine removal of 67,170.156 MT of finished goods during the period of about 1½ years is highly probable, which is supported by the ‘bilty nakal register’. Thus, the learned Commissioner have erred in dropping the demand.

39. Learned Counsel for respondent –assessee have relied on the findings of Id. Commissioner and the Hon’ble High Court.

40. Having considered the rival contentions, we find from the allegations in the show cause notice that the said demand of Rs.9, 94, 65,997/- was proposed on the basis of the ‘bilty nakal register’ (recovered from the two transporters) and on the basis of the statement of the two officers of the respondent – assessee namely Shri S. N. Jha, AGM (Excise) and R.K. Bhadoria, AGM (Logistics). We find that the Hon’ble High Court in its order have categorically held

that the statement of the said two officers cannot be relied upon by Revenue for want of fulfilment of the requirements of Section 9D of the Act. The Hon'ble High Court also took notice of the fact that the said Officers have retracted their statements soon thereafter and also not supported their statement given at the time of investigation, in their cross-examination.

41. So far the reliance placed by the Revenue on the statement of other persons recorded during investigation is concerned; we examine the same for the ends of justice.

41.1. Sh. Kamal Kumar Agarwal, Proprietor of M/s Kamal Transport Company in his statement recorded on 30.04.2002 has stated that he did not own any truck and was working on commission basis only. They have arranged only trucks for transportation of M. S. Bloom, Ingots and Sponge Iron manufactured by the respondent. They arranged trucks as per direction of the respondent. The trucks were loaded from their factory premises and lorry receipts were prepared on the basis of excise bill, gate pass and weighment slips handed over by the marketing Department of the respondent. Subsequently, the details of transportation were entered in the 'bilty nakal register'. On being shown set of invoice (photocopies) purportedly issued by the respondent along with lorry receipt issued by M/s Kamal Transport and weighment slip (all photocopies), they confirmed that the lorry receipts shown to him were prepared by them in respect of goods cleared by respondent. He further stated that the details mentioned in the lorry receipts, were true and correct. It is also stated that the goods were unloaded at the consignee place

as mentioned in the Lorry Receipts. He also stated that his employee Shri Narayan Singh prepared the lorry receipts, and they do not receive any remuneration for unloading of goods at consignee place.

41.2. During his cross-examination on 17.01.2006 /22.02.2006, he reiterated that he works on commission basis and have got no trucks; the officers have recorded his statement in his office and was forced to give the statement as dictated; he was threatened that he will be arrested and taken to Police Station; he has filed affidavit of retraction dated 07.11.2002; the three registers belong to his firm and that he used to make extra/ fictitious entries in the said register to project bigger size of his business.

41.3. Statement of Sh. Narayan Singh, employee of M/s Kamal Transport Company was recorded on 30.04.2002 by the officers wherein he inter alia stated that he is working in M/s Kamal Transport Company since 1994 and was responsible for preparation of lorry receipt and payment collection; he confirmed that he prepared most of the lorry receipts which were recovered and seized. He also stated that Shri Kamal Agarwal prepared other documents; after seeing- Lorry Receipts (photocopy) shown to him by the Officers, he stated that these were prepared by them in respect of transportation of goods from respondent's factory and the details mentioned are true and correct; most of such LRs are signed by him and few of them were signed by Shri Kamal Agarwal; on being asked about the original copies of the said Lorry Receipts, he stated that since they have received the transportation charges, they destroyed such Lorry Receipts.

41.4. Sh. Narayan Singh was Cross-examined on 22.08.2006, wherein he accepted that he used to make bilties by sitting in the office, without seeing the loading of the goods at the spot; he used to make bilties and make entries in the 'bilty nakal register' as per direction of Shri Kamal Agarwal; he did not check bilties while writing the 'bilty nakal register'; the Officers never shown him original copy of the bilties, but shown only photocopies on which he signed as per the direction of the Officers; he cannot confirm whether photocopies of bilties shown to him by the Officers were issued from M/s Kamal Transport; he had filed affidavit of retraction on 07.11.2002.

41.5. Statement of Shri Avdhendra Pandey, in charge, of M/s Bajrang Transport Company was recorded by the officers on 30.04.2002 wherein he inter alia stated that he has been working for the last two years and doing preparation of LRs and maintenance of registers; he confirmed that the photocopies of LR shown to him, were prepared by him in respect of transportation of goods by the respondent -assessee, and pertain to M/s Bajrang Transport Company. He explained the details of columns of the register seized from their office as containing details namely (1) running serial No. (2) date (3) place of consignee (4) name of consignee (5) truck No. (6) weight of goods (7) freight PMT (8) bilty No. and (9) invoice No. of the consigner/ respondent.

41.6. In his cross examination conducted on 17.01.2006 he deposed that M/s Bajrang Transport has no trucks and work on commission basis only; they arranged vehicle on receipt of commission and the goods were lifted by the truck peoples/ driver;

further, stated that his earlier statement recorded on 30.04.2002 was obtained by the officer under pressure and force; the signature on the Lorry Receipts as per the photocopies of the bilties are not his signature; only the last page of the bills dated 30.04.2002 bears his signature and rest of the pages do not bear his signature; he writes 'A. Pandey' only as his signature; on being shown the 'bilty nakal register' of M/s Bajrang Transport Company (seized by the officers), he stated that he has not written the said register nor the register contains his signature.

42. On a careful examination of the aforementioned statements and cross-examination, we find that there is no categorical admission of clandestine removal as alleged by the Revenue. We also find that all these persons had retracted their statement within a period of few weeks/ months of the recording of their initial statement by the officers during investigation. Thus, we find that these statements discussed hereinabove, do not support the allegations of clandestine removal for the alleged duty evasion of Rs.9,94,65,997/-.

43. So far the contention of Revenue that in view of the confirmation of the proposed demand of Rs. 1.51 crores (approximately) on the same analogy or set of evidence, by relying on the theory of preponderance of probability (**Bhoormull's case**), the demand for the other proposed amount of Rs. 9.5 crores (approximately) should also have been confirmed. We hold that the charge of clandestine removal and duty evasion is a serious charge having civil consequences upon the assessee. Such charge cannot be

confirmed unless there is sufficient corroborative evidence which leads to the inevitable conclusion of clandestine removal. In the facts of the present case, we find that in absence of the relevant inputs necessary for production for the alleged quantity removed clandestinely, namely raw materials, electricity, labour etc., the condition precedent of manufacture is not established and in absence of such material evidence, only on the basis of third party evidence the charge of clandestine removal is not sustainable. It has been so held by the Hon'ble Allahabad High Court in the case of **Continental Cement Company vs. Union of India -2014 (309) ELT 411 (All).**

We also find that the investigation is silent as regards the evidence of delivery of the alleged clandestinely removed goods to the named consignee and the important evidence of flow back of cash to the respondent –assessee.

44. It is rather more intriguing than surprising that the appellant revenue did not proceed further to verify the entries found in the records of the transporters, in spite of the fact that the data contained enormous entries alleged to have been clandestine transactions by the respondent assessee. Follow up or Cross verification at the alleged consignees, at least on a sample basis, would have not only thrown more light on the alleged clandestine clearances made by the appellant, but would have resulted in corroborative evidence to substantiate the allegation. We find that no such efforts have been made. We find that no amount of argument however logical would be a substitute for reliable evidence under Law. It is pertinent to note here that the assessee submits that no efforts

were made to intercept or apprehend or to enquire about even those trucks which were supposed to have left the premises just before the search operations began. Such failure only gives credence to the arguments put forth by the respondent assessee.

45. We further find that the show cause notice is bad for non-joinder of parties involved. Admittedly, the 'bilty nakal registers' which have been relied upon as material evidence by Revenue were seized from the premises of the two transporters; alleged parallel bilities, Xerox copy of which were provided by the source /informer, which were alleged to have been prepared by the said two transporters. For the reasons best known to the appellant Revenue, the transporters, who could have been charged with abetment and consequent penal action, were not made co-noticees in the show cause notice. In such circumstances, the 'bilty nakal register' which were recovered from their premises lose evidentiary value as it gives rise to serious suspicions and would not stand scrutiny of Law.

(emphasis supplied).

46. Thus, the presumption as to the truth and evidentiary value of the documents is available to the Revenue, if the document relied upon is recovered and seized from the premises of the assessee. However, where any incriminating documents are recovered from the premises of third party, such third party should also be jointly prosecuted by being added as co-noticee in the show cause notice. Similar view has been taken by this Tribunal in the case of **Brim Products vs. CCE -2001 (130) ELT 719 (T)** and in **Pioneer Industries vs. CCE -2006 (193) ELT 506 (T)**.

47. So far reliance being placed by the appellant –Revenue on the evidence relating to the confirmation of duty of Rs. 1.51 crores approx., we hold that such confirmation of demand is based on other corroborative and cogent evidence. Further, the respondent assessee had also admitted the same in most of the cases and also deposited / debited the duty component during investigation or prior to issue of the show cause notice. But for the demand under dispute of Rs. 9.95 crores, the said evidences do not corroborate the allegations of clandestine removal. We further take notice that for the alleged removal of 67,170.156 MT of finished goods, about 450 truck loads are required for transporting the same, but not a single truck load had been intercepted in the course of transport; not a single consignee has been questioned; not a single case of receipt of sale proceeds has been placed in support of the allegation of revenue.

47. We hold that clandestine removal is a serious charge and needs to be established with cogent evidence. We find that coordinate bench of this Tribunal, in the matter of *Nova Petrochemicals v. CCE, Ahmedabad-II*, in its Final Order Nos. A/11207-11219/2013, dated 26-9-2013, held as under:-

"After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenues which mainly are the following;

- (i) *There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
- (ii) *Evidence in support thereof should be of:*
 - (a) *Raw materials, in excess of that contained as per the statutory records;*

- (b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty.
- (c) Discovery of such finished goods outside the factory
- (d) Instances of sales of such goods to identified parties.
- (e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;
- (f) Use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validity cleared on payment of duty
- (g) Statements of buyers with some details of illicit manufacture and clearance;
- (h) Proof of actual transportation of goods, cleared without payment of duty
- (i) Links between the documents recovered during the search and activities being carried on in the factory of production, etc.

48. We find that in the instant case, none of the ingredients as above, have been proved. Moreover, as observed above, even a basic level of enquiry on the available evidence has not been conducted. We find that the Revenue has failed to establish the charge of clandestine removal. Therefore, we are of the considered opinion that Learned Commissioners order as far as it relates to the dropping of demand of duty for Rs.9,94,65,997/-, needs no intervention. Accordingly, we hold that the appeal filed by Revenue is liable for dismissal. We further hold that the respondent –assessee is entitled to consequential relief, if any, in accordance with law.

(Pronounced on 10.05.2022).

(Anil Choudhary)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)