

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75571 of 2018

(Arising out of Order-in-Appeal No.21-22/CE/RKL-GST/2017 dated 20.11.2017 passed by Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.)

M/s. Maa Foundry Private Limited

(At-Plot No.515, Chikatmati, PO-Kalunga, P.S.-Brahmanitarang, Dist.-Sundargarh, Odisha-770031.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Rourkela

.....Respondent

(KK-42, Civil Township, Rourkela-769004.)

WITH

Excise Appeal No.75572 of 2018

(Arising out of Order-in-Appeal No.21-22/CE/RKL-GST/2017 dated 20.11.2017 passed by Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.)

Shri Pitabhas Chhotray, Director

M/s. Maa Foundry Private Limited

(At-Plot No.515, Chikatmati, PO-Kalunga, P.S.-Brahmanitarang, Dist.-Sundargarh, Odisha-770031.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Rourkela

.....Respondent

(KK-42, Civil Township, Rourkela-769004.)

APPEARANCE

Shri K.Kurmy, Advocate for the Appellant (s)

Shri J.Chattopadhyay, Authorized Representative for the Respondent (s)

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75566-75567/2022

DATE OF HEARING : 22 July 2022

DATE OF DECISION : 16 November 2022

P.K.CHOUDHARY :

The instant Appeal has been filed by the Appellant against Order-in-Appeal No.21-22/CE/RKL-GST/2017 dated 20.11.2017 passed by the Ld.Commissioner(Appeals), GST, CX & Customs, Bhubaneswar.

2. Briefly stated, the facts of the case are that the Appellant is engaged in the manufacture of C.I. Ingot Moulds (C.I. Mould). Pig Iron and C.I. Scrap etc. are used as raw materials. Acting on an intelligence received by the Directorate General of Central Excise Intelligence, the Officers carried out simultaneous search operations on 23.03.2011 at (1) Factory-cum-office premises of M/s. Maa Alloys (P) Ltd., Chikatmati, Kalunga, Dist. Sundergarh, Odisha, (2) Factory-cum-office premises of Maa Foundry (P) Ltd., Chikatmati, Kalunga, Dist.Sundergarh, Odisha, (3) residential premises of Pitabass Chhotray, Director situated at Deogan, Fertilizer Township, Rourkela, (4) Residential premises of Anirudha Sutar, Accountant situated at Plot No.M/32, Chhend Colony (Ground floor), Rourkela and (5) residential premises of Ajay Kumar Das, Office Assistant situated at Kansbahal Jhopri Patti, Kansbahal Chowk, Dist.Sundergarh, Odisha. During the search conducted in the factory-cum-office premises of M/s. Maa Foundry (P) Ltd., several documents were seized with marking for identification of document No.1/DGCEI/RRU/MFPL/F/11 to 20/DGCEI/RRU/MFPL/F/11. Further, joint physical stock verification of finished product was also done and 71.140 MT of C.I. Ingot Mould was physically found. In the residential premises of Pitabass Chhotray, Director, situated at Deogan, Fertilizer Township, Rourkela, he was not present. Search was conducted in presence of Smt. Nirmala Chhotray, wife of Shri Pitabass Chhotray. During the search, 2 unused Invoice books in quadruplicate of M/s.Maa Foundry (P) Ltd. were found and were seized with marking for identification as No.01/DGCEI/PRU/MFPL/11 and 02/DGCEI/RRU/MFPL/11. The original copies of all 50 sets have been numbered by hand. Further, one unused Invoice book in quadruplicate of M/s. Maa Alloys (P) Ltd. was also found and was seized with marking for identification as No.03/DGCEI/RRU/MAPL/11. The original copies of

all 55 sets have been numbered by hand. In course of search on 23.03.2011 in the residential premises of Anirudha Sutar, Accountant of M/s.Maa Foundry (P) Ltd., he was available and the search was conducted in his presence and in presence of the independent witnesses called by the DGCEI Officers. During the search, several incriminating documents were recovered by the said Officers and for the purpose of identification marked as document No.01/DGCEI/PRU/MAPL/AS(R)/11 to 14/DGCEI/PRU/MAPL/AS(R)/11. During the search of the residential premises of Ajay Kumar Das, Office Assistant was present and one incriminating document was recovered and for the purpose of identification marked as document No.01/DGCEI/PRU/MAPL/AKD-Resi/11 and seized.

3. Show Cause Notice dated 24-12-2012 was issued on the basis of the said two private records i.e. (i) Note Book (Document No.01/DGCEI/RRU/MFPL/F/11) and (ii) Ledger (Document No.08/DGCEI/RRU/MFPL/AS (R)/11) purportedly seized on 23-03-2011 in the course of search and (iii) purported shortages of 20.770 MT of C.I. Moulds. On comparison of entries in the said private records with the Excise Invoice, it was purportedly noticed that some of the entries for the period from 17-10-2009 to 31-03-2010 and 24-01-2011 to 23-03-2011 did not have corresponding Excise Invoices and on that basis it was alleged that the Appellant had purportedly clandestinely produced and removed 1283 MT, 660.230 MT and 20.770 MT aggregating to 1964.970 MT of C.I. Moulds without payment of duty of Rs.44,24,025/-.

Breakups of the demand raised in the Show Cause Notice as upheld in the OIO/OIA

Sl. No.	Document No.	Nature of document	Author of document	Recovered from	Qty. (MT)	Period	Value	Duty
1.	08/DGCEI/RRU/MAPL/AS ®/11 (Annexure-29)	Ledger (PRIVATE RECORDS)	Ajay Kumar Das, Employee	Residence of Anirudha Sutar, employee	1283.970	17-10-2009 to 31-03-2010	Rs.2,89,77,336/-	Rs.25,15,612/-
2.	01/DGCEI/R	Hand written	A.K. Panda,	Office of	660.230	24-01-	Rs.1,79,46,722/-	Rs.18,48,512/-

	RU/MAPL/F/1 1 (Annexure- 24)	duplicate Note Book (PRIVATE RECORDS)	Employee (See Page 46 first Para of impugned OIA) <u>Maker</u> <u>not</u> <u>examined</u>)	the Appellant		2011 to 19-03- 2011		
3.	Joint Verification report (Annexure- 5)				20.770	19-03- 2011 to 23-03- 2011	Rs.5,81,560/-	Rs.59,901/-
		TOTAL			1964.970		Rs.4,75,05,618/-	Rs.44,24,025/-

4. The Appellant vide their reply dated 20.08.2013 and Additional Written submissions vide letter dated 17.12.2015, *inter alia* contended that the allegations in the instant case were entirely based on unauthenticated private records and there was no tangible, cogent and affirmative evidence to support the allegation of clandestine removal of such huge quantity of 1964.970 MT of C.I. Mould and the statements recorded under Section 14 of the Central Excise Act, 1944 are irrelevant piece of material due to non-compliance with Section 9D of the Central Excise Act, 1944 and therefore have to be eschewed from evidence.

5. The Ld. Additional Commissioner vide Order-in-Original dated 22-01-2016 confirmed the duty demand of Rs.38,06,364/- for purported clandestine removal of 1746.200 MT of C.I. Moulds and further imposed penalty of Rs.38,06,364/- under Section 11AC of the Act. However, the Ld. Additional Commissioner dropped duty demand of Rs.6,17,661/- on the ground that some of the entries were not related to the Appellant. The Ld. Additional Commissioner further imposed penalty of Rs.1.00 Lakh under Rule 26 of the Central Excise Rules, 2002 upon Sri Pitabass Chhotray, Director of the Appellant Company for his purported abetment in the alleged offence committed by the company.

6. The Appellant being aggrieved by the said order, preferred an appeal before Ld.Commissioner (Appeal), Bhubaneswar on 15.04.2016. The Ld. Commissioner (Appeal) vide the impugned Order-in-Appeal dated 20-11-2017 upheld the adjudication order dated 22-01-2016.

Hence the present Appeal before this Tribunal.

7. Ld.Advocate, appearing on behalf of the Appellant submitted as follows:-

7.1 There is no tangible, cogent and corroborative evidence on record. There is no confession of guilt. No independent investigation carried out. Demand is confirmed on mere comparison of private records with Central Excise Invoice.

7.2 In the Order-in-Appeal & Order-in-Original, it is accepted that the demand is based on "private records".

7.3 In the instant case there is no corroborative material in the form of excess raw material, installed capacity, manufacture of finished goods, clearance of finished goods, enquiry with buyers of finished goods, enquiry with sellers of raw material, transporter, flow back of funds.

7.4 In enquiry with buyers about the genuineness of entries in the private records, the buyers denied to have purchased C.I. Moulds from the Appellant.

7.5 It is consistently held that charge of clandestine removal is a serious charge and cannot be proved on the basis of private records without corroborative, tangible and cogent evidence based on independent enquiry. In support of his submissions, the Appellant relied on the following judgments:-

(i) *Ambica Iron & Steel Pvt. Ltd. Vs CCE reported in 2021 (12) TMI 958 CESTAT-Kol;*

(ii) *Jindal Cables Vs CCE reported in 2022-VIL-183-CESTAT-DEL-CE;*

(iii) *Hi-Tech Abrasives Ltd. Vs CCE reported in (2018) 362 ELT 961 (Chh.) [Page 60 Para 12.2]*

(iv) *CCE Vs C.M. Re-Rollers & Fabricators reported in 2004 (168) ELT 506 (Tri.-Del.);*

7.6 The demand in the instant case was raised merely on comparison of entries of private records with Central Excise Invoices and unmatched entries were presumed to be related to clandestine removal. The allegations/findings is thus based on suspicion.

7.7 In the case of *Sharma Chemicals Vs. CCE reported in (2001) 130 ELT 271 (Tri-Kol)*, it was held that mere tallying some of the entries of the private record with statutory records may give rise to suspicion but merely on suspicion, serious charge of clandestine removal cannot be sustained.

7.8 Further, it was submitted that :

- (i) there was no excess/shortage of raw material detected in the physical stock taking.
- (ii) there is no evidence of receipt of unaccounted raw materials for the manufacture of impugned goods.
- (iii) there is no evidence of transportation of raw material.
- (iv) there is no evidence of production of impugned goods by the Appellant.
- (v) there is no evidence of extra use of labour for production of goods.
- (vi) there is no evidence of consumption of any extra electricity required for manufacture of the impugned goods.
- (vii) there is no evidence of clearance or transportation/clearance of the impugned goods from the Appellant's factory.

(viii) the buyer have specifically denied to have purchased impugned goods from the Appellant.

(ix) that the differential entries relates to repair of C.I. Moulds and not clearance of finished goods.

(x) there is no evidence of flow back of funds.

(xi) there is no confession of guilt.

8. The Ld. Authorized Representative for the Respondent justifies the impugned order and prays that the Appeal may be dismissed, being devoid of merits.

9. Heard both sides and perused the Appeal records.

10. I find that in the course of the search operation, no parallel invoices or challans were found. All the invoice books found in the search operation were found to be unused. It is held in the impugned Order that the said invoices were intended to be used.

In the impugned order, Section 36A of the Central Excise Act, 1944 has been invoked under Para 5.4 at Page 43. It was submitted by the Advocate for the assessee that Section 36A can be invoked only by "Courts" and not quasi judicial authorities. Further, Section 36A was never invoked in the Show Cause Notice. The Appellant relies on CCE Vs. Ballarpur Industries Ltd. reported in 2007 (215) E.L.T. 489 (S.C.) to submit that the impugned order had travelled beyond the scope of the Show Cause Notice.

11. The six statements of three persons Sri Pitabas Chhotray [dated 23-03-2011 & 20-01-2012], Sri Anirudha Sutar [dated 23-03-2011 & 21-09-2011] and Sri Ajay Kumar Das [dated 23-03-2011 & 19-09-2011] are not examined and cross examined by the adjudicating authority, hence, by operation of Section 9D of the Central Excise Act, 1944, said six statements have become irrelevant piece of material, and therefore, have to be eschewed from evidence. Section 9D(2) of

the Central Excise Act, 1944 makes it clear that it applies to adjudication proceedings as well as to Court.

12. The Appellant relies on the following judgments:-

- (i) *Ambica Iron & Steel Pvt. Ltd. Vs. CCE reported in 2021 (12) TMI 958 CESTAT-Kol;*
- (ii) *Hi-Tech Abrasives Ltd. Vs. CCE, Raipur, reported in (2018) (362) E.L.T 961 (Chhattisgarh);*

13. The Hon'ble High Court of Chhattisgarh in the case of Hi-Tech Abrasives Ltd. (supra) has observed regarding the applicability of Section 9D. The relevant paragraphs are reproduced :-

"9.2 *At this juncture, we need to notice the provision contained in Section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the court, as they apply in relation to proceeding before the Court. This provision when read in juxtaposition, the small clauses (a) and (b) under sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the adjudicating authority.*

9.3 *A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.*

9.4 *The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The*

said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.

9.5 *Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded*

during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Private Limited (Laws (SC) 2011 838) = [2011 \(270\) E.L.T. 643](#) (S.C.). That decision turned on its own facts. In para 19 of the judgment, it was concluded as below :

"19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing director of the Company of his own volition deposition the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."

Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that manner.

.....

12.2 *We have gone through the detailed order passed by the adjudicating authority and we find that so far as the demand of challenge in the present case is concerned it rested only on two*

materials. One was the so called statement of the Director which the adjudicating authority and the Customs, Excise and Service Tax Appellate Tribunal received in advance as admission of clandestine removal by the Director of the appellant/Company and the other was the notebook which contained certain entries, which according to the adjudicating authority constitute relevant material to draw inference of clandestine removal by the avoidance of payment of duty. Once we have held that the statement of the Director could not be admitted as relevant piece of evidence, there is no question of there being any admission on the statement of the Director of the company. Then the only other material left is unverified private document in the form of certain entries made in the note book, seized during search operations. In view of what has been held by the Delhi High Court, with which we are in complete agreement and that the Tribunal has also taken a consistent view in this respect that without recording the statement of the author, the contents of private document would not constitute material, we are left with no legally admissible evidence on record to draw inference of clandestine removal. The inference regarding clandestine removal ought to be outcome of a detailed investigation and consideration of other relevant incriminating material which could be based on the stock of raw material, finished products, use of consumption of electricity, employment of labour and many other relevant material as noticed in the decisions reported in [2014 \(309\) E.L.T. 411](#) and [2017 \(345\) E.L.T. 187](#) rendered by the High Court of Allahabad and High Court of Jharkhand, respectively. What, amongst other things, could be relevant consideration of clandestine removal, was discussed as below :

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with

regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*
- (vii) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like -
 - (a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.*
 - (b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.*
 - (c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.*
 - (d) Quantity of the packing material used.*
 - (e) The total number of the employees employed and the payment made to them.**

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations in cash or kind have been paid by the noticee, such statements are must.

(f) Ostensible discrepancy in the stock of raw materials and the finished product.

(g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. Different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc.

These documents ought to have been collected by the respondent-department, if at all, they are interested in collector of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K. Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the Tribunals but the respondents-departments are turning deaf-ear to. In this case, they are also turning deaf-ear to their own circular dated 26-6-2014 (Annexure-3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K. Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All these are

nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive.

(I) The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal."

14. The Hon'ble Punjab & Haryana High Court in the case of Ambika International Vs. Union of India [2018 (361) E.L.T. 90 (P & H)] has observed that :-

"14. *In view of the fact that the case of the petitioners is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, inextenso, 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 an 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."

15. *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.*

16. *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.). 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.*

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.

17. *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).

18. *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.*

23. *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.*

24. *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 adjudication authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

25. *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.

26. *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.*

27. *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.

28. *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."

15. In the case of Ambica Iron & Steel Pvt.Ltd. (supra), the Tribunal observed :-

"14. *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-accounted 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, transporters' 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. Whereas, in the instant case, no such clinching or corroborative evidences to the above effect have been brought on record."*

In the instant case the entire case is based on the private records seized from the residence of the employee Shri Anirudha Sutar and office of the Appellant. There is considerable force in the contention of the Appellant that the private records relied upon by the Revenue cannot be a basis to uphold the serious charge of clandestine clearance. It is settled legal position that charge of clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing concrete and cogent evidence. In the absence of corroborative evidence, the issue in the instant case i.e. "the charge of clandestine clearance" cannot be labeled against the assessee.

16. It is further submitted that the statements of Sri Pitabas Chhotray, Director, Sri Anirudha Sutar and Sri Ajay Kumar Das nowhere indicate or admit the differential unmatched entries related to clandestine removal.

Sri Anirudha Sutar and Sri Ajay Kumar Das stated that the private records also contain repair of C.I. Mould.

Sri Anirudha Sutar, in his Statement dated 21-09-2011 in response to a specific query (with regard to Document No. 08/DGCEI/RRU/MFPL/AS®/11 vide Q.No. 15 stated that entries referred to in the said ledger relates to said so called 'Ledger' in his statement dated 19-09-2011 in reply to Q.No. 24 stated that said ledger relates to sale and also repairs of C.I. Moulds by the Appellant.

Sri Ajay Kumar Das the author of the Ledger (Document No. 08/DGCEI/RRU/MFPL/AS (R)/11) on the basis of which duty of Rs.25,15,612/- is demanded, never stated that unmatched entries are unaccounted clearances by the Appellant.

17. Further, I find that the Ld. Commissioner (Appeal) in the impugned Order has held that Sri Anirudha Sutar, Sri Ajay Kumar Das and Sri Pitabas Chhotray have 'accepted and agreed' that the entries in the said 'Ledger' (Document No. 08/DGCEI/RRU/MFPL/AS(R)/11) relate to sale of manufactured finished products by the Appellant which is patently perverse. In the Show Cause Notice Page 57 & 58 the statement of Sri Pitabas Chhotray, Sri Anirudha Sutar and Sri Ajay Kumar Das are treated as false, afterthought, misstatement, hence, even as per department there is no confession of guilt.

18. The maker of Document No.01/DGCEI/RRU/MFPL/F/2011 (Duplicate Note Book), Sri A. Panda, was never examined to ascertain the purpose for which and at whose instruction the said document is

maintained. Hence, nothing could be speculated in the vacuum. The Appellant relies on the following judgments-

(i) *CCE Vs. Vishnu & Co. P. Ltd. reported in 2016 (332) E.L.T 793 (Del.)*;

(ii) *Hi-Tech Abrasives Ltd. Vs. CCE, Raipur, reported in 2018 (362) E.L.T 961 (Chhattisgarh)*;

19. The confirmation of demand of Rs.59,901/- on the basis of purported shortage of 20.770 MT of C.I. Mould purportedly detected in physical actual weighing of the entire stock is not proper.

20. In the impugned Order, the Ld. Addl. Commissioner has accepted that the stock taking was not done by actual weighment but on visual inspection. In the impugned Order-in-Appeal and Order-in-Original it is held that the stock was "visually inspected".

21. In the case of *CIT Vs M/s Balajee Wires Pvt. Ltd. reported in 2008 (304) ITR 393 = 2007 INDLAW DEL 1203*, it is held by the Hon'ble Delhi High Court that if the search party physically does not count the bundle but took the visual estimate without actual weighment, such stock taking cannot be made the basis for demanding tax. It is held that taking physical weight is a tedious exercise but where a liability is sought to be fastened upon the assessee the revenue has to be little more serious and mere guess work and estimation cannot be resorted to. It is further held that mere putting signature on the stock statement by the party would not sanctify the fault committed in stock taking. The Appellant further relies on the judgments of the Hon'ble Orissa High Court in the case of *Hari Bhagat Agarwala Vs State of Orissa reported in (1982) 51 STC 355 (Ori.)* in which it is held that no tax can be levied without actual weighment.

22. The dispute in the instant case relates to the period 17.10.2009 to 31.03.2011 and 24.01.2011 to 23.03.2011 whereas the Show Cause Notice is issued on dated 24.12.2012 i.e. beyond the normal period of limitation of one year under Section 11A(1)/11A(4), hence the entire demand in the instant case is barred by normal period of one year.

23. In view of the above discussion and settled position of law, I hold that the allegation of clandestine manufacture and removal of finished goods by the Appellant made in the Show Cause Notice, is merely on assumption and presumption, without sufficient material evidence corroborating the said allegations. Therefore, I set aside the impugned order. Penalty imposed under Rule 26 of the Central Excise Rules, 2002 on Shri Pitabhas Chhotray, Director of the Appellant Company is also set aside. Accordingly, the Appeals, filed by the Appellants are allowed with consequential relief, as per law.

(Order pronounced in the open court on 16 November 2022.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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