Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11756 of 2017

(Arising out of OIO-BVR-EXCUS-000-PRCOM-002-003-17-18 dated 08/05/2017 passed by Principle Commissioner Customs, Excise and Service Tax-BHAVNAGAR)

Patidar Products **........Appellant**
Plot No.- 2/3,Opp.Vallabh Chamber, Lathi Road Bypass,
AMRELI, GUJARAT

VERSUS

C.C.E. & S.T.-Bhavnagar **.......Respondent**
Plot No.6776/B-1...Siddhi Sadan, Narayan Upadhyay Marg,
Beside Gandhi Clinic, Near Parimial Chowk,
Bhavnagar, Gujarat-364001

WITH

- **Excise Appeal No. 11835 of 2017 in (Mahashakti Sales Agency)**
- **Excise Appeal No. 11836 of 2017 in (Tulsidas & Co)**
- **Excise Appeal No. 11837 of 2017 in (Radheshyam Transport Co)**
- **Excise Appeal No. 11838 of 2017 in (Kiritbhai Bachubhai Finava)**
- **Excise Appeal No. 11839 of 2017 in (Bintu Stores)**
- **Excise Appeal No. 11843 of 2017 in (Shivam Marketing)**
- **Excise Appeal No. 11889 of 2017 in (Milan Transport)**
- **Excise Appeal No. 10230 of 2018 in (Ashwinbhai Pragjibhai Ambaliya)**

APPEARANCE:
Shri Sarju Mehta, Chartered Accountant for the Appellant
Shri Jeetesh Nagori, Commissioner (AR) & Shri Prabhat Rameshwaram, Additional Commissioner (AR) for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/11216-11224/2022

DATE OF HEARING: 01.09.2022
DATE OF DECISION: 18.10.2022

RAMESH NAIR

The following Appeals are arising out of Order-In-Original No. BVR-EXCUS-000-PR.COM-002 & 003-17-18 dated 08.05.2017 wherein, common investigation/ evidences were relied upon therefore, they are taken up together for disposal. A chart showing the details of Appeals and demand therein are as under:

Sr. No.	Appeal No.	Name of Appellant	Demand
1.	E/11756/2017	Patidar Products	Confiscation of Seized Cash and goods, total amount of Rs. 18,43,000/- fine imposed, Duty demand of Rs. 9,68,12,975, penalty of Rs. 9,68,12,975/-
2.	E/11835/2017	Mahashakti Sales Agency	Penalty of Rs. 10,00,000/-
3.	E/11836/2017	Tulsidas & Co.	Penalty of Rs. 2,00,000/-
4.	E/11837/2017	Radheshyam Transport Co.	Penalty of Rs. 2,00,000/-
5.	E/11838/2017	Kiritbhai Bachubhai Finava	Penalty of Rs. 5,00,000/-
6.	E/11839/2017	Bintu Stores	Penalty of Rs. 3,50,000/-
7.	E/11843/2017	Shivam Marketing	Penalty of Rs. 40,00,000/-
8.	E/11889/2017	Milan Transport	Penalty of Rs. 2,00,000/-
9.	E/10230/2018	Ashwinbhai Pragjibhai Ambaliya	Penalty of Rs. 5,00,000/-

1.1 The relevant facts of the case, in brief, as per records are that an intelligence was gathered by the DGCEI, Ahmedabad that M/s Patidar Products were engaged in evasion of Central Excise Duty by way of clandestine manufacture and removal of their finished products particularly "Flavoured Tobacco" and Gutkha under brand name "Patidar". They also floated fictitious firm viz., M/s Purva Enterprises to cover up their illegal transaction, wherein Smt. Gita Anil Govindbhai Metaliya, Wife of Shri Anil Govindbhai Metaliya, is shown as proprietor of the said firm. It was further gathered that Shri Kirit Bachubhai Finava and Shri Ashwin Ambaliya were helping Shri Anil Govindbhai Metaliya in clandestine removal of finished goods through M/s Millan Transport, M/s Radheshyam Transport Co. and M/s Jalaram Transport Company.

1.2 The officers of DGCEI, Ahmedabad conducted search operations at the factory premises of M/s Patidar, residential premises of Shri Anil Govindbhai Metaliya, Proprietor of M/s Patidar, residential premises of Shri Kirti Bachubhai Finava, Supervisor of M/s. Patidar, residential premises of Shri Ashwin Pragjibhai Ambaliya, ex-employee of M/s Patidar, Godown of M/s Patidar, three transporters viz., M/s Milin Transport, M/s. Radheshyam Transport Co., and M/s Jalaram Transport Co. Follow up searches were also conducted at M/s Khodiyar & Co., Amreli and M/s. Micro Seal Packaging, Rakanpur, and further at the premises of M/s Yesh Lamiprint Pvt. Ltd., Ahmedabad and M/s. Rototon Polypack Pvt. Ltd., Rajkot, at the premises of M/s. Shivam Marketing, Surat and M/s Shah Agency Ahmedabad and recovered & seized various documents/ records

1.3 During the search proceeding at factory premises of M/s Patidar it was observed that one Mini Truck was lying loaded with finished goods. No documents/ records of the above said finished goods were found in the said factory premises or were produced by Shri Rajubhai Panchambhai Vikali , Supervisor-cum-watchmen of M/s Patidar. Hence, the said finished goods as well as the said Mini Truck were placed under seizure. During the search operation on 13.07.2011 at the residential premises of Shri Anil Govindbhai Metaliya, Proprietor of M/s Patidar, Cash amounting to Rs. 17,50,000/- was recovered. On being asked, Smt. Gitaben Anil Metaliya could not give any satisfactory reply in all the matters. Accordingly the said cash was placed under seizure under panchanama dated 13.07.2011

1.4 During the scrutiny of the 64 Kaccha Chits (Bill Book), recovered & seized from the residence premises of Shri Kirtibhai Finava, Supervisor of M/s Patidar and 01 Kaccha chits (Bills Book) recovered and seized from the residential premises of Shri Anil Metaliya, proprietor of M/s Patidar it appeared that these books contained the details of the clearance of the goods manufactured by M/s Patidar to its various dealers. During the scrutiny of the 24 coupon books, recovered & seized from the residential premises of Shri Kirti Bachubhai Finava, Supervisor of M/s Patidar, it appeared that these books contain details such as number of free coupons, name & place of the retailer/ dealer of M/s Patidar and number of each and every coupon, so given to the retailer/ dealer of M/s. Patidar. The officers recorded the statements of various persons in this matter. From the circumstantial/corroborative evidences in the form of documents/ records/ books seized and confessional statements it appeared that M/s Patidar had been indulging in large scale evasion of Central Excise Duty for last five years. Shri Sanjay Patel, Director of M/s Yesh Lamiprint Pvt. Ltd., Ahmedabad, in his statement dated 17.10.2011, has admitted to have sold roughly 5500 kg. of Flexible packing materials for Patidar Gutka to M/s Patidar during January 2009 and 10,000 pieces of outer plastic bags during the February 2009. He also explained that the quantity of pouches per Kg. could be 1200 pieces approximately. Similarly Shri Mahendra Patel, Partner of M/s. Micro Seal Packaging in his statement dated 11.10.2011 agreed to have sold 700 kgs of Flexible Packing Materials of Patidar Zafrani Zarda & Patidar Gutka. The same facts were also admitted by Shri Dipakkumar Ganpatbhai Patel, partner of M/s Multi Color Flexi Pack, in his statement dtd, 14.07.2011, wherein he admitted to have sold 600 -700 kgs. of Flexible packing materials of Patidar Zafrani Zarda &Patidhar Gutka per month during the period from Sept. 2008 to Feb. 2011 to M/s Patidar. Shri Vasantbhai Makanjibhai Gadesha, Director of M/s. Rototon Poly Pack Pvt. Ltd., Rajkot, explained in his statement dated 21.07.2011 that as per the usual practice in his business, the quantity in kgs. was shown in the invoices by his company, however, the approximate weight of one empty pouch of Zafrani Zarda, sold to M/s Patidar, was 4.5 grams. Accordingly, 210 pouches (approx.) could be made in 1 Kg. of packing material.

1.5 Investigation in this case revealed that M/s Patidar had Manufactured and cleared Patidar brand Gutka during the period September 2008 to April 2011, which is evident from the record of the said period i.e Bill Books (Kaccha Chits). Shri Anil Govindbhai Metaliya, Proprietor of M/s Patidar, in his statement dated 02.08.2011 stated that they had manufactured Patidar brand Gutka for the period from July 2010 to December 2010, but the evidences, gathered from the suppliers/ manufactures of packing materials viz., M/s Yesh Lamiprint Pvt. Ltd., M/s Micro Seal Packaging and M/s Rototon Poly Pack Pvt. Ltd., indicates that M/s Patidar have manufactured and cleared to the goods i.e. Gutka even before July 2010.

1.6 The chewing Tobacco are classifiable under Chapter 24 of the Central Excise Tariff Act, 1985 and are assessed to Central Excise Duty on the basis of MRP in terms of the provisions of Section 4A of the Central Excise Act, 1944. It was alleged that during the period 2008-09 to 2011-12 M/s Patidar have cleared Flavoured Tobacco valued at Rs. 13,61,46,017 to its various dealers without payment of Central Excise Duty of Rs. 5,68,12,975/- (including BCD, NCCD, Addl. Duty of Excise, Edu. Cess and SHE Cess) and during the period 2008-09 to 2011-12 M/s Patidar have cleared Gutka valued at Rs. 4,88,56,896/- to its various dealers without payment of Central Excise Duty, however the central excise duty on Gutka is leviable under Compounded Levy scheme, as stipulated in Notification No. 42/08-C.E. dated 01.06.2008. According to the said Notification, the Central Excise duty on Pan Masala containing Tobacco, commonly known as Gutkha, falling under Chapter heading 24039990 having MRP of Rs. 0.50 per pouch, is stipulated to Rs. 12.50 Lakh per machine per Month. It appeared that during the period September 2008 to April 2011 M/s Patidar had manufactured Gutka having MRP of Rs. 0.50 per Pouch with the help of one machine. Accordingly, Central Excise Duty payable by M/s. Patidar comes to Rs. 4,00,00,000/-(i.e. for a total period of 32 months @Rs. 12.50 Lakhs per Month per Machine)

1.7 In the impugned matter two show cause notices were issued to the Appellant. First show cause notice dated 11.01.2012 was issued to the Appellant for confiscation of seized excisable goods i.e Patidar Brand Zafrani Zarda, Mini Truck Eicher and unaccounted currency seized and for imposing the penalty under Rule 25 of Central Excise Rules, 2002. After the

completion of investigation second show cause notice dated 21.03.2013 was issued to the appellant proposing demand of Central Excise Duty on Flavoured Tobacco (Zafrani Zarda) and Gutkha. After due process, the matter was adjudicated vide Order-In-Original No. BVR-EXCUS-000-PR.COM-002 and 003 -17-18 dated 08.05.2017. The Ld. Pr. Commissionerconfirmed the duty demand, imposed equal amount of penalty and further penalties on various individuals. He also ordered confiscation of seized goods , Cash and the motor vehicle and allowed them to be redeemed on payment of fines. Aggrieved by this order, the appellants filed these appeals.

02. Shri Sarju Mehta, Learned Chartered Accountant appearing on behalf of the appellants submits that the Principal Commissioner has denied the cross examination of witnesses and recorded his findings that it is settled position that cross-examination of witnesses is not necessarily required to be allowed in all cases. The witnesses have not been examined in the adjudicating proceedings as required by Section 9D of the Act an opportunity to cross -examine them has not been given to the Appellant. Consequently, their statements have no evidentiary value for establishing the alleged clandestine removal. The approach of the adjudicating authority in denying the cross examination is very contrary to the law laid down by the courts and tribunal in various Judgments. He placed reliance on the following judgments:-

- J & K CIGARETTES LTD. VS. CCE -2009 (242) ELT 189 (DEL)
- BASUDEV GARG VS. CC -2013(294) ELT 353
- ANDAMAN TIMBER INDUSTRIES VS. CCE., KOLKATA -2015(324) ELT 641 (SC)
- ATUAL BANSAL VS. CCE ORDER NO. A/11554-11556/2019 DATED 21.08.2019
- BHARAT SHETH AND OTHERS VS. CCE BHAVNAGAR – ORDER NO. A/10428-10506/2022 DATED 11.05.2022

2.1 He also submits that the seized Indian Currency cannot be confiscated under the Central Excise Law. The condition of Section 121 of Customs Act, 1962 read with Section 12 of the Act for confiscation of cash were not fulfilled. Hence the confiscation of cash is illegal. The burden of showing the cash recovered is the sale proceeds of the goods cleared without payment of

duty is on the department. The department has not discharged this burden and therefore the amount seized cannot be considered as sale proceeds.

2.2 He further submits that on perusing the Panchnama dated 13.07.2011 drawn at the factory premises of the Appellant, it is concluded that whatever goods were found in their factory premises were not having a corresponding Central Excise Invoice, the same was liable to confiscation; that the watchman who was present at that time was not in a position to show supporting document in regard to the said goods. The Panchanama itself shows that the goods were not cleared from the factory and goods were lying within the factory premises. Therefore, there is no offence. Hence the goods seized from the factory of the Appellant is not liable to confiscation.

2.3 He also argued that the case against the Appellant is essentially based on the materials in the form of Kachcha Chits, note books and Bill Book and other evidences on records is in form of statements of parties. The credibility of the documentary evidence, which is relied upon to hold that the Appellant was involved in clandestine removal of the products, is disputed on various grounds. Firstly, the seizure proceedings are themselves contended to be illegal, secondly, the panchas of those documents have neither been examined nor produced for cross-examination, thirdly, the documents are merely duplicate copies, fourthly, the contents of those documents are not proved to be true and in any case, the said documents were not seized from the factory premises of the Appellant or from the premises in possession of the Appellant.

2.4 As regarding the duty confirmed on Pan Masala containing Tobacco, commonly known as Gutka, he submits that no machine was available in the premises of the Appellant; that there is no evidence that the machine was working in the factory of the premises for what period and what was their capacity. In the present case, entire evidence was relied upon are documents recovered from the employee of the appellant and third party and their statements. However without cross-examination of the witnesses, their statements cannot be relied upon. In this support, he placed reliance on the following Judgment:-

- VISHWA TRADERS PVT. LTD. VS. CCE VADODARA -2012(278) ELT 362
- SULEKHRAM STEELS PVT. LTD. VS. CCE, AHMEDABAD -II-2011(273) ELT 140 (TRI, AHMD)
- CHARMINAR BOTTLING CO. PVT. LTD. VS. CCE, HYDERABAD -II-2005(192) ELT 1057 (TRI. DEL)
- RAMA SHYAMA PAPERS LTD. VS. CCE, LUCKNOW – 2004 (168) ELT 494 (TRI. DEL.)

03. Shri Jeetesh Nagori, learned Commissioner (AR) & Shri Prabhat Rameshwaram, learned Additional Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order and post-hearing he also submitted the copy of following decision in support of finding of impugned order and his arguments.

- 2009(233) ELT 157(SC) – Vinod Solanki Vs. Union of India
- 2016(340) ELT 521 (Tri. Del.) CCE, Chandigarh Vs. Vinay Traders.
- 2013(295) ELT 116 (Tri. Bang) – Ramchandra Rexins Pvt. Ltd. Vs. CCE, Bangalore -I,
- 2017(355) ELT 451(Tri. Del)- Haryana Steel & Alloys Ltd. Vs. CCE, New Delhi
- 2013(297)ELT 561 (Tri. Chennai) – Lawn Textiles Mills Pvt. Ltd. Vs. CCE, Salem
- 2011(270) ELT 643(SC)- CCE, Mumbai Vs. Kalvert Foods India Pvt. Ltd.
- 2013(289)ELT 3 (SC) Telestar Travels Pvt. Ltd. Vs. Special Director of Enforcement.
- 2015(318)ELT 437 (Tri. Mum)- PB Nair C& F P Ltd. Vs. CC(General), Mumbai
- 2016(333) ELT 256 (Del) – Rajesh Kumar Vs. CESTAT
- 2007(208) ELT 536 (Tri. Ahmd)- Montex Dyg & Ptg Works Vs. CCE, Surat -I
- 2009(248)ELT 242 (Tri. Mum)- Agarwal Overseas Corporation Vs. CC (EP), Mumbai
- 1983(13)ELT 1486 (SC)- Kanungo & Co. Vs. CC, Calcutta & Others

- 2018(15)GSTL 298 (Tri. Bang)- Paragon Steels Pvt. Ltd. Vs. CCE, Calicut
- 2014(300) ELT 119 (Tri. Mum)- Ahmedabad Rolling Mills P Ltd. Vs. CCE, Aurangabad.
- 2017(347) ELT 413 (Bom) – Sharad Ramdas Sangle Vs. CCE, Aurangabad
- 2011(269)ELT 485 (AP)- Shalini Steel Pvt. Ltd. Vs. CCE, Hyderabad
- 2018(360)ELT 255(AP)- Manidhari Stainless Wire Pvt. Ltd. Vs. Union of India
- 2010(255) ELT 68 (H.P.) -CCE Vs. International Cylinder Pvt. Ltd.
- 2005(184) ELT 263(Tri. Bang) -Gulabchand Silk Mills Pvt. Ltd. Vs. CCE, Hydrabad -II
- 2014(304) ELT 591 (Tri. Mum)- SM Steel Ropes Vs, CCE
- 2004 (165) ELT 136(SC) -CCE, Mandra Vs. Systems & Components Pvt. Ltd.
- 2018(362) ELT 559 (Mad)- Lawn Textiles Mills Pvt. Ltd. Vs. CESTAT, Chennai
- 2004(172) ELT 433 (SC)- CC, Kandla Vs. Essar Oil Ltd.
- 2009(235)ELT 587 (SC) CC (P) Vs. Afloat Textiles (I) Pvt. Ltd. And other.

04. We have heard both the sides and have considered the submissions made at length by both sides and perused the records and also considered the case laws quoted by both sides.

4.1 The appellant raised the issue of infraction of principles of natural justice on the part of the adjudicating authority by not permitting cross-examination of the witnesses sought by the appellant. It has been contended by the Appellants that this amounts to non-observance of the provisions of Section 9D of the Central Excise Act, 1944. They have also relied on case laws in which the Hon'ble High Court and Tribunal has held that the provisions of Section 9D will be equally applicable to departmental proceedings and also criminal proceedings in the court. However the adjudicating authority has not accepted the request of appellant for cross-examination of witnesses on the ground that all the persons have voluntarily

admitted their respective role in this case and it is settled legal position that cross-examination of witnesses is not necessarily required to be allowed in all the cases. We find that the stand taken by the adjudicating authority is not reasonable under the circumstances of the present case. We noticed that the section 9D of the Central Excise Act of 1944 provide as under:-

> *Section 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 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 the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.*
> *(2) The provisions 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 the Court.*

4.2 On perusal of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person who made the statement is examined as witness before the Court.

4.3 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. 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. 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. 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 with full conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. 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 view that in the present matter Ld. Pr. Commissioner committed illegality in placing reliance upon the statements of persons 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.

4.4 The Learned Adjudicating authority relied upon a decision of the Hon'ble Supreme Court in the case of *SurjeetSingh Chhabra* v. *Union of India* reported in 1997 (89) E.L.T. 646 (S.C.) and held that cross - examination of witness is not necessarily required to be allowed. However, in the case of *Surjeet Singh Chhabra* (supra). the gold was recovered at the airport and SurjeetSingh Chhabra admitted the smuggling of the gold. In these circumstances, when Surjeet Singh Chhabra retracted from statement, the Hon'ble Supreme Court held that the statement made under Section 108 of Customs Act, even retracted, can be used against SurjeetSingh Chhabra. In the present case, the facts are different.

4.5 We find that the Supreme Court in Lakshman Exports Ltd. 2002 (143) E.L.T. 21 (S.C.) (supra) while considering proceedings under the Central Excise Act, 1944 has held that, a noticee has a right to cross-examine the persons making statements against the noticee. The relevant para of judgment read as under:

> *"In an adjudication proceeding which is adversarial in nature, a party adducing evidence through a natural person is required to allow cross-examination of such natural person, to the other side. In the present case apparently the prosecution was relying upon evidence adduced by natural persons in the proceeding. The prosecution, therefore, ought to have allowed such persons to be cross-examined. The petitioner made a request to the adjudicating authority for an opportunity to cross-examine. Such request was made by the written notes of defence. The adjudicating authority took such written request on record. However, it did not allow the petitioner to cross-examine the prosecution witness. It did not deal with the request for cross-examination, in the impugned order. It is not necessary that, a party to a proceeding, specify the reason why it requires the cross-examination of the witness. When, a contesting party in adversarial litigation adduced evidence through a natural person, it results in a corresponding right to the opposite party in such adversarial proceeding to cross-examine such natural person. In absence of such cross-examination being allowed or facilitated the evidence given by such natural person has no evidentiary value and cannot relied upon. The adjudicating authority not having considered the request for grant of cross-examination of the prosecution witness, the impugned order stands vitiated by breach of the principles of natural justice. The impugned order is quashed. This order will not prevent the adjudicating authority to proceed afresh from the stage reached on April 25, 2018 or from such stage it deems appropriate. It is expected that, the adjudicating authority will keep the request of the petitioner to cross-examine the*

> *witnesses noted in its written notes of defence, in accordance with law."*

In *Swadeshi Polytex Ltd*. v. *CCE, Meerut* [2000 (122) E.L.T. 641 (S.C.)], it was held that if the Adjudicating Authority "intends to rely upon the statement of any such persons, the Adjudicating Authority should give an opportunity of cross examination to the appellant".

A similar view has been taken by the Hon'ble High Court of Delhi in the case of *Basudev Garg*2013 (294) E.L.T. 353 (Del) (supra). The relevant portion of the order is reproduced below :-

> *14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi-judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a 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 and expense which, under the circumstances of the case, the Court considers unreasonable, it is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under :-*
> *"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi-judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi-judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf, it goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the*

quasi-judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

The Hon'ble Madras High Court in the case of *Veetrag Enterprises* v. *Commissioner of Customs* - 2015 (330) E.L.T. 74 (Mad.) has observed as under :

> *"8. While considering the value of cross-examination, the Apex Court in Ayaaubkhan Noorkhan Pathan's case (cited supra) held thus :*
>
> > *"Cross-examination is one part of the principles of natural justice :*
> > *23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given an opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice."*
>
> *A mere reading of the above said proposition clearly shows that the rules of natural justice require that a party must be given an opportunity to adduce all relevant evidence upon which he relies and further that the evidence of the opposite party should be taken in his presence by giving an opportunity of cross-examining the witnesses examined by that party. In the present case, neither any speaking order has been passed nor the respondent justified in not permitting the petitioner to cross-examine the above said eight witnesses. Thus, such attitude of the respondent shows that the petitioner was not given fair opportunity to defend their case, therefore, not providing an opportunity to cross-examine the above said eight witnesses, in my view, would violate the principles of natural justice. Accordingly, the impugned order is set aside and the respondent is directed to permit the petitioner to cross-examine the above said eight witnesses and pass appropriate orders on merits and in accordance with law. Such exercise shall be completed by the respondent within a period of 45 days from the date of receipt of a copy of this order.*
> *9. In fine, for the reasons stated above, the writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed."*

4.6 From the above discussions and following the judgments cited above, we are of the considered opinion that the denial of cross-examination is unjustified. The decision relied by the Ld. Adjudicating authority are on different facts and distinguishable. Non-production of witnesses for cross-examination, it was held, is violative of principles of natural justice. All these judgments in the matter of cross-examination are at the stage of adjudication. The law, therefore, at that stage, need not be elaborated, as it is the right of an assessee in the event the Revenue seeks to rely on the

statements of witnesses recorded by it and whose statements are sought to be relied upon at the stage of adjudication to make available the said witnesses for cross-examination so that it could be established whether the statements recorded from the said witnesses have been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like. The object, being that a Tribunal or Court conducting a proceeding either before the Court or quasi judicial tribunal in adjudication, must have the true evidence and shift the evidence to weed out the chaff from the grain. Another reason being to satisfy itself that the person whose statement was recorded had made it voluntarily and based on his personal knowledge or legal records which can come out in cross-examination. This is to ensure the Court or Tribunal or the authority conducting the proceeding arrives at the correct conclusion based on tested evidence before it. The issue also is no longer *res integra* in view of the large number of judgements of the Supreme Court.

4.7 We further find that the judgment relied upon by the Ld. AR is also not applicable in the facts of the present case, as the said judgment does not consider the provisions of Section 9D(2) read with Section 9D(1) of the Act.

4.8 We also find that the instant demand has been confirmed by the Ld. Commissioner on the basis of the statements of the persons whose cross-examination have not been allowed to test the correctness and authenticity of the allegations and hence the same will prejudice the interest of the appellants. It is settled position that statements made by the persons cannot be entered into evidence where the cross-examination of the statements of said persons are sought to be relied against the assessee :-

- *CCE* v. *Parmarth Iron Pvt. Ltd.* - 2010 (260) E.L.T. 514 (Allahabad)
- *G-Tech Industries* v. *UOI* - 2016 (339) E.L.T. 209 (P & H)
- *Nidhi Auto Pvt. Ltd.* v. *CCE* - 2020 (33) G.S.T.L. 419 (Tri. - All.)

4.9 It is well settled law that clandestine removals cannot be arrived at based upon the confessional statement of persons only. The statements itself are not sufficient for holding so. There is catena of judgments laying down that the inculpatory statements alone cannot be made the basis for

arriving at a finding of clandestine removal. In a nutshell, it has been the constant stand of quasi-judicial and judicial appellate forums that for establishing the fact of clandestine removal, there need to be sufficient evidence on record leading to conclusive proof of production of goods, their removal from the factory by any mode of transportation and clandestine clearance to the buyers. Mere doubts, howsoever strong cannot take the place of evidence required to be produced by the Revenue. The onus to establish such clandestine activities, resulting in confirmation of demand is placed heavily on the Revenue and is required to be discharged by production of sufficient evidences. Further a case of clandestine removal cannot be upheld on the basis of certain statements alone as held in the case of *Commissioner of Central Excise* v. *Saakeen Alloys Pvt. Ltd*. [2014 (308) E.L.T. 655 (Guj.)] wherein Gujarat High Court rejected the appeal of the Revenue by making following observations in Para 10.

> *"10. All the appeals are based predominantly and essentially on factual matrix. The Tribunal elaborately and very correctly dealt with the details furnished by both the sides and rightly not sustained the demand of Rs. 1.85 crores, which had no evidences to bank upon. Confessional statements solely in absence of any cogent evidences cannot make the foundation for levying the Excise duty on the ground of evasion of tax, much less the retracted statements. To the extent there existed substantiating material, Tribunal has sustained the levy. No perversity could be pointed out in the approach and treatment to the facts."*

4.10 Coming to the issue of alleged clandestine removal of Flavoured Tobacco (Zafrani Zarda) and Gutka. It will be proper to start the analysis from the method of quantification of the duty presently confirmed by the impugned order. We have perused Annexure-A-1,A-2 & A-3 and B-1, B-2 & B3to the show cause notice, which are charts showing duty calculation for the period 2008-2009 to 2011-2012 on Flavoured Tobacco and Pan Masala containing Tobacco, commonly known as Gutkha. It is seen that the value and duty were calculated on the basis of 64 Kaccha Chits seized from the residential premises of Shri Kirti Finava, Supervisor of M/s Patidar Product and 01 Kaccha Chit seized from the residential premises of Shri Anil Metaliya, Proprietor of M/s Patidar Products. On the basis of said Kaccha Chits the duty demand has been confirmed against the appellant. It is seen that the entry mentioned in said Kaccha chits were presumed to have been cleared clandestinely without any supportive evidences. In the present

matter department has not produced any details as how the good mentioned in the said Kaccha Chits cleared clandestinely by the Appellant. The Ld. Adjudicating authority for confirmation of demand rely on the confessional statements of the persons including the Anil Govindbhai Metaliya, proprietor of Appellant firm, supplier of packing materials, transporter and some buyers. However, the contents of the statements were objected by the appellants and the persons, who gave statements were not put to cross-examination. Hence, the question of using inadmissible statements to confirm the duty demand is itself not sustainable. There is no details of procurement of raw materials (except statement of the suppliers of packing materials) or details of clearance to various buyers (except the statements of five buyers), money payment, etc. We also find that neither the department nor said alleged buyer, packing materials supplier and transporters produced any details in the form of documents /records in support of their statements. Thus, in the facts of the present case, the examination of the packing materials suppliers, transporters ,the buyers and other persons whose statements were relied by department of was essentially required. As the examination and cross-examination have not been done in the course of the adjudication proceedings, in spite of Appellant requests, we are of the opinion that none of the aforementioned statements can be relied upon for proving the allegations against the appellants. After discarding the statements, as aforementioned, we find that other than the bald allegations, there is no other cogent and corroborative evidences on record in support of the allegation of the Revenue.There is a cantina of judgments laying down that the inculpatry statements alone cannot be made the basis for arriving at a finding of clandestine removal. As analysed from the facts presented in these cases under appeal, it is apparent that even the statements given are not giving any categorical details of the quantum of manufacture and clearance of non-duty paid items. Annexures to the show cause notice which stands confirmed in *toto*, cannot be considered as an admissible way of calculating duty liability under any provisions of law.

4.11 Further, 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 personals, 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.

4.12 In the instant case, the entire case of the Revenue is based on the Kaccha Chits seized from the residential premises of Shri Kirti Finava and Shri Anil Metaliya. There is considerable force in the contention of the Appellant that the Kacha Chits 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 of fact *i.e.* in the present case "the charge of clandestine clearance" cannot be levelled against the assessee. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods have been procured to manufacture goods for clandestine clearance. No efforts have been made by the investigating agencies to establish the existence of any unaccounted manufacturing activity in the form of unaccounted raw material, shortage of stock, shortage of raw material/finished goods, excess consumption of electricity, unaccounted labour payments, interrogation of buyers/transporters or any incriminating record/document to suggest any flow back of cash etc. The Revenue authorities in this case have failed to discharge the burden of proving the serious charge of clandestine clearance with cogent and clinching evidence. It has been consistently held that no demand of clandestine manufacture and clearance can be confirmed purely on assumptions and presumptions and the same is required to be proved by the Revenue by direct, affirmative and incontrovertible evidence, as has been held in the following cases :-

- *bihar foundary & castings ltd.* V. *Cce, ranchi* [2019 (8) tmi 527-cestat, kolkata]
- *continental cement company* v. *Union of india* [2014 (309) e.l.t. 411 (all.)]
- *balashree metals pvt. Ltd.* V. *Uoi* [2017 (345) e.l.t. 187 (jhar.)]
- *cce, meerut-i* v. *R.a. Castings pvt. Ltd.* [2012 (26) s.t.r. 262 (all.) = 2011 (269) e.l.t. 337 (all.)]
- *popular paints and chemicals* v. *Cce & customs, raipur* [2018 (8) tmi 473 (tri. - delhi)]

4.13 The entries made in the Kaccha Chits may create doubt but it cannot take place of evidence. It is observed that the allegation of suppression of production and clandestine removal is a serious allegation and it has to be established by the investigation by affirmative and cogent evidence. CESTAT in the case of *Sober Plastic Pvt. Ltd.* v. *CCE* [2002 (139) E.L.T. 562 (T)] has held that demand based on weighment slips, slips recovered from Dharamkanta etc. relied upon for raising demand not verified with reference to transactions is not sustainable. In the present matter we also observed that department nowhere conducted the investigation at the end of all the persons whose names are mentioned in said Kaccha Chits. Further, it is settled position of law that proof and evidence of purchase of raw materials and sell of final product clandestinely is necessary to establish the allegation of suppression of production and clandestine removal of goods and that the allegation are to be proved with affirmative evidences. CEGAT in case of *Emmtex Synthetics Ltd.* v. *CCE* [2003 (151) E.L.T. 170 (Tri.) has held that the charge of clandestine removal has to be established by the revenue by adducing tangible, convincing and cogent evidences, CESTAT in the case of *Esvee Polymers (P) Ltd.* v. *CCE* [2004 (165) E.L.T. 291 (Tri.)] dealt with a case of alleged clandestine production and clandestine removal. The case was based on some private slips. The CESTAT observed that the mere slips or statement are not sufficient for confirmation of demand and allegation of clandestine removal. Evidence in the form of receipt of raw material, shortages thereof excess use of electricity excess/shortage of inputs in stock, flow back of funds, purchase of final products by parties alleging receipt and removal of goods etc. is necessary. CESTAT in the case of *CCE* v. *Supreme Fire Works factory* [2004 (163) E.L.T. 510 (Tri.) dealt with the

allegation of clandestine manufacture and removal and observed that mere suspicion cannot take place of proof. Proof and evidences of purchase of raw materials, sale of final goods clandestinely is necessary. The allegations are not sustainable in absence of evidences. CESTAT in case of *CCE* v. *Shree Narottam Udyog (P) Ltd.* [2004 (158) E.L.T. 40 (Tri.)] has dealt with the allegation of clandestine manufacture and removal of goods and held that settled law is that the charge of clandestine removal being a serious charge required to be proved beyond doubt on the basis of affirmative evidences. CESTAT in case of *Jagatpal Premchand Ltd.* v. *CCE* [2004 (178) E.L.T. 792 (Tri.) held that it is settled law whenever charge of clandestine removal made revenue has to prove assessee procured all raw materials necessary for manufacture of final product. The allegations are not sustainable if no investigation conducted by the revenue in respect of raw material essential for production of final goods and no evidence regarding removal of such final product brought on record by revenue. Similar view has been taken by the CEGAT in several other cases such as *Jangra Engg. Works* v. *CCE* [2004 (177) E.L.T. 364 (Tri.)], *Premium Moulding & Pressing Pvt. Ltd.* v. *CCE* [2004 (177) E.L.T. 904 (Tri.)], *Vakharia Traders* v. *CCE* [2004 (173) E.L.T. 287 (Tri.)], *Nutech Polymers Ltd.* v. *CCE, Jaipur* [2004 (173) E.L.T. 385 (Tri.)], *CCE* v. *Sumangla Steels* [2004 (175) E.L.T. 634 (Tri.)], *CCE* v. *Sangamitra Cotton Mills* [2004 (163) E.L.T. 472 (Tri.)], *CCE* v. *Velavan Spinning Mills* [2004 (167) E.L.T. 91 (Tri.)]. In the matter of *K. Rajagopal*v. *CCE* [2002 (142) E.L.T. 128 (Tri. - Mad.)] the Tribunal held that -Private notebooks not a conclusive piece of evidence to prove clandestine removal. No other corroborative evidence with regard to purchase of raw materials and sale and purchase by particular persons. Clandestine manufacture and removal not substantiated - Demand not sustainable.The ratio of these decisions is applicable in the instant case. Since the investigation has failed to adduce evidences to establish suppression of production and clandestine removal of the goods as discussed above and failed to discharge the onus to prove the allegations, the allegations are not sustainable. In view of the above discussions, the allegation of clandestine removal of finished goods is not established. Hence, the proposed demand is liable to be dropped for lack of evidences.

4.14 The Tribunal in the case of *Kothari Products* v. *C.C. Ex.* reported in 1999 (31) RLT 67, observed that it cannot be concluded that the note-book

is an authenticated private record of production so as to raise a demand based on the figures indicated therein. At the most, it may raise a doubt, but that cannot take the place of proof. Even though there may be certain element of truth in the prosecution story, but between 'may be true' and 'must be true', there is a long distance to travel and the whole of the distance must be covered by a legal and unimpeachable evidence before a person can be convicted. Similarly, we find that in the case of *Biria Tyres* reported in 2000 (126) E.L.T. 1079 (Tri.) = 1999 (33) RLT 52, demands of duties raised solely on the entries made in the Curing Register, were held not to be sustainable in the absence of independent evidence corroborating the same. Further, in the case of *C.C. Ex.* v. *Mira Steel Mills* reported in 1999 (112) E.L.T. 934, it was observed that some entries made in the private note-book seized from the factory premises tallying with the entries in RG-I, may raise suspicion that those entries in the note-book relate to the goods clandestinely removed in the past without payment of duty, but the charge of clandestine removal cannot be sustained on such suspicion.

4.15 Without prejudice, as regard the duty confirmed on Pan Masala Containing Tobacco, commonly known as Gutkha , we find that during the search and panchnama proceeding there is no working machine was found by the department from the factory premises of Appellant. The Panchnama drawn at the factory and alleged godown of the Appellant has not described that how many machines in the factory of the Appellant were in working condition or were actually working and what the production capacity of each of those machines. Further working of the machines in the appellant's factory was not tested or certified to ascertain the production capacity of the machines installed. There is no record/ evidences to show that the appellant were working for manufacture of alleged Gutkha in the factory premises or any other premises. There is no evidence of additional employees having been employed to enhance the production, nor is there any evidence of excess wages having been paid to the existing employees. there is no evidence of purchase of main raw materials 'Betel Nuts', Tobacco, Perfume, Lime, etc. in cash, brought to factory, and used in unaccounted manufacture of Pan Masala/Guthka in the factory premises, there being no further investigation of unaccounted purchases of supari, main ingredient. there is failure on the part of revenue to collect any evidence in relation to either procurement of raw materials by the appellant or production of huge

quantity of final goods alleged as removed clandestinely to sustain the charge of clandestine removal.Hence, the impugned demand is not sustainable for lack of evidences.

4.16 With regard to the cash recovered from the residential premises of Shri Anil Govindbhai Metaliya, on going through the observations made by the learned Adjudicating Authority, we are in disagreement with that. The Ld. Commissioner in impugned order held that Smt. Gitaben Anil Metaliya, wife of Shri Anil Govindbhai Metaliya, who was present during the course of search proceedings, could not explain the source of huge amount of cash of Rs. 17,50,000/- which was seized during the search proceedings. Therefore the said amount of cash pertains to sale proceeds of the clandestinely manufactured and cleared finished goods which were cleared by the Appellant without payment of Excise Duty. However we noticed that proprietor of the Appellant nowhere admitted that said cash is towards sale proceeds of clandestine removed goods. Further department nowhere produced any evidence to show that the said amount is the sale proceeds of clandestinely removed goods. The Adjudicating Authority has also failed to prove that the cash recovered is the sale proceeds of clandestine removed goods. It is well established that the onus to show that the Indian currency was the sale proceeds of the clandestinely removed goods is upon the Revenue, which is required to be discharged by production of affirmative evidences. It has been the subject matter of various decisions laying down that onus to prove so is upon the Revenue and is required to be discharged by production of affirmative, tangible and positive evidences. One such reference can be made to the decision of the Tribunal in the case of *Pandit D.P. Sharma* v. *CCE, Calcutta-II* [2001 (137) E.L.T. 692 (Tri.-Kolkata)], wherein after taking note of various decisions, the seized currency was released in the absence of any evidence to the contrary. The said decision of the Tribunal was affirmed by the Hon'ble Supreme Court when the appeal filed by the Revenue was rejected in the case of *Commissioner* v. *Pandit D.P. Sharma* [2003 (157) E.L.T. A201 (S.C.)]. To the same effect is another decision of the Tribunal in the case of *S. Kotteswaran* v. *Collector of CE (Customs), Madras* [1997 (91) E.L.T. 435 (Tribunal)]. It stands held in the said decision that mere non-accountal as to receipt of money is not sufficient so as to hold it as sale proceed of smuggled silver, the same is not liable to confiscation under Section 121 of the Customs Act. Further Tribunal in the

case of *Collector of Central Excise* v. *Sudhir Electronics* [2000 (123) E.L.T. 1054 (Tribunal)] has held that inasmuch as the Indian currency is not one of the specified items under Section 123 of the Customs Act, Department has to establish the sale of the smuggled goods and the identity of the seller and the producer and confiscation of the same cannot be made solely on the retracted statement. Law is settled on the above issue in the absence of any affirmative, tangible and positive evidence. Therefore, we hold that the seized currency during the course of investigation cannot be confiscated without proving that the said seized currency is the sale proceeds of excisable goods cleared clandestinely. Therefore, we are of the considered view that confiscation of the seized currency of Rs. 17,50,000/- is not sustainable accordingly, cash of Rs. 17,50,000/- is ordered to be released to the appellant by setting aside the confiscation.

4.17 We also gone through the Judgments relied upon by the Ld. Departmental representative and noticed that the fact of each judgments varies from the fact of the present case, hence in our view as per facts of the present case these judgments are not applicable.

4.18 As regards the confiscation of the goods for which redemption fine has been imposed, we find that during the search proceedings at the factory premises of Appellant, finished goods viz. Flavoured Tobacco valued at Rs. 1,72,540/ -were found loaded in truck and during the search proceedings at the godown of Appellant "Flavoured Tobacco in pouches totally valued at Rs. 7,62,000/- and packing materials valued at Rs. 10,000/- were found. The said goods were still within the premises and there is nothing on record to show that the same were to be cleared clandestinely by the appellant. Further officer conducted the panchanama proceeding in factory under the presence of watchmen of Appellant, no responsible person of Appellant was present during the panchanama proceeding. Moreover, Adjudicating authority in the present matter also not allowed the cross-examination of witnesses and panchas to find out the truth. Further, we also find that there is no justification for confiscation of the seized goods from the premises of M/s Radheshyam Transport Co, Surat. The Revenue has not produced any evidence to reveal that the said goods found from the transport's premises were cleared from the appellant's factory without payment of duty. All the goods available in the market are deemed to be duty paid, unless proved

otherwise. In the absence of any evidence to the contrary, we set aside the confiscation of the goods. Accordingly, we hold that the goods in question were not liable to confiscation.

05. As per our above discussion and finding, the demands of duty, corresponding interest and penalty, the confiscation of seized goods and seized cash are not sustainable, consequently, the imposition of penalties on all the co-appellants are also not sustainable. Accordingly, the impugned order is set aside and the appeals are allowed with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 18.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul