

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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 1421 of 2011

[Arising out of Order-in-Appeal No OIO-19/MP/VAPI/2011 passed by Commissioner of Central Excise, Customs & Service Tax, Vapi]

M/s Resham Petrotech Ltd.

.... Appellant

Survey No. 910/4/2/2,
Village-Dokamardi,
Amli, Silvassa
Dadra & Nagar Haveli

VERSUS

C.C.E. & S.T. Vapi

.... Respondent

4th Floor, Adharsh Dham Building,
Opp. Town Police Station, Vapi-Daman Road,
Gujarat

- 1. Excise Appeal No. 421 of 2008 (Harish Arora)**
- 2. Excise Appeal No. 1414 of 2011 (Rohit Kumar Asopa)**
- 3. Excise Appeal No. 1422 of 2011 (Pradeep Lohia)**
- 4. Excise Appeal No. 1423 of 2011 (Gopalji Lal Karn)**

[Arising out of Order-in-Appeal No OIO-11/MP/VAPI/2008 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-Vapi]

[Arising out of Order-in-Appeal No OIO-19/MP/VAPI/2011 passed by Commissioner of Central Excise, Customs & Service Tax, Vapi]

APPEARANCE :

Sh. K. M. Dwivedi, & Sh. H.G. Dharmadhikari, Advocate for the Appellant
Sh. T.G. Rathod, Jt. Commr. (AR) for the Respondent

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

FINAL ORDER NO. A/11535-11539/2019

DATE OF HEARING: 16.04.2019

DATE OF DECISION: 14.08.2019

RAMESH NAIR

These appeals have been filed by M/s Resham Petrotech Ltd, its director Shri Pradeep Lohia, Manager Shri Gopalji Lal Karn, Accounts Officer Shri Rohit Kumar Asopa and Partner of transport firm M/s Bombay Golden (India), Shri Harish Arora against Order-in-Original No. 19/MP/VAPI/2011 dated 30.08.2011 passed by Commissioner of Central Excise, Vapi. The brief facts of the case are that the Appellant, M/s Resham Petrotech are engaged in the manufacture of Polyethylene Sheathing Compound falling under chapter 39 of Central Excise Tariff

Act at their factory located at Silvassa. They are using Polyethylene Granules as basic raw materials which is procured by them from M/s GAIL, Pata and are also availing credit of the duty paid on said raw material. Based upon the investigation, they were issued show cause notice dated 25.11.06 alleging that they have availed cenvat credit of Rs. 1,26,99,671/- during the period August, 2002 to March, 2003 and of Rs. 47,94,058/- during the period Jan,2004 to October, 2004 without receipt of Polyethylene granules in their factory and instead used reprocessed granules in manufacture of their finished goods. The show cause notice relied upon the File No. A/29 seized from factory which showed receipt of accounted as well as unaccounted Reprocessed Granules by the Appellant Unit. Record No. A/9 maintained by Shri Rohit Kumar Asopa, Accountant was also seized from Delhi office which allegedly contains details of accounts between the Appellant Unit and transporter M/s Golden (India) towards transportation of Reprocessed granules. Record named as A/24 written by Shri Rohit Kumar Asopa and alleged to be containing the quantity of Raw material purchased from M/s GAIL during the month of March,2004, the actual receipt of raw material as well as the quantity diverted in open market and equivalent quantity of reprocessed granules replaced as adjustment in place of quantities so diverted was relied upon. It also allegedly contained entries for the period August'02 to March'03 which showed that freight payment was made by M/s Resham through cheque to M/s Bombay Golden and cash receipt from said firm. It was alleged that the said cash receipt is on account of goods which were instead of transportation from GAIL, Pata were sold at Delhi and the differential freight was returned to M/s Resham in cash. Shri Rohit Kumar Asopa's statement was also relied upon wherein he stated that the amount mentioned under cash received was from M/s Bombay Golden due to the fact that goods purchased from M/s GAIL and transported by M/s Golden to Silvassa were instead of transportation to factory were diverted to different places. The Bills of M/s Bombay Golden in said file also has Alphabets the words "S" or "D" written with pencil. Reliance was placed upon statement of Shri Harish Arora, Partner of M/s Bombay Golden to this effect. He also admitted preparing lorry receipts showing the transportation of goods from GAIL Pata to Silvassa and issue of bills to that effect but some goods were diverted and M/s Bombay Golden returned the differential amount in cash. The show cause notice also relied upon the letter of Incharge of

Sales-tax Check Post situated at Pithol, Madhya Pradesh along the Gujarat border indicating the consignments of Polyethylene granules passed through checkpost. The consignments which as per the report of said check post authority did not pass through the Pithol Check Post were alleged to have been not received by M/s Resham and were diverted enroute as the said route was shortest route for transportation from Gail, Pata to Silvassa. Based on above it was alleged that M/s Resham had taken cenvat credit of Rs. 1,96,88,018/- on 3265 MT Polyethylene granules without physical receipt of goods in their factory, from which a cenvat credit of Rs. 1,47,87,800/- has been deducted as the same was already reversed by M/s Resham at the time of sale of said granules. The remaining amount of credit of Rs. 49,00,218/- was alleged to have been wrongly availed by M/s Resham during the period August'02 to March'03 and was proposed to be recovered alongwith penalty and interest.

1.1 A further demand for the period January '04 to Oct. '04 was made against M/s Resham by relying upon the report of the Commercial Tax Officer, Pithol Check Post, Jhabua (M.P) who vide his letter dated 15.09.2006 intimated that only 22 consignments had crossed the Pithol Check Post out of 157 consignments shown to have been received by M/s Resham. Accordingly, demand of cenvat credit of Rs. 1,26,99,671/- was proposed against M/s Resham. A further demand of cenvat credit of Rs. 78,495/- was made on the ground that during the physical stock verification of finished goods and raw materials, a shortage of 8250 kg of polyethylene granules involving duty of Rs.7,84,95/- was found and Shri Gopalji Lal Karn, Manager and Authorised Signatory admitted that the said quantity has been sold in the open market.

1.2 The demands were confirmed by the adjudicating authority vide order dt. 28.02.2008. On an appeal filed by the Appellant before the Tribunal, the case was remanded back vide Order No. A/1831-34/WZB/AHD/2009 dt. 12.08.2009 for De-Novo consideration. The demands were again confirmed vide the impugned order by relying upon the statements and relied upon records. Hence the present appeals by all the Appellants.

2. Shri Dharmadhikari, Ld. Counsel Appearing for the Appellant submits that the impugned case involves the period of August'02 to

March'03 and January'04 to Oct'04. They are manufacturing Sheathing compound which is used by Telecom cable manufacturing companies and is purchased by vendors like Sterlite, UN Cables, Finolex etc. who after conversion of said granules into cable supply it to MTNL, BSNL etc. As per the condition of such supply contracts of Cable manufacturers with M/s BSNL or MTNL, the supplier of raw materials should be the approved by the buyers. The Appellant are approved vendor of BSNL/ MTNL and has got a source approval certificate issued by BSNL, in which there are prescribed quality / specifications of raw material to be used in manufacture of sheathing compounds. He draws our attention to the condition of approval as per which the appellant is not permitted to use re-cycled granules for manufacture of sheathing compounds. He submits that their major supply is to aforesaid cable manufacturers and it is not possible to use any reprocessed granules in manufacture of sheathing compound. In addition, they are also supplying sheathing compounds to other cable manufacturers, for which they also use re-processed / re-cycled granules, as per the pricing requirement of such parties and in the record, the entries showing supply of final product made out of re-processed granules supplied to private telecom suppliers is also appearing.

2.1 That after receipt of virgin or reprocessed granules in their factory, entries are made at various points including in Gate Register and thereafter, the goods are entered into statutory records like RG-23 A Part-I / Part-II and Raw Material Purchase Register. The materials are stored in the godown from where it is issued for production, as per the requirement note. No discrepancy in any such records was noticed or pointed out. The entire Show Cause Notice is primarily based on the report of the Asst. Commercial Tax Officer, Pithol Check-post, who has communicated the vehicle number, which has passed through the check-post. On the basis of such communication, the demand has been made against the Appellant by alleging that the remaining consignments did not pass through the said Check-post. The reason for disallowance as per the adjudicating authority and the show cause notice is that the said route is shortest route and if the vehicle has not passed through the check post, it means that the goods were not transported to factory of M/s Resham and therefore credit on such goods is not admissible to the appellant. The Revenue has relied upon the seized record Sr. No. A/29, which was seized from the Appellant's Delhi office and which contained

details of transportation of goods by M/s Bombay Golden (India) from GAIL. It is alleged that there has been payment of transportation charges to M/s Bombay Golden for period August'02 to March'03 to the tune of Rs. 41,31,793/- and further entry of receipt of Rs. 30,66,235/- as cash from the said transporter. A reference of certain other pages of the said file was given regarding receipt of cash from transporter and transportation of goods from Pata to Delhi and not to Silvassa. Reliance was also placed on the statement of Shri Harish Arora, partner of M/s Bombay Golden (India) wherein he stated that they had issued bills for freight charges from GAIL, Pata upto Silvassa and received entire amount through cheques and returned the differential amount in cash when the goods were un-loaded in Delhi and such amounts were reflecting in the said file.

2.2 He submits that the cash returned by them to M/s Bombay Golden pertained to differential freight on account of consignments in which the raw material was sold as such by the appellant and it is an admitted fact in the show cause notice that the credit of such goods was reversed at the time of sale of raw material. The total goods which were dispatched by M/s GAIL, Pata to the Appellant at Silvassa was 3265 MT, out of which the goods sold at Delhi were 2506 MT. The adjudicating authority, without considering the said submission regarding disposal of the raw material in Delhi, viz-a-viz the reversal of the credit has confirmed the demand which is illegal. The statement of Shri Harish Arora, Partner of M/s Bombay Golden (India) also explained to the above effect but the adjudicating authority did not give any finding or considered the same. The statement of Shri Rohit Kumar Asopa regarding cash receipt from Bombay Golden (India) as appearing in various pages of the seized documents A/29 is also in context of the goods, which was sold as such by the appellant by reversing the credit. He submits that only for the reason that they have purchased re-processed granules, it cannot be assumed that the said quantity has been used in manufacture of their finished product as no evidence of such use has been found from their factory. Shri Pradeep Lohia, director of Appellant concern in his statement has clearly stated that the papers written by Shri Rohit Kumar Asopa were never prepared as per his instruction or were in his knowledge. The papers found from the office were privately maintained by Shri Rohit Kumar Asopa and does not depict the true state of affairs. He submits that only on the basis of papers written by Shri Rohit kumar

Asopa it cannot be concluded that the goods on which credit was availed did not reach the Appellant factory. He submits that the reliance placed by the revenue upon statement of Shri Rohit Kumar Asopa is also not sustainable as Shri Asopa in his cross examination has specifically mentioned that his statement is not voluntary one but he was compelled to write the statement from a copy already made by the DGCEI officials. The said copy was given to him to write down his statement by copying from the same. He was told that time would not permit him to ask questions and to write the statements within one hour. He had to write that he had written the figures as per the dictation of Shri Pradeep Lohia, director of the appellant company. Shri Asopa could not disclose the actual source on the basis of which he had written the figures in a loose paper. In his statement he did not specify for which the concerned figures in the rough sheet pertained. The statement of Shri Asopa has got no evidentiary value. Further his statement stands retracted and it is a settled law that the retracted statement cannot be made basis for making demand against the Appellant.

2.3 Even the transporter Shri Harish Arora's statement is in general. The goods which were not used by the Appellant in their factory and were sold, the credit on such goods was already reversed. As regard reprocessed granules purchased by them, he submits that they were also doing trading of such granules and no evidence of such granules having been used instead of virgin granules has been brought on record. He submits that only for the reason that if the goods did not pass through the Pithol Check Post which allegedly is the shortest route from GAIL, Pata to Silvassa where the Appellant factory is located, it cannot be concluded that the goods did not reach the Appellant's factory. The transporters are at liberty to take any of the route they like.

2.4 The demand for the period January'04 to October'04 are based only upon the communication of Incharge of Pithol Check Post who communicated that the goods did not pass through the said check post. He submits that the adjudicating authority has failed to notice that during such period all consignments were cleared by M/s GAIL on FOR basis and therefore it is clear that the transporters were deployed by M/s GAIL with no involvement of M/s Resham. During this period, no delivery of the goods was taken by the Appellant from M/s GAIL in as much as against central excise invoices, the freight charges were

recovered by M/s GAIL from Appellant. It is not even known as to what is the understanding regarding freight between M/s GAIL and the transporter. Thus it cannot be said that the Appellant had any transaction with the transporter. He submits that for both the periods much reliance has been made on the report of the Asstt. Commercial Officer of Pithole Check-post although no statement was recorded from him but his reports have been heavily relied upon in the show cause notice and mainly on the basis of such report, the demand of duty has been raised. He submits that since only his report was relied upon and no statement was on recorded, hence they had sought cross examination of Shri N.K. Mishra, Asst. Commercial Officer which was denied by the adjudicating authority. This has led to denial of natural justice. When the reports of the Asst. Commercial officers were relied upon in the show cause notice and when the appellant from the very beginning requested for cross examination of the said Asstt. Commercial Officer, in that case the denial of same without any reason is illegal. In such circumstances the communication made by the said officer cannot be relied upon. He relies upon judgments in case of LAKSHMAN EXPORTS LIMITED 2002 (143) ELT 21 (SC), ARYA ABHUSHAN BHANDAR 2002 (143) E.L.T. 25 (S.C.), SWADESHI POLYTEX LTD.2000 (122) E.L.T. 641 (S.C.), RAJENDRA BAJAJ 2010 (253) E.L.T. 165 (Bom.), JHA SHIPPING AGENCY2011 (264) E.L.T. 321 (Cal.), ANIL PANNALAL SAROGI2009 (241) E.L.T. 219 (Tri. - Mumbai) to submit that without cross examination, such report could not have been relied upon.

2.5 Even the reliance placed by the adjudicating authority on communication of the Commercial Tax Officer of Pithole check-post is only assumption as the same has been relied upon without considering the fact that there are other alternate routes available to transport the goods from Pata to Silvassa. The Ld. Counsel takes us through list of 57 invoices and copies thereof showing other check-post stamps evidencing that the goods have been transported through alternate check-posts. Pointing out such instances, he draws our attention to Invoice No. 30304054150 dated 29.6.2004 evidencing LR No. 376244 showing the stamp of Jamli Sendhva Check post to Silvassa annexed to the bill. Similarly he relies upon Invoice No. 30304056249 dated 27.7.2004, which showed transportation of goods from UP to Silvassa via Mandar. In case of Invoice No. 30303067462 dated 31.3.2004 bearing LR No. 332918 showing stamp of Uncha Nagla check-post. He submits that it is

thus absolutely clear that the Pithol check post route is not the only route through which the goods were received by them. Despite several submissions, the adjudicating authority did not grant cross examination of the officer of VAT check post at Pithol, which would have easily shown that there are alternate routes for entering into the state of Gujarat and on the basis of assumption that Pithol route is the only route, the demand cannot be made.

2.6 He also submits that reliance placed upon the diary of the director Shri Pradeep Lohia showing resourcing of re-processed granules is not sustainable as the same has been denied by the director himself in his statement. Even, based on such information, no further investigation was conducted, viz. recording the statement of supplier of re-processed granules and it was assumed that the quantity without any tangible evidence has been procured un-accountedly. For the period January’04 to October’04, in order to show that the Appellant has received and consumed the entire granules including reprocessed granules, accounted, unaccounted granules he has submitted chart to show that they have consumed whole quantity received :

Sr.No.	Accounting of granules	Qty	Remark
a	Opening balance as on 01.01.2004	265	As per cenvat credit register (TG-23 Pt-I)
b	Qty. of virgin granules procured	3858	
c	Qty. of Re-processed granules procured	864	(including un-accounted re-processed granules
d	Less : Removal of input as such	75	
e	Qty. of granules available for production (III+IV+V) less (VI)	4912	
f	Qty. of granules used for mfr/	4776	
g	Closing stock of granules as per book as on 31.10.2004	136	
h	Physical stock as on 27.10.2004 as per panchnama	132	As per para 2.2 of show cause notice at page 26 of Appeal book

2.7 He submits that considering the procurement of re-processed granules, it is clear that all the quantities of virgin granules shown to have been procured in their record was consumed. Further there is difference of only 4 MT between book balance quantity and physical

quantity which is even less than the 1% of the quantity procured and it clearly shows that there has been no diversion of raw material. He submits that there is no evidence for the diversion of material having been sold to other buyers or receipt of the consideration. No buyer of alleged diverted quantity was found. In such circumstances, no demands can be made against the appellant. He also submits that there is no evidence for procurement of replacement of alleged quantity of virgin material by the Appellant. He relies upon orders in case of Himalayan pipe Industries 2013 (293) ELT 739 (TRI), Adhunik Alloys Ltd. 2016 (334) ELT 426 (TRI), G.S Alloys Castings Ltd. 2016 (331) ELT 310 (TRI), Sadashiv Structural P. Ltd. 2017 (357) ELT 834 (TRI), Good Earth Steel Pvt. Ltd. 2018 (9) GSTL 177 (TRI), PeeJay International Ltd. 2010 (255) ELT 418 (TRI) and Mittal Appliances Ltd. 2018 (12) GSTL 297 (MP). He also submits that the shortages of granules in their factory cannot be a ground to allege diversion of the same as there is no evidence of removal. The demand cannot be made on the basis of bald statement of employee.

2.7 Lastly he submits that as per the previous order of the Tribunal, the Tribunal had given its findings on alternate route for the transporters to carry the goods other than Pithol check-post. The Tribunal in reference to existence of 14 invoices with the stamping of the Commercial Check-post other than that of Pithol check-post had instructed verification of same. The adjudicating authority has contended that the stamping is there on 4 invoices, but the same is not legible. He submits that the adjudicating authority at the time of hearing never spelt out that the stamping is not legible on 4 invoices produced by the Appellant. The original invoices were with the Department and the Ld. Commissioner could have easily asked for the said invoices and examined the same. The Tribunal in its earlier order had stated that the correctness of the invoices could be verified by checking up with the transporter or the Commercial Check-post. However, no efforts were made by the adjudicating authority to check the correctness of the stamping on the invoices. The Ld. Commissioner also contended that in 14 LRs, the stamping was very much visible, but the invoices were not produced by the Appellant. He did not observe that the invoices were in possession of the Department, which clearly shows that the impugned order is not correct. During the impugned period of Jan'04 to Oct'04, 57 consignments involving 687.475 MT were transported to Silvassa

through available routes other than Pithol check-post. They have also enclosed copies of 20 invoices and 37 LR's having the stamping of other check-post other than Pithol check-post, along with reply. However, the same was not considered nor the same was discussed in the impugned order.

3. Shri T. G. Rathod Ld. AR appearing for the revenue reiterates the findings of the impugned order. He submits that there was only vague request for cross examination. Hence the cross examination has been rightly denied. He relies upon judgments in case of Pankaj P. Shah 2018 (361) ELT 984 (RAJ.), Harisons Steel P, Ltd. 2017 (354) ELT 442 (BOM.), Lawn textile Mills P. Ltd. 2018 – TIOL – 1924 – HC – MAD- CX, SM Steel Ropes 2014 (304) ELT 591 (TRI) and Umesha Textiles Pvt. Ltd. 2014 (314) ELT 176 (SC).

4. Heard both the sides and perused the case records. In earlier round of hearing, the matter was remanded back by the Tribunal to examine the issue afresh. The diversion of the raw material is based upon the statement of the transporter and the private records seized from the factory and office premises of the Appellant. The papers written by Shri Rohit Kumar Asopa kept in seized records A/29 is alleged to be containing details of payment of transportation charges to the transporter, M/s Bombay Golden (India) and receipt of cash by the appellant from the said transporter. The said papers were found to be written by Shri Rohit Kumar Asopa and as per his statement, it was written on the instruction of the director, Shri Pradeep Lohia. Reliance has also been placed upon the statement of partner of M/s Bombay Golden (India) wherein he stated that the bills were issued for the freight charges from GAIL, Pata to Silvassa and the entire amount was paid in cheque and in case of diversion of goods in Delhi, the cash on account of excess freight was returned back to the Appellant. The bills of the transporter, wherein the notings were made 'D' and 'S', which according to him, stand for delivery or Delhi or delivery at Silvassa and the bills which had noting 'D' pertained to the raw material, which was not allegedly received in the factory of the Appellant.. The show cause notice has relied upon the report of check post Incharge and in case of demand for the period January to October' 2004 the main ground for making demand is such report.

5. We find that the Appellant M/s Resham Petrochem are manufacturing Sheathing Compound for the Telecom companies who in turn are manufacturing Cables to be supplied to BSNL, MTNL etc. For supply of such Sheathing compound, the vendor should be approved by Compound Approval Centre for Telecommunications (CACT). We have seen the approval certificate issued by the Dy. General Manager, CACT, Bangalore to the Appellant and the basis of approval is that the material used in such compound should be Virgin, as per ASTM-D-883. We find that in case of demand pertaining from Aug. 02 to March 03, it is an undisputed fact that the Appellant had reversed the cenvat credit on 2506 MT of raw material cleared as such to M/s R.K. Enterprises at Delhi. Even, the show cause notice has admitted the fact of reversal of the credit. We find that it is an admitted fact that a quantity of 2506 MT of raw material was sold to M/s R.K. Enterprises at Delhi out of the 3265 MT of polyethylene granules alleged to have not been received in the factory. With this back ground we find that the show cause notice has not been able to demonstrate that the cash returned by M/s Bombay Golden to the appellant does not pertain to such clearances.

6. Though in the show cause notice, the adjudicating authority has placed reliance upon the statement of Shri Rohit Kumar Asopa, but we find that during his cross examination, he has stated that the officers asked him to copy the contents of his statement from a computer written paper, which was prepared by the officers themselves and the statement was not voluntary. Even though in his statement, Shri Asopa has stated that the seized records were maintained by him as per the instructions of the director Shri Pradeep Lohia, but we find that Shri Lohia in his statement has refused instructing Shri Asopa of maintaining any records. There is no source document on the basis of which such papers were written by Shri Asopa. Only on the ground that the records maintained by Shri Asopa of which no source is ascertainable it cannot be concluded that the Appellant has used reprocessed granule in place of virgin granules for production of Sheathing Compound. No examination of final product manufactured by the Appellant has been done to canvass the allegation that reprocessed granules has been used. The show cause notice could have easily quantified the quantity cleared to the vendors of M/s BSNL/ MTNL and other vendors which require use of only virgin material in manufacturing sheathing compound. The other clearances as per the Ld. Counsel in case where the reprocessed granules has been

consumed, as per the pricing requirement of such parties and in the record, the entries showing supply of final product made out of re-processed granules supplied to private telecom suppliers is also appearing. In such case it was easily ascertainable the extent of use of reprocessed granules. No such exercise has been undertaken by the revenue.

7. We find that though the allegation is of diversion of granules, but no investigation has been made from the transporter, truck driver as to where the said goods were diverted. Even Shri Asopa who had written/maintained the records on the basis of which the allegation of non receipt/ diversion of granules was made was not questioned about the recipient of such goods. Further it is nowhere appearing in the show cause notice as to how the consideration of such alleged diverted goods were received. The statement of Shri Asopa stands retracted by him during his cross examination and hence cannot be relied upon. Moreover the records maintained by him are in isolation and hence not reliable.

8. The allegation of the show cause notice of non receipt of granules for the impugned order is also based upon the report of check post authority. Mainly for the period Jan.'04 to Oct.'04 the sole basis of allegation is communication / report of the Commercial Tax Officer located at Pithol check post, which falls at M.P. – Gujarat route. As per the report of the check post authorities, the impugned consignments did not pass through the said check post and, therefore, in the show cause notice only those consignments were said to be received by the appellant, which had stamping at the Pithol check post. We find that the Appellant had produced the sample invoices along with the print out of Google map, which shows that there is a road for transportation of goods through Jamli, M.P. to Silvassa; the other route is through Mandar, Rajasthan and third route is Uncha – Nagla from Gail, Pata plant to Silvasa factory of the Appellant. The show cause notice and the impugned order has held that since the route passing through Pithol check post is the shortest route, hence the vehicles not passing through the said route cannot be said to have transported goods to Appellant's factory. We are of the view that only on the basis of such assumption, it cannot be concluded that since the vehicles did not pass through said check post and hence did not reach Appellant Unit. No statements of even a single driver has been recorded. Moreover it is not necessary that

the driver should take only shortest route. It is normal for the vehicle driver to by pass the route where there is possibility of long waiting in passing through check post or for different logistic reason. We find that no investigation or statement of any of the truck drivers has been recorded to show that the goods were diverted elsewhere. The Ld. Counsel has shown us the alternative routes and we find that in some of these routes there is not much bigger difference in road distance in comparison to route on which Pithol Check post lies. The Ld. Counsel has also shown us that during the impugned period of Jan.'04 to Oct.'04, 57 consignments involving 687.475 MT were transported to Silvassa through available routes other than Pithol check-post. The Appellant has enclosed copies of 20 invoices and 37 LRs having the stamping of other check-post other than Pithol check-post along with their reply which was not even considered or discussed in the impugned order. In such case we do not find any substance in the contention of the show cause notice that if the goods has not been transported through shortest route, the receipt of goods by the Appellant cannot be said to have taken place.

9. The Show cause notice, placed reliance upon the report of the check-post in- charge. The Appellant had sought cross examination of the check post in-charge to show that there are other alternate routes from GAIL, Pata to Silvassa through which the goods are also transported to Silvassa. However, the adjudicating authority denied the request of the appellant without assigning any reason. We are of the view that when the show cause notice has relied upon the report of check post officer, in that case the Appellant should have been granted cross examination of said person. Our views are based upon the judgments of Apex Court, High Court and Tribunal in case of LAKSHMAN EXPORTS LIMITED 2002 (143) ELT 21 (SC), ARYA ABHUSHAN BHANDAR 2002 (143) E.L.T. 25 (S.C.), SWADESHI POLYTEX LTD. 2000 (122) E.L.T. 641 (S.C.), RAJENDRA BAJAJ 2010 (253) E.L.T. 165 (Bom.), JHA SHIPPING AGENCY 2011 (264) E.L.T. 321 (Cal.). Thus in such case when no cross examination of person whose report is being relied upon has been provided, it cannot be held that the Appellant did not receive the said goods. Thus merely on the basis of the report of the check-post authorities, it cannot be concluded that the goods were not transported to the appellant factory at Silvassa. We also find that the director Shri Pradeep Lohia in his statement had also stated that they were doing

trading of re-processed granules. He also has refuted the statement of Shri Asopa and transporter. Further in his statement he also clearly stated that he has never instructed Shri Asopa to maintain any such documents on which the department has placed its reliance. In such case when the statement of Shri Asopa stands retracted, the same cannot be relied upon. Further in case of demand for the period Jan'04 to Oct'04 we find that the goods were sold and cleared by M/s GAIL to M/s Resham on FOR basis and the transporter was deputed by them. The adjudication has clearly overlooked this vital aspect. It was GAIL who would have decided the transporter to transport the consignments to M/s Resham and the Appellant has no control over deciding any transport. When the prices were on FOR basis and the transporter was appointed by M/g GAIL, it cannot be said that the Appellant could have diverted any goods by understanding with the transporter. Thus in absence of evidence of diversion of material the demand of cenvat credit is not sustainable as held in various following cases:

In case of Himalayan pipe Industries 2013 (293) ELT 739 (TRI), the Tribunal held as under:

"5. As regards the Revenue's appeal, we find that Commissioner has extended the benefit to the assessee on the basis of ST XXVI-A form produced by them during the course of adjudication. Revenue's contention is that same do not belong to the virgin raw materials inasmuch as, as per the statement of one Shri Rajender Thakkar, authorized signatory, they were also receiving the recycled HDPE granules. They were getting reprocessed second HDPE granules. The assessee's contention is that all the receipts are from virgin HDPE granules manufacturers and such submission cannot be relied upon as documentary evidence produced by the assessee. We agree with the said contention of the assessee. There is no documentary evidence on record to reveal that what was received by the manufacturer is reprocessed granules and not the virgin granules as reflected in the records. We accordingly, reject the Revenue's appeal."

In case of Adhunik Alloys Ltd. 2016 (344) ELT 426 (TRI), Tribunal passed the following order:

"7. On careful consideration of submissions by both the sides, I find that the case of the revenue is that the appellant have not received inputs namely Bura scrap and furnace oil in their factory premises at all. For denial Cenvat credit on Bura scrap, I find that the appellant has already reversed the Cenvat credit during the course of investigation and have not contested on merits. In that circumstances, the Cenvat credit on Bura scrap is denied. Consequently, the appellant is liable to pay duty thereon alongwith interest. As appellant has already reversed the Cenvat credit therefore, appellant is required to pay interest for the intervening period within 30 days from today."

8. I also find that there was some shortage of the finished goods found during the course of investigation. Considering the fact that the appellant has already paid duty thereon and the quantity found short is a meagre one therefore the same is confirmed.

9. For denial of Cenvat credit on furnace oil, the case of revenue has relied on the following evidences.

- A. no entry of vehicle no. at ICC.
- B. The statement of transporter/suppliers and
- C. the expert opinion of NISST

10. The case of the revenue is that the furnace oil never crossed the border of Punjab as the vehicle no. was not found entered at ICC. The purpose of setting of ICC is to establish that the goods which are entering in the Punjab have suffered VAT/C. Sales Tax/Sales Tax. This fact has been certified by the concern Excise Officer Ludhiana by certifying that the appellant has suffered CST/ST/VAT on the invoices in question. Therefore, merely, the vehicles in question were not entered at ICC does not disentitle to the appellant to avail Cenvat credit on the inputs in question. As the appellant has produced the certificate issued by Excise & Taxation Officer of Punjab therefore, the appellant cannot be denied Cenvat credit merely, on the ground that vehicle number has not been entered at ICC. I further find that in the case of Hitkari Industries Ltd. - [2008 \(226\) E.L.T. 583](#) (Tri.-Del.) and Himalayan Pipe Industries - [2013 \(293\) E.L.T. 739](#) (Tri.-Del.) this Tribunal has also observed information revealed from Sales Tax Department are not reliable as the appellant has produced certain documents which show with the transaction have been declared by the appellant. Admittedly, in the case the appellant has produced the certificate issued by the Excise Taxation Department, certifying that these goods have been received in their factory, therefore, the Cenvat credit cannot be denied.

11. The revenue has also relied on the various statements of supplier/transporters and also relied on the statement of Parveen Kumar Garg of M/s. LOT initially made on 25-2-2005. The same was retracted by him from next date 26-2-2005 which was despatched on 28-2-2005 thereafter, various summons have been issued to Sh. Praveen Kumar Garg but Sh. Praveen Kumar Garg never appeared nor the cross-examination of Sh. Praveen Kumar Garg was granted in that circumstances, statement of Sh. Praveen Kumar Garg have no evidentially value in the light of the decision in the case of M/s. Vishnu & Co. Pvt. Ltd. (Supra) wherein the Hon'ble High Court of Delhi has observed as under :

38. In the present case it needs to be first observed that there was no confession as such by any of the noticees as to their involvement in the activities alleged against them in both the SCNs. The Department relied on the statements made by third parties including transporters, agents, and their employees. Where such statements are subsequently retracted or resiled from, it becomes necessary for the department to produce other evidence which is of an independent nature which corroborates the retracted statements.

12. I also find that some kachaa ledger was also recovered from Sh. Praveen Kumar Garg, the same cannot be relied upon as evidence in the matter as these records have been recovered from third party whose cross-examination has not granted to prove the truth, therefore these Kachaa Ledger is not admissible as evidence. During the course of argument, the Ld. AR submits that M/s. Ritco Kirti Associate (P) Ltd. has produced for cross-examination. In fact the initially statement of Sh. Sanjeev Kumar of M/s. Ritco Kirti Associate (P) Ltd. was recorded but for cross-examination, Sh. Mukesh was produced. As the person who made the statement was not produced, the cross-examination of the third person is not relevant to reveal the truth. In that circumstances, as the revenue fails the produce Sh. Sanjeev Kumar for cross-examination the statement of M/s. Ritco Kirti Associate (P) Ltd. is not admissible at all.

13. Further, I find that the revenue has relied on the opinion obtained from the NISST to the extent that furnace oil is not required for the appellant for operation of their furnace or induction furnace. In fact the person gave the opinion have never visited the factory premises to the appellant and made a general statement. On the other hand, the appellant has produced the certificate issued by the Chartered Engineer who has physically visited the factory and stated that furnace oil is required for the running of induction furnace of the appellant. The said Chartered Engineer was not cross-examined by the revenue, on the contrary, he affirmed the contents of the certificate issued by him therefore the said certificate is having evidential value. In the absence of any contrary evidence produced by the revenue, the certificate issued by the Chartered Engineer who has visited the factory is admissible. Further, I find that during the course of investigation the furnace oil was found in stock of the appellant. The allegation of the revenue that the furnace oil is not required for manufacturing by the appellant but the same was available in the factory premises of the appellant, in that circumstances, the revenue is failed to prove their case by cogent evidence to show that the furnace oil has not required by the appellant.

14. In view of the above observations, the case of the revenue is not sustainable in the eyes of law as the same is lacking positive evidence to deny Cenvat credit on furnace oil.

15. Input shell, the following order is passed

- (i) Cenvat credit on Bura Scrap denied consequently the duty on Bura Scrap along with interest is payable,
- (ii) Duty on shortage of M.S. Ingot is confirmed,
- (iii) Cenvat credit on furnace oil is allowed, and
- (iv) No penalty is imposable on the appellants."

In case of G.S Alloys Castings Ltd. 2016 (331) ELT 310 (TRI), the Tribunal held as under:

"8. Even if I do not take into consideration the affidavit of Shri D. Srinivasa Rao in terms of the earlier order of the Tribunal, I find that the evidence collected by the Revenue is only in the shape of statements of third party. It is well settled that in the case of clandestine allegation, the onus to establish the same is on the Revenue, which is required to be satisfied by production of sufficient, tangible and positive evidence. The uncorroborated statements of third party cannot be adopted as an evidence, without corroboration from an independent source though such statements can be of some value but cannot be solely relied upon for the purpose of holding against the assessee.

I also note that the Revenue has not bothered to make any investigation from the transporters even though their names were available in the respective invoices. They have not found out whether the vehicles number mentioned in the invoice, have been actually used for the transportation of the goods or not. The appellants in the statement recorded during the investigation had clarified their stands that they have actually received the materials in question and any documents recovered from the premises of third party cannot be adopted to hold against them.

Even otherwise, the Revenue is silent on the issue that if the appellant has not received the materials in question, how have they manufactured the corresponding final products. It is not the Revenue's case that they have procured the raw material from any other alternative source. It is not only impractical but impossible to manufacture the final product

without raw material in question. The appellants having reflected the raw material in their Cenvat credit account and having shown the utilization of the same, heavy duty stands cast on the Revenue to establish that such raw material was not the one which was covered by invoice in question and stands procured by the assessee from any other source. There is neither any allegation much less any evidence to reflect upon the procurement of raw material from any outside source.

9. *In view of the above, I find no merits in the Revenue's stand. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief."*

In case of Sadashiv Structural P. Ltd. 2017 (357) ELT 834 (TRI), Tribunal passed the following order:

"6. *On examination of the records and submissions made by both the sides, I find that in this case an audit took place and it was presumed by the department that the respondent No. 1 shown as burning loss to the tune of 5.62% to 5.68% respectively during the periods 2006-2007 to 2007-2008 and no statement was recorded of any person to explain such shortage. No effort was made to examine whether during the course of manufacture, any waste and scrap arose or not? Further, when the respondent No. 1 explained that they have cleared waste and scrap on payment of duty, no effort was made to ascertain the truthfulness on the fact. No effort was made to visit the premises of respondent No. 2 to ascertain that the respondent No. 2 has received waste and scrap or not. The whole investigation/audit remained faulty and the show cause notices were issued to both the respondents in the wake to allege that respondent No. 1 has cleared the goods clandestinely. In the show cause notice it was not considered that when the respondent No. 1 has cleared waste and scrap on payment of duty therefore, on such quantity of waste and scrap, further, duty was not required to be demanded.*

7. *Further, I find that during the course of adjudication also there was no application of mind by the adjudicating authority by not considering that the duty paid on waste and scrap by the respondent No. 1 for demanding duty on account of clandestine removal of goods. The said adjudication order was challenged by the respondent before the Id. Commissioner (Appeals) who in the absence of any corroborative evidence produced by the Revenue had relied on the explanation given by the respondent in reply to the letter of the range superintendent and it is the positive evidence on record that waste and scrap has been cleared by the respondent No. 1 on payment of duty. In these circumstances, the Id. Commissioner (Appeals) has rightly set aside the adjudication order.*

8. *During the course of argument the Id. AR relied on various jurisdictional pronouncements Gulabchand Silk Mills Pvt. Ltd. (supra). The facts of the said case are not relevant to the case in hand as in that case the vehicle carrying finished goods was intercepted and it was found that vehicles carried excess goods on which duty burden was not discharged. Further, in the case of Sita Cement Ltd. (supra) it was a case wherein during the course of road patrolling, Commissionerate intercepted three trucks and the driver of the said trucks produced duplicate copies of three challans and invoices showed the PLA debit entry no. giving the impression that the duty has been paid by the manufacturer through PLA but during the cross-examination it was found that no duty was paid by the assessee. Further, relying in the case of N.P. Agro (supra), I find that it is a case of seized goods during the course of investigation and on seized goods no explanation was given by the assessee. The said case laws are not applicable to the facts of the case in hand. As in this case neither the goods were seized nor goods were intercepted. It is a case of audit and on the basis of audit it was presumed that respondent No. 1 have showed excess burning loss during the course of manufacturing and it was further presumed that the*

respondent No. 1 cleared goods clandestinely without payment of duty. Further, it is the contention of the respondent No. 1 that they have cleared waste and scrap generated during the course of manufacture of finished goods which was cleared on payment of duty and the said fact was also not examined. Accordingly, on the basis of assumption and presumption it was alleged that respondent No. 2 has not received the goods. Accordingly, I find that whole investigation is faulty and the show cause notices were issued to the respondent without producing any evidence on records.

9. *In that circumstances, I do not find any infirmity in the impugned order. The same is upheld. Consequently, the appeals filed by the Revenue are dismissed."*

In case of Good Earth Steel Pvt. Ltd. 2018 (9) GSTL 177 (TRI), Tribunal passed the following order:

"5. *Having considered the rival contentions and on perusal of the records, I find that the Adjudicating Authority has failed to follow the directions given by Id. Commissioner (Appeals) in the earlier round of litigation, wherein it was directed to produce the persons whose statements have been relied upon by Revenue and also the persons who had given contradictory statements, for their cross-examination in the proceedings. I find that the Adjudicating Authority failed to exercise powers vested in him for the purpose of ensuring the attendance of witnesses. From the Order-in-Original, I find that the Id. Adjudicating Authority have recorded that the respondents prayed for cross-examination of five persons namely; Shri Lalit Kumar Sharma, Proprietor of Bhawna Steels, Shri Vijay Sahni, Proprietor of M/s. V.K. Enterprises, Ghaziabad, Shri G.K. Bansal, Director of Bansal Structurals Pvt. Limited, Ghaziabad, Shri H.A. Khan, Superintendent (Preventive), Central Excise, Division-III, Kanpur & Shri N.K. Das, Superintendent, Central Excise, Kanpur. Accordingly, the Adjudicating Authority issued summons fixing 10-4-2008 for cross-examination and none appeared on the said date 10-4-2008. Then another date was fixed on 13-5-2008, for the above said persons to appear. On the said date two persons namely; Shri H.A. Khan, Superintendent (Preventive) & Shri N.K. Das, Superintendent, appeared for cross-examination. Shri Amit Awasthi, Counsel for the party/respondents had put questions to the said witnesses and thus cross examined them. It is explained by the Id. Counsel for the respondent that these are the formal witnesses who prima facie supported the relied upon documents, the fact of recording of statement etc. in the search/investigation proceedings. The Counsel for the respondents reiterated the request for cross-examination of Shri Lalit Kumar Sharma, Shri Vijay Sahni & Shri G.K. Bansal. Another date of hearing in the matter was fixed on 25-6-2008 and in this regard, summons were issued to them and none of the persons came to attend the cross-examination on the scheduled date. On further request by the counsel for the respondent, date of hearing be fixed on 20-7-2008 to cross-examine also one, Shri Shashi Shekhar, SIO, DGCEI, Kanpur, the main Investigating Officer in the proceedings. The next date fixed on 29-8-2008 on which date the aforementioned three persons were also summoned. On 29th August, 2008, the counsel for the assessee sought adjournment by the previous letter dated 11-8-2008. Thereafter, another date was fixed on 23-10-2008. Summons was served on Shri G.K. Bansal & Shri Vijay Sahni by the Officers of the Revenue. However, summons to Shri Lalit Kumar Sharma, Proprietor of Bhawna Steels, could not be served inasmuch as the firm was lying closed. Shri Vijay Sahni did not appear on the date fixed. Shri G.K. Bansal, Director of Bansal Structurals Pvt. Limited, Ghaziabad, acknowledged the receipt of summons, stated that as he is recuperating after surgery hence, is unable to appear on the said date 23rd October, 2008. Shri Shashi Shekhar, SIO, DGCEI, Kanpur appeared for cross-examination but counsel for the party did not come to attend and had sent request*

for adjournment, on medical grounds. I find that the Adjudicating Authority has failed to follow the directions of the Id. Commissioner (Appeals) to ensure the attendance of the witnesses in spite of all the powers of ensuring attendance of witnesses as are provided in the Code of Civil Procedure, 1908 are vested in the Adjudicating Authority. It is further matter of fact on record that the respondents have manufactured final products, out of the raw materials alleged to be not received, and removed the finished products on payment of duty and further filed tax returns for the same, and such returns are not questioned by the Revenue. I further find that the Revenue have failed to establish the source of raw material, in the absence of non-receipt of inputs on which Cenvat credit was taken, leads to the conclusion that the entire case of Revenue is on the basis of presumptions. I, further, find that the Id. Commissioner (Appeals) have recorded that the payments for purchase of raw materials have been made by cheques. Further, there is no allegation that the payments made by account payee cheques to the suppliers have been received back by the respondent. Further, none of the Directors or employees have admitted about non-receipt of inputs covered by the invoices doubted by the Adjudicating Authority. In view of the aforementioned findings and conclusions, I find that the appeals of Revenue are not tenable. Accordingly, I dismissed the appeals of Revenue. The respondent-assessee shall be entitled to consequential benefits, if any, in accordance with law."

In case of PeeJay International Ltd. 2010 (255) ELT 418 (TRI) the Tribunal held as under:

"14. *Merely because the numbers and dates of LR's and GR's in the statement of the representatives of the manufacturer of the inputs and the representative of the dealers as well as of the transporters from the manufacturer of inputs to the dealers tally, that by itself, will not be a conclusive and satisfactory evidence about diversion of the inputs by the respondent in the open market, in the facts and circumstances of the case. It is not in dispute that the dealers as well as the respondents both are having their establishment in the District of Ludhiana. It is not in dispute that the statutory records maintained by the respondents do not disclose absence of receipt of such inputs by the respondent in their factory. It is not in dispute that the records maintained by the respondents were never doubted by the department. On the contrary, the same were verified and confirmed. In these circumstances, in the absence of cogent evidence about the clandestine disposal of the inputs without utilization thereof in the manufacture of the final product by the respondent, we fail to understand as to how the demand in relation to the amount over and above Rs. 44,09,228/- can be sustained.*

15. *It is also sought to be contended that the statements which have been referred to in the show cause notice should be considered as the conclusion proof of the charge against the respondents since those statements were never retracted by the deponent. As already noted above, even assuming that what has been stated by the dealers in their statements to be the whole truth, that itself, in the absence of proper co-relation being established between the inputs which were delivered and received by the dealers and the final product which disclose absence of PFY element, it is difficult to establish the contention that there is any cogent evidence in relation to the charge against the respondents."*

In case of Mittal Appliances Ltd. 2018 (12) GSTL 297 (MP). the Tribunal held as under:

"4. *Considering the aforesaid, the Commissioner vide order dated 6-5-2010 dropped the demand. The order was assailed in appeal before the Learned Tribunal. On due consideration of the material evidence which has come on record the Tribunal came to the conclusion that no case is made out to reverse the findings recorded by the Commissioner and upheld the order and dismissed the appeal. Relevant Paragraph Nos. 4 to 6 reads as under :-*

"4. The Cenvat credit availed by the appellant was sought to be denied mainly on the basis of certain irregularities alleged with reference to transportation and non-existence of evidence for transportation of duty paid inputs to the premises of the respondent. The dispute relates to 18 invoices. The respondent claims that these raw materials were actually cleared and received from M/s. Inter Metal Trade Ltd. and M/s. Indo Micro Nutrients Pvt. Ltd. of LR's covered by proper invoices. We have perused the impugned order carefully.

5. The reasons given by the Commissioner to drop the demand is summarized by him as below :-

a. The show cause notice does not deny removal of goods from the factory of M/s. Indo Micro Nutrients and M/s. Inter Metal. Nothing has been brought on record to show as to what happened to the goods which are alleged to have not been transported in the trucks in question.

b. It is further noticed that nothing objectionable has been mentioned in the panchnama of search dated 12-1-2007 at the factory premises of M/s. Inter Metal and M/s. Indo Micro Nutrients in respect of the stock of finished goods/inputs.

c. Nothing has been brought on record to show the place to which the goods were sent on payment of duty after removal from the factory of the supplier.

d. Further, the case records are silent on the points that when the trucks in question were not used for transportation then what were the vehicles in which the said goods were transported and to what destination.

e. No discrepancy in the stock of raw material or finished goods was noticed in the factory of M/s. MAL, Nothing has been brought on record to show as to how M/s. MAL produced their final products in the event of not having received the inputs in their factory.

f. It is noticed that M/s. MAL have paid the amount for the purchase of inputs to M/s. Indo Micro Nutrients and M/s. Inter Metal by crossed cheques/DDs. In the event of not having received any inputs, nothing has been brought on record to show as to what happened to the amount so paid by M/s. MAL.

g. M/s. Sujoy Transport Company which later became M/s. Saral Logistics Pvt. Ltd. had four offices. But the investigation did not go through the records of other offices other than located at Sagore Kuti Chauraha.

6. The appeal by Revenue relies on the submission of Shri Atlant Dwivedi Proprietor of M/s. Sujoy Transport Company. We find that the submission is based on records mentioned at one of his offices situated at Sagar Kuti Chauraha. The original authority has recorded that vehicles which transported the duty paid inputs were deployed by Shri Ravikant Dwivedi Director of M/s. Saral Logistics System Pvt. Ltd., from his office situated in Rama Chauraha. The question regarding the transportation of raw material has been discussed at length by the original authority (Paras 23, 24 of the impugned order).

5. *On due consideration of the aforesaid so also the argument advanced by the Counsel for the parties, we are of the view that there is no material to reverse the findings of fact recorded by the CESTAT and Commissioner. No substantial question of law arises in this appeal."*

10 We also find that in earlier round of appeal, the Tribunal had directed to re-examine the statement which was not done by the adjudicating authority. The statement of Shri Rohit Kumar Asopa stands retracted by him and the director of the appellant, Shri Pradeep Lohia, has refused diversion of goods, as alleged in the show cause notice. Moreover, in absence of any investigation to identify the buyer of the diverted material and receipt of consideration by the appellant company, we are of the view that merely on the basis of transporter's statements or the private records, it cannot be concluded that the appellant, M/s Resham Petrochem has diverted the goods. Thus the demand does not sustain.

11. In case of demand of Rs. 78,495/- we find that except arriving at shortage no evidence of removal of goods has been relied upon. The statement of Gopalji Karn, Manager and Authorised Signatory stating removal of goods is not supported by any evidence. No buyer of such goods has been shown or its transportation evidence is on record. Also no consideration has been shown to have been received on account of such alleged removal. In such case we do not find any reason to make demand from M/s Resham.

12. As per our above discussions and findings, we find that the department could not establish the non receipt of inputs beyond doubt to uphold the impugned order. We thus set aside the impugned order. The appeals are allowed with consequential reliefs, if any.

(Pronounced in the open court on 14.08.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)