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

REGIONAL BENCH - COURT NO. 3

Excise Appeal No. 1406 of 2011

[Arising out of Order-in-Original No. OIO-11/BRC-I/MP/2011 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

M/s Dhariwal Industries Ltd. .... **Appellant**
National Highway No. 8, At-Fazalpur, Post-Sankarda,
Vadodara,Gujarat-391350

VERSUS

C.C.E. & S.T. Vadodara-i .... **Respondent**
1st Floor, Central Excise Building,
Race Course Circle,
Vadodara,Gujarat-390007

WITH

1. **Excise Appeal No. 1358 of 2011 (Ajit Baburao Jain)**
2. **Excise Appeal No. 1359 of 2011 (Ashok Udhav Patil)**
3. **Excise Appeal No. 1360 of 2011 (Vinod Hiralal Shimpi)**
4. **Excise Appeal No. 1361 of 2011 (Jeevan Agencies)**
5. **Excise Appeal No. 1362 of 2011 (Parthi Distributors)**
6. **Excise Appeal No. 1363 of 2011 (Vinayak Agencies)**
7. **Excise Appeal No. 1364 of 2011 (Bagai Golden Transport Comp)**
8. **Excise Appeal No. 1365 of 2011 (Sarco Roadlines Pvt. Ltd.)**
9. **Excise Appeal No. 1371 of 2011 (Rasiklal M. Dhariwal)**

[Arising out of Order-in-Original No. OIO-11/BRC-I/MP/2011 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

APPEARANCE :
Sh. Mayur Shroff, Advocate for the Appellant
Sh. L. Patra., Assistant Commr. (AR) for the Respondent

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

FINAL ORDER NO. A/ 11918-11928 /2019

DATE OF HEARING: 08.08.2019
DATE OF DECISION: 15.10.2019

RAMESH NAIR

The present appeals have been filed, against Order-in-Original dt. 07.09.2011 passed by the Commissioner of Customs & Central Excise, Vadodara – I, by M/s Dhariwal Industries Ltd. (M/s DIL), Shri Ajit Baburao Jain, CEO of M/s DIL, Shri A.U.Patil Factory Manager of M/s DIL, Shri V.H. Shimpi Storekeepr of M/s DIL, M/s Jeevan Agencies, Ms Parthi Distributors, M/s Vinayak Agencies, M/s Bagai Golden Transport, M/s Sarco Roadlines, Shri Rasik M. Dhariwal. Since Shri Rasik M Dhariwal had expired during pendency of the appeal, the appeal filed by him stands abated. The brief facts of the case are that the Appellant M/s Dhariwal Industries Ltd. (DIL) are engaged in manufacture of Pan Masala Gutka (PMG) in 2 gms and 4 gms pouches. They were issued show cause notice dt. 06.02.1995 alleging that during search at various premises, it was found that they have not properly accounted the receipts of various packing material and finished goods in their records and therefore the goods found at factory in Dashrath, Baroda and Godown situated at Jasubhai Fulabhai Godown at N.H. No. 8, Dashrath, Baroda were seized. Also finished goods were seized from Vinayak Agencies, Jodhpur and Jeevan Agencies, Raipur. Search was also conducted at transporters premises.

1.1 During the period 01.04.94 till 11.08.94 the Appellant have received 51,413.47 Kgs of 2 gms PLR and 10,145 Kgs of 4 gms PLR. Out of the above quantities 10,020.551 Kgs of PLR was found in factory and 19,669.351 Kgs was found at Dashrath Godown. Both the quantities were put to seizure.

1.2 The officers conducted trial to arrive at average consumption of PLR (Printed Laminate Roll) for manufacture of 1, 2 and 4 gm Pan Masala Gutka pouches. On the basis of trial run so conducted it was contended that out of roll of PLR of gross weight of 1490 gms and tare weight of 290 gms. i.e net weight of 1200 gms of 2 gms PLRs, 2601 pouches of 2 gms PMGs. were manufacture. The average consumption of PLR for one 2 gms PMG pouch works out to 0.46 gms approximated to .5 gms. Similarly the average consumption of PLR for one 4 gms PMG Pouch was worked out to 0. 5 gms. The similar trial run was also carried out at Ghodnadi, Sirur factory for which separate show cause notice was issued. In respect of Sirur factory, the average consumption of PLR for one gms PMG Pouch and one 4 PMG pouch was worked out to 0.38 and 0.452 gms after considering normal wastage.

1.3 In case of Appellant Unit, based on trial run the show cause notice alleged that from the receipt quantity of 30779.568 Kgs of 2 gms PLR and 1089 Kgs of 4 gms PLR the Appellant has manufactured 15389.784 boxes (61,59,136 pouches) of 2 gms and 871.2 boxes (21,78,000 pouches) of 4 gms. The Appellant has recorded production of 6019 Boxes of 2 gms PMG and 562 Boxes of 4 gms PMG in RG 1 Register. 4,95,000 pouches of 2 gms were seized during the search on 13/14.08.94. Thus the remaining production of PMG which was not recorded by the Appellant was removed clandestinely without payment of central excise duty. It was also alleged that after considering the receipt, stock and consumption of inner printed carton, there appears to be shortage of 1,85,370 Nos. of 100 gms and 9,750 Nos. of 200 gms inner printed cartoon during the impugned period i.e 01/94 to 13/14.08.94.

1.4 It was further alleged that purchase invoices and purchase order seized from Baroda factory shows that M/s DIL has received 31 consignments of inner printed cartoon from various suppliers such as Deek Printers, Ahmedabad, M/s Deek Printers Pvt. Ltd, Ahmedabad and M/s Gaurang Thakore & Co., Ahmedabad, but receipt of only 19 consignments was shown in RG23A Part I register. On the basis of LRs/ register of transporter M/s Bagai Golden Transport/ Sarco Roadlines and Sudhir Roadlines, it was alleged that Appellant Unit has cleared 17 consignments of PMG out of which they have paid duty only on 9 consignments which were booked in their own name and the rest of the consignments booked on the name of other consignors were cleared without payment of duty. During panchnama at Vinayak Agencies 27 carton of PMG were found without any identification marks and numbers on them and the same were detained. The invoice no. 50 dt. 29.07.04 having serial no. 376 to 425 was produced by Shri Mohan Kumawat, Proprietor of Vinayak Agencies. From Jeevan Agencies, Raipur premises 96 cartons of 4 gms PMG and 57 cartons of 2 gms PMGs and 10 packets (inner printed cartons) of 4 gms PMGs were found on which there was no identification marks and no duty paying documents could be produced.

1.5 The show cause notice alleged that the co-appellants in their statements accepted the clandestine removal of goods. Also that the transporter also accepted that the goods not consigned in the name of Appellant were PMGs. It was alleged that the Appellant unit has not accounted for all the receipts of the inner printed cartons in statutory records and also received inner printed cartons without accompanying bills or invoices; not followed the proper procedure for removal of modvatable inputs from factory; not accounted for the entire production of PMG in their record and had cleared unaccounted PMG valued at Rs. 2,77,87,054.86 A duty demand of Rs. 1,38,93,527/- was proposed against Appellant; a duty demand of Rs. 10,32,640/- was proposed on ground that the Appellant has cleared PLR (input) as such to their go-down; demand of duty of Rs. 5,43,750/- was made on the ground that they have cleared consignments clandestinely by booking consignments through Sarco Roadlines, Baroda under bogus consignor and consignee names. It was also proposed to confiscate the goods viz. Packing material and gutka pouches in strips seized from factory valued at Rs. 29,19,368.93 under Rule 173Q; confiscate the PLR seized from godown of Appellant; confiscate the finished goods viz. Manikchand PMG valued at Rs. 4,36,860/- seized from M/s Jivan Agencies, Raipur and valued at Rs. 1,17,450/- seized from Vinayak Agencies, Jodhpur; to impose penalty under Rule 173Q; to seize the property used in alleged clandestine production. Penalty was also proposed against Co- Appellants under Rule 209A.

1.6 The proposals made in the show cause notice regarding duty demand, penalties and confiscation of goods were confirmed vide adjudication order dt 13.05.99. Also the show cause notice issued to Shirur unit on same grounds was also decided wherein the adjudicating authority had dropped the part demands.

1.7 Aggrieved the Appellants in both the case filed appeal before Tribunal. The revenue also filed appeal against the part dropping of demand in case of Shirur unit. Vide common order dt. 28.05.2004, the Tribunal set aside the demands on unaccounted production in case of both the units. In respect of demand of Modvat credit and violations and confiscation of Pan Masala and PLR seized and penalty on confiscated goods, the case was remanded back to the adjudication authority. The department appeal in respect of Shirur Unit was dismissed. Vide Order dt. 07.06.2005 the matter was readjudicated and a demand of Rs. 10,32,640.92 and Rs. 5,43,750/- was confirmed against the Appellant alongwith fine and penalty. The seized goods were also ordered for confiscation. Meanwhile against the Order dt. 28.05.2004 of the Tribunal, the revenue filed appeal challenging the setting aside of demands. The Hon'ble High Court vide order dt. 06.02.2009 remanded back the matter with the observation that the Tribunal may pass appropriate order untrammeled by the findings recorded by it in order dt. 28.05.2004. The Appellant against the Order-in-Original dt. 07.06.2005 had filed appeal before Tribunal. The revenue also filed miscellaneous application for deciding matter relating to demand of duty as per direction of the Hon'ble High Court order dt. 06.02.2009 but the same was rejected by the tribunal. The Tribunal vide order dt. 15.06.2010 remanded the whole matter back to the adjudicating authority to decide the issue afresh. Resultantly vide impugned order dt. 06.09.2011, the demands as proposed and penalties against the Appellant were confirmed. Hence the present appeals by the Appellant Unit and Co-Appellants.

2. Shri Mayur Shroff Ld. Counsel appearing for the Appellants submits that the impugned order has been passed by overlooking the facts. He submits that duty demand of Rs. 1,38,93,527.43 has been made on the basis of estimated production arrived at on the basis of consumption of PLR (Printed Laminated Roll) during a single run on the packing machine. One roll was put on Fill and Seal machine and it was said that 2601 pouches of 2 gms were manufactured from PLR weighing 1200 gms. On the basis of the experiment a figure of 0.46 gms (1200gms/2601 pouches) was arrived at which was rounded to 0.50. In respect of 4 gms pouches an identical figure of 0.50 was arrived at. The revenue thereafter on the basis of receipt of Plastic laminated rolls during the subject period, arrived at the estimated production. Comparing the said estimated production with the production shown in RG-1, the conclusion was arrived at that the excess quantity so arrived has been cleared clandestinely. He submits that such experiment on a single day and on single machine cannot be basis for ascertaining the production of Pan Masala Gutka (PMG) over a period of time. The production of any commodity would depend upon number of factors and vary from machine to machine, quality of PLR, dimension of PLR, wastage, power supply etc.

That even the production estimate so arrived at by the officers is in doubt as the trial run was conducted arbitrarily and unilaterally in absence of any representative of the Appellant Unit. This is apparent from the cross examinations of employees of the Appellant concern and officers who visited the factory. Shri V.H. Shimpi, Storekeeper during his cross examination stated that he was not present during the trial run and was physically and mentally tortured by the officers to write whatever was asked to him by the officers. He also stated that he was not even aware as to who was taking the trial run and was not aware of any of the details of trial run. There are contradictions in version of departmental officers given during cross examination which establish that the trial run was patently unreliable and the ratio arrived at was hypothetical. In his cross examination Shri R. V. Borkar, Superintendent stated that PLR was counted numerically and not by weight whereas Shri. Brahmbhat has stated that the PLR was actually weighed at the time of trial run. It is also significant that the version of the departmental officers regarding the stock of raw materials like Supari, Katha, lime, tobacco etc. also differ. While Shri R. V. Borkar has stated that raw materials like Supari, katha, lime, tobacco etc were available in the factory and officers had counted the physical stock of each items while Shri Brahmbhatt has stated that they took stock only of PLR since no stock of any other raw material like Supari,Katha, lime etc. was taken. From the cross examination of panchas it is manifest that they were not present during the proceedings and had not witnessed the trial run or the stock taking exercise conducted by the officers. Hence the allegation of clandestine removal cannot be foisted on the Appellant on unilateral, arbitrary and hypothetical exercise carried out by the officers. He also points out that similar exercise was carried out at Shirur Unit and the adjudicating authority dropped the charges and the department appeal before Tribunal against said order was dismissed. The appeal before Hon'ble Mumbai High Court against the Tribunal order is pending and the order has not been stayed.

2.1 He submits that for manufacture of PMG number of raw materials are required like Supari, Katha, Lime, menthol and tobacco and "Compound S & G" which is major and an essential and indispensable raw material for manufacture of PMG. No discrepancy in any of the above raw material was found neither there is any unaccounted procurement of any of the raw material. Merely on the basis of alleged discrepancy in packing material, the charges of clandestine clearance of PMG cannot be made. He relies upon Tribunal order in case of Ghodawat Pan Masala Products Ltd. 2004 (175) ELT 182 (TRI), Chandan Tobaco Co. 2011 (270) ELT 87 (TRI), M. Veerbhan 2005 (182) ELT 389 (TRI) as upheld by Hon'ble Apex Court reported in 2006 (197) ELTA34 (SC). He submits that the adjudicating authority has erred in appreciation of facts. He points out Para 7.3 of the impugned order wherein the adjudicating authority has observed that wastage is for DIL – V worked out to 0.38 gms for 2 gms pouch and 0.452 gms for 4 gms pouch. The said ratio was for Pune Unit and not vadodara Unit as apparent from show cause notice dt. 06.02.95. The adjudicating authority has held that average consumption of PLR on 2 gms PMG works out to 0.46 gms and after accounting for wastage etc, the said average consumption works out to 0.38 gms for 2 gms pouch. It is simple logic that if wastage etc. is accounted for, the average consumption would increase and not decrease. The adjudicating authority further held that a trial run was just to ascertain the PLR consumption per pouch and the same could have been ascertained by weighing empty pouches also. The finding that the weight of pouch may vary only in 1/100th of 1/1000th gms is mere ipse dixit without any technical basis. Infact there are wide variation in the figures (0.38 at Shirur for 2 gm pouch and 0.46 at Vadodara for the same 2 gm pouch) makes it manifest that the variation of the results of the trial run was not 1/100th or 1/100th gms but to the extent of 31% - (0.12/0.38 x 100) which establishes the unreliability of trial run.

2.2 The Ld. Adjudicating authority in his findings has held that the cross examination should not have been allowed which is contrary to the tenants of natural justice and the impugned order deserves to be set aside on this ground alone. The findings are contrary to the provisions of Section 9D of the Central Excise Act. He relies upon judgments in case of Arya Abhushan Bhandar 2002 (143) ELT 25 (SC), Swadeshi Polytech 2000 (122) ELT 641 (SC), Jindal Drugs Pvt. Ltd. 2016 (340) ELT 67 (P & H).

2.3 He submits that the adjudicating authority has relied upon statements recorded by the officers of Chairman Shri R.M. Dhariwal, Manager Shri A.U. Patil, Storekeepr Shri V.H. Shimpi. The statements were retracted and during cross examination also these persons have stated that they were made to sit long hours and were threatened to give statements as per officers dictates. He takes us through the retraction affidavit and cross examination proceedings. He points out that the statement of Shri A.U. Patil does not contain any material which can show clandestine removal. The statement of Shri Vinod Shimpi not reliable as he was not even present during trial run as stated by him in his cross examination. In course of cross examination, the officer Shri Brahmbhatt has stated that production manager was present but surprisingly no statement of Shri Joshi, production Manager was recorded. He relies upon Apex Court judgment in case of Vinod Solanki 2009 (233) ELT 157 (SC) to submit that confession which has been retracted must be substantially corroborated by other independent and cogent evidences. Evidence in the form of confessional statements is weak in nature and presumption of innocence is human right. He submits that adjudicating authority has erred in treating he purported removal of Rs. 5,43,750/- as corroborative in nature for the purpose of upholding demand of Rs. 1,38,93,527.43/-. The demand for Rs. 1,38,93,527.43 is for the period 01.04.94 to 11.08.94 whereas the demand for Rs. 5,43,750/- is for the period after 11.08.94. The irregularities found at Bagai Golden Transport in respect of goods transported to Indore, Raipur are not related to removal from factory of the Appellant without payment of duty and the demand is based on third party records i.e transporters. Further no duty has been demanded on the basis of said instance although the seizures were made from M/s Vinayak Agencies, Jodhpur and Jivan Agencies, Raipur. Such miniscule seizures cannot be made basis for demanding huge duty from Appellant unit even if it is assumed that the seizure was justified. As far as shortage of inner printed cartoon, he submits that the shortage is not having any relation with the demand.

2.4 As regard duty demand of Rs. 10,32,064/- he submits that the demand has been made in terms of Rule 57I readwith Section 11A on 19669.351 Kgs of PLR seized from their godown. He submits that the goods were not removed to any person but were lying in godown and after provisional release were used in manufacture of goods. In such a case it cannot be said that the credit was availed wrongly. It is only a technical breach.

2.5 In respect of confiscation of Pan Masala Gutka pouches and raw material/ packing material valued at Rs. 29,29,368/-, he submits that all the seized goods are packing material and menthol except 2 gms PMG worth Rs. 3,59,865/-. There is no basis for confiscation of raw material and packing material which are not finished goods. As far as finished goods PMG is concerned, the same were lying in loose condition (in strip form) and were to undergo the process of packing in the inner printed cartons and further packing in corrugated boxes. The loose strip has not reached the RG – 1 stage and there was no basis for seizure of the same. He relies upon judgments in case of Anchal Prints Pvt. Ltd. 2009 (235) ELT 117 (TRI), Mohit Rollers P. Ltd. 2018 (9) GSTL 389.

2.6 In respect of demand of Rs. 5,43,750/- he submits that the demand has been made on the basis of transporters record and the Appellant have not been named as consignor in those records. Not a single document has been found from their factory and hence in absence of any corroborative evidence, no demand can be made from them.

3. Shri L. Patra, Ld. Assistant Commissioner (AR) appearing for the revenue submits that the adjudicating authority has rightly confirmed the demands. He submits that the persons who were cross examined were close business associates (as distributors) and employees and were hand in glove with the main Appellant and the deposition resulted in mutual benefits. The director has admitted the removal of goods clandestinely and therefore the cross examination is not necessary. He places reliance in case of Shalini Steels 2011 (269) ELT 485 (AP) that denial of cross examination would not cause any prejudice. He also submits that retraction of statements cannot be relied as the statements were recorded before the competent officer under section 14 and claims has been made by such persons without any evidence. It is on party to prove that the statements were obtained by exercise of coercion, threat and pressure. The statements constitute valid and substantive evidence. He relies upon judgment in case of Barkat Ram 1962 (3) SCR 338 AND Naresh Sukhwani 1996 (83) ELT 258 (SC). In their reply they did not make any allegation regarding any such threat, coercion or duress. The retraction and cross examination are belated one and cannot be relied upon. He relies upon judgements in case of Shalini Steels Pvt. Ltd 2011 (269) ELT 485 (AP), Systems & Components Pvt. Ltd. 2004 (165) ELT

136 (SC), Naresh J Sukhwani 1996 (83) ELT 258 (SC), KP Abdul Majeed 2014 (309) ELT 671 (Kerala), Singam Mark 2005 (189) ELT 111 and National Boards 2017 (313) ELT 113 (TRI) and other judgments that cross examination is not necessary. He also submits that the demand has been rightly confirmed and takes us through the show cause notice and the findings of the impugned order. He submits that the records were not properly maintained and were incomplete. He takes us through the facts and statements in his submission and reiterates the findings of the impugned order.

4. Heard both the sides and perused the case records. We find that the demand of Rs. 1,38,93,527/- has been made on the basis of trial run conducted by the officers. On the basis of such trial run, the consumption of PLR was arrived at and further estimated production was arrived at on the basis of receipt of PLR during the impugned period. This estimated production has been compared with the production accounted for and the difference between the two is alleged to have been removed clandestinely. We find that the Appellant has challenged the trial run on the ground that the same was conducted arbitrarily and wrongly by the officers. Further the statements were retracted by way of affidavit and cross examinations. We find that during investigation the persons whose statements were recorded had retracted their statements. During cross examination the employees and the director Shri R.M. Dhariwal has stated that the statements were recorded under threat, coercion and duress. In such case we find that only on the basis of statements and trial run to ascertain the consumption of PLR, demand cannot be made. We find that on the basis of average consumption of Printed laminated, a packing material arrived on the basis of disputed trial run, it cannot be alleged that the Appellant has manufactured PMGs and the same in turn were removed clandestinely. Only on the basis of alleged average consumption of PLR, the charge of clandestine removal cannot be made. As pointed out by the Ld. Counsel, we find that only from PLR, PMG cannot be produced, it is a mere packing material. The show cause notice has not shown any unaccounted receipt or excess consumption of main raw materials i.e. Supari, Tobacco, Katha, kimam, perfume, menthol which are main raw materials for manufacture of PMG. The packing material would come into picture, only once raw material is consumed and the finished goods are produced. In case of CCE Vs. Brims Products 2011 (271) E.L.T. 184 (Pat.), the Hon’ble High Court has held as under :

> ***"9.*** *In our opinion, since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the Revenue. One has to keep in mind that, though being the main ingredient, betel-nut is not the only raw material which is used in manufacture of Pan Masala. That apart, since the investigation has been carried only at the transporters end, no presumption could be drawn with regard to manufacture and removal of the final product. Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.*
>
> ***10.*** *Accordingly, we answer the reference against the Revenue and in favour of the assessee and it is held that the receipt of one of the raw materials, does not conclusively prove clandestine manufacture and surreptitious removal of finished final product. Further, since the charge is regarding clandestine manufacturer and removal of finished product for evading excise duty, the same cannot be held to be proved on the basis of principle of preponderance of probabilities and the Revenue has to prove the same beyond doubt. The reference is answered accordingly."*

Applying the ratio of said judgment to the present case, we are of the view that on the basis of receipt of PLR (packing material) or trial run which is also even disputed, it cannot be concluded that the Appellant has manufactured unaccounted PMG and cleared the same without payment of duty. In case of

5. In case of Ghodavat Pan Masala Products Ltd. 2004 (175) ELT 182 (TRI), the tribunal while deciding issue of demand on the basis of consumption of PLR held as under :

> ***"14.*** *After hearing rival submission, perusal of the records and the case laws relied on by both the sides, we find that the demand of the department is based only on theoretical calculation of PLR which is not the main input of the appellants. The main product of appellant is Star Gutkha and as mentioned in the preceding paragraphs for preparation of Gutkha the main raw materials such as Supari, Katha, Tobacco, Menthol, Cardamom, lime etc. are needed. As contended by the ld. Consultant of the appellant, the wastage was claimed around 22% as against 14.69% allowed by the department. Though there is no statutory permissible limit fixed under the law, however, the ld. Consultant has contended that as per the trade practice the wastage of 22% is easily allowed in the*

manufacture of Pan Masala which is neither unreasonable nor illogical. The practice itself has assumed the force of law by its usage in the trade for a long time and as such we do not find any justification on the part of the department not to have allowed wastage of 22%. Besides, we find that when the department has based his case on the statement of certain parties and when the statements were retracted in writing by them, it was imperative on the department to have brought corroborative evidence to substantiate the allegation of clandestine removal. The department having not done so, has lost their right to raise the demand merely on presumption/assumption. In a case of its kind the department was duty bound to have brought direct, tangible, corroborative and strict evidence to prove the clandestine removal beyond reasonable doubt. We do agree with the contention of the ld. SDR that mathematical accuracy cannot be expected in such a matter. However, it does not mean that the Department is absolved of its responsibility to bring on record the tangible, strict, positive, direct and corroborative evidence to prove clandestine removal beyond reasonable doubt as there is no evidence of actual excess production, removal of such excess production, transport of such excess production, confirmation from buyers and receipt of unaccounted cash towards sale of such unaccounted clearances. We find that the department has not done so. Few more cases in this regard are as under :-

(i)	2001 (130) E.L.T. 228 (T), *Commissioner of C. Ex., Patna* v. *Universal Polyethylene Industries*	Clandestine removal and clearance is a serious charge against manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence.
(ii)	2001 (130) E.L.T. 334 (T), *Chennai M.T.K. Gurusamy* v. *CCE, Madurai*	Clandestine removal - Evidence Standard of - No positive evidence to establish clandestine removal adduced by department - Quantity alleged removal calculated on basis of transport company's records based on presumptions and assumptions not sustainable.
(iii)	*Gurpreet Rubber Industries,* 1996 (82) E.L.T. 347 (T) = 1996(63) ECR 68 (T)	Clandestine production and removal not proved by any evidence such as installed capacity purchase & utilization

		of raw materials labour employed, power consumed, *etc.*, demand set aside.
(iv)	*Ambica Metal Works* - ECR Vol. 29 page 549	Evasion of duty must be based on solid and acceptable evidence
(v)	*D.S. Screen Pvt. Ltd.* - 1990 (50) E.L.T. 475 (Tri.)	In the absence of any corroborative of circumstantial evidence fraudulent removal not inferable.
(vi)	*V.K. Thampy* - 1994 (69) E.L.T. 300	Investigation not done to ascertain whether the parameters like electricity consumed - Raw materials used.
(vii)	*K. Harinath Gupta* - 1994 (71) E.L.T. 980	Clandestine removal burden on dept - Sources of raw materials not contacted buyers not contacted — Receipt of sale proceeds not established.
(viii)	*Icy Cold* - 1994 (69) E.L.T. 337	Clandestine removal a positive act not provable on mere assumptions and presumptions.
(ix)	*Madhu Food Products* - 1995 (76) E.L.T. 197	No evidence of actual removal from factory without payment of duty.
(x)	*LML Ltd.* - 1997 (94) E.L.T. 519	Clandestine removal cannot be proved by office memo - Not a direct evidence nits evidentiary value extremely limited.
(xi)	*Swarna Polymers (P) Ltd.* - 2000 (120) E.L.T. 148 (T) 2000 (92) ECR 325	Inflated figures submitted to bank are not sufficient grounds to allege clandestine production & removal should be co-related - Raw materials & power consumed.
(xii)	2000 (40) RLT 1077 (T) - *Commissioner of C.E.* v *Dashmesh Casting (P) Ltd.*	Allegation based on octroi records showing movement of respondents' truck. No other evidence brought on record. Allegation not

		established.
(xiii)	2000 (121) E.L.T. 46 (T) = RLT 41 P. 348 - *CCE, Meerut* v. *Raman Ispat*	Evidence note book showing production of steel ingots receipt and consumption of raw materials/scrap no investigation done with person who made the entries. No investigation with traders who returned the scrap. Clandestine removal not established.
(xiv)	2000 (120) E.L.T. 505 (T) *K.J. Diesels (P) Ltd.* v. *CCE., Kanpur*	Difference in RG 1 closing stock and monthly statement alone is not sufficient to a duty demand on alleged clandestine removal in the absence of any corroborating evidence.
(xv)	2000 (116) E.L.T. 618 (T) = 1999 (34) RLT 662 (CEGAT) *Grauer & Weil (India) Ltd.* v. *CCE, Meerut.*	Circumstantial evidence not sufficient to establish clandestine removal - More positive evidence is necessary to sustain charge.
(xvi)	1999 (114) E.L.T. 537 (T) = RLT 35 p. 162 (T) - *Arti Steels Ltd.* v. *CCE Chandigarh*	No cogent reasons given for figures of production - Co-relation between various other documents - Gap in power consumption — No sufficient materials for establishing clandestine removal.
(xvii)	2000 (117) E.L.T. 659 (T) -RLT 35 p. 654 (T) *Pepsico India Holding* v. *CCE Meerut*	All other parameters as laid down in Rule 173E should also have been taken into consideration.

The legal position as brought out in the cases mentioned above leaves no doubt that the demand cannot be sustained on the ground of presumption.

15. *From the replies to the show cause notice dated 9-10-97, 6-1-97, 2-2-97, 17-2-97 on pages 120 to 211, it is crystal clear that the appellants have submitted specific replies to the points raised by the department and as such* *it was incumbent on the department to prove their case beyond reasonable doubt. In the absence of any strict, tangible, direct, positive and corroborative evidence, we do not find any justification to sustain the demand raised in this case. We, therefore, set aside the impugned order and allow the appeals filed by the appellants with consequential relief, if any.*

Further in case of Chandan Tobacco Co. 2014 (311) ELT 593 (TRI), the Tribunal held that inference drawn based on calculations are not sufficient to establish clandestine removal. In case of M. Veerabadhran 2005 (182) ELT 389 the tribunal held in Para 8 that *"............... To raise such a demand is a presumptive or speculative exercise, which cannot be countenanced. Any demand of duty on an assessee for a given period should be founded on positive evidence indicating manufacture and clearance, without payment of duty, of excisable goods during that period. It cannot be raised on the basis of some formula devised from facts pertaining to goods produced after the said period as in the instant case. In the present case, insofar as the period 1-4-1995 to 11-3-1997 is concerned, there is no evidence whatsoever, whether it be one of procurement and utilization of raw material or of production and clearance of supari out of the factory or of sale of such goods to show that the assessee had clandestinely manufactured and removed supari during the said period. Hence we are unable to sustain the demand of duty raised by the Commissioner on M/s. Ravi Kumar & Co. for the period 1-4-1995 to 11-3-1997. The Tribunal's decision in Ghodavat Pan Masala Products (supra) is squarely in support of this view. In that case, a demand of duty raised on the assessee by the Department on the basis of certain theoretical calculations of pouches generated per kgs. of printed laminated roll was set aside by the Tribunal. The facts of the instant case are also more or less similar to those of Ghodavat Pan Masala Products (supra). The Department worked out an unintelligible formula for assessing alleged clandestine production and removal of scented supari pouches presumably on the basis of weighments of laminated plastic rolls found in the factory. There is no dispute of the fact that the manufacture of supari in pouches is a wholly mechanised process in which betel-nut powder and laminated plastic roll are fed into a machine and the pouches containing betel-nut powder emerge. But this by itself would not sanctify any guess work (as in this case) for estimating production for the past period on the basis of weighment of laminated plastic roll, for demand of duty. The Tribunal's decision in Ghodavat Pan Masala Products (supra), in our view, squarely works in favour of the appellants. The appellants can legitimately claim support from certain other decisions (cited by their Counsel) also. In the case of I.T.C. Ltd. v. CCE, Bangalore [Tribunal's Final Order No. 333/1996-D dated 13-5-1996 [1996 (87) E.L.T. 453 (T)] in Appeal No. E/1318/88-D], it was held that cigarette sample checks undertaken by the Department on 5th, 6th and 8th*

> *September, 1986 were not to be made applicable to past clearances of cigarettes. In the case of Sri Sakthi Textiles (P) Ltd. v. Government of India & Others [Madras High Court's order dated 1-4-1972 in W.P. No. 1421/71], it was held that, on the basis of the results of tests on samples of goods, duty could not be levied on the goods manufactured and cleared prior to the period of sampling. The Government themselves had taken the same view in the case of National Textile Corporation [1982 (10) E.L.T. 639 (GOI)], Aggarwal Metal Works [1982 (10) E.L.T. 689 (GOI)] etc. In the case of CCE, Coimbatore v. Cambodia Mills Ltd. [2001 (128) E.L.T. 373 Mad.)], the Hon'ble High Court held, in respect of goods manufactured on the date of drawal of sample, that demand of duty based on the test result was sustainable only in respect of the goods manufactured on that date. A demand for the subsequent period on the same basis was held unsustainable. In the case of Emami Ltd. v. CCE, Kolkata [2002 (148) E.L.T. 1238], a similar view was taken by the Tribunal. We find, there is no dearth of decisions on the point, which are in favour of the appellants in the instant case. We, therefore, set aside the demand of duty."*

6. The above Tribunal order was upheld by the Apex Court as reported in 2006 (197) ELT A34 (SC). Hence in terms of ratio laid down in above judgments and the facts discussed above, we are of the view that no demand can be made on the basis of alleged receipt and consumption formula of PLR.

7. We also find that the adjudicating authority has held that the cross examination should not have been allowed. The revenue has cited case laws that the cross examination is not necessarily to be granted. We are of the view that when the statements has been disputed and the Appellant has contested the same, the authenticity of the statements comes into doubt. The grant of cross examination is valuable right of the assessee and request for same cannot be brushed aside by merely denying the same. In the present case the cross examinations of employees and the officers were allowed by the predecessor of the adjudicating authority and hence the same had to be considered. As pointed out by the Ld. Counsel during cross examination, the statements were denied and from the cross examination of the investigating officers, the discrepancy in the manner of conducting the trial run was also exposed. In such case the outcome of the cross examination would be of great importance. We find that the statements given by the employees accepting clandestine removal stands retracted by them. In such case there is no reason to rely upon such statements to allege clandestine

removal. Our views on relevancy of cross examination are also based upon judgments in case of Arya Abhushan Bhandar 2002 (143) ELT 25 (SC), Swadeshi Polytech 2000 (122) ELT 641 (SC), Jindal Drugs Pvt. Ltd. 2016 (340) ELT 67 (P & H),

8. In respect of duty demand of Rs. 10,32,064.92 we find that the demand has been made on the ground that 19669.351 Kgs of Plastic Laminated roll was found from the godown of the Appellant. We find that there is no evidence that the Appellant were to clear such PLR without payment of duty from their factory. Ultimately the said roll after release was consumed in the manufacture by the Appellant. In that case only on the limited ground that the PLR was found at godown of Appellant, the duty demand cannot be made as the goods were not intended to be removed without payment of duty nor there is any evidence to allege so.

9. As regard confiscation of goods worth Rs. 29,12,368.93, we find that the goods were raw material/ packing material except 2 gms PMG pouches which were lying in factory in strips form. As far as the raw material and packing material is concerned, the same were legally acquired and there is no case for seizure/ confiscation of same. In respect of finished goods, we find that the PNG were in strip form awaiting packing in inner cartoon and then corrugated boxes. Even the show cause notice accepts the fact that the PMG Pouches were packed in inner printed cartoon and then into corrugated boxes. This clearly means that the goods did not reached to RG-1 Stage of accounting. We thus do not find any reason to seize/ confiscate the goods when the goods did not reach RG-1 Stage nor there was any preparation on part of assessee to remove the same clandestinely.

10. A demand of Rs. 5,43,750/- has been confirmed on records of Sarco Roadlines. It was alleged that the goods detailed in records of transporter belong to the Appellant and were cleared clandestinely. We find that the demand is based upon third party i.e transporter record and there is no evidence to link Appellant with those goods. No evidence has been adduced to show as to who from the Appellant concern consigned the goods and what is the origin of goods. In such case merely on the basis of transporter's record, it cannot be concluded that the goods were

cleared clandestinely by the Appellant. Hence the demand of subject amount is not sustainable.

11. As regard confiscation of goods seized from M/s Jivan Agencies, Raipur and M/s Vinayak Agencies, Jodhpur, we find that the goods has been seized on the ground that the same did not have any identification marks. As pointed out by the Appellant before adjudicating authority that the goods in case of Vinayak Agencies could have been identified from the seized records. That the goods were accounted for in the records of aforesaid persons and nothing incriminating was found. In case of M/s Jivan Agencies that no evidence of said goods consigned from the Appellant's factory was found. We find that no evidence to show that the said goods were consigned by Appellant unit. Further we find that there are glaring inconsistencies in the statements of Shri Gautam Zabak, Partner of M/s Jivan Agencies. In one of his statement 28.11.94, he stated that the goods were received from Appellant Unit, Baroda and in next statement he stated that the goods were received from Pune Unit. Thus the statements of Shri Zabak were contradictory and without investigation and corroboration, it cannot be said that the Appellant had cleared the seized goods. Further Shri Zabak also retracted his statement. In such case we do not find any reason to sustain the confiscation of seized goods.

12. In view of our above findings and judgments, we are of the view that the demands, penalties and confiscation ordered by the adjudicating authority is not sustainable. We therefore set aside the impugned order and allow the appeal filed by M/s DIL with consequential reliefs. For the same reason, we also allow appeals filed by co-appellants with consequential reliefs by setting aside the impugned order except Shri R.M. Dhariwal whose appeal stands abated.

(Pronounced in the open court on 15.10.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Neha