

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.10939 of 2015

(Arising out of OIO-AHM-EXCUS-003-COM-032-14-15 passed by Commissioner of Central Excise-AHMEDABAD-III)

Sunrise Stainless P Ltd

Unit-Iii, 3426 To 3428 & 3435,
Phase-Iv, Gidc, Chhatral,
Gandhinagar,
Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Ahmedabad-iii

Custom House... 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad,
Gujarat- 380009

.....Respondent

WITH

- i. Excise Appeal No. 10940 of 2015 (Sunrise Tradewings P Ltd)**
- ii. Excise Appeal No. 10941 of 2015 (Snehal Rajinikant Shah)**
- iii. Excise Appeal No. 10942 of 2015 (Mahendra Manilal Shah)**

APPEARANCE:

Shri J.C. Patel, Shri Rahul Gajera Advocates for the Appellant
Shri T.G. Rathod, Joint Commissioner (AR) for the Respondent

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

Final Order No. A/12332-12335 /2019

DATE OF HEARING: 30.9.2019
DATE OF DECISION:06.12.2019

RAMESH NAIR

The present appeals have been filed by M/s Sunrise Stainless Pvt. Ltd. (SSPL), Unit – III, its director Shri Mahendra Manilal Shah, M/s Sunrise Tradewings Pvt. Ltd. (STPL) and its director Shri Bhavesh/Snehal R. Shah against Order dt. 09.02.2015 passed by the Commissioner, Central Excise, Ahmedabad – III. The brief facts of the case are that M/s SSPL are engaged in manufacture of “Stainless Steel Pipes & Tubes. Searches were conducted at factory premises of M/s SSPL, Unit – III, Office premises of M/s SSPL at Sunrise Building, Mumbai, office premises of M/s SSPL at Mumbai, Residential premises of Shri Snehal/Bhavesh R. Shah director of M/s Sunrise Trade Wings Pvt. Ltd.

(M/s STPL) and records/ papers were seized. One booking register was also seized from M/s Suvidha Transport which allegedly showed details of transportation of goods from Chhatral Unit of Appellant to Mumbai. The statements of following persons were also recorded :

- (i) Shri MahendraManilal Shah, Director of M/s SSPL.
- (ii) Shri Snehal/ Bhavesh Shah, director of M/s STPL.
- (iii) NawalkishoreRadheyshyamDalal, Partner of M/s Allit Metals
- (iv) Babulal GaneshmalBhora, Proprietor of Rashmi Steels
- (v) Pradeep Jagdish Bhagat, Proprietor of Suvidha Roadways
- (vi) Jayantilal J. Sanghavi, Proprietor of Veer Ratan Steel,
- (vii) Mulchand J. Jain, Proprietor of Ratnaveer Metal
- (viii) MangilalBachrajBurad, Broker

2. Based upon pen drive/ papers and diary seized from residence of Shri Snehal/ Bhavesh Shah, kaccha slips seized from Shri Mahendra Manilal Shah, register seized at M/s Suvidha Transport and statements of traders, it was alleged that Shri Mahendra Manilal Shah in his statements accepted clearances of goods viz. S.S Pipes without payment of duty as found from the pen drive and diary seized from residence of Shri Bhavesh/ Snehal R. Shah. That in respect of challans in small papers seized from him, the same were related to sale of pipe without payment of duty to M/s Vinod Tube, Rajkot. It was contended that the pen drive seized from residence of Shri Bhavesh/ Snehal R Shah was opened in presence of Shri Mahendra M. Shah and the data revealed sale of SS Patta and Pipes to customers in cash for the period April' 2007 to July' 2012. The data also related to purchase of Stainless Steel Flats and coils which are raw material for manufacture of SS Patta and Pipes, sales of SS Patta and Pipes and other data related to M/s SSPL viz. bank accounts and other transactions, Cash transactions, receipts of payments in RTGS by M/s SSPL and STPL and payment of equal amount in cash, the entire ledger reflecting only receipt and payments of amounts, Day book indicating date wise transactions, P & L Account and Balance Sheet for the period prepared by taking into account SS Pipes and Pattas sales reflecting in seized pen drive. Statement of Shri Snehal Shah was relied upon that he explained the contents of data in pen drive which were related to business transactions of M/s STPL. He also admitted that all the bank amount shown in records retrieved from pen drive have been shown by decreasing one digit. However in respect of cash

amount he did not accept the same. It was alleged that the data retrieved from pen drive showed certain ledger accounts reflecting receipts of amounts in cheques or by RTGS by SSPL and payments of equal amounts in cash to said parties but nowhere shows sale and purchase which indicates that M/s SSPL were issuing invoices to certain parties without the sale of goods and were receiving the purported payments through Bank Accounts and were returning the amounts to the parties in cash. It was also alleged that whatever amount was received in cash by M/s SSPL was either paid to parties from whom raw material was purchased in cash or was given to various parties/ persons for getting cheques of equal amount which were deposited in various bank account held by M/s SSPL and its sister concern M/s STPL and proves the trail of the cash realised from cash sale of the SS Pipe to the accounts of M/s SSPL. This also disproves the contention of Shri Bhavesh/Snehal Shah that cash transactions including cash sales of SS Pipes has been affected in his personal capacity. Register of M/s Suvidha Roadways for the period Nov' 2011 to Jan' 2013 shows details of transportation of pipes from Chhatral to Mumbai and the details tallies with the sale of SS Pipes recorded in pen drive. It indicated payment of freight of Rs. 3,16,32,259/- to Shri Pradeep, Proprietor of M/s Suvidha Roadways which was accepted by him. That the statements of traders/ brokers who have purchased SS Pipes as stated in pen drive ledger data shows the clandestine removal of goods from Appellant. The ledger account of Shri Mahendra M Shah namely "M M Shah" maintained in seized pen drive indicates that during the period from 01.04.2008 to 03.07.2012, Shri Mahendra Shah received amount of approx. 6.52 Crores and paid amount of 4.17 crores mostly in cash and cheques which proves the trail of cash realised from cash sales of the SS Pipes to the accounts of Shri Mahendra Shah and contradicts the claim of Bhavesh/ Snehal Shah that cash transactions were affected by him. Based upon above investigation, the Appellant Unit was issued show cause notice dt. 01.07.2013 alleging that M/s SSPL have clandestinely cleared SS Pipes without payment of duty of Rs. 11,29,73,580/- during the period June'2008 to December'2012. The demand was based upon following instances :

- (i) Demand of Rs. 9,44,35,432/- was based on Ledger Account " Pipe Sales" retrieved from Pen Drive seized from the residence of Bhavesh/ Snehal R Shah.
- (ii) Demand of Rs. 1,67,29,149/- was based upon Ledger Account "Pipe" retrieved from Pen Drive seized from residence of Bhavesh/Snehal R. Shah.

- (iii) Demand of Rs. 8,31,323/- based on documents recovered from residence of Shri Bhavesh/Snehal R. Shah.
- (iv) Demand of Rs. 1,49,900/- based on documents recovered from office of Shri Mahendra M. Shah.
- (v) Demand of Rs. 8,27,505/- based on Transport Register recovered from office of Suvidha Roadways, Vasai.

3. The demand as proposed and penalties were ordered against M/s SSPL vide impugned order. Penalty was also imposed in terms of Rule 26 against co-appellants. Aggrieved the Appellants have filed present appeals.

4. Shri J.C. Patel, Ld. Counsel appearing for the Appellant M/s SSPL submits that the Show Cause Notice has placed reliance on statements of Mahendra Manilal Shah, Director of Sunrise Stainless Steel P. Ltd, Shri Snehal R. Shah (alias Bhavesh Shah), Director of Sunrise Trade Wings P. Ltd., Nawalkishore Radheshyam Dalal, Partner of Allit Metal & Tubes, Babulal Ganeshmal Bhora, Proprietor of Rashmi Steels, Pradeep Jagdish Bhagat, Proprietor of Suvidha Roadways, Jayantilal J. Sanghavi, Proprietor of Veer Ratan Steel, Mulchand J. Jain, Proprietor of Ratnaveer Metal, Mangilal Bachraj Burad, Broker. That Shri Mahendra Manilal Shah in his statements has stated that the Appellant Unit manufactures SS Pipes for which the raw materials are HR Coils (local and imported) and the main suppliers of the raw materials are Jindal Steels Ltd, Shah Alloys P. Ltd, Shah Foils Ltd, Mutual Steels Ltd and Rohit Ferromet. In his statement dated 5.3.2013 he has maintained that clearances of SS pipes were made on payment of duty and denied any cash sales without payment of duty. Shri Snehal R. Shah in his statement has stated that Sunrise Trade Wings P. Ltd, of which he was director was trading in SS Patta, SS Coils and SS pipes and that he also carried on trading in his personal capacity and that the Ledger accounts retrieved from the Pen Drive seized from his residence pertained to his personal trading activity and of receipt and payment of cash loans taken by him. Shri Mahendra M. Shah vide letter dated 1.7.2013 submitted to DGCEI on 2.7.2013 i.e. before issuance of Show Cause Notice had claimed that there was no clandestine manufacture and clearance of SS Pipes by SSPL. The Appellant M/s SSPL has resisted the Show Cause Notice by filing replies dated 21.5.2014, 18.12.2014 and 16.1.2015. They disputed the evidentiary value of the Pen drive and papers seized from the residence of Bhavesh/Snehal R. Shah, the rough (Kachcha) documents

recovered from the office of Mahendra M Shah and the transport register recovered from office of Suvidha Roadways, Vasai. There is no evidence of purchase of raw materials to manufacture the alleged huge quantity of SS pipes alleged to be cleared clandestinely and of consumption of excess electricity to manufacture such huge quantity. The Appellant's factory did not have the production capacity to manufacture such huge quantity alleged to be clandestinely cleared. They had sought cross-examination of all the persons whose statements are relied upon in the Notice and of the investigating officers which was not allowed. The demands made on the basis of Ledger Account "Pipe Sales" retrieved from Pen Drive seized from residence of Bhavesh/Snehal R. Shah is liable to be set aside as the data stored in the Pen Drive is inadmissible as evidence since the requirements of Section 65B of the Indian Evidence Act 1872 and Section 36B of the Central Excise Act, 1944 have not been satisfied. Section 65B of the Indian Evidence Act 1872 and Section 36B of the Central Excise Act, 1944 provide that an electronic record which is generated/produced by a computer and which is stored in any device (such as Pen Drive) would be admissible in evidence only if it is established that:

- (a) the data in question was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

5. In view of the said provisions, before the data contained/ stored in the seized Pen drive can be admissible in evidence, it is necessary to first identify the computer on which the said data was produced/ generated and further it should be established that the conditions mentioned in Section 36B (2) are satisfied in respect

of such computer. He relies upon judgment of Hon'ble Supreme Court in case of Anvar P.V 2017 (352) ELT 416 (SC) and Tukaram S. Dighole v. Manikrao Shivaji Kokate 2010(1) RCR (Civil) 959 and also of Hon'ble Punjab and Haryana High Court in case of Jatinder Pal Sing v Krishan Kishore Bajaj- CRM-M-37435 of 2018 (O & M). He relies upon Tribunal's decision in case of S.N.Agrotech V CC – 2018 (361) ELT 761 wherein it was held that the provisions of Section 65B of the Indian Evidence Act are in pari materia with Section 138C of Customs Act 1962 which corresponds to Section 36B of the Central Excise Act 1944.

6. Without prejudice to his other submissions, he further submits that the Ledger Account "Pipe Sales" on the basis of which demand is raised nowhere bears the name of the Appellant M/s SSPL. The said account is appearing under the name "Star" and not Sunrise Stainless Steel P. Ltd. The persons whose statements have been relied upon in relation to the Ledger accounts retrieved from the Pen drive were not permitted to be examined under Section 9D of the Central Excise Act 1944 and their cross examination not granted to the Appellant. Since no opportunity of their cross examination has been given to the Appellant, the statements are not admissible in evidence. He places reliance judgments in case of Basudev Garg Vs. CC – 2013 (294) ELT 353 (Del), CCE v Premier Alloys Ltd – 2019 (366) ELT 659 (All). That Shri Mahendra Shah in his statement dated 5.3.2013 stated that clearances of SS pipes were made on payment of duty and denied any cash sales without payment of duty. Shri Snehal R. Shah in his statement has stated that Sunrise Trade Wings P. Ltd, of which he was director, was trading in SS Patta, SS Coils and SS pipes and that he also carried on trading in his personal capacity and that the Ledger accounts retrieved from the Pen Drive seized from his residence pertained to his personal trading activity and to receipt and payment in cash of loans taken by him. He submits that during visit to the SSPL, no shortage or excess of raw materials or finished goods was found and no evidence of procurement of excess raw materials, consumption of excess electricity and production capacity to manufacture such huge quantity alleged to have been clandestinely cleared was found. No seizure of any unaccounted goods or cash. The Appellant's factory does not have the capacity to produce such a huge quantity which is alleged to have been cleared clandestinely. The Commissioner has not rebutted this assertion in his findings. Therefore in absence of any such evidence, no case of clandestine manufacture and removal can be made out. He relies upon decisions in case of Vishwa Traders P.Ltd v CCE – 2012 (278) ELT 362 upheld by

Hon' ble High Court in 2013 (287) ELT 243 (GUJ) and by Hon'ble Supreme Court in 2014 (303) ELT A24 (SC), He also relies upon orders in case of Arya Fibres P. Ltd v CCE – 2104 (311) ELT 529 and other judgments.

7. As regard confirmation of demand made under Annex A-3 based on documents recovered from residence of Snehal R. Shah, he submits that demand is not sustainable. It is a settled law that documents recovered from the premises of a third person cannot be evidence of clandestine removal, particularly when cross examination of such third person is not given. He places reliance on decisions in case of Charminar Bottling Co. P. Ltd Vs. CCE – 2005 (192) ELT 1057, Atul Bansal & ors Vs. CCE – 2019 (8) TMI 959. He submits that Shri Bhavesh/Snehal R. Shah is neither an employee nor director in Sunrise Stainless Steel P. Ltd. As per his own statement, he is carrying on his own trading activity in his personal capacity. That apart, it is settled law that on the basis of documents/ private diary recovered from the premises of a third person no case for clandestine removal can be made out in the absence of any evidence of procurement of excess raw materials, consumption of excess electricity, production capacity to manufacture the excess quantity and transportation or seizure of any goods. In the present case there is no such evidence. There was no seizure of any excess/ unaccounted raw material or excess/ unaccounted finished goods when the department carried out search at the Appellant's factory. Therefore in the absence of any such evidence, no case for clandestine removal can be said to have been made out as laid down by the Hon'ble Tribunal in the case of Arya Fibres P. Ltd v CCE – 2104 (311) ELT 529. Without prejudice to the aforesaid submissions, he submits that the name of Sunrise Stainless Steel P. Ltd, nowhere appears in the Diary and loose documents recovered from Snehal R. Shah. In case of confirmation of demand under Annex-4 based on rough documents (Kachcha challans) recovered from office of Mahendra M. Shah he submits that the same is liable to be set aside. Merely based on Kachcha/ rough documents, without any evidence of clandestine manufacture in the form of purchase and consumption of excess raw materials and power, case for clandestine removal cannot be made out. In respect of demand under Annex-5 based on transport register recovered from Suvidha Roadways, he submits that demand is not sustainable as no case of clandestine removal can be made out on the basis of third party documents, particularly when such third party is not allowed to be cross-examined. Even most of the entries mentioned in Annex-5 to the Notice do

not figure on the pages of the said Register mentioned in Annx-5. Hence demand is not sustainable.

8. Shri T.G. Rathod (Joint Commissioner) Learned Authorized Representative appearing for the revenue submits that the pen drive and records viz. loose papers and small diary seized from residence of Shri Bhavesh/Snehal R. Shah show that the sale transaction were of goods of M/s SSPL. Also the register seized from transporter M/s Suvidha Transport shows that the goods were transported from Chhatral where the Appellant Unit is located to Mumbai. He relies upon the statement of brokers and Shri Mahendra Shah and Bhavin Shah that the ledgers found in pen drive pertains to the goods cleared by M/s SSPL. He relies upon Orders in case of K.K. Plastics Vs. CCE, Cochin 2019 (1) TMI 909, Final Order No. A/51970-51979/18 – Guruharkishan Ind. Vs. CCE, Delhi – III, CCE, Salem Vs. CESTAT Chennai 2019 (336) ELT 647 (Mad), Lawn Textiles Mills P. Ltd. 2018 (362) ELT 559 (Mad.), Laxmi Enterprises 2018 – TIOL – 1293 – CESTAT – DEL, Usman Suleiman Darvesh 2017 (358) ELT 1014, NR Sponge P. Ltd. 2015 (328) ELT 453 (TRI), International Cylinders P. Ltd. 2015 (255) ELT 68 (HP), Shri UlaganayagiAmmal Steels 2008 (231) ELT 434 (TRI) and Copies Force India Ltd. 2008 (231) ELT 224 in support of his submission that the incriminating document found from Shri Bhavesh/Snehal R. Shah shows that M/s SSPL has cleared goods clandestinely. He reiterates the findings made in the impugned order.

9. Heard both the sides and perused the case records. The investigation was initiated by searching the factory premises and office of M/s SSPL and residential premises of Shri Bhavesh/Snehal R. Shah. During search at factory premises of M/s SSPL, no incriminating papers were found nor any discrepancy was observed in raw material/ finished goods stock, their accounting and production/ clearance of finished goods. No document in the form of production record, accounting record or gate register showing unaccounted purchase/ receipt of raw material or unaccounted clearance/sale/ transportation of finished goods was found. The officers seized Pen drive from residence of Shri Bhavesh/Snehal R. Shah which contained the alleged ledgers. Also one small diary and some loose papers were seized from residence of Shri Bhavesh Shah. Some loose slips were also seized from Shri Mahendra M Shah. Statements were recorded of director of M/s SSPL, Shri Bhavesh/Snehal R. Shah and traders/ brokers. From Suvidha Roadways register containing details of booking was also seized. Based upon above records

and statements, the demand has been made against M/s SSPL. We find that Shri Snehal/ Bhavesh Shah in his statement has stated that the Pen Drive ledger pertained to trading done by him of SS Patta, SS Coils and SS Pipes in his personal capacity. The show cause notice and the impugned order has alleged that the persons whose statements have been relied upon has stated that they were doing trading or acting as broker in SS Pipes of M/s SSPL. They have also verified the Pen drive ledger as pertaining to their firm.

10. We find that the Appellant Unit in its reply to show cause notice had challenged the authenticity/ genuineness of such pen drive data on the ground that the same is inadmissible in evidence as the requirements of Section 65B of the Indian Evidence act and procedure required under Section 36B of the Central Excise Act was not followed. We find that Section 36B of Central Excise Act is parimateria to Section 65 of the Indian Evidence Act. As per Section 36B(1) computer printout is considered as document for the purpose of central excise act and rules and is admissible as evidence subject to condition in Section 36 B (2) which is as under :

- (a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- (b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and
- (d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.

11. We find that in the present case none of the above conditions were satisfied. There is no computer on which the data stored in pen drive was produced. There is also no person was identified and examined who has prepared such data. In such case the pen drive data cannot be considered as admissible evidence. Our views are based upon the judgment of Hon'ble Supreme Court in case of Anvar P.V 2017 (352) ELT 416 (SC) wherein the Hon'ble Apex Court. Further in case of M/s. Premier Instruments & Controls Pvt. Ltd. [2005 \(183\) E.L.T. 65](#) (T), M/s. Premier Packaging Pvt. Ltd. [2005 \(184\) E.L.T. 165](#) (T), M/s Tex-Age [2008 \(221\) E.L.T. 395](#) (T), M/s. HarsingharGutkaPvt. Ltd. [2008 \(221\) E.L.T. 77](#) (T), M/s. S.J.N. Auto Industries Pvt. Ltd. [2008 \(231\) E.L.T. A101](#) and M/s. Indo Green Textiles Pvt. Ltd. [2007 \(212\) E.L.T. 343](#) (T), S.N.Agrotech 2018 (361) ELT 761 same views were expressed. We also place our reliance in case of Jatinder Pal Singh Vs. Kishan Kishore Bajaj CRM-M-37435 of 2018 (O & M) wherein it was held as under :

" The electronic records containing electronic information are processed and created on computing devices consisting of processor and working on variety of factors. After processing the raw information, like strokes from a keyboard, the computer processor creates the 'machine readable' information and sends it to the default storage memory device. However, before so storing, the said machine readable electronic record is created through the computer language; which is a binary digital language comprising of '1' and '0'." (page 13 of the judgment)

"This digital information is stored on memory device of computer. This processed information can also be stored on as small device as a Micro SD card or the Pen Drive. Besides this, the electronic record can be reproduced on the optical and magnetic devices like the CD or the tape record. As is obvious, the tape records are already phased out. Its only the optical devices like the Hard Disc Drive, CD or the electronic storage devices like the Solid State Drive, Pen Drive and Data Cards, which are used. But all this information is readable only by machines. For making this information cognizable by human beings, it would be required to be converted in suitable output through other devices like, printer or a screen. Since, the electronic information record is comprised in digital codes formats, therefore, by using appropriate softwares&hardwares,virtually any information can be created by arranging those digits in that particular manner, so as to create the digital information; containing therein a linguistic sentence or a sentence of conversation in audio form. Once an information is created, its mirror image can be used by a person claiming it to be the copy of the original. Still further, by passing the so created information through the appropriate filters of softwares, data or the filters of pitch and frequency, which again would be in the digital form, voice of anybody can be re-created by the experts of the computer field. Hence, since the entire computer information is in the form of precise digital form only, therefore, the same can be created as 'original' also with the same precision, even without the risk of possibility of the fabrication being easily detected. Its only the question of as to what is the level of expert who is creating the digital information. Hence, the digital information has to be treated with due suspicion and more stringent test has to be applied to it than the ordinary evidence, as has been held by the Hon'ble Supreme Court in its judgment rendered in 2010(1) RCR (Civil) 959 – Tukaram S. Dighole v. Manikrao Shivaji Kokate. Hence, the authenticity

of the recording of the information is as important as the content of the information itself, lest the Court should be taken for a ride by unscrupulous experts in the field of the fabrication of the information. Accordingly, the above mentioned Section 65-B of the Indian Evidence Act has laid down a strict test to ascertain the authenticity of the creation or the recording of the information. What is permissible to be led in evidence under Section 65-A and 65-B of Evidence Act is the computer output of Electronic Information. As mentioned above, the computer output is the retrieval of the electronic information, which is otherwise readable only by a machine, into an output which is recognisable by human senses, like, text print-out on a page, video on a screen or audio played on a device. Before being retrieved through an output device, like printer, screen or audio device, the electronic information is in existence and is stored in the form of processed digital codes, created through the computer processor. The same piece of machine readable information can be retrieved in different manner and different forms on different types of output devices. For example, a page of information typed as electronic information in M.S. Word can be seen on screen; as well as; can be printed out on a sheet of paper. Therefore, the original electronic information is the information which is present in the forms of digital codes stored on default memory device. The computer output of the same is only reproduction of the same in different formats. Therefore, it is only this default memory device which contains the 'Primary' information created by the computer processor. Any copy of this on any other device is only a 'Secondary' information or the secondary evidence in legal parlance. However, what is normally sought to be produced before the Court in evidence is either the 'output' or the 'copy' of the original information stored as digital codes. Therefore, the conventional categorization of evidence in 'Primary' and 'Secondary' evidence does not strictly holds good in case of electronic record or the computer output. Hence, Section 65-B of Evidence Act insists for certificate qua the authenticity of electronic evidence; without making any distinction of 'Primary' or 'Secondary' evidence, unlike the other documentary evidence."

12. In view of above judgments we are thus of the view that the pen drive data cannot be relied upon without following the requirements Section 36B of the Central Excise Act, 1944. As such the demands based upon pen drive in the present case cannot be confirmed against M/s SSPL. We further find that taking the pen drive data as base, the statements of traders were recorded who stated that the data contains the ledger of transactions effected by them with M/s SSPL. The Appellant during the adjudication proceedings had sought cross examination of persons and officers whose statements were relied upon in show cause notice under Section 9 D of the Central Excise Act. However the same was denied to them. In our view when the demand against M/s SSPL was based upon pen drive and papers seized from residence of third party Shri Bhavesh Shah as well as statements of third party i.e traders/ brokers, in that case it was imperative for the adjudicating authority to allow cross examination of such persons to the Appellant. Since no opportunity to cross examine such persons whose statements has been relied upon was provided to the assessee, the statements given by these persons cannot be considered to uphold the charges of clandestine removal against

Appellant Unit. Our views are based upon the judgment of Hon'ble High Court of Delhi in case of M/s Basudev Garg Vs. CC 2013 (294) ELT 353 (DEL) wherein the Hon'ble Court held as under :

9. We have considered both the aspects of the matter and have heard counsel of both sides. The learned counsel for the appellants have placed reliance on the decision of the Supreme Court in the case of *Swadeshi Polytex Ltd. v. Collector* reported in [2000 \(122\) E.L.T. 641](#) (S.C.) as well as on *Lakshman Exports Limited v. Collector of Central Excise* reported in [2002 \(143\) E.L.T. 21](#) (S.C.) for the proposition that whenever any statement is relied upon by the Revenue, an opportunity of cross-examining the maker of the statement should be given to the Noticee. Learned counsel for the appellants also placed reliance upon a decision of a Division Bench of this court in the case of *J&K Cigarettes Ltd. v. Collector of Central Excise* reported in [2011 \(22\) S.T.R. 225](#) (Del.) = [2009 \(242\) E.L.T. 189](#) (Del.).

10. Insofar as the general propositions are concerned, there can be no denying that when any statement is used against the assessee, an opportunity of cross-examining the persons who made those statements ought to be given to the assessee. This is clear from the observations contained in *Swadeshi Polytex Ltd. (supra)* and *Laxman Exports Limited (supra)*. Apart from this, the decision of this court in *J&K Cigarettes Ltd. (supra)* clinches the issue in favour of the appellant. In that case, the validity of Section 9D of the Central Excise Act, 1944 was in question. The said Section 9D of the Central Excise Act, 1944 reads as under :-

"9D. Relevancy of statement under certain circumstances.

- (1) A statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains :-

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

11. We may straightaway say that the provisions of Section 9D of the Central Excise Act, 1944 are identical to the provisions of Section 138B of the Customs Act, 1962 which would be applicable in the present case.

12. Section 138B of the Customs Act, 1962 reads as under :-

"138B. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

It is apparent that both the provisions are identical.

13. This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under :-

"12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal."

14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi judicial proceedings. The Division Bench also observed as under :-

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

15. *The observations and conclusions arrived at by the Division Bench in the case of J&K Cigarettes Ltd. (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the authorities below. In fact, Section 138B of the Customs Act, 1962 has not been examined at all.*

Further in case of Premier Alloys Ltd. 2019 (366) ELT 659 (ALL), the Hon'ble High Court held as under :

32. *In the present case, it is not a case of admission on the part of assessee himself or his authorized representative but statements relied herein are that of proprietors of transport companies and others. It would be travesty of justice to hold that ex parte statements recorded of other persons than assessee or its representatives can be relied as a sufficient evidence to pass an order adverse to assessee without allowing such persons to be cross-examined by assessee and that too despite demand.*

33. *So far as Section 9D is concerned, we find that it only renders statement made and signed by any person before any Central Excise Officer of a Gazetted Rank, relevant, for the purpose of proving anything in any prosecution for an offence, truth of facts which it contains but it does not declare such statement to be a conclusive evidence so as to base findings in regard to fiscal liability only on that statement. Making a document relevant for the purpose of proving truth of facts which it contains is one thing and holding such statement as conclusive evidence to prove a fact is another thing.*

34. *Revenue in the case in hand has tried to use and rely aforesaid statements of third parties, without permitting cross-examination by assessee, as a conclusive evidence to prove facts stated therein. It means that Revenue want to utilize an ex parte version to pass an adverse order against a person without giving such person an opportunity to cross-examine the persons who have made such statements so as to have an opportunity to show that those statements are not true or there is some inaccuracy or otherwise irregularity etc. Such an attempt on the part of Revenue is not only illegal but also in the teeth of principles of natural justice and beyond the scope of Sections 14 and 9D of Act, 1944.*

35. *In view of above discussion, we answer both questions against appellant and confirm the view taken by Tribunal in the judgment under appeal.*

13. Thus in our view the demands cannot be made on the basis of pen drive data and statements made by third parties. We also find that in his statement dt. 05.03.2013 Shri Mahendra Shah, director of Appellant Unit has stated that the clearances made by the unit were on payment of duty. He also denied any cash sales without payment of duty. In such case, the adjudicating authority should have provided opportunity to cross examine the persons whose statements were relied upon. In respect of demand made under Annexure – ‘A3’ based on documents recovered from residence of Bhavesh/Snehal R Shah, we find that the same were recovered from third party. Even Shri Bhavesh Shah in his statements had stated that the trading was carried out in his personal capacity and the pen drive data pertains to his personal trading activity. We find that records were seized from third party and coupled with the fact that no cross examination of any of the persons whose names were appearing in these records were given. Shri Bhavesh/Snehal R Shah is neither employee nor director in M/s SSPL and hence his records are third party records which cannot be relied upon without corroborating with any evidence from Appellant’s unit. Similarly in case of demand made in Annexure – 4 the same is based upon documents recovered from Shri Mahendra M Shah. We find that Shri Mahendra in his statement dt 05.03.2013 has clearly stated that the clearances from M/s SSPL were made on payment of duty and no clearances were made in cash. Further the clearance in such papers was shown to M/s Vinod Steel which was not investigated. In absence of any evidence and merely on basis of such slips, the demand cannot be made. Similarly in case of demand made in Annexure – 5 the demands are based upon Transport Register seized from office of Suvidha Roadways at Vasai, We find that except said transport register which is a third party record, no other evidence of clandestine removal has been adduced. There is no corroboration of such register with no any incriminating document recovered from factory and hence the demand based upon such register cannot be made. We also find that the Appellant Unit in their reply had also stated that they do not have production capacity for manufacture of quantity as alleged to have been cleared clandestinely. The adjudicating authority has confirmed demand by relying upon the seized documents whereas the same could not have been relied upon in absence of corroborative evidence from the independent source or any evidence at the Appellant Unit’s end. The show cause notice does not point out any discrepancy at the time of visit of the officers in raw material or finished goods stock. No inculpatory record/ papers were found at the factory of Appellant Unit

which could show that any excess raw material has been received by them or any goods has been cleared clandestinely by them. There is no production record or raw material consumption record showing excess unaccounted production. No statement of production incharge or worker is appearing. Except pointing out the transport register of Suvidha Transport and that too for few transports, there is no other independent evidence of transportation of goods. Pertinently we find that statements of few traders/ broker were recorded but none of them has provided even a single name of customer or actual buyer. No finished goods alleged to be clandestinely cleared was seized from any alleged buyer. No transport Bilty or octroi receipts/ records has been brought on record to show that the goods were consigned from Chhatral to Mumbai. Thus there is no primary evidence to allege any clandestine clearance. The statements and third party records which are secondary evidence cannot be relied upon to allege clandestine clearance as the same has no independent evidentiary value. We find that the Tribunal in case of M/s Viswa Traders Pvt. Ltd. 2012 (278) E.L.T. 362 (Tri. - Ahmd.) in similar set of facts has held as under :

12. *Be that as it may be, it is to be noted that there is no dispute that to manufacture of said final product 'Frit' requires the use of Quartz, Feldspar, Zinc, Borax Powder, Calcium and Dolomite as inputs/raw material. On the date of visit of the officers to the factory premises of the appellant, it is undisputed that the stock of raw materials as well as finished goods was tallying with recorded balances. This conclusion can be reached from perusal of records, as there is nothing on record to indicate otherwise.*

13. *On careful perusal of the entire records of the case, we find that there is nothing on record as to unrecorded purchases or consumption of various other raw material in the manufacture of Frit, there is also nothing on record to indicate that the appellant had purchased the Quartz, Feldspar, Zinc, Borax Powder, Calcium and Dolomite and without accounting them used for the manufacture of Frit for clandestine removal. There is also nothing on record nor there is any statement of the suppliers of other raw materials, which would indicate that the appellant had received unaccounted raw material from the suppliers of these raw materials. There is a solitary evidence in the form of statement of supplier of one of the raw material i.e. Borax Powder, who indicated that the appellant had procured Borax Powder and not accounted the same in his record; and the said entries and information were deduced from the documents of the premises of Shri Anil Jadav and whose evidence has been discarded for having not been produced for cross examination; in the absence of any other tangible evidence to show that the appellant had been procuring the other major raw materials required for manufacture of Frit without recording in books of accounts, we are unable to accept the contentions of the Id. AR appearing for the Revenue and the findings of the adjudicating authority, that there was clandestine manufacture and clearance of the finished goods. The investigation has not proceeded further to bring on record unaccounted purchases of all the raw materials required for manufacturing of 'Frit'.*

14. In the case of Dhanavilas (Madras) Snuff Co. - [2003 \(153\) E.L.T. 437](#) (Tri-Chennai), we find that in Para 6, the Tribunal has recorded as under :

"6.....Revenue ought to have produced the evidence of purchase of raw material, manufacture and clearance of goods clandestinely by examining the workers and also those who have received the goods without payment of duty. In view of lack of evidence, the Commissioner has rightly dropped the proceedings with regard to the charge pertaining to clandestine removal. However, he has upheld the charge pertaining to certain other charges and has confirmed duty and penalties....."

In yet another case in the case of S.T. Texturisers - [2006 \(200\) E.L.T. 234](#), this Bench, in respect of clandestine removal, very clearly held as under :

"6. Considering the above arguments of the appellant in the light of the various decisions of the Tribunal, it is seen that it has been consistently held by the Tribunal that entries in rough register cannot be made the sole basis for arriving at finding of clandestine manufacture. Reference in this regard be made to the Tribunal decision in the case of Essvee Polymers (P) Ltd. [[2004 \(165\) E.L.T. 291](#) (Tri. - Chennai)], Krishna Bottlers (Vijayawada) Pvt. Ltd. v. Commissioner of Central Excise, Gantur [1999 (32) RLT 845 (CEGAT)], Ganga Rubber Industries v. Collector of Central Excise [[1989 \(39\) E.L.T. 650](#) (Tribunal)]. The ratio of all the above decisions is that the allegations of clandestine manufacture and removal being quasi criminal in nature are required to be established beyond doubt by producing evidence in the shape of procurement of raw materials, shortage, excess use of electricity, flow back of funds and purchase of final products by customers etc. Admittedly no such evidence has been produced on record by the Revenue, the evidentiary value of the statements relied upon by the Revenue already stands discussed by me in the proceedings paragraph. The said statements having been made under Section 108 of the Customs Act, 1962 are not comparable to the confession recorded under Section 164 of CRPC before Magistrate, and as such are required to be corroborated, by evidence of removal without payment of duty. As already discussed the said statements are devoid of probative value and cannot be considered to be supportive of charges of clandestine removal."

In yet another case in the case of T.G.L. Poshak Corporation - [2002 \(140\) E.L.T. 187](#), the co-ordinate Bench of the Tribunal held as under.

"6. We have carefully considered the submission and perused the impugned order. Insofar as the assessee's appeal is concerned, we notice from the extracted portion of the Commissioner's order that Revenue is solely relying on the exercise note books mainly balance sheets. The Tribunal in large number of cases which have already been noted above in the tabulated list of citations furnished by the Counsel has held that unless there is clinching evidence on the nature of purchase of raw materials, use of electricity, sale, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of note books maintained by some workers. The facts in the case of Aswin Vanaspati Industries would be identical to the facts herein as in that case also the allegation was with regard to removal of Vanaspati based on the inputs maintained. The Tribunal went in great detail and have clearly laid down that unless department produces evidence, which should be clinching, in the nature of purchase of inputs and sale of the final product demands cannot be confirmed based on some note books. A similar view was expressed by the Tribunal in the other judgments noted supra. The citations placed

would directly apply to the facts of this case. Hence, following the ratio of the cited Judgments, the assessee's appeal is allowed.

All the above reproduced ratio would lead to a conclusion that the charge of clandestine manufacture and removal has to be proved beyond doubt and in the case before us, as already discussed, there is nothing on record that instils confidence in our mind that the appellant had clandestinely manufactured and cleared the final product.

Further, it is settled law that for the purpose of clandestine removal, there has to be clandestine manufacture. We find on perusal of the record, that the Revenue authority, despite having engaged themselves in massive investigation, has not brought on record a single evidence of procurement of other major raw materials required for manufacture of Frit, either in the form of entries in the books of accounts or in the form of statements of supplier of the other major raw materials. It is undisputed that for manufacturing of Frit (the final product) major raw material is 'Quartz' which is approximately 45% of the total inputs going in the manufacturing of 'Frit'. We find from the records that Revenue has not produced a shred of evidence, to indicate that the appellant had been procuring Quartz without accounting them in books of account nor is there any evidence to indicate that other raw materials were also procured without recording them in books of accounts. In the absence of any such evidence, we are unable to persuade ourselves that the appellant M/s. VTPL had clandestinely manufactured the quantity of 'Frit' during the period 1998-1999 to January 2002. If there is no clandestine manufacture, there cannot be any clandestine clearance. Further, we also find from the records that there is no investigation which has been carried out to indicate that there has been unusual consumption of electricity or any other evidence in the form of receipt of raw material into the factory premises of the appellant M/s. VTPL or that the production figures were so manipulated that the clandestine removal could take place without receipt of other raw materials. The investigating authorities, during the course of raid, had even seized the records of security at the factory gate, but from these records, Revenue was not able to show that there was illicit receipt of the raw materials in the manufacture of final product in the factory premises.

15. We find that Hon'ble High Court of Gujarat, in the case of Nissan Thermoware Pvt. Ltd. - [2011 \(266\) E.L.T. 45](#) (Guj.), has specifically held as under :

"7. Thus, on the basis of findings of fact recorded by the Tribunal upon appreciation of the evidence on record, it is apparent that except for the shortage in raw material viz., HD which was disputed by the assessee and the statement of the Director, there was no other evidence on record to indicate clandestine manufacture and removal of final products. On behalf of the revenue, except for placing reliance upon the statement of the Director recorded during the course of the search proceedings, no evidence has been pointed out which corroborates the fact of clandestine manufacture and removal of final products. In the circumstances, on the basis of the material available on record, it is not possible to state that the Tribunal has committed any legal error In giving benefit of doubt to the assessee."

(Emphasis supplied)

The above ratio, as laid down by Hon'ble High Court of Gujarat, would squarely cover the issue before us.

16. In the absence of any tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods from the factory premises of M/s. VTPL, in the peculiar facts and circumstances

of this case, we hold that the impugned order which confirms the demand on the appellant M/s. VTPL and imposes penalty on them is not sustainable and is liable to be set aside and we do so.

14. The above order of the tribunal stands upheld by the Hon'ble High Court of Gujarat as reported in 2013 (287) E.L.T. 243 (Guj.).

15. Further in case of ARYA FIBRES PVT. LTD. 2014 (311) E.L.T. 529 (Tri. - Ahmd.), the tribunal while dealing with the reliability of papers found from the evidence of the buyer held that private records seized from the premises of the buyer cannot be sole basis for demand especially when corroborative evidence like purchase of extra raw material, actual removal of clandestine goods, receipt of sale proceeds, etc. not produced. The relevant extracts of the order are as under :

42. *We may now proceed to deal with the four demands of duty in the present case :*

I. The first duty demand of Rs. 56,52,945/- is mainly based on documents seized from the premises of GSL i.e. A-19, A-20, A-21, A-22 and A-23. Other than these documents, the evidence is V.N. Parab's statement and Mohan Bhai Gupta's statement. The seized documents as per the stand of the Revenue are note books maintained by Parab. The allegation with regard to the present demand is that Nova had clandestinely cleared POY to GSL. According to the Revenue the entries made in A-19, A-20, A-21, A-22 and A-23 pertain to clandestine procurement of POY of 115/68 denier from Nova and clandestine production of DTY by GSL by processing the same. The Id. Senior Advocate has submitted that the entries made therein by V.N. Parab are totally vague, inasmuch as there is nothing therein to show that they pertain to clandestine procurement of POY and clandestine clearance of DTY. The learned Senior Advocate has also pointed out that there are discrepancies in the seized documents relied upon by the Revenue. He has further pointed out that A-21 does not even refer to the quantity of DTY produced by GSL. It is also difficult to establish that all the quantities of DTY were made out of 115/68 denier of POY. Annexure B-1 and B-2 have been prepared only on the basis of presumptions. He, further, submitted that the conclusion that A-19 and A-21 refer to the quantities being loaded in the crill is also without any evidence. There is no proof that GSL has used 100% of its capacity for production of DTY. Except for these entries, there is no substantial material to show that such a huge quantity of POY has been cleared to GSL without payment of duty and that the entire quantity has been used of production of DTY. There is no proof of purchase of such huge quantity of POY from Nova by GSL. No evidence has been led by the Revenue to show that GSL had actually produced DTY out of POY supplied by Nova. There is no evidence of transportation of POY from Nova to GSL factory. Undoubtedly, huge quantities of raw material would be required for manufacturing such a huge quantity of POY. No evidence has been brought either in the SCN or in the Adjudication Order to show that raw materials have been purchased by Nova for manufacture of such a huge quantity of POY. There is no proof of any extra payment being made to Nova by GSL. In the absence of these evidences, the Id. Senior Advocate submitted that it would be impossible to conclude that Nova had cleared POY of such huge quantities to GSL, in the light of the decisions of this Tribunal, which he has earlier placed before us. He also submitted that V.N. Parab's statement, could not be given much credence for the reason that these were note books maintained by him in the office of GSL. It would be difficult for Nova to explain why such entries were made by V.N. Parab who was neither their employee nor acting under their instructions. When the Directors of Nova were shown the records of GSL, they have stated that they cannot comment

on the records of GSL. It was also the submission made by the Id. Senior Advocate that no presumption of truth can be drawn against Nova from the documents A-19, A-20, A-22 or A-23 or from the statement of V.N. Parab. Under Section 36A of the Act, where any documents have been seized from the custody or control of any person and such document is tendered in evidence against him or against him and any other person who is jointly tried with him, unless the contrary is proved against such person, the Court shall presume the truth of the contents of such document. Therefore, the truth of contents of such documents can be presumed only where the person from whose custody or control the document has been seized is being proceeded at all, whether solely or jointly tried with some other person. In the present case, V.N. Parab has not been proceeded against solely or jointly with some other person. In the present case, admittedly the documents were recovered from the premises of GSL. The said documents were produced by Parab who is no way connected with Nova. No presumption could therefore be drawn against Nova. There has, therefore, to be independent corroboration of the facts alleged in the show cause notice, apart from documents. The learned Senior Advocate has relied upon the decision of the Hon'ble Supreme Court in the case of *State of Kerala v. M.M. Mathew*, (1978) 4 SCC 65. He drew attention to the relevant para of the said judgment :

"It is now well settled that strong suspicion, strange coincidences and grave doubts cannot take place of legal proof. To establish the charges against the respondents, it was, in our judgment, essential for the prosecution to establish that the secret books of account related to the business transactions carried on by the respondents and none else. This it could have established in a variety of ways viz. (1) by adducing satisfactory proof to the effect that the place from which the secret books of accounts were seized formed part of the place of business of the respondents or was in their exclusive possession and control, (2) that the secret books of account were maintained by or under the orders of the respondents, (3) that the said books of account were in the handwriting of either of the respondents or their accountant, or clerk or some other person employed by them".

Admittedly none of the documents marked as A-19 to A-23 was recovered from the premises of Nova. It is not the case of the Revenue that these note books were maintained by V.N. Parab under the instructions of Nova. Further, these note books were not in the handwriting of any of the persons of Nova or its accountant or clerk or any employees of Nova. Applying the ratio of the decision of the Hon'ble Supreme Court in *M.M. Mathew (supra)*, the documents upon which the show cause notice has placed strong reliance has no probative value. The Id. Senior Advocate further submitted that merely because the document has been produced during investigation, it does not establish its probative value. The Hon'ble Supreme Court in the case of *Bareilly Electricity Supply v. Workmen*, 1971 (2) SCC 617 has held that mere production of document does not amount to proof. Further, in the case of *Life Insurance Corporation of India & Anr v. Rampal Singh Besin*, (2010) 4 SCC 491, the Hon'ble Supreme Court has held that "mere admission of a document in evidence does not amount to its proof". Para 25 of the said decision reads thus :

"We are of the firm opinion that mere admission of a document in evidence does not amount to its proof. In other words, mere marking of exhibit on a documents does not dispense with its proof, which is required to be done in accordance with law".

The Id. Senior advocate has, therefore, submitted that the confirmation of the demand of Rs. 56,52,945/- is arbitrary, illegal and unjustified and deserves to be set aside.

In reply to the submission of the Id. Senior advocate, the Id. Special Counsel has filed written submission on 30-7-2013, which he also explained orally. After summarizing the facts as stated by the Adjudicating authority, by way of what has been stated in the show cause notice, the Id. Special Counsel has

submitted that, except for saying that investigations did not touch on purchase of raw materials and payments therefore, Nova did not come forward with any satisfactory explanation in respect of the facts stated in the show cause notice, and the statements referred to therein. In this view of the matter, he submits that the present demand has been confirmed by the Adjudicating Authority for valid reasons and cannot be faulted.

We have considered the submissions of both parties. We find that no evidence has been produced by the Revenue to show that Nova has effected sale of such huge quantities of (2,75,197.31 kgs) POY to GSL. There is no tangible evidence of GSL having actually produced all the DTY or Twisted Yarn from out of non-duty paid POY supplied by Nova. No transporters' documents have been seized or produced by the Department to show transport and sale of such huge quantities of POY from Nova to GSL or, even for that matter, from GSL to the buyers of DTY produced by GSL. No evidence has been forthcoming of purchase of raw materials by Nova for production of POY in such huge quantities, or of payments effected by GSL to Nova for the excess quantities of POY, clandestinely manufactured and cleared by Nova and sold to GSL, or even of payments made by the buyers of DTY from GSL made out of quantities alleged to have been purchased by GSL from Nova. The only basis of the demand is the figures contained in A/19 and A/21, seized from GSL premises, of which V.N. Parab is the author. Even if the figures in the seized documents tally (this is disputed by Nova, since V.N. Parab has not, when he was being examined during the investigation, stated that they tally), that by itself cannot prove clandestine manufacture and clearance, the tests for which have been adequately explained by this Tribunal in the decisions cited earlier, amongst several others. The documents in question, have not been resumed from Nova's premises, nor is the author of the documents (V.N. Parab), a person in Nova's employment or acting under Nova's instructions. Reliance by the Id. Senior Advocate on the decisions of the Hon'ble Supreme Court in State of Kerala v. M.M. Mathew (supra) and Bareilly Electricity Supply v. Workmen (supra) are appropriate and supports the submission made on behalf of Nova. In cases like the present, where the demand is based on clandestine production, clearance and sale of excisable goods, mere entries in note books or diaries cannot establish the same. Proof of actual production, whether by direct evidence or corroborative evidence is a 'must', and the probative value of such evidence has to be established, especially when such a finding would lead to penal consequences.

In our view, therefore, the present demand of Rs. 56,52,945/-, which has been confirmed against Nova by the impugned order, is not based on evidence which, as this Tribunal has repeatedly emphasized in cases of clandestine manufacture and clearance, would justify a finding against the appellant (Nova). Inferential or conjectural conclusions cannot be arrived at in such cases as has been done in the present demand, merely based on what GSL did with the POY allegedly sold to them by Nova. Unless there is conclusive evidence that Nova did actually manufacture POY and clandestinely clear them without payment of duty, liability cannot be placed on Nova on the basis of conjectures and surmises, as the Hon'ble Supreme Court emphatically declared in the Oudh Sugar Mills case (supra). We are of the view that there is no tangible evidence produced by the department to establish that Nova has clandestinely manufactured and cleared POY on which the present demand has been made. We, therefore, set aside the demand of Rs. 56,52,945/- as being illegal and unjustified.

II. The second demand of Rs. 3,93,20,685/- is based on Ashok Chiripal's diary, his statement and statements made by some of the employees of Nova. According to the show cause notice, the diaries refer to production, captive consumption and clearance of Polyester Chips by Nova. Figures showed wide variations with statutory records. The chips are further used in the manufacture of POY by Nova. As regards this demand, the allegation is that Nova had suppressed the actual production, captive consumption and clearance of Polyester Chips and has not recorded for the entire production of

Polyester Chips in the statutory records. Excess Polyester Chips have been captively consumed by Nova for further manufacture of POY which was further clandestinely cleared by them. According to the Revenue, the diaries were maintained by Ashok Chiripal in his own handwriting showing production and captive consumption of Polyester Chips. Excess production of Polyester Chips was recorded in these diaries. According to Nova, these diaries by themselves do not speak of any clandestine procurement of raw-materials, manufacture of Polyester Chips and excess production of Polyester Yarn. Inferences have been drawn from the entries made in these diaries without corroborating the same with any concrete evidence. Merely because Ashok Chiripal has stated that the entries mentioned in the diaries are true and pertains to the excess production of Polyester Yarn, would not be enough to fasten the liability upon Nova. There is no evidence of procurement of raw material i.e. Mono Ethylene Glycol (MEG) and Purified Terephthalic Acid (PTA) for the production of such a huge quantity of Polyester Chips in a period of less than 6 months. Not a single person has been identified by the Revenue who has supplied such a huge quantity of raw materials for the manufacture of Polyester Chips. That apart, no evidence have been led by the Revenue regarding production of such a huge quantity of POY. Undoubtedly, these POY could not have been transported without proper mode of transport. The Revenue has failed to bring on record any evidence regarding transportation of POY alleged to have been manufactured clandestinely. No buyer has been identified who has clandestinely procured the POY from Nova. Merely because Ashok Chiripal has explained the entries made in the diary, it cannot be accepted as a basis for demanding duty against Nova. The adjudicating authority has sought to rely upon the statement of Ashok Chiripal without subjecting him to cross examination. The Id. Senior Advocate appearing for Nova reiterated these submissions. He emphasized that, under Section 36A of the Act, mere production of document would not have no probative value as has been held by the Hon'ble Supreme Court in Bareilly Electricity Supply (supra). It was pointed out by the learned Senior Advocate that the decision of Hon'ble Supreme Court in Duncan Agro Ltd. has been wrongly applied to the facts of the present case. It has further been pointed out in the written submissions filed before us by the Id. Senior Advocate that the decision only states that a statement under Section 108 of the Customs Act, 1962 corresponding to Section 14 of the Central Excise Act, 1944 is admissible as evidence. "Admissibility of a statement in evidence does not make it a confession". In this connection, he has referred to the decision of the Hon'ble Supreme Court in Veera Ibrahim v. State of Maharashtra, (1976) 1 SCC 302 = [1983 \(13\) E.L.T. 1590](#) (S.C.), that Section 24 of the Evidence Act requires certain facts to be established. The statement in question should be a "confession". Firstly, such confession should have been made by the accused. Other ingredients of S. 24 are not relevant in the context of the present case. It is important to note that the statement in order to amount to "confession" must admit the offence or at any rate substantially all the facts which constitute the offence. Admission of incriminating facts howsoever great, is not by itself a "confession". In the present case, the so-called confession has not been made by a person charged with any offence. Ashok Chiripal has not been charged with any offence which is in violation of the law in the present case. No show cause notice has been issued to him. The question of his statement being regarded as "confession" does not, therefore, arise, because confession, by its very nature, has to be made by a person charged with breach of law. In fact, at the time of hearing, the Id. Special Counsel did not dispute the submissions made by the Id. Senior Advocate of Nova that there was no "confession" by Ashok Chiripal. It was only his statement that has been relied upon.

According to the submission made by the Id. Senior Advocate, who, once again relied heavily on the tests laid down by the Tribunal regarding the nature of evidence required to affirm a finding of clandestine manufacture and clearance, a very important consideration which failed to be appreciated by the Adjudicating Authority was that, in respect of the instant demand, there was no evidence whatsoever of the procurement of the required raw materials (MEG & PTA) for production of the alleged 1910587.5 kgs of

Polyester Chips in less than 6 months. Nor was there any evidence of actual production of such quantities by Nova. There is also no evidence of transportation of POY, if at all manufactured, to any buyer. No payments made by Nova to suppliers of raw materials, nor by buyers of POY to Nova have been specifically alleged or any evidence adduced of the same. The Id. Senior Advocate for Nova, in his written submissions, again referred to the decisions of the Hon'ble Supreme Court in Bareilly Electricity Supply case (supra), Ram Bihari Yadav (supra), LIC of India v. Ram Pal Singh Besin, (2010) 4 SCC 491 in support of the proposition that mere admission of a document in evidence does not amount to its proof, which has to be done in accordance with law. He also relies upon the fact that the entries in the diary showed that approximately 4.97 lakhs kgs were manufactured in March, 2002, 16.46 lakhs kgs in April, 2002 and 28.54 lakhs kgs in May, 2002. Such variation could not have been real, on which no explanation was sought from Ashok Chiripal when his statement came to be recorded. Nova's request for his cross examination was rejected. The Adjudicating Authority, as submitted by the Id. Senior Advocate, rejected the aforesaid submission regarding the variation by merely stating that there was no such variation in the Polyester Chips manufactured from month to month in 2002 since Annexures C1 and C2 to the show cause notice do not support it, and the Diaries and the statement of Ashok Chiripal have to be taken as correct and weightage given. The Id. Senior Advocate also submitted that MEG and PTA (raw materials) were being purchased by them from Reliance Industries Ltd., a major supplier of the same, in respect of which proper records are maintained by them as well as Nova, and it was presumptuous for the Department even to contend that they were purchased from Reliance Industries Ltd. without any payment being recorded or in cash. Apparently, the investigating authorities never verified this from Reliance Industries Ltd. and the impugned order records a mere finding that the statement that Nova purchases the raw materials from Reliance Industries Ltd. is "factually incorrect" without giving any reason for arriving at the said finding. It was, therefore, the submission of the Id. Senior Advocate for Nova that the diaries and statements relied upon by the Revenue do not prove the case of clandestine manufacture and clearance of POY by Nova, which has to be established in accordance with law laid down by the Tribunal in the long line of decisions, referred to by him while dealing with the earlier demand.

In reply to the submissions made on behalf of Nova, the Id. Senior Special Counsel for the Revenue filed written submissions on 30-7-2013 and explained the same. The diaries had been maintained by Ashok Chiripal, showing production and consumption of polyester chips in Nova's factory from March, 2002 to August, 2002. The statement of Ashok Chiripal was not retracted by him, which stated that the figures were showing actual production of polyester chips by Nova and captive consumption thereof for manufacture of POY. A quantity of 17,69,298 kgs of polyester chips shown to have been transported were not entered in the Excise records. The statements of Vikram Oza and Nitin Patel, employees of Nova were to the effect that Nova was receiving PTA (one of the raw materials) which was not accounted for in the records. The Id. Special Counsel also showed us certain figures in the diaries about production on 31-3-2002 and submitted that the records and the statements cannot be belittled.

We have considered the rival submissions. We are constrained to reiterate that it is one thing to make out the content of entries made in a document. It is totally a different thing to assess the probative value of the contents of the document. As repeated by this Tribunal, clandestine manufacture and clearance cannot be readily inferred from documents and statements. They have to be established on evidence, relatable to or linked with actual manufacturing operations. As far as the present demand is concerned, there is no such evidence forthcoming in the record before us. Mere reliance on note books/diaries or statements cannot justify a finding of clandestine manufacture and/or clearance. Investigation into the sources of supply of raw material (MEG & PTA in the present case), especially when Nova had stated that they get their raw materials from Reliance Industries Ltd., one of

the biggest producers thereof, would have revealed the actual facts. Apparently, no efforts seem to have been made in this behalf by the investigating authorities. Of equal importance would have been investigations into the transportation of the raw materials (in huge quantities, as alleged) to Nova and of POY allegedly manufactured from the factory of Nova to its buyers, and payments for such raw materials and for the clandestinely cleared POY. In the absence of all such evidence, a finding that excisable goods have been clandestinely manufactured and cleared by Nova cannot justifiably be arrived at. The probative value of the entries needs to be established by independent corroboration, which is lacking in the present case. The long line of decisions referred to and relied upon by the Id. Senior advocate for Nova have laid down the parameters for a charge of clandestine manufacture and clearance to be established, which have not been satisfied in the present case. We need to say nothing more. The present demand of Rs. 3,93,20,685/- is, therefore, unjustified and deserves to be set aside. Accordingly, we do so.

16. In case of CHARMINAR BOTTLING CO. (P) LTD 2005 (192) E.L.T. 1057 (Tri. - Del.), the tribunal while arriving at the relevancy of reports found from the third party to confirm demand against manufacturer held as under :

"We have considered the submissions of both the sides. The charge of clandestine removal of bags-in-boxes by the Appellants has not been established by Revenue which has mainly relied upon the difference in figures of sale of the impugned product reflected in PMX Reports. It is not disputed by Revenue that these reports are prepared by M/s. Hyderabad Beverages and not by the Appellants. No evidence has been brought on record to show any excess production of the impugned product by the Appellants by way of procuring necessary raw materials. In a similar situation in the case of Moon Beverages wherein the charges of clandestine removal was made on the basis of computerized sheets of sales figures maintained by M/s. Parle Exports Ltd. whom the figures were sent by the assessee, the Tribunal has held that "the charge of clandestine removal cannot be established on the basis of one single factor.....Other corroborative evidence such as evidence of other inputs required for manufacture of aerated waters namely sugar, carbon dioxide being purchased and utilized in the manufacture of the final product during the period in dispute is required. There is no such corroborative evidence in the present case. There is also no evidence of higher electricity consumption." In the present appeal before us also there is no corroborative evidence except the PMX Reports. Revenue has also not contradicted the submission of the learned Advocate that the Managing Director of the Appellants was not even questioned about these reports. In the case of Rama Shyama Papers Ltd, supra, wherein the records were seized from the premises of one of the customer of the assessee, the Tribunal did not uphold the charge of clandestine removal as "the Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant's company to the premises of M/s. Chitra Traders or the Customers when the goods were sent directly to as per the directions of Chitra Traders... The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant Company." In the present matter also the Revenue has not brought any material on record to show that the excess bag-in-boxes said to have been sold by M/s. Hyderabad Beverages were removed from the premises of the Appellants. As show cause notice alleging clandestine removal cannot be issued based on assumption and presumption and as held by the Supreme Court in Oudh Sugar Mills Ltd. v. U.O.I., 1978 (2) E.L.T. (J 172), the findings based on assumption and presumption without any tangible evidence will be vitiated by an error of law. We, therefore, set aside the demand on charge of clandestine removal.

16. In the facts of the present case there is no dispute that the documents/records recovered solely from third parties, statements of third parties whose cross examination was not allowed despite it is mandatory under section 9D of CEA, 1944, no incriminating documents recovered from the Appellant SSSPL, no excess/short stock of raw material or finished goods were found; no excess electricity consumption was proved, no evidence of any cash receipt or it's seizure, no excess raw material consumption was found. On the above undisputed facts, law is settled in the above referred judgments, that clandestine removal without any evidence as narrated above cannot be established."

17. Going by the ratio of above judgments and our discussion and findings we are of the view that demands made against the Appellant Unit are not sustainable. As regards appeals filed by other co-appellants, the charges against them are consequential to demands against the main appellant SSSPL, therefore demands against these co-appellants are also not sustainable. We therefore set aside the impugned order and allow the appeals.

(Pronounced in the open court 06.12.2019)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul