

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.11822 of 2018

(Arising out of OIA-CCESA-SRT-APPEALS-PS-511-2017-18 passed Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Thakar Traders

J-4, Ground Floor, Ghayal Building, Matawadi Chowk,,
Lambe Hanuman Road,
Surat, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-i

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat- 395001

.....Respondent

WITH

Excise Appeal No.12083 of 2016

(Arising out of OIO-SUR-EXCUS-001-COM-003-16-17 passed Commissioner of Central Excise-SURAT-I)

Om Synthetics

102,103, 109-111, Jb Shopping Centre Matawadi Circle
Lambe Hanuman Road
Surat, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Surat-i

New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat,
Gujarat- 395001

.....Respondent

APPEARANCE:

Shri Anand Mishra, Shri Gaurav Maharshi, Shri Shubham
Sharma(Advocates) , Shri Purvin Shah (C.A.), for the Appellant

Shri S.K. Shukla, Superintendent (Authorized Representative) for the
Respondent

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

Final Order No. A/ 12336-12337 /2019

DATE OF HEARING: 03.09.2019
DATE OF DECISION: 06.12.2019

RAMESH NAIR

The present appeals have arisen out of common investigation and hence are being taken up together for disposal. M/s Om Synthetics have filed appeal against the impugned Order No. SUR-EXCUS-001-COM-003-16-17 dt. 21.07.2016 passed by Commissioner of Central Excise, Service Tax, Surat – I. & M/s Thakar Traders has filed appeal against Order-in-appeal No. CCESA-SRT/(Appeals)/PS-511/2017-18 dt. 15.01.2018 passed by Commissioner (Appeals), Vadodara, Zone – II. In case of M/s Om Synthetics, the adjudicating authority confirmed duty demand of Rs 1,11,20,402/- penalty of same amount and also imposed fine. In case of M/s Thakar Traders the Commissioner (Appeals) has upheld the duty demand of Rs. 7,92,680/-, penalty of Rs. 792680/- under section 11AC, fine of Rs. 5000/- u/r 27, redemption fine of Rs. 18450/- on confiscated Girder wheels valued at Rs. 18450/-. The question to be decided in the present appeals is that whether the Appellant M/s Om Synthetics are entitled for the benefit of SSI notification No. 8/2003 – CE dt. 01.03.2003 where the goods bearing brand name “Bhayani” was cleared by them and also whether demand of duty against both the Appellant is sustainable on alleged removal of goods without payment of duty.

2. Brief facts of the case are that search was conducted at factory and office premises of M/s Bhayani Engineering Co. by the officers. It was found that M/s Om Synthetics were running a factory whereas M/s Thakar traders were operating office in said building. It was found that M/s Bhayani Engineering is partnership firm having two partners viz. Shri Kishorbhai Shambhubhai Bhayani and Shri Thakarshibhai Bhagwanbhai Kukadiya in equal ratio. The firm is engaged in manufacture and after sales service of roundish machine used for giving round shape to diamond after bruiting process. M/s Om Synthetics is partnership firm having partners Shri Kishorbhai Shambhubhai Bhayani, Shri Thakarshibhai Bhagwanbhai Kukadiya and Shri Babubhai Bhawanbhai Kukadiya in equal proportion. The firm is engaged in manufacture of Russian Brutter, Golden Russian and 4P laser machine which are used for bruiting and sawing of diamonds. M/s Thakar Traders is partnership firm of Smt. Dakshaben Kishorbhai Bhayani and Smt. Rekhaben Thakrshibhai Kukadiya in equal proportion and

engaged in selling of tools and parts of diamond processing machinery. During investigations records/documents along with some machines were seized and statements of concerned persons and buyers of goods were recorded. Subsequently show cause notice dated 07.09.2015 was issued to M/s Om Synthetics on the ground that they have cleared goods under the brand name “Bhayani” without payment of duty as found from the incriminating documents seized from the residential premises of partner Shri Kishorebhai. The show cause notice also relied upon the statement of partners and employee Shri Prabhakar and Shri Dhaval. It was also alleged that although the sale documents were issued in name of M/s Bhayani Engineering but the goods were manufactured by M/s Om Synthetics. In case of M/s Thakar Traders they were issued show cause notice dt. 02.09.2015 wherein it was alleged that they have manufactured and cleared goods viz. Brutter wheel and Grinder Wheel under the brand name “Bhayani” only on delivery challan without payment of duty. It was alleged that M/s Om Synthetics and M/s Thakar Traders are not eligible for SSI exemption No. 8/2003 – CE dt. 01.03.2003 and are liable for duty. In case of M/s Om Synthetics vide impugned order dated 21.07.2016, the demands and penalties as proposed were confirmed. In case of M/s Thakar Traders the demands were confirmed by the adjudicating authority against which they filed appeal before Commissioner (Appeals). The Appellate authority vide impugned Order-in-appeal dated 15.01.2018 held that the Appellant are liable to pay duty on Brutter wheel Grinder Wheel. He however held that the brand name is registered in the name of family members, who are partners in firm and are co-owners, therefore they are eligible for SSI Exemption under Notification No. 8/2003 – CE dt. 01.03.2003 on the goods cleared under brand name “Bhayani”. Both M/s Om Synthetics and M/s Thakar Traders are before us against the respective impugned orders passed against them.

3. Shri Anand Mishra, Learned Counsel appearing for the Appellant M/s Om Synthetics takes us through the demand calculation Annexure – ‘A’, ‘B’, ‘C’ and ‘D’ of the show cause notice. He submits that Annexure – ‘A’ has been prepared on the basis of challans seized from the residential

premises of Shri Kishorebhai Bhayani. Annexure – ‘B’ has been prepared on the basis of records seized from the factory premises of M/s Om Synthetics. Annexure – ‘C’ has been prepared on the basis of Retail/ Tax Invoices issued by M/s Om Synthetics for sale of machines details of which does not tally with the delivery challans seized from factory premises of M/s Om Synthetics/ M/s Bhayani Engineering and residential premises of Shri Kishorbhai Bhayani. Annexure – ‘D’ has been prepared on the basis of record No. 54 seized from the factory premises of Om Synthetics/ Bhayani Engineering and record no. 20 seized from residential premises of Shri Kishorbhai Bhayani of those machinery details, which do not reflect in Annexure – ‘A’, ‘B’ & ‘C’.

4. The Ld. Counsel submits that the clearance alleged to have been made by Appellant in Annexure – ‘A’ are erroneous. The seized documents clearly show the clearances were made by M/s Bhayani Engineering and the documents were not recovered from the Appellant factory but from residential premises and therefore no reliance can be placed upon such document. It is alleged that the value of clearances is 2,77,35,400/- is based on seized documents/ records which were numbered from 1 to 20. The record No 1 to 18 are delivery challan books and record No. 19 & 20 are loose papers wherein accounts of cash receipt for sale proceeds and expenditure against delivery challans of record no. 1 to 18 and similar types of challans not available in records is mentioned. He submits that the delivery challans are nowhere co-related with any of the seized records of receipt of any cash/ consideration neither any investigation. The investigation could co-relate only for Rs. 34,82,806/- and there is no evidence that said delivery challan belong to M/s Om Synthetics. The statement of Shri Kishorbhai Bhayani and Hardik Bhayani contradicts the demand.

5. In relation to demands made in Annexure – ‘A’, ‘B’ and ‘D’, he submits that the statements relied upon are itself contradictory which are not admissible and has no evidentiary value. At the time of preparation of panchnama dt. 13.03.2015 at residential premises of Shri Kishorbhai

Bhayani, his son Shri Hardik Bhayani in presence of panchas stated that all the delivery book and the papers in which the debit/ credit entries are written are of M/s Bhayani Engineering Co. He takes us through the said panchnama. There are contradictory statements of Shri Kishore bhai. In his statement dated 13.03.2015 he stated that the record No. 19 & 20 contain loose papers which were recovered from his residential premises, wherein the cash receipts of the sale proceeds against the delivery challans in record no. 1 to 11 are of M/s Om Synthetics whereas the record no. 12 to 18 are of M/s Bhayani Engineering. Further in relation to document No. 19 & 20 which forms basis of demand in Annexure – ‘A’ pertains to the “ cash collection receipts against sales of M/s Bhayani Engineering Co. , M/s Om Synthetics and M/s Thakar Traders. Clearly the statements of two persons for same documents are contradictory in absence of any clandestine removal established and the records seized from residence of Shri Kishorbhai Bhayani cannot be construed as valid evidence for demanding duty. He also points out that there are contradictions in statement of Shri Kishorbhai and employee of Thakar Traders Shri Prabhakarbai. Whereas Shri Kishorbhai has stated that the delivery challan were either prepared by him or Shri Prabhakarbai whereas on the contrary Shri Prabhakar bhai stated that he is working as a supervisor at M/s Bhayani Engineering and working as per direction of partners of Bhayani Engineering. Thus the statement of Shri Kishorbhai Bhayani cannot be relied upon.

6. The Ld. Counsel submits that all the seized records forming part of Annexure – ‘A’, ‘B’ & ‘D’ do not pertain to Appellant unit as they bear name of Bhayani Engineering and are signed on behalf of M/s Bhayani Engineering Co. Only two delivery challans of Appellant Unit were shown in impugned order which show description of goods as “On and Off Switch as well as service charge” and “Motor service charge, nuts and switch”. This does not show any removal of machine. Further there is no evidence of Appellant’s name in any manner hence the seized records cannot be alleged to be of Appellant. The seized records clearly bear the name of M/s Bhayani Engineering Co and the same cannot be used against Appellant. No independent or corroborative documentary evidence is on record

beside the sole evidence of contradictory statement of Shri Kishorebhai Bhayani which cannot substitute the mandatory requirement of manufacture by Appellant. The manufacture of goods has to be shown which is absent. The Ld. Counsel also submits that the vital fact of manufacturing of common machines by M/s Bhayani Engineering and Appellant has been overlooked. The revenue assumed that the machines were manufactured only by Appellant Unit inspite the fact on record that Shri Kishorebhai in his statements has categorically stated that *"In M/s Bhayani Engineering Co. situated at Ground Floor of J.P. Shopping Center, mainly we manufacture Roundish Machine. However, when there is more demand of the Machinery and production we sometimes manufacture Russian Machine, Bruter Machine in M/s Bhayani Engineering Co."* That even though such challans have been relied upon but the said challans are of Bhayani Engineering Co. alone. This establishes that M/s Bhayani Engineering Co. was also manufacturing similar machines as that of appellant. The basis of demand is erroneous. He submits that for these reasons the demand made in Annexure –‘A’, ‘B’ and ‘D’ are not sustainable. He also submits that denial of SSI Exemption on the ground of use of "Bhayani" brand name is erroneous as co-ownership agreement of trade mark was entered into between Bhayani Engineering Co. on one part and Appellant Unit and M.s Thakar Traders on second part for use of trademark "Bhayani" on co-ownership basis. Therefore there is transfer of ownership and right to use such brand name "Bhayani" by them. The notification No. 8/2003 – CE dt. 01.03.2003 excludes only those clearances which are made using another person trade mark which is not the case here. He also relies upon impugned Order-in-appeal passed against M/s Thakar Traders wherein the Appellate Commissioner has granted SSI Exemption even after use of brand name "Bhayani" considering M/s Thakar Traders to be co-owner. He also relies Tribunal order dt. 11.10.2018 in case of M/s Shreeji Enterprise and Ors. Vs. Commissioner of CE & ST in appeal No. E/1555-1556/2010 – DB and Minimax industries and Othrs. 2011 (269) ELT 166 (DEL). The Id. Counsel submits that no investigations were conducted at raw material suppliers who supplied the raw material. That statements of 15 buyers of machines were recorded

which does not reveal anything substantial except two customers. That even out of these two customers show cause notice was issued only to Khodiyar Diamond and no SCN was issued to Jalpa Diamond. That the allegation of show cause notice is clandestine removal to around 400 customers out of which only 15 were investigated which couldn't bring any corroborative evidences from any of the buyer . No corroborative evidences of receipt of raw material or unaccounted production has been found. He relies upon orders in case of Saakeen Alloys Pvt. Ltd. 2015 (10) TMI 558 (SC), Mahesh Silk Mills 2015 (319) ELT A52 (GUJ.), Diamond Scaffolding Co. 2011 (274) ELT 10 (Cal.), TGL Poshak Corporation 2001 (99) ECR 424 (TRI), Jay AjitCharia 2015 (40) STR 1139 (TRI). He also submits that statement of Third Partner was not recorded which was crucial to ascertain the facts. No show cause notice was issued to M/s Bhayani Engineering Co. inspite of the fact that the seized records contained name of said firm and who were manufacturing same machinery and the same is violation of the settled law by straight away adding the values of those documents in the clearance of Appellant. He relies upon judgment in case of 1997 (94) ELT 88 (TRI), Ramsay Pharma (P) Ltd. 2001 (94) ECR 681. The Id. Counsel submits that the retraction affidavit of Shri Kishorbhai, Shri Thakarshibhai, Shri Prabhakarbai, Shri Dhaval and Prabhakar make clear that the statements recorded earlier even though not having correlated evidences are not admissible. The said persons in their affidavits has clearly stated that they were not well versed in English language and the questions and answers were precompiled by the officers and they were forced to sign the same.

7. In case of M/s Thakar Traders, the Id. Counsel submits that the Appellant were undertaking the business activity of processing of various wheels such as Girder Wheels, Bruter Wheels, Russian Wheels falling under CETH 84669100. The searches were conducted at their premises and residential premises of partners. The manufacturing process of Russian Bruter wheels require various processes. Without the grinding process the product has no relevance and cannot become goods. The goods are prepared by the job worker as he does the grinding process. The process of

grinding is considered as manufacture. The explanation was given by the production Incharge Shri Ajay Yadav in presence of panchas as apparent from the panchnama. The goods after receiving back from job worker were cleared after payment of VAT. The process of Notification No. 214/86- CE was not followed and therefore the job worker who has undertaken the process of grinding is manufacturer. In respect of show cause notice issued to M/s Thakar Traders he submits that the Annexure – ‘A’ was prepared on the basis of Record No. 3 & 4 which is misinterpreted and misconstrued by the department as the said record contains the details of products manufactured on trial and error basis during the initial stage. There is no date or rate of such goods which was put by the officers themselves. The said papers clearly contain the heading as “Testing” in Gujarat language. He also takes us through the remark column wherein the words “Old ready” or “raw-old” or “new material” is mentioned and submits that it establishes that re-cycling process undertaken during testing. The liability to duty would arise only on removal. The author of said records was neither verified nor questioned. The two buyers namely Shri Madanlal Dhanrajji Nagar and Mrs. Dolly Shah in their statements has stated that they brought the goods from Appellant Unit and also produced ledger and tax invoice which clearly shows that there is no evasion of duty. Further the retraction affidavits were filed by Shri Thakarshibhai Kukadiya and Shri Kishorbhai that they were not well versed in English and the statements were pre-compiled by the officers. No investigation was conducted from any raw material supplier. There is no corroborative evidence to show the clandestine manufacture and removal of goods. He relies upon judgments of Saakeen Alloys Pvt. Ltd 2015 (10) TMI 558 (SC), TGL Poshak Corp. 2001 (99) ECR 424 (TRI), Rigidcut Tools Pvt. Ltd. 2001 (134) ELT 64 (TRI). He thus prays to set aside the impugned order.

8. Shri S.K. Shukla Learned Superintendent (Authorized Representative) appearing for the revenue reiterates the findings of the impugned order. He submits that from the statements of Shri Kishorebhai Bhayani and employees in respect of seized records from residential premises of Shri Kishorebhai and factory premises, it is clear that the

Appellant unit has made clearances without payment of duty. He also submits that the clearances made under the trade name “Bhayani” by Appellant M/s Om Synthetics is not eligible for SSI Exemption under Notification No. 8/2003 – CE. He thus prays to uphold the impugned orders.

9. Heard both the sides and perused the case records. We find that the demand has been summed up in Annexure – E prepared on the basis of Annexure - ‘A’, ‘B’, ‘C’ and ‘D’. Annexure – ‘A’ has been prepared on the basis of challans and records No. 1 to 20 seized from residential premises of Shri Kishorbhai Bhayani. The records No.1 to 18 are delivery challans alleged to be prepared by him and Supervisor Shri Prabhakar. The record No. 19 to 20 are loose papers alleged to be containing cash receipts of sale proceeds and expenditure against aforesaid challans and similar challans not found in records. The Annexure ‘B’ is prepared on the basis of records No.1,2,23 and 24 seized from the office cum factory premises of M/s Om Synthetics for the period 02.12.2012 to 07.03.2015 which are delivery challans. Annexure – ‘C’ contains description of Retail/ Tax Invoices issued by M/s Om Synthetics for sale of machines details of which does not tally with the delivery challans seized from factory premises of M/s Om Synthetics/ M/s Bhayani Engineering and residential premises of Shri Kishorbhai Bhayani. Annexure – ‘D’ has been prepared on the basis of record No. 54 seized from the factory premises of Om Synthetics/ Bhayani Engineering and record no. 20 seized from residential premises of Shri Kishorbhai Bhayani of those machinery details which do not reflect in Annexure – ‘A’, ‘B’ & ‘C’. The demand has been made in Annexure – ‘E’ to SCN. The revenue has allegedly relied upon the statement of buyers to allege that the goods received by these buyers were cleared clandestinely by M/s Om Synthetics. It is also the case of the revenue that since all the goods were covered under the brand name “ Bhayani”, M/s Om Synthetics is not eligible for the benefit of SSI exemption Notification No. 8/2003 – CE dt. 01.03.2003.

10. We find that as far as demands compiled on the basis of Annexure – ‘A’ are concerned, the details were taken from the delivery challan seized from the residence of Shri Kishorebhai Bhayani, Partner of M/s Bhayani Engineering Co. The said documents bears name of Bhayani or are signed on behalf of Bhayani Engineering. During search and panchnama proceedings on 13.03.2015, Shri Hardik Son of Shri Kishorebhai Bhayani informed the officers that all the delivery books and the papers in which the debit/ credit note are written are of M/s Bhayani Engineering. We find that though the show cause has conducted investigation of all the three units and the units had common partners. The documents/ records were maintained at common factory building/ premises and the same were seized. However no investigation seemed to have conducted in case of M/s Bhayani Engineering. If the delivery challans contained name of M/s Bhayani Engineering or the person has signed as being related with M/s Bhayani Engineering, in that case it was imperative to include M/s Bhayani Engineering in investigation and issue show cause notice for their involvement. Merely on the basis of statement of Partner or the supervisor, it cannot be concluded that the clearances were of M/s Om Synthetics when the seized records show otherwise. No value of clearances has been shown to have been made by M/s Bhayani Engineering Co. When the documents/ records relied upon for making demand has been seized from residence of partner of M/s Bhayani Engineering, in that case, the first presumption will be that such documents belong to clearances of M/s Bhayani Engineering. It was especially so when the documents bear the name of M/s Bhayani Engineering and or were signed on behalf of Bhayani Engineering. Only on the basis of half cooked investigation, the demand cannot be raised. We also find that though clearances of Rs. 2,77,35,400/- has been alleged to have been made by Om Synthetics on the basis of delivery challan, however when the same is corroborated with record No. 18 and 20, it is hardly corroborating to the extent of Approx. Rs. 35 lakhs. In such case it is clear that even there is no corroboration between the alleged delivery/ clearances of goods and receipt of consideration, there is no basis for demand. In his statement dt. 13.03.2015, Shri Kishorbhai Bhayani stated

that loose papers of record No. 19 and 20 are the cash receipts of sale proceeds against the delivery challans of record no. 1 to 11 and the record no. 12 to 18 are of M/s Bhayani Engineering. In relation to documents No 19 and 20, he stated that the same are cash collection receipts against sales of M/s Bhayani Engineering Co., M/s Om Synthetics, M/s Thakar Traders. The statements of Shri Kishorebhai Bhayani are thus contradictory in nature. The Appellant has drawn our attention to the two delivery challans of Om Synthetics which are of “ On and Off Switch as well as service charge” and “ Motor Service charge, nuts and switch”. These challans do not depict any removal of machinery. The other challans do not bear the name of Om Synthetics and in such case it cannot be said that the challan belong to M/s Om Synthetics. We also find that Shri Kishorbhai Bhayani in his statements has also stated that when the demand of machinery is more in that case they sometimes manufacture Russian Machine, Brutter machine in M/s Bhayani Engineering. In view of such facts, it cannot be said that the clearances made on challans bearing name of M/s Bhayani Engineering were made by M/s Om synthetics. Thus the demands made in Annexure – ‘A’, ‘B’ and ‘D’ are based merely on assumption that the goods stated in documents of Bhayani Engineering were manufactured by M/s Om Synthetics. The revenue has relied upon the investigation made from the alleged buyers of goods. However we find that except two customers, no goods were seized from any of the alleged buyers. Even out of these two alleged customers namely M/s Khodiyar Diamond and M/s Jalpa Diamond, show cause notice was issued only to Khodiyar Diamond. We note that the show cause notice alleges around 400 clearances and out of the same only 15 were investigated. Even out of these 15 alleged buyers, the investigation could not bring out any corroborative evidences. In case of M/s Khodiyar Diamond also no corroborative evidence is appearing which can show that the goods were cleared clandestinely. It is also found that no investigation was made at raw material supplier except some very meagre quantity supplied. During investigation no excess raw material was found or shortage of raw material was detected. No unrecorded finished goods were found. In case

of **M/s Sakeen Alloys 2013 (296) E.L.T. 392 (Tri. - Ahmd.)**, the tribunal held as under :

“8. In the cases relating to clandestine removal of excisable goods, following are the indicators of clandestine removal activities by a manufacturer :-

- (i) Excess stock of raw materials found in the factory premises.*
- (ii) Shortage of raw materials in the records of manufacturer.*
- (iii) Excess/shortage of manufactured goods found in the factory premises.*
- (iv) Excess consumption of electricity/power used in the manufacture of finished goods.*
- (v) Any transit seizure of clandestinely removed goods made by the investigating authority.*
- (vi) Any cash amounts seized from the factory premises or dealer's premises or residential premises searched during investigation.*
- (vii) Confessionary statements of the persons concerned with the clandestine manufacture/removal of excisable goods.*

9. It is observed from the case records that in the present proceedings, there are few confessional statements of the persons which were later retracted by the persons concerned. The confessional statements subsequently retracted can be argued to be an afterthought under a proper legal advice but to observe the principles of natural justice, it becomes necessary to provide cross-examination of such witnesses, as held by various judicial courts including the Hon'ble Supreme Court relied upon by the appellants. In the case of CCE v. Omkar Textiles - [2010 \(259\) E.L.T. 687](#) (Guj.), it was held by the Jurisdictional Gujarat High Court that onus is on the Revenue to furnish the evidence to prove the charges of clandestine removal and it is not sufficient if some confessional statements have been given by the Director of the Company. Similarly, in the case of CCE v. Arsh Casting Pvt. Limited [[2010 \(252\) E.L.T. 191](#) (H.P.)], the Hon'ble High Court of Himachal Pradesh held that the private records maintained by the staff of the company cannot be made as the sole evidence to hold that clandestine removal of the goods is established and accordingly, the following point of law was decided in favour of the assessee:-

“Whether on the basis of private records, the Central Excise duty can be demanded or not when these private records show higher production than that reflected in the statutory records resulting into removal of the excess stock clandestinely i.e. without issue of invoice and without making entries of production and clearance in the statutory records?”

10. Similarly, in the case of CCE, Chandigarh-1 v. Shingar Lamps Pvt. Limited [[2010 \(255\) E.L.T. 221](#) (P&H)], the Hon'ble High Court held that the private records which have been discovered during the raid may not be sufficient for holding clandestine production and removal but there should be some positive evidence suggesting clandestine production and removal. The Hon'ble Supreme Court in the case of Shalimar Rubber Industries v. Collector of Central Excise, Cochin [[2002 \(146\) E.L.T. 248](#) (S.C.)] has also held that once the statement is retracted and the assessee asked for cross-examination then if such cross-examination is denied, the department cannot make

such statements as the basis for concluding that there was clandestine removal. It is further observed that the Hon'ble CESTAT in the case of Rama Shyama Papers Limited v. CCE, Lucknow [2004 (160) E.L.T. 494 (Tri.-Del.)] came to the following conclusion in Paras 9 and 10 of the judgment which are reproduced below :-"

"9. We have considered the submissions of both the sides. The Revenue has charged the Appellants with clandestine manufacture and removal of paper mainly on the basis of documents seized from the premises of Chitra Traders and Transporters and the various statements recorded from the Proprietor of Chitra Traders, transporters and labourers working in the factory of the Appellants and also the driver or cleaner of the Truck which was in the process of loading on 22-6-2001 when the Central Excise Officers visited their factory premises. The Appellants, on the other hand, have contended that most of the persons whose statements have been relied upon have not been produced for cross-examination and the documents seized from third parties' premises have not been corroborated by adducing evidence of any of the customers though the enquiries were conducted at different places as deposed by Shri Anurag Sharma, Inspector, in his cross-examination on 4-3-2002. Out of 19 consignments said to have been cleared by the Appellant No. 1 without payment of duty on the basis of five transporter, we observe that in respect of two consignments, it has been mentioned by the Revenue that the same may not pertain to the Appellants. Further, only one transporter Shri Sanjay Garg of M/s. Balaji Transporter Co. was produced for cross-examination which accounts for only two consignments out of 19 consignments in question. Shri Garg, it is observed from the record of cross-examination, has deposed that they generally work as commission agent and provide transport to Appellant No. 1; the payment is used to be received directly by the drivers after delivery of the goods at the consignee's end and in case the driver did not report back for the next 3-4 days, it was presumed that the goods had reached the consignees end. Further, the name of the Applicant No. 1 on one GR No. 34 had been written not by Shri Sanjay Garg, but by his brother, whose statement has not been recorded and on GR 187, there is no mention of the name of the Appellant No. 1 at all. No statement of the drivers concerned has been recorded by the Revenue to establish that the finished goods manufactured by the Appellants were removed without payment of duty. The other transporters have not been produced for the purpose of cross-examination nor the statements of drivers who might have actually carried the goods, had been recorded. Moreover no statement of any of the recipients of the goods had been brought on record. Thus the statements of the transporters have remained uncorroborated and also suffers from the shortcoming of being not being cross-examined by the Appellants. It has been the settled law that the liability cannot be fastened on an assessee on the strength of documents seized from the possession of third party. There should be some corroborative evidence/material. The Tribunal has in the case of Emmtex Synthetics Ltd., supra, when the charge of clandestine removal was made against the Appellants therein out of yarn received from a third party based on the diary, loose documents and packing slips allegedly recovered from Shri B.M. Gupta, Vice President of the Supplier Company, held that "no presumption on the basis of uncorroborated, uncross-examined evidence of B.M. Gupta and the alleged entries made by him in the private diary, loose sheets, charts, packing slips could be drawn about the receipt of polyester yarn by the Appellants from the company, M/s. HPL, in a clandestine manner during the period in question. Similarly, no inference could be legally drawn against the Appellants of having manufactured texturised yarn out of the said polyester yarn and the clearance thereof, in a clandestine manner without the payment of duty." The Tribunal had also referred to the decision in Oudh Sugar Mills Ltd. v. Union of India, 1978 (2) E.L.T. (J172) wherein "the Apex

Court has observed that no show cause notice or an order can be based on assumptions and presumptions. The findings based on such assumptions and presumptions without any tangible evidence will be vitiated by an error of law". The Tribunal also took note of the decision in *Kamal Biri Factory and Shri Khushnuden Rehman Khan v. CCE, Meerut* - [2003 \(161\) E.L.T. 1197](#) (T) = 1997 (23) RLT 609 (CEGAT) wherein view has been taken that the allegations of clandestine removal of the goods will not stand established when based on the entries made by the assessee's employee in a diary or on the basis of third party's record in the absence of any corroborative evidence. It has also been the consistent view of the Tribunal that the statements of the witnesses, without allowing the assessee to test the correctness of the same by cross-examining those witnesses; cannot be made the basis for holding the allegation against the assessee. (*Takshila Spinners v. CCE, supra*). Similar views have been expressed by the Tribunal in the case of *Haryana Petrochemicals Ltd., supra* wherein the Tribunal has held that reliance cannot be placed on the documents maintained by a third party "who did not have the courage to come forward for cross-examination in order to test the veracity and correctness of the private record maintained by him." It has also been held by the Tribunal in the case of *Kothari Synthetics Industries v. CCE, Jaipur* - [2002 \(141\) E.L.T. 558](#) (T) that entries made in the transport Register of the transport company could not be accepted as a conclusive proof of clandestine receipt of goods from that transport company for want of corroboration from any tangible evidence. Following the ratio of these decision, the duty demand cannot be upheld solely on the basis of uncorroborated statements and records of transporter. The statements tendered by the labourers can also not be relied upon by the Revenue as these persons were not produced for being cross-examined. Moreover, there is no corroboration of their statements with regard to the Trucks by which the goods were allegedly removed or the persons who received the goods. The Truck driver Shri Shiv Bahadur Yadav has also not been cross-examined and cleaner Shri Rakesh Kumar had deposed that the Bills/Invoices are supposed to be with the Driver and he being cleaner had no knowledge.

10. The confirmation of duty in respect of 149 consignments is also based on the records seized from the premises of M/s. Chitra Traders and not on the basis of any record seized from the premises of the Appellant-company. The Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant-company to the premises of M/s. Chitra Traders or the Customers whom the goods were sent directly to as per the direction of Chitra Traders. No inquiry has also been made into these Customers who ultimately received the goods. There is no substance in the reasoning given by the Commissioner in the impugned order to the effect that "as the party did not challenge the fact of their business association with M/s. Chitra Traders, Delhi, the enquiry further down the line was not considered necessary." 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. The mere fact that the Appellant-company had business relation with Chitra Traders, does not mean that they will be liable to each and every entry made by Chitra Traders in their books of account. It is also noted that none of the transporters and none of the labourers whose statements have been relied upon by Revenue have mentioned that the goods in question were delivered to Chitra Traders from the premises of the Appellants. The material brought on record may at the most create a doubt only. But doubt cannot take the place of evidence. The Revenue has, thus, not proved its case against the Appellants in respect of 149

consignments. We, therefore, set aside the demand of duty and penalty imposed on Appellant-company and consequently the demand of interest.”

11. *From the above settled law, it is clear that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statements which are retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. In the present case also, it is observed, from the annexures to the show cause notice dated 1-5-2009 issued to the appellants, that there were huge cash transactions to the tune of Rs. 11.23 Crores. When such large number of transactions involving huge amounts are being undertaken in clandestine removal activities, it is very likely that some cash would have been seized. There is not a single instance where either seizure of cash is made or any clandestinely removed goods are seized or raw materials/finished goods were found either short or in excess in the factory premises of the appellant or at any other place. As per the Panchnama drawn at the factory premises it is shown that there was no excess/shortage of the raw materials or finished goods found. The documentary evidences collected from the business premises of M/s. Sunrise Enterprise and the statements recorded by investigation, can at the most raise a reasonable doubt that some clandestine removal activities are undertaken by the appellant. However, such a suspicion or doubt has to be strengthened by positive evidences which seem to be lacking in this case. Any suspicion whosoever cannot take the place of evidence regarding clandestine removal of excisable goods. Moreover, after having positive evidences, quantification of duty on clandestinely removed goods also becomes essential. As already mentioned above, the stock lying in the stock yard of M/s. Sunrise Enterprise, Mehsana was found containing the goods received from M/s. Sakeen Alloys Pvt. Limited under proper invoices. When the goods received under proper invoices are found in the stock yard of M/s. Sunrise Enterprise, then it is possible that out of such goods certain quantities were sold to various customers by accepting payment in cash. In such a situation, the quantification undertaken by the investigation becomes doubtful and incorrect. For this purpose cross-examination of the person Incharge looking after the records of M/s. Sunrise Enterprise was must, which was not allowed by the adjudicating authority. In view of the above observations, the demand of duty of Rs. 1,85,10,861/- is not sustainable and is required to be set aside.*

11. The above order of the Tribunal was upheld by the Hon'ble High Court as reported in 2014 (308) E.L.T. 655 (Guj.) and was maintained by the Apex Court as reported in *Commissioner v. Saakeen Alloys Pvt. Ltd. - 2015 (319) E.L.T. A117* (S.C.).

12 In case of T.G.L. POSHAK CORPORATION 2002 (140) E.L.T. 187 (Tri. - Chennai), the tribunal while dealing with similar set of evidence 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.

We also find that when the goods shown to have been cleared under the delivery challans of Bhayani Engineering are alleged to be manufactured by M/s Om Synthetics, in that case the show cause notice should have also been issued to M/s Bhayani Engineering as it is their clearances which was sought to be clubbed/ added in clearances of M/s Om Synthetics. In such case the show cause notice has wrongly made demand from M/s Om Synthetics. Our views are also based upon the Tribunal's order in case of M/s RAMSAY PHARMA (P) LTD. 2001 (127) E.L.T. 789 (Tri. - Del.) wherein the tribunal held as under :

2. It is the contention of the appellants who are represented by their Counsel, Shri Vivek Kohli, that non-issue of show cause notice to M/s. Shree BaidyanathAyurved Bhawan Ltd., whose clearances have been clubbed with those of the appellants itself vitiates the entire proceedings and in this connection he relies upon the decision of the Tribunal in the case of Ogesh Industries v. Commissioner of Central Excise, Kanpur reported in [1997 \(94\) E.L.T. 88](#) and M/s. Dawn Fire Works Factory and Others v. Commissioner of Central Excise, Madras reported in 1999 (31) RLT 104.

3. We see great force in the above submission. In the case of Ogesh Industries cited supra, it has been held that when a demand is raised by clubbing of the value of clearances of two units, and show cause notice has been issued only to one unit and not to the other, when the separate existence of both Units was projected, the notice is bad in law and the proceedings have been set aside by the Tribunal on this basis. The above decision has been followed in the case of M/s. Dawn Fire Works Factory and Others and both these decisions have been followed in the recent decision in the case of M/s. S.K.N. Gas Appliances v. Commissioner of Central Excise, New Delhi reported in [2000 \(120\) E.L.T. 732](#) (Tribunal). Learned DR Shri Dube seeks to distinguish the decisions in the case of Ogesh Industries and Dawn Fire Factory Works cited supra by submitting that the present case is not one of clubbing of clearances; however, we find from the impugned order that the Department has proceeded on the basis that the aggregate value of clearances of excisable goods effected by the appellants and all the units of M/s. Shree BaidyanathAyurved Bhawan taken together exceeds the ceiling limit on value of clearances prescribed in the SSI exemption Notifications. Therefore, the ratio of the above cited decisions is applicable on all fours to the present case and following the same, we set aside the impugned order as bad in law on this preliminary point alone without going into the merits of the case.

13. Similar views were given by the Tribunal in case of *Ogesh Industries* [1997 \(94\) E.L.T. 88](#) and *M/s. Dawn Fire Works Factory and Others* 1999 (31) RLT 104. We also find that Shri Kishorebhai, Shri Thakarshibhai and employees of M/s Om Synthetics had filed retraction affidavits. In such case their statements could not have been made basis for making demands.

14. We also find that the impugned order has mainly confirmed demand on the ground that the Appellant unit is not entitled for the SSI exemption as they have sold machines bearing the trade/ brand name “Bhayani”. We find that in terms of co-ownership agreement entered into M/s Bhayani Engineering Co. on one part and M/s Om Synthetics and M/s Thakar Traders on second part for use of Trademark “Bhayani” on co-ownership basis. Thus it cannot be said that the said brand name is owned by others and hence the exemption cannot be denied. We also note that in case of M/s Thakar Traders, the other appellant the Appellate Authority has held that SSI exemption cannot be denied on ground of use of trade name “Bhayani” as it is co-owned. Such finding of Appellate Commissioner has not been challenged as thus attained finality. We thus hold that the Appellant are entitled for SSI Exemption on clearance of goods. Our views are also based upon the orders in case of MINIMAX INDUSTRIES 2011 (269) E.L.T. 166 (Del.). We thus hold that the demand against M/s Om Synthetics is not sustainable.

15. As regard demand against M/s Thakar Traders we find that they were supplying various types of wheels viz. Girder Wheels, Bruter wheels, Russian Wheels. We find that the demand has been made on ground that the clearances made by Appellant are liable for duty. The Appellant has contended that the Russian bruter wheel was sent for jobwork of grinding without following the procedure under central excise rule or job work exemption notification and the goods came into existence only after grinding of wheels were completed. We find that the above facts are not disputed. The activity of manufacture as per Section 2 (f) of the Central Excise Act was completed and Russian Bruter wheel came into existence after the jobworker undertook the process of grinding. In such case when the procedure as contemplated under Exemption Notification No. 214/86 – CE dt. 01.03.86 was not followed the jobworker of the goods become liable for duty and the duty cannot be demanded from M/s Thakar Traders. We have also gone through the Annexure – ‘A’. The goods detailed therein were for testing as appearing in seized record. No investigation was made as to why this record was maintained. In absence

of any investigation it cannot be concluded that the record pertains to clandestine clearances. Even the author of such record was not questioned. The investigations at two buyers Shri Madanlal Dhanrajji Nagar and Mrs. Dolly Shah who brought goods from Appellant revealed that the goods were brought under invoices which shows that the goods were not cleared clandestinely Further Shri Kishorbhai Bhayani and Shri Thakarshibhai Kukadiya in their affidavit stated that they were not in conversent in English and the statements were pre-complied by the officers. In such case the demands cannot be confirmed without corroborative evidence. No independent and corroborative evidence has been brought to show any excess procurement of raw material or clearance of goods to buyer which can show that the Appellant cleared goods clandestinely. Our views are also based upon judgments in case of Sakeen Alloys and T.G.L. Poshak Supra. Thus we hold that the charges of any clandestine removal against the Appellant are not sustainable. For the same reason we set aside the fines and penalties imposed upon the Appellants.

16. In view of our above findings and discussion, we set aside the impugned orders and allow both the appeals with consequential reliefs, if any.

(Pronounced in the open court on 06.12.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)