

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10796 of 2017

(Arising out of OIO-BHR-EXCUS-000-COM-103-16-17 dated 29/12/2016 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch)

Faizan Texturising

.....Appellant

Unit-Ii, Shop No. 303, Zuber Chambers,
Salabatpura, SURAT, GUJARAT

VERSUS

C.C.E-Bharuch

.....Respondent

R K Casta Second Floor, Corporate House, Station Road
Bharuch, Gujarat-392001

WITH

- i. Customs Appeal No.10798 of 2017 (Altaf Aman Bagad)**
- ii. Excise Appeal No. 10797 of 2017 (Faizan Texturising)**
- iii. Excise Appeal No. 10808 of 2017 (Shri Altaf Aman Bagad)**

APPEARANCE:

Shri J.C. Patel & Ms. Shamita Patel, Advocates for the Appellant
Shri J.A. Patel, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10320-10323 /2022

DATE OF HEARING: 02.02.2022
DATE OF DECISION: 11.04.2022

RAMESH NAIR

All these appeals have been filed by the appellants against impugned common Order-In-Original No. BHR-EXCUS-000-COM-103-16-17 dated 29.12.2016 passed by the Commissioner Central Excise & Customs, Bharuch. The impugned order has demanded Customs duty in respect of the imported raw materials and Central Excise Duty in respect of the finished goods and locally procured raw materials.

1.1 As per facts on record, M/s. Faizan Texturising is a 100% EOU engaged in the manufacture of Polyester Texturised Yarn and Polyester Twisted Yarn falling under Chapter 54 of the schedule to the Central Excise Tariff Act, 1985. Their factory was visited by the officers on 21.04.2003, who conducted various checks and verifications. As a result, shortage of 7618 kg. imported raw material viz. "Bright Polyester Spin Draw Yarn" was detected. Shri Altaf Aman Bagad Partner of the appellant unit, in his statement recorded on 21-04-2003 confessed that short found goods stand cleared by them without payment of duty to M/s H N Textiles, Surat.

1.2 In follow-up investigation, statement of Shri Yashin Imran Bhura, Proprietor of M/s. H N Textiles was recorded on 29.03.2004 wherein he admitted having purchased the 7618 Kgs Bright Polyester Spin draw yarn from Appellant without cover of any Central Excise documents and without payment of duty. On further scrutiny of records seized under panchnama dated 21.04.2003, officers found that in Bond-Register while debiting the quantity of raw materials issued, a calculation mistake of 2000 Kg. was committed by the appellant. Hence as per the department there was shortage of 9618 kgs of raw materials instead of 7618 kg.

1.3 On the basis of separate enquiry in connection to M/s Neeraj Exim Pvt. Ltd., West Bengal, it was revealed that Appellant had cleared 249175 Meters of Grey Fabric against the CT-3 certificate No. 22 dated 12.04.2003 to M/s Neeraj Exim Pvt. Ltd. Kalyani, West Bengal. The appellant unit was not having facility to manufacture Polyester Grey Fabrics. The Appellant in its invoices and AR3As had mentioned the description of the goods as "Polyester Grey Fabrics /Grey Fabrics". Therefore, it appears that the Appellant had sold 284060 Sq. mtrs of Polyester Knitted Grey Fabrics manufactured by them into the domestic market illicitly without payment of duty and to adjust

the stock by showing clearance of Polyester Grey Fabrics / Grey Fabrics to M/s Neeraj Exim. On investigation, it appears that even the Polyester Grey Fabrics/Grey Fabrics cleared to M/s Neeraj Exim had not been received physically by M/s Neeraj Exim.

1.4 On the above basis proceedings were initiated against the appellants by way of issuance of show cause notices on 7-4-2008, which stands culminated into an order dated 10.03.14 passed by Commissioner, Central Excise & Customs, Surat- confirming the demand of duty. Aggrieved with the Order dated 10.03.14 Appellant had preferred appeal before the CESTAT, The CESTAT, vide Final Order dated. 07.07.2015 remanded the matter back for fresh adjudication. Thereafter, vide the *de novo*, Order-In-Original dated 29-12-2016 the adjudicating authority confirmed the Custom duties amounting to Rs. 4,13,519/- on 9618Kg. of Polyester Spin Draw yarn along with interest and penalty and confirmed the demand of central excise duty equal to aggregate of Customs duties amounting to Rs. 30,41,820/- leviable on 284060 Sq. Mtrs. of Polyester Knitted Grey Fabrics cleared under the guise of deemed exports along with interest and penalty. In addition, confirmed the demand of customs duties amounting to Rs. 46,65,539/- on 677750.650 Kgs. of imported Bright Polyester Spin Draw Yarn procured duty free but not utilized for the intended purpose along with interest and penalty. He also imposed the penalty of Rs 10 Lakhs on Shri Altaf Aman Bagad under Section 112 (b) of the Customs Act 1962 and separate penalty of Rs. 10 lakhs under Rule 26 of Central Excise Rules, 2002. He also imposed redemption fine of Rs. 6 Lakhs in respect of Polyester Knitted Grey Fabrics and redemption fine of Rs. 70,000/- in respect of Polyester Spin Draw yarn. Hence, the appellants filed the present appeals before this Tribunal.

02. The Learned Advocate Shri J.C. Patel and Ms. Shamita Patel, Advocates appearing for the appellant submit that the show cause notice dated 07.04.2008 demanding duty for the period April 2003, was not served on the Appellant in the manner required by Section 37C(1) (a) of the Central Excise Act 1944 (Section 153 (1) (a) of Customs Act 1962), within the limitation period of one year nor with the extended period of limitation of five years under the Proviso of said Section 11A(1) and Section 28(1). It was only on 07.03.2014, that the Appellant learnt about a personal hearing notice pasted at the factory gate in respect of the said show cause notice dated 07.04.2008. The Appellant thereupon obtained a copy of the said show cause notice dated 07.04.2008 from the adjudication cell. The said show cause notice was therefore, for the first time received by the Appellant only in March 2014 which is even beyond the extended period of limitation of five years. Since the said Show Cause notice was not served on the Appellant within the normal limitation period of one year nor the within the extended limitation period of five years, the demands made by the said Notice are barred by time.

2.1 He submits that the Hon'ble Tribunal while remanding the matter to the Commissioner by Order dated 07.07.2015 clearly held that the Appellant had by letter dated 10.12.2007 informed the department of change of address. The Show Cause Notice dated 17.04.2008 being subsequent to the intimation of change address given on 10.12.2007, ought to have been served on the Appellant at the said changed Address in the manner provided under Section 37C(1) (a) of the Central Excise Act 1944 (Section 153 (1)(a) of Customs Act 1962). The Notice could not be served under Section 37 C(1) (b) by allegedly pasting on the factory gate. Since the Show Cause Notice was not served at the changed address as provided in Section 37C(1) (a) of

the Central Excise Act 1944 (Section 153(1) (a) of Customs Act 1962)., within the normal period of limitation of one year nor the extended period of limitation of Five year, the duty demands are barred by time and on this ground itself, the entire impugned Order-In-Original is liable to be set aside. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of Dharampal Lachand Chug Vs CCE – 2015(323) ELT 753 (Bom), Benu Prabhakar Vs CCE 2021 (11) TMI 553 /2022-TIOL-10-CESTAT-DEL and Ram Nivas Singh Contractor Vs CCE – 2019 (24) GSTL -451.

2.2 On merit he submits that out of alleged shortage of 9618 Kgs imported raw material viz. "Bright Polyester Spin Draw Yarn", 7618Kg are alleged to be illicitly cleared to H.N. Textiles. The said allegation and finding of illicit clearance to H.N. Textiles is based on statements dated 21.04.2003 and 29.03.2004 respectively of Appellant's partner and proprietor of H.N. Textiles. The said statements are not admissible as evidence since none of the said two persons has been examined during the adjudicating proceedings as required by Section 138B of the Customs Act 1962 (Section 9D of the Central Excise Act 1944). The Appellant had sought cross-examination of Yasin Imran Bhura, which has not been considered by the Commissioner. He placed reliance on the decision Basudev Garg Vs CC- 2013(294) ELT 353 (Del) and Hi Tech Abrasives Ltd. Vs CCE -2018 (362) ELT 961.

2.3 As regard the alleged clearance of balance 2000 kgs in the open market, he submits that there is absolutely no evidence of the same. There is no single statement to that effect nor any evidence of any buyer or recipient of the same, nor evidence of transport of the said 2000 kgs nor evidence of any payment received by the Appellant for the same. The demand for duty on the said 2000 Kgs is therefore clearly unsustainable in law.

2.4 As regards 2,49,175 L. Mtrs of "Polyester Gray Fabrics" cleared against CT-3 Certificate No. 22 dated 12.04.2003 to Neeraj Exim Pvt. Ltd. he submits that it is an admitted position that Superintendent of Central Excise, Kolkata having Jurisdiction over Neeraj Exim Pvt. Ltd. issued Re - warehousing Certificate in respect of the said goods. The allegation that same had not been received in the factory of Neeraj Exim Pvt. Ltd. cannot be a ground for demanding duty thereon from the Appellant. Appellant's partner Altaf Aman Bagad, has in his statement dated 13.07.2004 stated that sales of Grey Fabrics to Neeraj Exim Pvt. Ltd. against the said CT-3 Certificate were made Ex-factory and delivered at the Appellant's factory gate and freight was paid by Neeraj Exim Pvt. Ltd. Appellant had received payment for the said sales by cheque. Shri Puneet Rungta, authorized representative of Neeraj Exim Pvt. Ltd. has in his statement dated 24.07.2003 stated that he arranged transportation of raw material from the Appellant's factory and that payment for the raw material was made by Account Payee Cheque. Reliance placed by the Commissioner on Statement of Shri Yadvendra R. Singh, Director of Neeraj Exim Pvt. Ltd. to the effect that transportation was arranged by the Appellant is untenable in law for the reason that Shri Yadvendra R. Singh has himself stated that day to day work was being looked after by Shri Puneet Rungta who has stated that he arranged transportation of raw material from the Appellant's factory. In any event no reliance can be placed on statement of Shri Yadvendra R Singh since the Commissioner has not granted his cross-examination, which was sought by the Appellant.

2.5 He argued that, there is absolutely no evidence to show that the Appellants were in any way involved in the alleged diversion of the goods by Neeraj Exim Pvt. Ltd., once the same were sold and delivered to Neeraj Exim

Pvt. Ltd. at the Appellant's factory gate. Once it is clear as aforesaid that the sale for clearance under CT-3 Certificate was ex-factory and the goods were delivered to Neeraj Exim Pvt. Ltd. at the Appellant's factory gate, no duty can be demanded from the Appellants and if the goods were not received in the factory of Neeraj Exim Pvt. Ltd. the duty has to be demanded from Neeraj Exim Pvt. Ltd. He placed reliance on the decisions *Vikram Enterprises Vs CC -2008 (226) ELT 437* and *Hytaisum Magnetic Ltd. Vs CC- 2008 (229) ELT 634*.

2.6 He further argued that contention of the department that while the Appellant were manufacturing "Polyester Knitted Grey Fabrics", the goods shown to supplied to Neeraj Exim P. Ltd. were described as " Polyester Grey Fabrcis", therefore 2,49,175 L. Mtrs of Polyester Knitted Grey Fabrics were illicitly cleared in domestic market and to adjust the stock, clearance of Polyester Grey Fabrics is shown to have been made against the CT-3 to Neeraj Exam Pvt. Ltd. The said contention are totally misconceived and untenable in law, Firstly, the description "Polyester Grey Fabric" is a generic description and is wide enough to cover "Polyester Knitted Grey Fabrics" also. In fact it would be evident from the show cause notice itself that even in the daily stock register the goods were being described as "Polyester Grey Fabrics" only. Secondly, there is absolutely no evidence whatever, for the wild allegation that 2,49,175 L. Mtrs of Polyester Knitted Grey Fabrics were illicitly cleared in domestic market and to adjust the stock, clearance of Polyester Grey Fabrics is shown to have been made against the CT3 to Neeraj Exim Pvt. Ltd. There is no evidence of any buyers in the domestic market to whom clearances was made, no evidence of any transportation of the same, no evidence of any payment received from any buyer in the domestic market. On the contrary, payment from Neeraj Exim Pvt. Ltd., has been received by Account Payee Cheque and there is no allegation or

evidence of return of the said amount to Neeraj Exim Pvt. Ltd. In the circumstance, Central Excise Duty demand on 2,49,175 L. mtrs of Polyester Knitted Grey Fabrics and Customs duty demand on 67750.650 Kgs of imported raw material used in manufacture of said 2,49,175 L Mtrs of Polyester Knitted Grey Fabrics is clearly untenable in law.

2.7 Without prejudice, he also submits that in any event, it is settled law as laid down in following Judgments that once duty is demanded on the finished goods, there cannot be a duty demand in respect of the raw materials used in the manufacture of the finished goods.

- (i) CCE Vs Sanjari Twister – 2009 (235) ELT 116 maintained in Commissioner Vs Sanjari Twister 2010(255) ELT A15(SC)
- (ii) Dupont Synthetics Pvt. Ltd. Vs CCE – 2010(259) ELT 408
- (iii) Asia Metals Vs CCE – 2015 (328) ELT 152
- (iv) Vandevi Texturixers Vs CCE – 2007 (220) ELT 289
- (v) Abubakar Ismail Kapadia Vs CCE -2019 (369) ELT 1003

03. Per contra, Shri J.A. Patel, Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order and placed reliance on the following judgements:

- (i) Dhanalakshmi Steels Vs CESTAT, Chennai – 2012 (275) ELT 535 (Mad.)
- (ii) CCE Kanpur Vs U P Engineering Corporation- 2010(261)ELT 888 (Tri. Del)
- (iii) Payal Ashok Kumar Jindal Vs Captain Ashok Kumar Jindal 1992 (60) ELT 19(SC)
- (iv) Haresh Chimanlal Vora & Others Vs CC, Cochin 1988(35) ELT 182 (Tri)
- (v) Sigma Enterprises Vs CST, Kolllam – 2014 (36)STR 985 (Ker)

- (vi) Akai Impex Ltd Vs. CCE, Surat – 2009(237)ELT 749 (Tri. -Ahmd)
- (vii) Harshvardhan Export Pvt. Ltd. Vs CC, Surat – 2006(203)ELT 316 (Tri. Del)

04. We have considered the submissions made at length by both sides and perused the records.

4.1 It is seen that the lower authorities have arrived at the findings of illicitly cleared 9618 kgs of 50/36 Bright Polyester Spin yarn on the basis of the shortages detected at the time of the visit of the officers and by observing that the 7618 Kgs cleared to M/s HN Textiles and remaining 2000kgs have been cleared and sold in open market. Fact of said removal accepted by the partner of the unit as also by the proprietor of M/s H N Textiles. However, it is settled law that though the admission is extremely important piece of evidence it cannot be said to be conclusive and it is open to the person who has made the admission to show that this is incorrect. We also note that there are numerous decisions of the Tribunal laying down that such admission of shortages without there being any admission of clandestine removal, cannot be considered to be conclusive evidence to establish the guilt of the assessee. Burden of proof is on the Revenue and is required to be discharged effectively. Clandestine removal cannot be presumed merely because there was shortages of the stock or on the basis of statement of person only. In Majority decision in the case of *Tejal Dyestuff Industries* as reported in [2007 \(216\) E.L.T. 310](#) (Tri) Tribunal held that the Revenue cannot make its case on the basis of statement alone in the absence of any independent evidence to corroborate the same. The said decision was confirmed by Hon'ble High Court of Gujarat as reported in [2009 \(234\) E.L.T. 242](#) (Guj.), when the appeal filed by the Revenue was

dismissed. Further, Tribunal in the case of *CCE v. Luxmi Engineering Works* as reported in [2001 \(134\) E.L.T. 811](#) (Tri.-Del.), has held that there being no corroborating evidence in the form of receipt of raw materials or sale of final products to each buyers, the allegations of clandestine removal cannot be upheld. The said decision was upheld by Hon'ble High Court of Punjab & Haryana as reported in [2010 \(254\) E.L.T. 205](#) (P & H), laying that even if some records recovered during raid and corroborated by some supportable evidence for attempt of clandestine production and removal, it is necessary to have some positive evidence of clandestine production and removal.

4.2 We also find that the Appellant sought cross-examination, which has not been considered by the Ld. Adjudicating Authority. It is settled preposition of law that for the purpose of reliance on statement, Section 138B of the Customs Act 1962 (Section 9D of Central Excise Act 1944) mandates cross examination of person whose statement is relied upon, otherwise the said statement cannot be relied upon in the proceedings. This denial of cross-examination has resulted in denial of principle of natural justice. In the case of *Andman Timber Ind. Vs. CCE*, 2015 (324) ELT 641 (SC), the Apex Court while dealing with the relevancy of cross examination held as under:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought

out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [[2005 \(187\) E.L.T. A33](#) (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice.

9. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal."

Similarly, the Hon'ble Delhi High Court in case of JK Cigarettes Vs. Collector of Central Excise 2009 (242) E.L.T. 189 (Del.) held 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 gazetted 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 9-D 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.

13. Section 14 of the Act confers powers on the Central Excise Officer to summon persons to give evidence. Such statements are admissible in evidence. By relying upon these statements so

recorded, the Central Excise Officer adjudicating the case may: (a) raise demand of Central Excise duty; (b) confiscate any goods, plant or machinery, etc.; and (c) levy penalties. Therefore, the adjudication proceedings are quasi-judicial in nature [See - Sri T. Ashok Pai v. CIT, Bangalore, (2007) 7 SCC 162, Vinod Solanki v. Union of India, [2009 \(233\) E.L.T. 157](#) (S.C.) = [2009 \(13\) S.T.R. 337](#) (S.C.); and Kothari Filaments & Anr. v. Commissioner of Customs (Port-Kolkata) & Ors., [2009 \(233\) E.L.T. 289](#) (S.C.) = [2009 \(13\) S.T.R. 225](#) (S.C.)].

14. Going by this nature of the proceedings, which can entail civil and/or evil consequences to the show-cause noticees, submission of learned counsel for the petitioner was that the right of the accused to cross-examine persons, whose statements are relied upon against him, is a very important facets of the principles of natural justice. Normally, rule is that if the witness is not cross-examined, then the examination-in-chief/statement of that witness cannot be termed as evidence and, therefore, cannot be read in evidence. He submitted that necessity of allowing cross-examination of the witnesses in departmental adjudication proceedings is well-settled and accepted, as is clear from the following decisions :-

- (i) Laxman Exports Ltd. v. Collector of Central Excise - [2002 \(143\) E.L.T. 21](#) (S.C.) = (2005) 10 SCC 634.
- (ii) Swadeshi Politex Ltd. v. Commnr. of Central Excise - [2000 \(122\) E.L.T. 641](#) (S.C.).
- (iii) Arya Abhushan Bhandar v. Union of India - [2002 \(143\) E.L.T. 25](#) (S.C.).
- (iv) Gyanchand Sant Lal Jain v. Union of India - [2001 \(136\) E.L.T. 9](#) (Bombay High Court).
- (v) Kellogg India Pvt. Ltd. & Madhukar Patil v. UOI - [2006 \(193\) E.L.T. 385](#) (Bombay High Court) = [2007 \(8\) S.T.R. 84](#) (Bom.).
- (vi) Ripen Kumar v. Deptt. of Customs - [2003 \(160\) E.L.T. 60](#) (Delhi High Court)
- (vii) New Decent Footwear Industries v. UOI - [2002 \(150\) E.L.T. 71](#) (Delhi High Court)"

In view of above settled position of law, the Appellant is required to be afforded the opportunity of cross-examination of persons whose statements have been relied by the Department for confirmation of demand. Here Ld. Adjudicating authority failed to do that.

4.3 We also find that as regard the alleged clearance of 2000 kgs. Polyester Spin Drawn Yarn in open market, no evidence was produced by the department. Apart from the shortages, there is virtually no other evidence on record to reflect upon the clandestine activities of the appellant. As per the settled law such shortages by themselves, cannot lead to the fact of clandestine removals so as to justify confirmation of demands. Reference

can be made to the Hon'ble Allahabad High Court decision in the case of *Minakshi Castings* reported in [2011 \(274\) E.L.T. 180](#) (All.) as also the Hon'ble Punjab & Haryana High Court in the case of *CCE, Ludhiana v. Nexo Products (India)* reported in [2015 \(325\) E.L.T. 106](#) (P & H) and to another decision of the Hon'ble Punjab & Haryana High Court in the case of *C.C.E. & S.T., Ludhiana v. Anand Founders & Engineers* reported as [2016 \(331\) E.L.T. 340](#) (P & H). It stands held on the above decisions that the clandestine removal charges based on shortages in stock cannot be upheld in the absence of any other evidence brought on record by the Revenue showing such illegal activities on the part of an assessee. The said decisions stand followed by the Tribunal in many numbers of cases.

4.4 We also observed that the Hon'ble High Court in the the case of *Continental Cement Company v. Union of India* reported in [2014 \(309\) E.L.T. 411](#) (All.), it was held as under:

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions."*

4.5 We further find that in the case of *CCE, Cus. & Ser. Tax, Daman vs. Nissan Thermoware P. Ltd.* 2011 (266) E.L.T. 45 (Guj.) (supra), the Hon'ble Gujarat High Court has observed 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."

The Hon'ble Gujarat High Court has held that the confessional statement of an accused in criminal offence which cannot be par with the statement recorded during preventive checks; therefore, the Hon'ble High Court has set aside the charge of clandestine removal.

4.6 In view of above, we find that no demand is sustainable merely on the basis of shortage and statements of persons, who has not been offered for cross-examination. We find no justifiable reason to uphold the said demands. The same is accordingly set aside along with setting aside of penalty on the said count.

4.7 We also find that in the present case demand was also confirmed against the Appellant in respect of clearances of 249175 L Mtrs of Grey Fabric under CT-3 certificate to M/s Neeraj Exim Pvt. Ltd. on the ground that the partner of Appellant unit could not give the names and address of transporters. Appellant were not having the facility to manufacture Polyester Grey Fabrics and had only the facility to manufacture of Polyester Knitted Grey Fabrics. Appellant in its invoices and ARE-3As had mentioned the description of the goods as "Polyester Grey Fabric/ Grey Fabrics". It is the allegation that appellant have sold 284060.00 Sq. mtrs of Polyester Knitted Grey Fabrics manufactured by them into the domestic market illicitly without payment of duty and to adjust the stock they have to shown the clearances of Polyester Grey Fabrics / Grey Fabrics to M/s Neeraj Exim. Polyester Grey

Fabrics /Grey Fabrics purportedly cleared to M/s Neeraj Exim had not been received physically by M/s Neeraj Exim. We find that the appellant has produced the re-warehousing certificate in the form of ARE-3 duly certified by the Jurisdictional Superintendent of M/s Neeraj Exim Pvt. Ltd. Further there is no allegation of the department that re-warehousing certificates submitted by the appellant are fake. Thus it cannot be assumed that the goods did not reach to the consignee. Once the re-warehousing certificates have been produced by the consignor, the same has to be considered as genuine unless any evidence of non-receipt of goods by the consignee is reported. Only for the reason that the Director of M/s Neeraj Exim Pvt. Ltd. stated that transportation of goods was arranged by the Appellant and appellant failed to produce the details of transporters including lorry receipts, payment details etc. it cannot be assumed that the goods were not cleared by the Appellant. It is on record that Appellant has requested for cross-examination of Shri Yadvendra R. Singh, Director of M/s Neeraj Exim, however Ld. Adjudicating Authority has not granted his cross-examination. Statement recorded during investigation in the present matter, whose maker are not examined in chief before the adjudicating authority, would have to be eschewed from evidence, and it will not be permissible for Ld. Adjudicating Authority to rely on the said evidences. Therefore, we hold that the said statement was not admissible evidence in the present case.

4.8 We, further find that Appellant's partner in his statement dated 13.07.2004 clearly stated that sales of Grey Fabrics to M/s Neeraj Exim Pvt. Ltd. against the CT-3 certificate were made Ex-factory and delivered at the Appellant's factory gate and freight was paid by M/s Neeraj Exim Pvt. Ltd. We also find that in the present matter Appellant had received payment for the said transaction by cheque and the said transaction were recorded in the books & accounts of the Appellant. Shri Puneet Rungta, authorized

representative of M/s Neeraj Exim in his statement dated 24.07.2003 also stated that he arranged transportation of raw material from the Appellant's factory. Reliance placed by the Adjudicating authority on statement of Yadvendra R. Singh, Director of Neeraj Exim Pvt. Ltd. to the effect that transportation was arranged by the Appellant is not correct for the reason that Yadvendra R. Singh has himself in his statement stated that day to day work was being looked after by Puneet Rungta who has stated that he arranged transportation of goods from the Appellant's factory.

4.9 We also find that once the CT-3 certificate was issued the duty liability if at all arises stands shifted to the recipient who has issued the CT-3 certificate and the appellant's clearances are covered by CT-3 is not chargeable to duty. The Tribunal in case of *Santogen Textile Mill Ltd. v. CCE, Mumbai-II*, [2007 \(214\) E.L.T. 386](#) (Tri. - Mumbai), has held that in cases where the 100% EOU has diverted the duty free procured goods to the market, instead of bringing the same in his factory, the manufacturer cannot be fastened with any liability in as much as he loses control over the goods so as to ensure safe reach of the same with the consignee. It is the 100% EOU, who has entered into a bond with the Asstt. Commissioner for proper accountal of receipt, storage and utilization of such goods and to pay, on demand, an amount equal to the duty leviable on the goods, if the same are proved not to have been used in connection with the production of the goods for export purposes. Similarly, in case of *CCE, Cochin v. BPL Systems & Projects Ltd.* - [2002 \(144\) E.L.T. 437](#) (Tribunal), it has been held that in case the goods are removed by a manufacturer on receipt of CT-3 certificate to a 100% EOU, and not used as envisaged, action for recovery of the duty liability on exemption availed at the stage of removal from the factory of the

manufacturer has to be initiated by the officer incharge of 100% EOU and not that of the manufacturer's factory. Similar is the view taken in case of *CCE, Guntur v. Ferro Alloys Corpn.* - [1994 \(71\) E.L.T. 931](#); *CCE, Madras v. Madras Radiators Pressing Ltd.* - [1994 \(69\) E.L.T. 409](#) (Tribunal).

4.10 By following the ratio of above decisions, we hold that the duty liability cannot be fastened upon the appellant.

4.11 We also find that the contention of the Ld. Commissioner that Appellant were manufacturing "Polyester Knitted Grey Fabrics", the goods shown to be supplied to M/s Neeraj Exim Pvt. Ltd. were described as "Polyester Grey Fabrics", therefore 2,49,175L Mtrs. of polyester Knitted Grey Fabrics were illicitly cleared in domestic market and to adjust the stock, clearance of polyester Grey fabrics is shown to have been made against the CT3 to M/s Neeraj Exim Pvt. Ltd., totally misconceived. The Revenue has to show from their own records or from the investigation at the consignee's end that the goods did not reach the consignee. Since the department has made the allegation of non-re-warehousing of the goods at the consignee's factory, it has to prove the same by substantial evidence and it cannot be made on assumption. It has to be shown as if the goods were not warehoused then where were the same diverted. In present case there is no evidence of diversion of goods produced. The appellant has submitted the ARE-3 certificates and the payment receipts details and books of accounts to support the contention of clearance of goods to M/s. Neeraj Exim Pvt. Ltd. The goods so cleared by them stands entered in their statutory records. We also agree with the argument of Ld. Counsel that the description of "Polyester Grey Fabrics" is a generic description and is wide enough to cover " Polyester Grey Fabrics" and in daily stock register the goods were being described as "Polyester Grey Fabrics" by the Appellant. No evidence was

produced by the revenue in the present matter for the allegation that 2,49,175L Mtrs. of Polyester Knitted Grey Fabrics were illicitly cleared in domestic market by the Appellant to adjust the stock, no statement of any buyer recorded to whom clearance was made, no transportation details provided, no evidence of any receipts of payment from domestic buyers produced. Therefore in the given set of facts and in absence of any adverse evidence, it cannot be said that the goods did not reach the consignee or were not warehoused. We thus hold that the demands are not sustainable in this matter.

4.12 Without prejudice, we also find that on the one hand the Revenue has made duty demand on goods consumed in the finished goods and on the other hand it is demanding duty on the finished goods which is wrong. Even if there is any duty demand, the same shall be restricted only upon finished goods. The raw material duty cannot be demanded as the same were consumed for intended purpose of manufacture. Our views are also based upon Tribunal's decision in cases of *Sanjari Twisters*, [2009 \(235\) E.L.T. 116](#) the said decision maintained in Supreme Court wherein it was held that

"4. The department being aggrieved with the said portion of the impugned order by which no duty stand was confirmed in respect of raw materials, has filed the present appeal. The appeal has been filed on the ground that non-duty paid raw materials were admittedly used in finished products which were cleared to DTA in contravention of provisions of law. Such raw materials, which were imported by availing the benefit of notification No. 53/97-Cus. dt. 3-6-97, should have discharged the duty.

5. After hearing the Id SDR, we find that the main issue involved relates to the determination of FOB value of export to arrive at the quantum of eligible domestic clearances and whether the same should include only physical export or it should include deemed export as well. If deemed exports are held to be not included, then the quantum of clearances permitted in DTA will be accordingly reduced. This issue has been decided by the Tribunal in favour of the assessee on a number of precedent decisions, holding that the value of deemed export should be included while determining the FOB value of export, based on which DTA clearances are permitted. However, in this case, the assessee is not in appeal before us. The duty on finished goods stands demanded on the ground that the same is in excess of the permissible limit for the purpose of DTA clearance. The department's claim is to the effect that the raw material used in such finished products cleared in DTA should be treated as not used for the intended purposes and the duty on import should be demanded. We do not agree with this view. In this case, it can not be said that the raw materials have not been used for the intended purpose. Even if

there was clearances in excess of permissible limit it may amount to be case of diversion of finished goods, the duty shall be payable in respect of finished goods and no duty become demandable on the raw material used in the manufacture of such diverted goods."

Therefore, in the present matter duty demand on imported and indigenous raw materials used in manufacture of finished goods are also not sustainable.

4.13 Since, we have decided the present Appeals on merit, we have not gone into other aspect addressed by the Ld. Counsel on limitation.

4.14 In view of the above discussion, demand of duty along with interest and imposition of penalties as well as confiscation and imposition of redemption fine on the raw materials and the finished goods are not sustainable.

4.15 As regards the penalties imposed on partner of Appellant's firm, we find that in view of the foregoing, the demand itself is not sustainable against the main Appellant; hence the question of penalties on partner of Appellant's firm does not arise.

05. We, accordingly, set aside the impugned order and allow the appeals with consequential relief to the appellants.

(Pronounced in the open court on 11.04.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)