

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

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10809 of 2017

(Arising out of OIO-BHR-EXCUS-000-COM-102-16-17 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.10795 of 2017 (Shri Altaf Aman Bagad)**
- ii. Excise Appeal No. 10799 of 2017 (Faizan Texturising)**
- iii. Excise Appeal No. 10800 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/ 10324-10327 /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-102-16-17 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 12.06.2003, who conducted various checks and verifications. As a result, shortage of 52436.500 kg. raw material was detected. Shri Altaf Aman Bagad Partner of the appellant unit, confessed that short found goods stand cleared by them without payment of duty to M/s Mukesh Textiles, Surat and M/s LT Textiles, Surat on cash basis. The officers seized records/ documents and 10 kachha delivery challans. Statement of Shri Salim Abdulla Naviwala, Supervisor of Appellant's firm was also recorded. In follow-up investigation, premises of M/s L T Textiles, Surat and M/s Mukesh Textiles, Surat were searched.

1.2 On the basis of scrutiny of documents seized under panchnama dated 12.06.2003, it was revealed that Appellant had cleared 3,04,463.50 L. Mts of "Polyester Grey Fabrics" during the period from 05.05.2003 to 14.05.2003 to M/s Uma Textiles Processors (100% EOU), without payment of duty against the CT-3 as deemed export. Statement of Chandresh Kishan Bhai Dhandha, Proprietor of M/s Uma Textiles Processors was recorded wherein he stated that they had received "Polyester Grey Fabrics from the Appellant against the CT-3 and they never received "Knitted Grey Fabrics" from the appellant. The appellant unit was not having facility to manufacture Polyester Grey Fabrics. Therefore, it appears that the Appellant had sold 3,04,463.50 L. Mts knitted fabrics, manufactured from duty free imported/ indigenous raw materials procured under various CT-3 and shown to have been cleared to M/s Uma Textiles Processors in their stock account were illicitly sold in the domestic market without payment of Central Excise Duty leviable thereon and for fulfilling of export obligation in respect of the said "Polyester Knitted Fabrics" Appellant supplied 3,04,463.50 L. Mts of "

Polyester Grey Fabrics” by procuring from the market as appellant was not having facility to manufacture the “ Polyester Woven Grey Fabrics” and received the re-warehousing certificates for “ Polyester Grey Fabrics”.

1.3 On the above basis proceedings were initiated against the appellants by way of issuance of show cause notices on 31-03-2008, which stands culminated into an order dated 10.03.14 passed by Commissioner, Central Excise & Customs, Surat –II 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 demand as under:

(i) Demand of Central Excise Duty amounting to Rs. 1,44,699/- leviable on the illicitly cleared 7905.350 Kgs. Of indigenous Polyester Texturised Yarn under proviso to Section 11A(1) of Central Excise Act, 1944.

(ii) Demand of Customs duty amounting to Rs. 83,754/- on 1592.090 Kg. of imported Viscose Yarn under Section 72(1) read with proviso to Section 28(1) of the Customs Act, 1962.

(iii) Demand of Customs duty amounting to Rs. 17,94,129/- leviable on the illicitly cleared 42,939.060 Kgs. of imported Polyester Spin Yarn under Section 72(1) read with proviso to Section 28(1) of the Customs Act, 1962.

(iv) Demand of Central Excise Duty equal to the aggregate of Customs Duties amounting to Rs. 44,17,125/- leviable on the 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics cleared illicitly under the guise

of deemed export under proviso to Section 11A(1) of Central Excise Act, 1944.

(v) Demand of Customs duty amounting to Rs. 16,12,094/- forgone on procurement of 30,421.920 Kgs. of imported Viscose Yarn under Section 72(1) read with proviso to Section 28(1) of the Customs Act, 1962.

(vi) Demand of Customs duty amounting to Rs. 1,08,733/- forgone on procurement of 1676.58 Kgs. of imported PTY under Section 72(1) read with proviso to Section 28(1) of the Customs Act, 1962.

(vii) Demand of Central Excise Duty equal to the aggregate of Customs Duties amounting to Rs. 37,72,323/- forgone on the procurement of 1,04,910.10 Kgs. of Polyester Texturised Yarn under proviso to Section 11A(1) of Central Excise Act, 1944 read with Notification No. 22/03-CE dated 31.03.2003

(viii) Interest at the appropriate rate, in respect of the Custom Duty mentioned at (ii),(iii),(v) and (vi) mentioned above under Section 72 read with Section 28AB of the Customs Act, 1962

(ix)) Interest at the appropriate rate, in respect of the Central Excise Duty mentioned at (i),(iv) and (vii) mentioned above under Section 11AB of the Central Excise Act, 1944.

(x) Confiscation of 7,905.350 Kgs of Indigenous Polyester Texturised Yarn valued at Rs. 5,05,943/- and 3,04,463.50 L Mtrs of Polyester Knitted Grey Fabrics valued at Rs. 66,98,197/- under Rule 25 of the

Central Excise Rules, 2002 and impose collective redemption fine of Rs. 7,50,000/- under Section 34 of the Central Excise Act, 1944.

(xi) Confiscation of 1592.090 Kgs. of imported Viscose Yarn valued at Rs. 1,99,012/- and 42,939.060 Kgs. of imported Polyester Spin yarn valued at Rs. 29,62,796/- illicitly sold without payment of Customs duty, under Section 111(j) and 111(o) of the Customs Act, 1962 and impose the redemption fine of Rs. 3,00,000/- collectively under Section 125 of the Customs Act, 1962.

(xii) Impose penalties of Rs. 1,44,699/-, Rs. 44,17,125/-, Rs. 37,72,323/- under Section 11AC of the Central Excise Act, 1944.

(xiii) Impose penalties of Rs. 83,754, Rs. 17,94,129/-, Rs. 16,12,094/- & Rs. 1,08,733/- under Section 114A of the Customs Act, 1962.

In addition, 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. Hence, the appellants filed the present appeals before this forum.

02. The Learned Advocate Shri J.C.Patel along with Ms. Shamita Patel, learned Advocates appearing for the appellant submits that the show cause notice dated 31.03.2008 demanding duty for the period May -June 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 within the extended

period of limitation of five years under the Proviso of Section 11A(1) of Central Excise Act, 1944 and Section 28(1) of Customs Act, 1962. 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 31.03.2008. The Appellant thereupon obtained a copy of the said show cause notice dated 31.03.2008 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 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 31.03.2008 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 have been 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 years, 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 DharampallLachand 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 merits he submits that the allegation and finding of illicit clearances of the raw materials found short are based on statement dated 12.06.2003 of Appellant's Supervisor Salim Abdulla Naviwala and Appellant's Partner, Asif Aman Bagad and Kachcha Delivery Challan recovered from the factory. The said Statements are not admissible in evidence since none of the said two persons had been examined during the adjudication proceeding as required by Section 138B of the Customs Act 1962 (Section 9D of the Central Excise Act 1944). 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 He also submits that there is no statement of any of the alleged buyers nor any statement of any transporter. There is also no evidence of any payment having been received from the alleged buyers. It is settled law that charge of clandestine removal cannot be said to be established based on Kachcha delivery challans.

2.4 As regards 3,04,463 L. Mtrs of "Polyester Gray Fabrics" cleared against CT-3 Certificate No. 1dated 28.04.2003 to Uma Textiles Processors (100% EOU) he submits that it is an admitted position that the same had been received by the said 100% EOU, Uma Textiles Processors. It is contended in the Show Cause Notice that while the Appellants were manufacturing "Polyester Knitted Grey Fabrics", the goods shown to be supplied to Uma Textile Processors were described as "Polyester Grey Fabrics". It is therefore contended that 3,04,463.50 L.Mtrs of polyester Knitted Grey Fabrics were illicitly cleared in domestic market and that said quantity of Polyester Grey

Fabrics supplied to Uma Textiles processors were purchased from the market. The said contentions are totally misconceived and untenable in law. Firstly, the description " Polyester Grey Fabrics" 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 (para 14 of the show cause notice) that even in the register maintained by the Appellants, the goods were being described as "Polyester Grey Fabrics" only. Secondly, there is absolutely no evidence whatever, for the wild allegation that 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics were illicitly cleared in domestic market and to adjust the stock, Polyester Grey Fabrics were purchased from market and supplied against the CT-3 to Uma Textile Processors. There is no evidence of any buyer in the domestic market to whom clearance was made of 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics, no evidence of any transportation of the same, no evidence of any payment received from any buyer in the domestic market. Similarly, there is no evidence of purchase of the said quantity of Polyester Grey Fabrics by the Appellant from the market. Thirdly, the reliance placed on the statement dated 26.06.2003 of proprietor of Uma Textiles Processors that what was received by them was not Knitted Grey Fabrics is untenable in law since he has not been examined in the adjudication proceeding under Section 9D of the Central Excise Act 1944 and thereby the Appellants have been denied the opportunity of cross- examining him. In the circumstances, Central Excise Duty demand on 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics and Customs duty demand on imported raw materials and Central Excise Duty on indigenous raw material used in manufacture of said 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics, are clearly untenable in law.

2.5 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) VandeviTexturixers Vs CCE – 2007 (220) ELT 289
- (v) Abubakar Ismail Kapadia Vs CCE -2019 (369) ELT 1003

Therefore, duty demands on the imported and indigenous raw materials used in manufacture of said 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics, are liable to be set aside.

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

- (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. It is seen that the lower authority have arrived at the findings of illicitly cleared 44531.15 Kgs. Imported yarn and 7905.35 kgs indigenous Yarn on the basis of the shortages detected at the time of the visit of the officers and Kachha Delivery Challans recovered from the premises of Appellant. Fact of said removal accepted by the partner of the unit and Supervisor of the unit. 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.

4.1 The department apart from the Kachcha Delivery Challan seized from the Appellant's premises and statement of partner and supervisor has not been able to give any independent evidence which can corroborate the charges. No statement of alleged buyers to whom the impugned goods were cleared recorded by the department. The Appellant has placed reliance upon various judgments to canvas their point that in absence of corroborative evidence no demand can be made. We find that no corroborative evidence has been stated in show cause notice in the form of transportation of such raw material to M/s Mukesh Textiles, M/s L T Textiles and Broker Shir Munaf Gulam Sheikh, no statement of said buyers recorded by the department, clearance of goods from the factory was not established, receipt of cash from even a single person on account of alleged illicitly sale not established. We also find that the revenue did not undertake any investigation at the end of M/s Mukesh Textiles and Shri Munaf Gulam Sheikh from where the clearance of goods has allegedly taken place. Further no statement of transporter, transporting the said alleged goods recorded. Thus in such circumstances, the demand on account of clandestine removal of shortage goods cannot be made. In case of Davinder Sandhu Impex Ltd. 2016 (337) E.L.T. 99 (Tri. - Del.) the tribunal has held that:-

"6. *In this case during the course of investigation, the statement was recorded and the statement given by Shri Baldev Singh, Managing Director admits that there is a shortage of 10 to 15% for manufacturing the final product and it is also admitted by Shri Baldev Singh that they have cleared certain goods without payment*

of duty, but the said statement was retracted by Shri Baldev Singh who claims to be that same has been recorded under influence and duress, thereafter, another statement was recorded on 3rd May, 2005 which was also retracted on the same day, where also same statement recorded which is a typed one and it is the claim of the Revenue that same has been typed by Shri Dinesh Kumar (who is an employee of the appellant) in the office of the Department. To that effect, Shri Dinesh Kumar filed an affidavit on 1st August, 2006 that the statement has been typed by the officers of the Department themselves not by him and that said affidavit has not been controverted. Further, the cross-examination of Shri Ashwani Kapoor, Inspector on 3rd August, 2006 explaining that wastage on each stage of production have not been considered by the Adjudicating Authority. Moreover, the Knitwear Club, Ludhiana which is an independent body have also stated in their letter dated 19 May, 2005 that in normal course, there is a wastage of around 40% same has also not been considered by the Adjudicating Authority but without bringing any corroborative evidence apart from statement of Shri Baldev Singh demand has been confirmed. Such a situation has been dealt by this Tribunal in the case of KlenePaks Ltd. v. CCE, Bangalore-I (supra), wherein the facts of the case are as under :-

"2. The relevant facts that arise for consideration are appellant-company herein are manufacturers of HDPE/PP, woven fabrics, sacks. The appellant-company availed Cenvat credit of the duty paid on HDPE/PP granules purchased from various manufacturers like M/s. GAIL; M/s. Reliance Industries Ltd; M/s. HPCL etc. The officers of the DGCEI visited their factory and carried out various investigations. First show cause notice dated 4-7-2003 was issued directing one of the appellant-company herein to show cause as to why the 323 bags of plastic granules seized in the godown of M/s. Mahalakshmi Plastics be not confiscated. Further, investigations were carried out by the authorities and statements of various persons like the officers, directors of the company and also the suppliers of raw materials were recorded. Investigations culminated in issuance of show cause notices which summarises the contraventions, main allegation being, that the appellants had contravened the provisions of Rule 57A/57AB of the Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules, 2001-2002 inasmuch as they had not used Cenvat credit availed plastic granules in the manufacture of woven fabrics/sacks, but appear to have clandestinely removed them without payment of duty. The said show cause notices while quantifying the demand, worked out the demands based upon the wastage that could be permitted to the appellants which was pegged at 7.5% (based upon percentage of wastes in other factories) and input-output ratio in the Handbook of Procedures of the EXIM Policy and concluded that the reasonable wastage that could be allowed to the appellants is in the range of 7.5%, while the actual percentage of waste is more than

that. Coming to such a conclusion, a demand was raised on all the appellants.”.

7. *In these set of facts, this Tribunal has observed as under :-*

"5.1 As regards the merits of the case, we find that the impugned orders have proceeded on the ground that the appellants had shown excess percentage of waste and by showing such excess percentage of waste, they had cleared the HDPE/PP granules clandestinely without reversal of Cenvat credit or without paying any duty. It is undisputed that there is no evidence of any sought whatsoever in all these appeals, as to who is the purchaser of so-called clandestinely removed HDPE/PP granules. The entire Orders-in-Original only proceeds on the ground that the appellants could not have manufactured HDPE/PP sacks or fabrics by using non-standard grades of HDPE granules. We cannot accept the proposition as mere assumptions and presumptions, cannot be the basis for coming to a conclusion that there was clandestine removal. It is now a well settled law that mere presumptions and assumptions cannot be the basis for fastening the charge of allegation of clandestine removal”.

8. *We further find that in the case of CCE, Cus. & Ser. Tax, Daman v. Nissan Thermoware P. Ltd. (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”.

and thereafter 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.

9. *We also find that in the case of Mahavir Metals Industries v. CCE & Cus., Daman, Vapi (supra), this Tribunal further held as under :-*

"7. I further note that my learned brother has also recorded that in absence of any specific evidence to support the clandestine removal of the quantity, it is necessary that the details given by the appellant subsequently are considered and commented upon. While agreeing with my learned brother that there is no specific evidence to uphold the finding of clandestine removal, the remand of the matter for re-calculation of shortages would be only a theoretical exercise. It is settled law that such calculation of shortages arrived at on the basis of input-output calculation, cannot be made the basis of clandestine removal. The appellants have also challenged that the statement of the authorized signatory as also by the partner do not stand corroborated with sufficient evidence as they are against the record and cannot be made the sole basis for holding against them. I agree that the veracity of the statements has to be gauged from the accompanying circumstances and has to be corroborated by way of same independent evidences, which is fully absent in the present case. As such, I am of the view that in the light of various decisions relied upon by the appellant in their memo appeal, such statements which are inconsistent with the documentary evidences, only raises a doubt, but cannot take the place of an evidence. As such, I am of the view that the impugned order is required to be set aside in totality and the appeal is required to be allowed.

16. *On perusal of the Order-in-Original and Order-in-Appeal, I find that the appellant has taken a consistent stand before both the lower authorities that the burden of proof as regards allegation of clandestine removal is on the Department. It is seen from the records that the entire charge of clandestine removal of the finished goods is based upon the theoretical working of calculating the consumption of inputs and presumptive clearance of the finished goods from the factory premises of the appellant. The assumptions which have been considered by the Revenue authorities are totally faulty inasmuch as that the charge of clandestine removal is first to be established based upon the clandestine manufacture and removal of the goods. In the instant case, except for the statements of the partners that there was clandestine removal of the finished goods, there is nothing on record to indicate that the appellant assessee had, in fact, manufactured the final products out of the inputs detected short on the calculation of input-output ratio. I find that as correctly pointed out by the Id. Counsel that this Bench in the case of Suzlon Fibres Pvt. Ltd. (supra), in Para 3 has categorically stated as under :*

"3. We agree with the above contention of the Id. Advocate, apart from the input-output ratio, there is no evidence on record to show clandestine manufacture and clearance of the goods. Such cases are required to be established beyond doubt on the basis of concrete and positive evidences. We accordingly set aside the impugned order and appeals are allowed with consequential relief."

17. My view as regards there cannot be allegation of clandestine removal unless there is an evidence to indicate that there was clandestine manufacturing, is fortified by the judgment of Hon'ble High Court of Gujarat in the case of Nissan Thermoware Pvt. Ltd., wherein their Lordship have 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."

18. In view of the foregoing and there being no concrete evidence (as agreed by both the Members) of clandestine removal of the goods, the appeals are required to be allowed as held by Hon'ble Member (Judicial). I have concurred with her views".

10. Further, we find that the Hon'ble Gujarat High Court in the case of CCE v. Saakeen Alloys Pvt. Ltd. (supra), the Hon'ble Gujarat High Court has observed as under :-

"7. As can be noted from the decision of the Tribunal, it has extensively dealt with the entire factual matrix presented before it. The Tribunal rightly concluded that in the case of clandestine removal of excisable goods, there needs to be positive evidences for establishing the evasion, though contended by the Revenue. In absence of any material reflecting the purchase of excessive raw material, shortage of

finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross-examination was also not made available so as to bring to the fore the true picture and therefore, it concluded against the Revenue observing that not permitting the cross-examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below”.

which has been affirmed by the Hon’ble Apex Court.

11. *In this case also, we find that the case has been made out only on the basis of the statement of Shri Baldev Singh, Managing Director of the appellant and no other evidence in the form of to manufacture of such huge quantity, the consumption of electricity, additional packing material, payment for purchase of additional packing material, payment received for clandestine removal of goods, how the goods were transported has been brought on record by the Adjudicating Authority or the inspecting team, therefore, relying on the said decision cited hereinabove, we hold that charge of clandestine removal is not sustainable in the absence of any corroborative evidence to the statement of Shri Baldev Singh, Managing Director.*

12. *In these circumstances, we set aside the impugned order and allow the appeals filed by the appellants with consequential relief.*

In case of TGL Poshak Corporation Vs. CCE 2002 (140) ELT 187 (TRI), the tribunal held as under :

"5. *Heard Ld. SDR, Shri G.S. Menon, who reiterates the departmental view. He contends that there are statements and several registers maintained by the party which clearly indicated that they had manufactured and cleared the goods. He refers to the evidence which was culled out by the investigating agencies which clearly showed the manufacture of 'vanaspati' during the period in question. He submits that the Commissioner has not*

given details on the evidence and therefore matter has to be readjudicated by taking into consideration the evidence which is already noted by him in his order. He also refers to the grounds of appeal which are reproduced below :-

(A) The demand for Rs. 68,35,193/- was towards the duty on the clearance of vanaspati without payment of duty made during the period of 1990-91 & 1991-92 (upto 31-1-92). The demand was based on the excess clearances shown by a set of private records when compared with the clearances shown by RG-1 register. The set of private records are :-

(1) Confidential file which contain production & clearance particulars of vanaspati and other products during the period 1990-91 and 1991-92 as shown to the bank and as shown in the Central Excise records.

(2) Select operational Data Returns which are the monthly production and clearance details filed with bank. These figures tallied with those found in the confidential file.

(3) Consortium Meeting file which is a correspondence file with bank for working capital and contained the production and clearance figures.

(4) Balance sheet for the years 1990-91 and 1991-92 whose figures tallied with those shown in confidential file and select data returns submitted.

(B) It is evidence from the three sets of private records and balance sheets for the year 1990-91 and 1991-92 that the figures in each of the private records had tallied with each of the other records. Same production and clearance figures being present in 4 sets of records gives the strength of corroborative evidence. These records clearly show that more clearances were effected than what was shown in the statutory record i.e. RG-1 register. Hence the veracity of private records need not be doubted and the figures taken from the private records appear to be having the strength of corroborative evidence and hence the demand of Rs. 68,35,193/- made on the basis of figures shown by private records requires to be confirmed. As this demand is dropped, the order appears to be not proper to this extent.

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.*

7. Insofar as the Revenue's grievance on the Commissioner's dropping the proceedings is concerned, we notice from the extracted portion of the Commissioner's order that Commissioner has duly considered the note books relied upon by the department that they are not in the nature of purchase and removal of goods which was only certain balance sheets and certain private registers which does not prove the case of the department with regard to purchase of raw material, manufacture of final goods and clandestine removals. There is no seizure of goods or statements from the purchaser of goods who have paid money and the amounts received by them, appellants have also not recovered, nor there is any proof that amount said to have been received has flown back. Therefore, the dropping of proceedings, is proper and legal, we do not find any merit in the revenue appeal and same is rejected.

4.2 In the case of *Sharma Chemicals v. CCE* reported in [2001 \(130\) E.L.T. 271](#) (Tri. – Kol) supra, the Tribunal under Para 14 has held that entries in the private notebook may give rise to suspicion but that is not sufficient to uphold the allegations in absence of independent corroborative evidence. In the case of *K. Rajagopal v. CCE* reported in [2002 \(142\) E.L.T. 128](#) (Tri. - Che.), supra, it is held that entries in the private notebook is not a conclusive evidence to prove clandestine transactions in absence of other corroborative evidences. In the case of *Good Kare Medico Pvt. Ltd. v. CCE* reported in [2019 \(366\) E.L.T. 133](#) (Tri. - All.) supra, it is held that order based on rough entries made in two sheets recovered from Director's residence in his own handwriting, when there is no other corroborative evidence, hence merely on the basis of such rough entries without corroborative evidence, clandestine activities cannot be alleged. Since in the instant case the duty demand is upheld by Ld. Commissioner merely on the basis of entries in the Kachcha Delivery Challan recovered from the premises of Appellant unit and statement of partner and supervisor of Appellant's firm who never confessed the guilt and whose statement is not tested in accordance with Section 138B of the Customs Act 1962 (Section 9D of Central Excise Act 1944), impugned order legally not sustainable.

4.3 We also find that the Appellant disputed the impugned demand confirmed on the basis of statements recorded during the investigation. It is settled preposition of law that the said statements cannot be relied upon as admissible evidence in absence of examination during the adjudication

proceedings as required by Section 138B of the Customs Act 1962 (Section 9D of Central Excise Act 1944). The Hon'ble Chhattisgarh High Court in the matter of Hi Tech Abrasives Ltd. Vs Commissioner of C.Ex&Cus., Raipur held that :

"9.5 *Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana. Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Private Limited (Laws (SC) 2011 838) = [2011 \(270\) E.L.T. 643](#) (S.C.). That decision turned on its own facts. In para 19 of the judgment, it was concluded as below :*

"19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is

no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing director of the Company of his own volition deposition the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."

Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that manner.

4.4 Similarly in the matter of Basudev Garg Vs Commissioner of Customs reported at 2013(294) ELT 353 (Del.) the Hon'ble Delhi High 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.

16. *For this reason, we feel that the Tribunal should have a fresh look at these cases keeping in mind the provisions of Section 138B as also the decision of this court in J&K Cigarettes Ltd. (supra). The Tribunal will also consider the fact of non-supply of the report and other documents which were obtained by the concerned authorities from Srilanka after hearing had been concluded on 14-10-2004. Consequently, we set aside the impugned order and remit the matters to the Tribunal for a fresh consideration in the light of the observations and directions given above. Parties shall be at liberty to raise all issues available to them in law.*

4.5 We also find that apart from the alleged 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). Its stand held on the above decisions that the clandestine removal charges based on shortages in stock cannot be confirmed 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.

4.6 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."*

4.7 In view of above, we find that no demand is sustainable merely on the basis of shortage and statements of persons, who have not been examined in chief during the adjudication, 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.

4.8 We also find that in the present case demand was also confirmed against the Appellant in respect of clearances of 3,04,463.50 L. Mtrs of Grey Fabric under CT-3 certificate to M/s Uma Textiles Processors (100% EOU) on the ground that the 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". Appellant have sold 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics into the domestic market illicitly without payment of duty and said quantity of Polyester Grey Fabrics supplied to M/s Uma Textiles Processors were purchased from the market. Contradictory, 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 Uma Textiles Processors. 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 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. Here M/s Uma Textiles Processor also admitted the receipts of goods from Appellant. Only for the reason that the Appellant have mentioned the description of goods on invoices and ARE-3 as "Polyester Grey Fabrics", it cannot be assumed that the "Polyester Knitted Grey Fabrics" not cleared by the Appellant. Further, it is on record that Appellant has requested for cross-examination of Proprietor of M/s Uma Textiles Processors to find out that what was received by them from the Appellant, however Ld. Adjudicating Authority has not granted his cross-examination. The said approach of Ld. Commissioner legally not correct and against the principles of natural justice as held by Tribunal and high court in various decisions. We also find that the register maintained by the Appellant also shown description of goods as "Polyester Grey Fabrics". We also agree with the argument of Ld. Counsel of Appellant that description "Polyester Grey Fabrics" is a generic description and is wide enough to cover "Polyester Knitted Grey Fabrics" also. 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 statutory books & accounts of the Appellant.

4.9 We, further find that in support of their contention department nowhere produced any corroborative evidence to show that the Appellant has cleared 3,04,463.50 L. Mtrs of Polyester knitted Grey Fabrics illicitly in domestic market and to adjust the stock, Polyester Grey Fabrics were purchased from the market and supplied against the CT-3 to Uma Textiles Processors. 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, no statement of supplier of alleged "Polyester Grey Fabrics " produced, not a single buyer from domestic market produced by the department to show that the Appellant has cleared illicitly

alleged quantity of " Polyester Knitted Grey Fabrics" to them and purchased the alleged quantity of " Polyester Grey Fabrics". Therefore, in the given set of facts and in absence of any adverse evidence, it cannot be said that the 3,04,463.50 L. Mtrs of Polyester Knitted Grey Fabrics were illicitly cleared in domestic market and to adjust the stock, polyester Grey Fabrics were purchased from market and supplied against the CT-3 to M/s Uma Textiles Processors. There are several judicial pronouncements of the Hon'ble Apex Court, High Courts and Tribunal wherein it has been consistently held that in the case of clandestine manufacture and removal of goods, Revenue has to prove it beyond doubt. We rely on the Hon'ble High Court judgment in the case of *Commissioner of Central Excise v. Brims Products* - [2011 \(271\) E.L.T. 184](#) (Pat.) wherein it was held that:-

"8. Facts emanating from the records, disclose that the Central Excise authority itself has held with regard to two consignments out of four, that the investigation is incomplete and has been carried out only at the transporters end, thus, does not reveal actual purchase by the buyers. The authorities with regard to the aforesaid two consignments have also extended benefit of doubt to the respondent. We are of the opinion that there could not have any reason for arriving at different conclusion with regard to the remaining two consignments.

9. In our opinion, since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the Revenue. One has to keep in mind that, though being the main ingredient, betel-nut is not the only raw material which is used in manufacture of Pan Masala. That apart, since the investigation has been carried only at the transporters end, no presumption could be drawn with regard to manufacture and removal of the final product. Presumptions and assumptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received at the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of positive evidence, benefit of doubt will always go in favour of the assessee.

10. Accordingly, we answer the reference against the Revenue and in favour of the assessee and it is held that the receipt of one of the raw materials, does not conclusively prove clandestine manufacture and surreptitious removal of finished final product. Further, since the charge is regarding clandestine manufacture and removal of finished product for evading excise duty, the same cannot be held to be proved on the basis of principle of preponderance of probabilities and the Revenue has to prove the same beyond doubt. The reference is answered accordingly.

4.10 In the matter of M/s. Sakeen Alloys Pvt. Ltd. v. C.C.Ex. [2013 \(296\) E.L.T. 392](#) (Tri.) which was upheld by the Gujarat High Court [[2014 \(308\) E.L.T. 655](#) (Guj.) and subsequently by the Hon'ble Supreme Court reported at [2015 (319) E.L.T. A-117 (S.C.)]. The Tribunal held that :-

"5. We have carefully gone through the rival submissions and perused the records. In this case, the case of clandestine removal has been made out against the appellant M/s. Sakeen Alloys Pvt. Limited on the basis of records/pen-drive recovered from the business premises of M/s. Sunrise Enterprises. In the statements of Managing Director and the Excise persons of M/s. Sakeen Alloys Pvt. Limited and Shri Mukeshbhai V. Patel of M/s. Sunrise Enterprises it has been admitted that they have clandestinely manufactured and cleared CTD/round bars but they have retracted their statements immediately after recording the statements. It is the case of the appellants that request for cross-examination of the persons whose statements were recorded has not been made available to them by the adjudicating authority. In view of the various judgments relied upon, it was also argued that no investigation has been extended to the suppliers of raw materials or purchasers of finished goods to establish whether such clandestine removal of excisable goods have actually been undertaken by the appellants or not. It was emphasized that cross-examination of the persons whose statements have relied upon is obligatory to be provided especially when the statements are retracted by the appellants.

6. It is observed from Para 3.1 of the show cause notice dated 1-5-2009 issued to the appellants that stock yard of M/s. Sunrise Enterprise, Mehsana was searched by the departmental officers and during such checks it was found by the officers that TMT Bars lying in the stock were embossed with 'VARSANA' on each bar which was explained by Shri MukeshbhaiVirabhai Patel of M/s. Sunrise Enterprise have been manufactured by M/s. VarsanaIspat Limited, Kutch. Further, this paragraph also states that the stock lying in the stock yard of M/s. Sunrise Enterprise also had the stock received from M/s. Sakeen Alloys Pvt. Limited, but on verification of the stock with the invoices, the stock was found to have tallied with the documents available with M/s. Sunrise

Enterprise. When the stock lying in the stockyard of M/s. Sunrise Enterprise was found to have tallied with the invoices available with M/s. Sunrise Enterprise then the request of the appellants for cross-examination of Shri Mukeshbhai V. Patel of M/s. Sunrise Enterprise was necessary to bring out the truth whether the records/pen-drive maintained by M/s. Sunrise Enterprise pertained to same stock which is received under duty paid invoices or otherwise.

7. It is also observed from Para 14.4 of the show cause notice that names and address of M/s. Siddhi Industries Pvt. Limited and M/s. Mahavir Alloys, Dabhol, Nani Daman are manufactured who were alleged to have supplied the excess raw materials to the appellants from which clandestinely removed goods were manufactured. Their addresses were made available to the department but no enquiry was conducted at the supplier's end to establish that excess materials in fact were supplied to the appellants. Similarly, no investigation has been extended to the buyers of the finished goods whose names are in the records/pen-drive of M/s. Sunrise Enterprise. This part of the investigation was necessary to establish that clandestinely removed goods have reached to the buyers and they have confirmed to have received such goods. Appellants herein have filed affidavits from some of such buyers which the adjudicating authority has not accepted. It would have been in the interest of justice to call some of these purchasers for cross-examination so that true picture of the entire activities undertaken by the appellants was made clear. Appellants also requested for cross-examination of the Chartered Engineer who gave them the certificate regarding manufacturing capacity and consumption of electricity.

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.”

4.11 We also find that 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.

4.12 Similarly, in the case of *M/s. Shingar Lamps Pvt. Ltd. v. CCE, Chandigarh* as reported in [2002 \(150\) E.L.T. 290](#) (Tri.-Del.), it was held that in the absence of any evidence of excess consumption of raw material or of electricity to support the allegation of excess production and their removal, the demand cannot be upheld on the basis of clandestine removal. The said decision was again upheld by Hon’ble High Court of Punjab & Haryana as reported in [2010 \(255\) E.L.T. 221](#) (P&H), reiterating the necessity of production of positive evidence of clandestine removal.

4.13 Similar view was taken in the Tribunal’s decisions in case of *M/s. Chemco Steels Pvt. Ltd. v. CCE, Hyderabad-I* as reported in [2005 \(191\) E.L.T. 856](#) (Tri.-Bang.), *M/s. Andra Cements Ltd. v. CCE, Guntur* as reported in [2005 \(191\) E.L.T. 1046](#) (Tri.-Bang.), *M/s. Ruby Chlorates (P) Ltd. v. CCE,*

Trichy as reported in [2006 \(204\) E.L.T. 607](#) (Tri.-Chennai), laying down that in the absence of any evidence showing excess consumption of raw materials or of electricity or receipt of sale consideration, the charges of clandestine removal cannot be upheld. Hon'ble High Court of Gujarat in the case of *CCE v. M/s. Vidya Laminates Pvt. Ltd.* as reported in [2007 \(211\) E.L.T. 382](#) upheld the findings of the Tribunal as arrived at in the case of *M/s. Vidya Lamintes Pvt. Ltd.* as reported in [2006 \(197\) E.L.T. 260](#) (Tri.-Mumbai), laying down that the burden to prove the clandestine removal lies solely and exclusively on the Department and is required to be discharged by concrete and clear evidence.

4.14 Viewing the evidence relied upon by the Commissioner, in the light of the ratio of law declared in the above judgments, we find that the entire case of the Revenue is based upon the surmises and conjectures. No concretes positive and tangible evidence appears on record. The evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal. Relying on these judgments, we also hold that the charges of illicitly removal of the alleged goods is not sustainable in the present matter.

4.15 Without prejudice to the above finding, 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).

4.16 By following the ratio of above decisions, we hold that the duty liability cannot be fastened upon the appellant in respect of the goods cleared to M/s Uma Textiles Processors by the Appellant.

4.17 Without prejudice, we also find as regard the issue in these appeals is the demand of duty on the raw materials and confiscation of the said goods and imposition of redemption fine. We find that the adjudicating authority observed that the raw materials imported and indigenous by the appellant have been utilized by them in the manufacture of finished goods and the said resultant products were diverted into the local market. The adjudicating authority also confirmed demand of duty on the finished goods. The Tribunal in the case of *Vandevi Texturisers Pvt. Limited v. CCE, Surat* - [2007 \(220\) E.L.T. 289](#) (Tri.- Ahmd.), in respect of clandestine manufacture and removal by 100% EOU, held that once duty has been demanded on the

diverted goods, the question of demand of duty on the inputs, which has gone into the finished goods, does not arise.

4.18 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.

4.19 In view of the above discussion and finding, 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. Since, we have decided the present Appeals on merit, we have not gone into other aspect addressed by the Ld. Counsel on limitation.

4.20 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)