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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 10077 of 2018 - DB

(Arising out of OIO-DMN-EXCUS-000-COM-007-17-18 dated 26/09/2017 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Balbir Rolling Mills Private Limited **........Appellant**
(previously Known As Balbir Re-rolling Mills Limited),
Plot No. 108/8/1 And 2, Khadoli,
Silvasa, Dadra And Nagar Haveli

VERSUS

Commissioner of C.E. & S.T.-Daman **......Respondent**
3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

With

EXCISE Appeal No. 10211 of 2018 - DB

(Arising out of OIO-DMN-EXCUS-000-COM-007-17-18 dated 26/09/2017 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Sanjay Gaur **........Appellant**
General Manager And Authorised Signatory
Balbir Rolling Mills Private Limited.
(previously Known As 'balbir Re-rolling Mills Limited'),
Plot No.108/8/1 And 2, Khadoli,
Silvasa, Dadra And Nagar Haveli

VERSUS

Commissioner of C.E. & S.T.-Daman **......Respondent**
3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

APPEARANCE:

Shri J C Patel, Shri Rajeev Ravi & Shri Rahul Gajera, Advocate for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 11954-11955/2024

DATE OF HEARING: 02.08.2024
DATE OF DECISION: 06.09.2024

RAMESH NAIR

The principal Issue which arises in the present Appeals is whether the allegation of clandestine manufacture and clearance of the finished goods

(Structural Items/ Rolled Products) can be said to have been established merely on the basis of Private Records of a Third Party (manufacturer of Billets) and Statements of persons who did not remain present for cross-examination, particularly when there is no evidence whatsoever of any buyers of the finished goods, of payments received for the finished goods and of transportation of the finished goods.

1.1 The first Appellant, was at the material time, engaged in the manufacture of M.S. Structural Items falling under Chapter 72 of the Central Excise Tariff. The Second Appellant was General manager and authorized signatory of the first appellant. In or about December 2011, officers of DGCEI initiated investigations against Twenty First Century Wire Rods Limited (hereinafter "TFCWRL") having factories at Khadoli and Parzai, Silvassa and on 1-12-2011 conducted search at the said factories of TFCWRL and at the residential premises of the directors and some employees of TFCWRL.

1.2 In the course of search carried out at the residence of Motilal Junwal, Accountant of TFCWRL, the DGCEI officers recovered Private records maintained by Motilal Junwal viz. Note Books Nos. 7, 11, 15 and File No. 22, which allegedly contained entries of clandestine supplies of Billets to the Appellant made without payment of duty. It is the case of the department based on the Statement of Motilal Junwal that entries appearing in the said Private records with the letter "B" were entries of accounted production cleared on payment of duty and that entries appearing in the said Private records with the letter "W" were entries of unaccounted production cleared without payment of duty. Based on such entries appearing in the said Private Records, the department alleged that

691.33 M.Tons of Billets were clandestinely manufactured and cleared by TFCWRL to the Appellant without payment of duty during the period August 2011 to November 2011. The department further alleged that out of such 691.33 M.Tons of Billets allegedly received by the Appellant clandestinely, the Appellant manufactured 691.33 M. Tons of Structural Items/ rolled Products and cleared the same clandestinely without payment of duty. The department also relied upon two Blank Invoices recovered from Ramesh Pandey who was working as a cook in canteen of TFCWRL, which are alleged to have been kept for using as cover for clandestine removal. The department also recorded Statement dated 12-6-2013 of the Second appellant, Sanjay Gaur in support of the said allegations.

1.3 Based on the aforesaid allegations, Show cause notice dated 1-8-2013 was issued to the Appellant demanding Central Excise duty of Rs.25,40,675/- on the said 691.33 M.Tons of Structural items/ rolled products alleged to have been clandestinely manufactured and cleared out of 691.33 M.Tons of Billets alleged to have been clandestinely received by the Appellant from TFCWRL. The Appellant replied to and contested the said Show Cause Notice by their Advocate's letter, by which it was inter alia submitted that no case for clandestine removal on the part of the Appellant can be said to have been established merely on the basis of Private records maintained by a Third Party in the absence of any evidence of clandestine manufacture/ production by the Appellant.

1.4 Being aggrieved by the said Order-in-original the appellant filed the present appeal.

2. Shri J C. Patel Learned Counsel with Shri Rajeev Ravi & Shri Rahul Gajera Learned Advocate appearing on behalf of the appellant made his submission as under:-

Settled law that clandestine manufacture and removal of goods cannot be said to have been established based on private records of a Third Party and mere statements in absence of any evidence of buyers of the goods, payment received for the goods and transportation of the goods:

2.1 The entire demand for duty on 691.33 M. Tons of Structural Items/ rolled Products alleged to be clandestinely manufactured and cleared by the Appellant is made and confirmed on the basis of Private records maintained by a Third Party viz. Note Books Nos. 7, 11, 15 and File No. 22 maintained by Motilal Junwal, Accountant of TFCWRL and recovered from his residence (See pages 120 to 124 and 132-133 of Appeal). The said private records maintained by the said third party allegedly contained entries of clandestine supplies of Billets made by TFCWRL to the Appellant made without payment of duty. The department also relied upon two Blank Invoices (See page 127 of Appeal) recovered from Ramesh Pandey who was working as a cook in canteen of TFCWRL, which are alleged to have been kept for using as cover for clandestine removal.

2.2 Based on the said private records of the said Third Party, it is presumed that the Appellant clandestinely received 691.33 M.Tons of Billets from TFCWRL and manufactured therefrom, 691.33 M.Tons of

Structural Items/ rolled products which are presumed to have been clandestinely cleared by the Appellant.

2.3 There is absolutely no evidence whatever of transport of the said alleged quantity of 691.33 M.Tons of Billets from the factory of TFCWRL to the factory of the Appellant and of any payment made by the Appellant to TFCWRL for the same.

2.4 There is absolutely no evidence of manufacture of 691.33 M.Tons of Structural items/ rolled products out of the said 691.33 M.Tons of Billets allegedly received by the Appellant from TFCWRL. Not a single buyer of the said alleged 691.33 M.Tons of Structural items/ rolled products has been identified. There is no evidence of transportation of the said alleged 691.33 M.Tons of Structural items/ rolled products to any Buyer. There is no evidence whatever of any payment received by the Appellant from any buyer for supply of the said alleged 691.33 M.Tons of Structural items/ rolled products to any Buyer. In the absence of any such evidence, no case of clandestine removal can be said to have been established merely on the basis of entries in Private records maintained by a Third party and on the basis of Statements of persons who have not been examined and cross-examined in the adjudication proceedings as required by Section 9D of the Central Excise Act 1944.

2.5 In support of the submission that charge of clandestine removal cannot be upheld based on third party documents and mere statements in absence of any evidence of production of goods, their transportation, buyers of the goods, receipt of payment from the buyers, reliance is placed on the following decisions:

a) Bajrangbali Ingots & Steel P. Ltd v CCE – 2019 (1) TMI 966-CESTAT-NEW DELHI,
b) Raipur Forging P. Ltd v CCE – 2016 (335) ELT 297
c) CCE v Garg Industries P. Ltd – 2023 (385) ELT 541
d) Arya Fibers P. Ltd v CCE – 2014 (311) ELT 529
e) Continental Cement Co v UOI – 2014 (309) ELT 411 (All).

2.6 Moreover, reliance placed on Statements recorded by the department to arrive at finding of clandestine removal is also not tenable in law for the reason that the deponents of the Statements have not been examined as required by Section 9D of the Central Excise Act 1944. In fact, as recorded in the Order-in-original in Para 3.2 (Page 75 of the Appeal), that none of the witnesses turned up for cross-examination. As laid down in the following decisions, where witnesses do not remain present for cross-examination, no reliance can be placed on their statements:-

- Commissioner v Motabhai Iron & Steel Industries – 2015 (316) ELT 374 (Guj)
- Shalimar Rubber Industries v CCE – 2002 (146) ELT 248 (SC)
- Adhunik Alloys Ltd v CCE- 2016 (344) ELT 426
- Shri Jamin Uday Thakore & ors v CCE – 2018 (1) TMI 49 CESTAT- MUMBAI
- Chandan Tubes & Metals P. Ltd v CCE – 2006 (193) ELT 48
- Krishna Steel Industries v CCE – 2010 (254) ELT 292

In the case of CCE v Vishnu & Co P. Ltd – 2016 (332) ELT 793 (Del), it is held by the High Court in Para 42 of the judgment that it is the responsibility of the department to ensure presence of the witnesses for cross examination if the department is relying on statements of the witnesses.

3. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of records, we find that though there is no independent evidence found from the appellant to support the revenue's allegation on clandestine manufacture and clearance of the finished goods from the factory of the appellant. The entire case is made on the basis of alleged receipt of clandestinely removed Billets by M/s Twenty First Century Wire Roads Ltd.. The Revenue has also relied upon the statement of accountant of the TFCWRL, however, the cross examination has not been conducted in this regard. Therefore, the adjudicating authority has gravely erred by violating the principles of natural justice. Therefore, the statement that too of third party which is the evidence relied upon the revenue can not be accepted as evidence of clandestine removal.

5. We further find that there is no evidence of clandestine manufacture of appellant's final product. The revenue couldn't bring a single evidence of finished goods allegedly manufactured received by any buyer. There is not a single evidence of receipt of sale proceed against alleged clandestine manufacture and clearance of final product. No evidence of transport of any single consignment of alleged clandestinely removed goods was adduced. Third party's evidence is not sufficient to establish the clandestine

removal of appellant's goods particularly when the said third party's statement was not examined under Section 9D of Central Excise Act, 1944 which reads as under:

> ***"Section 9D. Relevancy of statements under certain circumstances.-***
>
> *(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank 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 interests 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."*

By reading the above Section 9D, it is clear that it is not the optional but mandatory to conduct the cross examination of the witnesses. Since in the present case no cross examination was allowed, the statements can not be relied upon which is the root of the evidence and in the absence of root tree cannot stand. This issue of cross examination has been time and again considered repeatedly by various forums. Some of the judgments are reproduced below:-

a) In the case of Andaman Timber Industries Vs. Commissioner of C. Ex. Kolkata-II- 2015 (324) ELT 641 Hon'ble Supreme Court has given the following decision:-

> ***"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.*

10. *No costs."*

b) In the case of Jindal Drugs Pvt. Ltd. Versus Union of India 2016 (340) E.L.T. 67 (P & H) Hon'ble Punjab & Haryana High Court has passed the following decision:-

"8. *In view of the fact that the case of the petitioners is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*

> ***"9D. Relevancy of statements under certain circumstances.*** *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank 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 interests of justice.

(2) The provision 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."

9. *A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.*

10. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

11. *As already noticed hereinabove, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).*

12. *The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

13. *Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.*

14. *Clause (a) of Section 9D(1) refers to the following circumstances :*

(i) when the person who made the statement is dead,

(ii) when the person who made the statement cannot be found,

(iii) when the person who made the statement is incapable of giving evidence,

(iv) when the person who made the statement is kept out of the way by the adverse party, and

(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

15. *Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioners have also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 2183/1994, dated 3-1-1995 wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.*

16. *If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

17. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

18. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during* *inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

19. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.*

20. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

21. *It is only, therefore, -*

(i) after the person whose statement has already been recorded before a Gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

22. *Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

23. *Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

> ***24.*** *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v C.C., 2001 (137) E.L.T. 637 (T).*
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> ***25.*** *In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner :*
>
> *(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No. 2.*
>
> *(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.*
>
> *(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.*
>
> *(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).*
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> ***26.*** *With the above directions, the writ petition stands disposed of."*

c) In the case of HI Tech Abrasives Ltd Vs. Commissioner of C. EX. & Cus., Raipur- 2018 (362) ELT 961 (Chhattisgarh) Hon'ble Chhattisgarh High Court has passed the following judgment:-

> ***"9. Findings on Substantial Questions of Law (i) & (ii) :***

We shall decide the first two substantial questions of law as they are overlapping. The submission of counsel for the appellant has been that firstly, the Director's statement was not admissible and secondly it cannot be treated as admission because in reply to Show Cause Notice, the said statement was stated to have been obtained under duress. We shall first examine the legal position with regard to the admissibility of the statement of Director which admittedly was taken during search operations by the investigation officers.

9.1 *At the outset, it needs to be clarified that during the course of argument, Learned Counsel for the parties agreed that second substantial question of law is with regard to legality of procedure adopted by the adjudicating authority and not the Tribunal as such because the Tribunal has only exercised appellate jurisdiction. This is quite obvious from orders passed by the Tribunal, the appellate authority and pleadings/ground in the appeal. There is no dispute that the adjudicating authority did not record the statement of the Director Mr. Narayan Prasad Tekriwal and the basis of the finding recorded by the adjudicating authority as well as Customs, Excise and Service Tax Appellate Tribunal, has been the statement of the Director as recorded by the investigation officer during investigation. Section 9D of the Central Excise Act of 1944 reads as under :*

Section 9D - Relevancy of statements under certain circumstances. *— (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank 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 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 the 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 the Court.

On scanning the anatomy of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. (her, the adjudicating authority).

9.2 *At this juncture, we need to notice the provision contained in Section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the court, as they apply in relation to proceeding before the Court. This provision when read in juxtaposition, the small clauses (a) and (b) under* *sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the adjudicating authority.*

9.3 *A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.*

9.4 *The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.*

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."

In view of the above judgments it is a settled law that in absence of cross examination the statements cannot be relied upon as evidence as the same lose its evidentiary value.

5.1 The various judgments cited by the appellant support their case, as the ratio of the said judgments applies in the facts and circumstances of the present case.

6. In view of the above discussions and findings, we are of the view that revenue could not establish it's case of clandestine removal. Hence the demand will not sustain. Accordingly, the impugned order is set aside and appeals are allowed with consequential relief.

(Pronounced in the open court on 06.09.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha