

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10262 of 2014-SM

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-COMM-0011-13-14 dated 28.10.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-I]

B B Agro Chem Industries

.... Appellant

Flat No. 1 Kiran Apartment,
Athwa Gate, SURAT, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Surat-I

.... Respondent

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

WITH

(i) Customs Appeal No. 10263 of 2014 (B B Agro Chem Industries)

(ii) Customs Appeal No. 10264 of 2014 (Manoj Desai)

(iii) Customs Appeal No. 10355 of 2014 (Ashwinbhai Bhanabhai Umrigar)

[Arising out of Order-in-Original/Appeal No SUR-EXCUS-001-COM-0011-13-14 dated 28.10.2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I]

APPEARANCE :

Hardik Modh, Advocate for the Appellant
Shri Sanjay Kumar, Superintendent (AR) for the Revenue.

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

DATE OF HEARING : 10.02.2023

DATE OF DECISION: 24.02.2023

FINAL ORDER NO. A/10320-10323 / 2023

RAMESH NAIR :

These appeals are directed against Order-in-Original No. SUR-EXCUS-001-COMM-0011-13-14 dated 28.10.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-SURAT-I.

2. As per the said impugned order, the demand was confirmed in respect of excise duty on the charge of clandestine removal and demand of Customs duty was also confirmed in respect of inputs allegedly used in the manufacture of excisable goods and the basis of confirmation of demand is

that the departmental officers arithmetically worked out on the basis of total stock position of raw material, production and clearances and stock recorded in the statutory records of the unit for the period 2002-03 and 2003-04. The calculation of the alleged clandestine removal was worked out theoretically by considering that how much copper scrap is required to produce how much copper oxy-chloride. After coming to the calculation whereby it was assumed that difference in quantity might have been cleared clandestinely, excise duty demand was raised. Due to this lapse, the departmental authority also alleged that the raw material used in the alleged clandestinely removed goods, the appellant is also liable to excise duty and hence customs duty on such raw material was also raised. The Adjudicating Authority has confirmed the demand by the impugned order against which the present appeals have been filed.

3. Shri Hardik Modh, learned Counsel appearing on behalf of the appellant, at the outset submits that the present case of clandestine removal is based on assumption-presumptions as not a single evidence of clearance of single consignment was brought on record. There is no evidence of actual manufacture, removal, transportation and sale of goods. The demand was raised only on theoretical basis by making arithmetical calculation as per assumed ratio of consumption of raw material in finished. Therefore, the demand on this basis cannot be sustained. He placed reliance on the following judgments:-

(a) Zinc Collied (India) vs. Commissioner of Central Excise - 2013 (297) ELT 370 (Tri. Ahmd.)

(b) Mahavir Metals Industries vs. Commissioner of C.EX. & Cus. 2014 (313) ELT 581 (Tri. Ahmd.)

(c) Sri Durga Cables Pvt. Limited vs. Commissioner o C. Ex. & Cus. 2020 (374) ELT 459 (Tri. Kol.)

4. He further submits that except this theoretical calculation, the department has also relied upon various statements of the appellant and buyers of the goods. He submits that since there is no documentary evidence available for physical clearance of goods clandestinely, no responsibility as casted upon to conduct cross-examination of witness under Section 9(D) of Central Excise Act, 1944, was discharged and the demand was confirmed without carrying out the cross-examination of witnesses. Therefore, statements cannot be relied upon. He placed reliance on the following judgments:-

- (a) G-Tech Industries vs. Union of India -2016 (339) ELT 209 (P&H)
- (b) J. & K Cigarettes Limited vs. Collector of Central Excise - 2009 (242) ELT 189 (Del.)
- (c) Andaman Timber Industries vs. Commissioner of C. Ex. - 2015 (324) ELT 641 (SC)

5. As regards the demand of Customs duty on duty free inputs allegedly used in the manufacture of finished goods which is, as per the department, clandestinely removed, cannot be sustained. He submits, firstly, clandestine removal is not sustained therefore, there is no question of demanding Customs duty on raw-materials. Secondly, without prejudice, once the demand on goods claimed to have been manufactured and cleared and on which excise duty demand was raised, no further Customs duty on raw-materials used therein can be demanded. He relied upon following judgments:-

- (a) Dupont Synthetics Pvt. Limited vs. Commissioner of C. Ex. - 2010 (259) ELT 408 (T)
- (b) Commissioner of Central Excise vs. Sanjari Twisters - 2009 (235) ELT 116 (Tri. Ahmd.) -affirmed by the Hon'ble Supreme Court in [2010 (255) ELT A15 (SC)]

6. He submits that in the present case the adjudication has been inordinately delayed by six years from the date of show cause notice therefore, on this ground alone the entire proceedings can be held to be vitiated, as held by Hon'ble High Court and Hon'ble Supreme Court. He placed reliance on the following decisions:-

(a) Siddhi Vinayak Syntex Pvt. Limited vs. Union of India - 2017 (362) ELT 455 (Guj.)

(b) Parimal Textiles vs. Union of India - 2018 (8) GSTL 361 (Guj) which has been affirmed by the Hon'ble Supreme Court [2018 (13) GSTL J143 (SC)]

7. As regards the penalty on the partners, he submits that once the partnership firm is penalized, no separate penalty can be imposed on the partners as held by Hon'ble Gujarat High Court in the following judgments:-

(a) Commissioner of Central Excise vs. Jai Prakash Motwani - 2010 (258) ELT 204 (Guj)

(b) Pravin N. Shah vs. CESTAT - 2014 (305) ELT 480 (Guj.)

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

10. I have carefully considered the submissions made by both sides and perused the record. I find that in the present case, the allegation against the appellant is that appellant have clandestinely removed the goods. The charges are on the basis of theoretical calculations that so much of copper scrap is required to manufacture of that much of copper oxy-chloride. I find that demand on this basis cannot be sustained because whatever strong suspicion is there on the basis of arithmetical calculation that the assessee might have manufactured the goods and cleared clandestinely but for the purpose of clandestine removal strong, tangible evidence is required to

prove such serious charge of clandestine removal. In the present case except for the theoretical calculation which is not based on any facts, clandestine removal was confirmed. To arrive at conclusion of clandestine removal there should be much more evidences such as physical manufacture of goods, removal of goods from the factory, transportation of goods and sale of goods. Not a single such evidence is adduced by the department. Merely hypothetical calculations of quantity for clandestine removal cannot be accepted. The issue of demand of duty on the basis of arithmetical calculation without any evidence, considered by this Tribunal in various judgments and held as under:-

(a) In the case of Zinc Collied (India) (supra) the Tribunal decided the matter as under

“7. After considering the submissions made by both sides, I find that the issue involved in this case is regarding the confiscation of the goods which were found unaccounted in the factory premises and demand of duty on the short found goods.

8. I take up the issue of shortage of Zinc Metal. I find from the statements recorded of the various responsible persons of the appellant company that they have clearly indicated in reply to the show cause notice as well as during the statements recorded, that the Zinc Metal was issued for manufacturing of the final products but inadvertently was not recorded in the RG23 Part-I register. It is also seen that the charge of the department is of clandestine removal of such Zinc Metal from the factory premises. For such charge, the Revenue has not adduced any corroborative evidence of clandestine removal. In the absence of any corroborative evidence, I find that the decision of the Tribunal in the case of *Atlas Conductors* (supra), wherein I was one of the Member, will squarely cover the issue in favour of the assessee. In the absence of any corroborative evidence of clandestine removal, duty demand cannot be made on the presumptive grounds, either for removal of inputs as such or on the presumptive ground of manufacturing final products from the said goods. Accordingly, the demand of duty on the short found goods is unsustainable and I hold it so.

9. As regards confiscation of the goods found excess in the factory premises *i.e.*, Zinc Residue and Zinc Horn, I find strong force in the contentions raised by the learned counsel that the said goods were recorded in their private records which is evident from the fact that they have been utilizing and declaring the goods to the banks as work in progress. I find it so from the statement submitted by the learned counsel before the Tribunal as regards work in progress for the month ending 30 June, 2008 and in the said statement Zinc Residue and Zinc Horn is shown as WIP to the extent they were found excess during visit of officers. If the goods are in work in progress, the same cannot be called as final products. If that be so, the goods found in excess, in my considered view, cannot be held as offending goods as they have not reached the stage of recording in the RG-1 register. The decisions cited by the learned counsel in the cases, *Shree Rubber Plast Company (P) Limited* and *Srinivasa Frozen Foods Limited* will cover the issue in favour of the assessee.

10. I find that the impugned order of the first appellate authority is liable to be set aside and I do so. In view of the foregoing, the appeal is allowed.”

(b) Similar issue has been considered by this Tribunals division bench in the case of Mahavir Metals Industries (supra) wherein the Third Member given the following observation :

“10. [Per : M.V. Ravindran, Member (J)]. - This Difference of Opinion is listed before me as per order of Hon’ble President for deciding the points of difference arose between the Bench while deciding the appeal Nos. E/877 to 879/2005.

11. Following Difference of Opinion are indicated :-

- (i) Whether the finding of clandestine removal can be upheld on the basis of input-output ratio of raw materials and final product.
- (ii) Whether the plea of the appellant that even as per the calculation, the shortage would be to the extent of 28,799 kgs, if the benefit of various clauses is extended to them, can be held to be an admission on their part or the same is required to be held as a plea in the alternative.
- (iii) Whether absence of any specific evidence to support the clandestine removal of the goods would require the impugned order to be set aside or the matter is required to be remanded for re-calculation of shortages by adopting the appellant’s plea in the alternative.
- (iv) Whether the statements made by authorized signatory and by the partner are required to be corroborated with sufficient evidence for arriving at the findings of clandestine removal.
- (v) Whether the statements, which are against the records, can be made sole basis for upholding the findings of clandestine removal.
- (vi) Whether, in the facts and circumstances of the case, the matter is required to be remanded for recalculation of duty as held by Member (Technical) or appeals are required to be allowed as held by Member (Judicial).

12. Ld. Counsel appearing on behalf of the appellant would submit that the order recorded by Hon’ble Member (Judicial) is to be accepted. It is his submission that the shortage of the stock of inputs as found out by lower authorities on the day of inspection was based upon the calculations of input-output ratio. It is his submission that such calculation cannot be made a basis to come to conclusion that there was clandestine manufacturing and removal of the goods. It is his submission that the first appellate authority as well as adjudicating authority has relied upon the statements of the partners to hold that there was a clandestine manufacturing and removal of the goods, but it is not the factual position and doesn’t reflect from the correct position and hence the statements needs to be discarded. It is his submission that the calculations based upon the input-output norms is totally incorrect and the assumption of there being a shortage of 28,799 kgs of raw material is an alternative submission, which is not to be considered as an acceptance of shortage of raw material and subsequent manufacturing and clearance of the finished goods. It is his submission that Revenue authorities have not brought on record any evidence regarding clandestine manufacturing and clearance. He would submit that as regards the evidence of clandestine manufacturing and clearance, the law is squarely settled in the case of *Durga Trading Company* - [2002 \(148\) E.L.T. 967](#) (Tri.-Del.) and upheld by the Apex Court as reported in [2003 \(157\) E.L.T. A315](#) (S.C.). It is his submission that there is nothing on record indicating who are the purchasers of the finished goods clandestinely removed

and whether the said goods were removed from the factory premises and investigations has awfully short of putting any evidence.

13. He would also rely upon the judgment of the Tribunal in the case of *Suzlon Fibres Pvt. Ltd. v. CCE, Surat* - [2008 \(230\) E.L.T. 166](#) (Tri.-Ahmd.), wherein it was held that the case of clandestine manufacture and removal will be only on input-output ratio and no other evidence in such cases requires proof beyond doubt on the basis of concrete and positive evidence. He would also rely upon the judgment of Hon'ble High Court of Gujarat in the case of *Nissan Thermoware Pvt. Ltd.*, [2011 \(266\) E.L.T. 45](#) (Guj.), wherein Hon'ble High Court has clearly held that except for the shortage of raw material which is disputed by the assessee and statement of the Director, there being no evidence on record to indicate clandestine manufacture and removal of the final product, hence there cannot be any charge of clandestine removal.

14. Ld. AR, on the other hand, would submit that the assessee is not disputing the receipt of the raw materials as indicated in the statement in the show cause notice and reproduced in Order-in-Original during the visit of the officers. It is the submission that the statements given by the partners as regards clandestine removal of the finished goods, is not rebutted or retracted and it would form the basis of allegation of the clandestine removal. It is his submission that Hon'ble Member (Technical) has ordered only re-calculation of the demand of duty based upon the appellant's own submission as regards shortage of input after seeking allowances for the wastages and burning losses that may arise. It is his submission that if input are not challenged then the shortage of raw material stock as calculated is not properly explained and suspicion is created that there is a shortage of input, itself would indicate that there was something wrong in the factory premises of the appellant.

15. I have considered the submissions made at length by both sides and perused the records.

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."

(c) Similarly, in the case of Sri Durga Cables Pvt. Limited (supra), the Tribunal passed the following order:-

"7. We find that the issue to be decided in this case is whether the appellant has clandestinely removed the goods on which the duty demand has been made. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods have been procured to manufacture goods for clandestine clearance. No evidence for extra production or unaccounted cash or statement of buyers or transporters has been obtained. It is a settled legal position that charge of clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing some evidence. The Tribunal has taken consistent view that in absence of corroborative evidence, the charge of clandestine clearance cannot be levelled against the assessee. Some of the decisions are as below :

- *Ghodavat Pan Masala Products Ltd. v. CCE* - [2004 \(175\) E.L.T. 182](#) (Tri.-Mumbai)
- *CCE v. Supreme Fire Works Factory* - [2004 \(163\) E.L.T. 510](#) (Tri.-Chennai)
- *CCE v. Suvidha Limited* - [2009 \(236\) E.L.T. 675](#) (Tri.-Del.)

8. We further find that the whole basis of applying the input-output ratio of 1:1 to arrive at the quantity of final products alleged to be clandestinely cleared by the appellant is solely based on the production pattern of other assessee in the same Commissionerate. We are of the view that the Learned Commissioner made a fundamental error in making such assumption to raise demand on the allegation of clandestine clearance. In the case of *R.A. Castings Pvt. Ltd. v. CCE, Meerut* - [2009 \(237\) E.L.T. 674](#) (Tri.-Del.), the Tribunal held that demand raised on the basis of electricity consumption as per technical Report given by Dr. Batra was not sufficient to hold that excess goods might have been manufactured by the assessee which could have been clandestinely removed without payment of duty. The important findings made by the Tribunal is reproduced below :-

"20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates [widely] depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. *The reasons for high consumption of electricity in the case of the appellants' factories have*

not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr. Batra's report has been blindly applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. In the following case laws, it has been held that the consumption of the electricity alone is not sufficient to determine the production :

22. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :

- (i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;
- (ii) Utilization of such raw material for clandestine manufacture of finished goods;
- (iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;
- (iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;
- (v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

In the instant case, no such evidences to the above effect have been brought on record.

22.1 For want of evidence relating to the above points, clandestine removal cannot be sustained merely on the basis of the technical opinion report of Mr. Batra. In this connection, the following case laws are relied :

- (i) *Emmtex Synthetics Ltd. v. Commissioner of Central Excise, New Delhi* reported in [2003 \(151\) E.L.T. 170](#) (Tri.-Del.);
- (ii) *Commr. of Central Excise, Chennai v. Dhanavilas (Madras) Snuff Co.* reported in [2003 \(153\) E.L.T. 437](#) (Tri.-Chennai);

(iii) *Commissioner of Central Excise, Madurai v. Madras Suspensions Ltd.* reported in [2003 \(156\) E.L.T. 807](#) (Tri.-Chennai);

(iv) *Commissioner of Central Excise, Coimbatore v. Sangamitra Cotton Mills (P) Ltd.* reported in [2004 \(163\) E.L.T. 472](#) (Tri.-Chennai);

(v) *Commissioner of Central Excise, Coimbatore v. Velavan Spinning Mills* reported in [2004 \(167\) E.L.T. 91](#) (Tri.-Chennai);

(vi) *M. Veerabadhran & Others v. Commissioner of Central Excise, Chennai-II* reported in [2005 \(182\) E.L.T. 389](#) (T) = 2005 (98) ECC 790 (T).

23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

24. *The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what it alleges with positive and concrete evidence. In the absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained.*

25. The law does not entitle the Revenue to disregard all the statutory excise records as well as audited financial accounts and records of the assessee-company, which have been duly verified and accepted by the competent authorities from time to time not only for central excise but also for purposes of income-tax, etc.

26. The Central Excise authorities cannot ignore the facts, records, documents and transactions actually carried out and reflected in the books of accounts and records duly assessed, audited and accepted by other revenue authorities.

27. Since the incriminating statements of the share brokers etc. have been relied upon in the proceedings, it was incumbent upon the Revenue to produce them as well as the investigating officer for cross-examination by the appellants, as was repeatedly requested by them. In the absence of the same, the statements of the share brokers etc. cannot be relied upon. Even if, for the sake of argument, it is accepted that the income shown in the balance sheets is not the income derived from the sources declared by the appellants, there is nothing on record to link it with the so called clandestine removal of the goods and that cannot be made the basis to establish a case of clandestine removal. In any case, the Commissioner has not determined the duty liability on the basis of the profit shown in the balance sheets. He has used this only as corroboration and not the primary basis for determining the quantum of production of steel ingots. Once the main evidence itself is found to be unreliable, such figures of profits etc. in the balance sheets cannot form a basis for rejecting the quantum of production appearing in the records of the appellants.

.....

It may be emphasised that the instant case has been booked only on the basis of theoretical conclusions drawn on the basis of the 'technical opinion report' of Shri N.K. Batra, Professor of I.I.T., Kanpur and no evidence relating to clandestine manufacture and removal of goods is on record.

29. In the light of the above discussions, we hold that the demands of duty are not sustainable. The same are set aside."

9. We have perused the decision of the Hon'ble Allahabad High Court in the case of *Bajrang Petro Chemicals* (supra) as relied by the Learned Authorized Representative for the Revenue. We are of the view that the said decision is clearly distinguishable inasmuch as in that case, demand was raised on the ground that final products were physically found to be short pursuant to verification of stock undertaken by the Departmental officers in presence of the assessee, the reasons of which could not be explained by the assessee. The Hon'ble High Court in para 10 of the order specifically noted that there was a huge shortage of finished goods for which no explanation was offered by the assessee which meant that the assessee had admitted the shortage and paid the duty accordingly. Based on the said finding, the High Court observed that the method of clandestine removal of the goods is not required to be explained. Therefore, the said decision has no application to the facts of the present case. In fact, in the instant case, no shortages of goods were ever found which fact is on record and not in dispute. In any case, since we have already noted hereinabove, that the whole basis of allegation of clandestine removal is the production pattern of other assessees, which has no legal or scientific basis, the impugned duty demand cannot be sustained.

10. In view of the above discussions, the impugned order cannot be sustained and accordingly the same is set aside. The appeal is allowed with consequential relief as per law.:"

11. In view of my above discussion supported by judgments referred above, the demand merely on the basis of arithmetical calculations cannot be sustained.

12. As regards the reliance made by department on various statements, I find that it is admitted position that without any corroboration statement under Section 14, should have been examined by cross-examination which is mandatory under Section 9D of the Central Excise Act, 1944. The appellant have raised serious objection that witnesses' statement were not cross-examined. I find that this issue is no longer res-integra that statements, if it is relied upon by the Adjudicating Authority, he should first cross-examine the witnesses then only statement shall be taken as admissible evidence for deciding the matter. This issue has been considered time and again by various High Courts and Supreme Court.

(a) In the case of G.Tech Industries (supra) The Hon'ble P&H High Court observed as under:-

"14. 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.

15. 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.

16. 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."

(b) Similarly on the issue of Section 19, the Hon'ble Delhi High Court in the case of J&K Cigarettes Limited (supra) taken following view:-

"23. At the outset, we have to keep in mind that while dealing with the constitutional validity of a provision, one cannot take into consideration the apprehensions expressed by the petitioners regarding the misuse of such a provision. Validity of a provision would be totally different from the valid exercise of powers conferred upon the authority under such a provision. If powers are not exercised properly and in a legal manner in a particular case, then that particular act of the quasi-judicial authority can be set at naught. This would not be a ground for declaring a provision of the Act itself as unconstitutional.

24. We may also point out at this stage itself that the power of the Parliament to make such a provision is not in question. It is also conceded by the learned senior counsel appearing for the petitioners in this case that such a provision could be incorporated in the statute, which is *pari materia* of Section 32 of the Evidence Act viz., to rely upon statements of certain persons even when they have not been produced for cross-examination, under the given circumstances. Thus, 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. Of course, the circumstances have to be exceptional.

25. Section 9D of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant. These are :-

- (a) when the person who had given the statement is dead;
- (b) when he cannot be found;
- (c) when he is incapable of giving evidence;
- (d) when he is kept out of the way by the adverse party; and
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable.

26. Interestingly, the learned senior counsel for the petitioners did not join the issue that the aforesaid circumstances are not exceptional circumstances. They are the circumstances which naturally would be beyond the control of the parties and it would not be possible to produce such a person for cross-examination who had made a statement on earlier occasion. The provisions under Section 9D of the Act are necessary to ensure that under certain circumstances, as enumerated therein, viz. if the witness has been won over by the adverse party or is avoiding appearance despite several opportunities being given. The rationale is that decision making in a case cannot be allowed to continue in perpetuity. These provisions are based on the Doctrine of Necessity. It provides for relevancy of statements recorded under Section 14 of the Act dispensing with or without the opportunity for testing the truth of such evidence by cross-examination. For, when a person is dead or incapable of giving evidence or cannot be found, no better evidence can be had in the circumstances than the statement tendered by witnesses before a quasi-judicial authority.

The safeguards which are enumerated in the provision under Section 32 of the Evidence Act are essential as the provision provides for an exception to the rule of exclusion of hearsay evidence, while proving for relevancy of even direct oral evidence of the fact under enquiry, which otherwise is not admissible, to ensure that there is no miscarriage of justice. Similarly, provisions under Section 9D provide for relevancy of statements recorded under Section 14 of the Act, under certain circumstances, in criminal as well as quasi judicial proceedings, to meet the ends of justice.

27. We, thus, are intent to agree with the submission of the learned Addl. Solicitor General that if an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, viz. relevancy of statement of fact by person who is dead or cannot be found under certain circumstances, passed with the same purpose and for the same object, the safe and well known rule of construction is to assume that the legislature, when using well-known words upon which there have been well known decisions, use those words in the sense which the decisions have attached to them. The provisions under Section 32 of the Evidence Act have not been found to be *ultra vires* of the Constitution. Therefore, the provisions under Section 9D of the Act, which are *pari materia* with the provisions under Section 32 of the Evidence Act, cannot be held as *ultra vires* of the Constitution.

28. The moot question that arises at this stage is as to whether the provision in question is arbitrary. Such a provision can still be held to be offending Article 14 of the Constitution and can be termed as arbitrary if it is established that the provision gives uncanalised and uncontrolled power to the quasi judicial authorities.

But, we are of the opinion that it is not so. The safeguards are inherent in the provision itself. In the first instance, only those statements of such persons, which are made and

signed before the Central Excise Officer of a gazetted rank, are treated as admissible. Thus, protection is taken to treat the statements relevant only if they are made before an officer enjoying a higher rank/status. Secondly, (and that has already been taken note of) such statements are made relevant only under certain specified circumstances, and these are the ones which are beyond anybody's control. Thirdly (and this is most important), the quasi-judicial authority can rely upon the statement of such a person only when the stated ground is proved. For example, in those cases where the person who made the statement is dead, there should be sufficient proof that he is dead. In case, where a person cannot be found, the authority would have to form an opinion, based on some material on record, that such a person cannot be found. It would not be mere *ipse dixit* of the officer. In case, cogent material is not there to arrive at such a finding, the persons against whom the statement of such a person is relied upon can always challenge the opinion of the authority by preferring appeal to the higher authority, which appeal is statutorily available. Same yardsticks would apply to other grounds. If the quasi judicial authority opines that a person is incapable of giving evidence, formation of such an opinion has also to be predicated on proper material on record, which could be in the form of mental or physical disability of such a person.

29. Thus, when we examine the provision as to whether this 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 forming the opinion. Only then, it would be possible for the affected party to challenge 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.

30. Therefore, it cannot be said that the provision gives uncanalised or uncontrolled power upon the *quasi judicial* authority. Granting of opportunity and passing reasoned order are the conditions inbuilt in exercise of power by any *quasi judicial* authority and, therefore, it is not necessary that these conditions should be specifically mentioned in the provision. The very fact that before power under Section 9D(2) of the Act could be exercised, the authority has to satisfy itself about the existence of any of the conditions stipulated therein, which provides clear and sufficient guidance to such *quasi judicial* authority to exercise its power under the section. We may also state that such arguments have been repelled by the Supreme Court on number of occasions. [See - *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465; and *Bhatnagars & Co. Ltd. v. Union of India*, AIR 1957 SC 478].

31. Interestingly, even in the present case, the attempt of learned senior counsel appearing for the petitioners was to show that the respondent No. 1 ought to have given prior intimation and granted an opportunity to the assessee to make its submissions on invocability of Section 9D itself and thereby enabling the assessee to take appropriate steps, as may be possible, in the circumstances of the case. He submitted that if a particular witness was not allowed to be cross-examined by stating that it was not possible to procure his presence without delay or expense, had the opportunity been given to the petitioners to meet the expenses, the petitioners would have borne the expenses and could have procured the presence of witnesses. Likewise,

he argued that if the opinion was that it is the adverse party, i.e. the petitioner, who kept a particular person out of the way, the petitioner should have been confronted with that so as to enable him to contact the witness through his own resources and inform him about the time and place of the cross-examination, or else, to enable the petitioners to clarify the relevant facts and assist and cooperate with the adjudicator in contacting the witness. These examples, at the most, would indicate as to how the powers are to be exercised by the adjudicating authority. That would not make the provision arbitrary. As stated in the beginning, validity of the provision is totally different from exercise of powers by an authority invoking those provisions. We may only refer, at this stage, to the judgment of the Supreme Court in the case of *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation*, (1993) 2 SCC 279. In that case, the Supreme Court categorically observed that wherever wide power is conferred by statutes on public functionaries, the same is subject to inherent limitation that it must be exercised in just, fair and reasonable manner, *bona fide* and in good faith; otherwise, it would be arbitrary. In such cases, test of reasonableness is more strict. Following observations therefrom are worth quoting :-

“15. Every wide power, the exercise of which has far reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is *ultra vires*. It does not become *bona fide* and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is *mala fide* if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason.”

32. Thus, we summarize our conclusions as under :-

- (i) We are of the opinion that the provisions of Section 9D(2) of the Act are not unconstitutional or *ultra vires*;
- (ii) while invoking Section 9D of the Act, the concerned authority is to form an opinion on the basis of material on record that a particular ground, as stipulated in the said Section, exists and is established;
- (iii) such an opinion has to be supported with reasons;
- (iv) before arriving at this opinion, the authority would give opportunity to the affected party to make submissions on the available material on the basis of which the authority intends to arrive at the said opinion; and
- (v) it is always open to the affected party to challenge the invocation of provisions of Section 9D of the Act in a particular case by filing statutory appeal, which provides for judicial review.

33. Thus, insofar as the *vires* of the provision are concerned, we find no merit in these writ petitions and dismiss the same. No costs.”

(c) The Hon’ble Supreme Court also in the case Andaman Timber Industries (supra) clearly held as under:

“6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis

of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

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

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

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

13. In view of the above judgments, it is settled law that without conducting cross-examination as provided under Section 9D, no statement can be admitted as evidence. Hence, in the present case, without cross-examination the statement recorded being not admissible evidence are discarded. Except the statement and hypothetical arithmetical calculation, there is nothing on record to suggest an iota of doubt that the appellant have cleared the goods clandestinely. Therefore the demand of excise duty on alleged clandestine removal is not sustainable. As regards the duty of

Customs on the raw material, since I set-aside the charge of clandestine removal and demand of duty thereto, consequently no demand of customs duty will sustain. Without prejudice, I also find that in various judgments, a view has been taken that once the duty was demanded on manufactured finished goods on the raw material used therein, customs duty cannot be demanded. The following judgments are cited in this regard:-

- (a) Dupont Synthetics Pvt. Limited vs. Commissioner of C. Ex. - 2010 (259) ELT 408 (T)
- (b) Commissioner of Central Excise vs. Sanjari Twisters - 2009 (235) ELT 116 (Tri. Ahmd.) -affirmed by the Hon'ble Supreme Court in [2010 (255) ELT A15 (SC)]

14. As regards the submissions of the appellant that demand cannot be sustained on delayed adjudication of show cause notice. There is inordinate delay of six years in passing the adjudication order. Therefore, prima-facie on this issue also the appellant has made out a strong case. However, since the entire case is decided on its merit and facts, I am not passing any order on the issue of delay in adjudication.

15. As regards the submission of the appellant penalty on the partner is not sustained for the reason that in case of partnership firm, no separate penalty can be imposed on the partner. I completely agree on this proposition as the Hon'ble Gujarat High Court in the case of CCE vs. Jai Prakash Motwani (supra) held that once penalty on the partnership firm is imposed no separate penalty can be imposed on the partners. However, in the present case, since the demands against the partnership firm itself are set-aside, no penalty on the partners can be imposed.

16. In view of my above discussion and findings, the impugned orders are not sustainable hence the same are set-aside. Appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 24.02.2023)

(Ramesh Nair)
Member (Judicial)

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