**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**

# REGIONAL BENCH : ALLAHABAD

**COURT No. I**

**Appeal No. : E/70392/2018-EX[DB], E/70393/2018-EX[DB], E/70474/2018-EX[DB], E/70465/2018-EX[DB], E/70456/2018-EX[DB], E/70457/2018-EX[DB], E/70458/2018-EX[DB], E/70459/2018-EX[DB], E/70460/2018-EX[DB], E/70461/2018-EX[DB], E/70462/2018-EX[DB], E/70469/2018-EX[DB], E/70466/2018-EX[DB], E/70467/2018-EX[DB], E/70463/2018-EX[DB], E/70479/2018-EX[DB], E/70468/2018-EX[DB], E/70472/2018-EX[DB], E/70476/2018-EX[DB], E/70475/2018-EX[DB], E/70473/2018-EX[DB], E/70482/2018-EX[DB], E/70477/2018-EX[DB], E/70487/2018-EX[DB], E/70486/2018-EX[DB], E/70485/2018-EX[DB], E/70484/2018-EX[DB], E/70483/2018-EX[DB], E/70481/2018-EX[DB], E/70492/2018-EX[DB], E/70491/2018-EX[DB], E/70395/2018-EX[DB], E/70394/2018-EX[DB], E/70455/2018-EX[DB], E/70464/2018-EX[DB], E/70471/2018-EX[DB], E/70478/2018-EX[DB], E/70488/2018-EX[DB], E/70489/2018-EX[DB], E/70490/2018-EX[DB], E/70470/2018-EX[DB], E/70396/2018-EX[DB],E/70480/2018-EX[DB]**

(Arising out of Order-in-Original No.01/Pr.Commr./MRT/2017 dated 16.01.2018 passed by Principal Commissioner, Central GST Commissionerate, Meerut)

**Appellant : Meenu Paper Mills Pvt Ltd, Manish Kapoor Director Of, Shri Suresh Kumar Garg, Shri Rakesh Kumar Agarwal (proprietor), Shri Anil Kumar Jain (director), Balaji Papers, Shri Yash Bhatia (director), Shri Amrish Kumar Agarwal (proprietor), Vidya Kraft Paper Ltd, Shri Mukesh Kumar Agarwal (proprietor), Shubh Papers, Shri Naveen Bansal (partner), Shri Vinod Kumar Khanna (proprietor), Shri Surender Prakash (director), Savera Papers, Shri Ashok Singhal(director), Shri Shiv Kumar (proprietor), Prakash Traders, Agarwal Papers, Jyoti Global Pvt Ltd, Shri Arshad Ali Khan (proprietor), Shri Sandeep Kumar Mittal (proprietor), Shri Yogendra Pal (proprietor), Himanshu Paper P Ltd, Shri Sandeep Kumar Garg (partner), Satya Kraft Pvt Ltd, Shri Deepak Maheshwari (proprietor), Shri Mahendra Khanna (proprietor), Aakar Traders, Shri Istkar (proprietor), Neeraj Paper Marketing Ltd, Nishant Garg, Ravinder Kumar, Shri Anil Kumar Sharma (proprietor), Shri Harish Kumar Singhal (director), Shri Raghuvansh Kumar Agarwal, Shree Jaiveer Singh (proprietor), Shri Rajiv Jain (director), Nav Durga Kraft & Tissues Pvt Ltd, Vanik Papers Pvt Ltd, Shri Dalip Khanna (proprietor), Aslam Tyagi, Shri Praveen Bansal (proprietor)**

**Respondent : C.C.E. & S.T.-Meerut-I (In All Appeals)**

Appearance:

Ms. Seema Jain, Advocate, Shri Ajay Kumar, Advocate &
Shri Abhishek Srivastava, Advocate for the Appellant

Shri Sandeep Kumar Singh, Deputy Commissioner (AR),

for the Respondent

**CORAM:**

**Hon'ble Mrs. Archana Wadhwa, Member (Judicial)**

**Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)**

Date of Hearing : 26.02.2019
Date of Pronouncement : 23.04.2019

FINAL ORDER NO. 70816-70858/2016

**Per: Mrs. Archana Wadhwa.**

All the appeals are being disposed of by a common order as they arise out of the same impugned order passed by the Commissioner vide which he has confirmed the demand of duty of Rs.8.96 Crores approx. against M/s.Meenu Paper Mills Pvt.Ltd. on the allegations and findings of clandestine removal along with confirmation of interest. In addition penalty of identical amount stand imposed upon them. Further the adjudicating authority has imposed penalties of varying amounts on the other appellants, who are individuals being director, proprietor or partners of various firms.

2. After hearing both sides duly represented by Ms.Seema Jain, learned Advocate for the appellants and Shri Sandeep Kumar Singh, learned Deputy Commissioner(AR) for the Revenue, we find that M/s.Meenu Paper Mills Pvt.Ltd. located at Muzaffarnagar was engaged in the manufacture of kraft paper of different GSM ranging from 80 GSM to 180 GSM out of waste paper and pulp procured locally. They were duly registered with the Central Excise department and were clearing their goods on payment of duty of excise, after availing the facility of Cenvat credit of duty paid on various raw materials and inputs. Shri Manish Kapoor is the Director of the said unit.

3. The appellants' factory was visited by the Central Excise officers on 02.12.2014, who conducted various checks and verifications. As a result of stock-taking of the finished goods, certain shortages of the kraft paper involving duty of Rs.98,929/- were found. Shri Aslam Tyagi, Accountant of the said unit, in his on the spot statement dated 02.12.2014 deposed that he was satisfied with the manner of stock-taking and admitted the shortages of the kraft paper, but could not give any satisfactory reason for the same.

4. The Revenue further conducted the searches at the residential premises of Shri Manish Kapoor, Director of the said manufacturer and recovered certain incriminating documents and records. The search of his residential premises also resulted in recovery of one laptop, one external hard-disc, one 16 GB Pendrive of Sandisk make. All the documents and the items recovered were seized by the officers under Panchnama dated 02.12.2014.

5. Further searches were also conducted in the residential premises of one Shri Ravinder Kumar, Accountant-cum-Computer Operator and certain incriminating papers along with one laptop and two Pendrive of Sandisk and Soni make were recovered and seized under Panchnama dated 02.12.2014. Searches were conducted at the residential premises of Shri Jitendra Pahuja, Chartered Accountant of M/s.Meenu Paper Mills and incriminating loose papers and two laptops were recovered and seized under the Panchnama dated 02.12.2014.

6. The said records, documents, laptop, Pendrive resumed form various premises were scrutinized by the Revenue and the data contained in the hard-discs, and and Pendrive was retrieved and examined. From the said data, Revenue entertained a view that the same was related to sale and purchase by M/s.Meenu Paper Mills,

which has been cleared clandestinely by the said manufacturer. Statements of various persons were recorded. Shri Ravinder Kumar, Accountant-Cum-Computer Operator of the assessee informed that the data stand stored in the name of M 14-15. He clarified that M meant M/s.Meenu Paper Mills in coded form and 14-15 referred to financial year 2014-15. He also deposed that the said data pertains to both accounted as well as unaccounted sale. Similarly the Pen-drive recovered from the residential premises of the Director Shri Manish Kapoor were examined and data was retrieved from therein, leading the Revenue to believe that the same represents the un-accounted sale purchase by M/s.Meenu Paper Mills.

7. During the course of further investigations, statements of various persons were recorded including the scrutiny of the documents of the transport companies, who under-took the transportation of the final product of M/s.Meenu Paper Mills. On comparison of the data retrieved from the Pendrive with the sale purchase figures as reflected in the statutory records of the assessee, the Revenue entertained a *prima facie* view that the said appellant was indulging in clandestine removals. Accordingly during the course of further investigations the statement of Shri Nishan Garg working as Excise Assistant of

M/s.Meenu Paper Mills was recorded and he was confronted with the sale and purchase ledger account and the data contained in the Pendrive. The said deponent deposed that the same represents the sale and purchase of M/s.Meenu Paper Mills and admitted that GRs/Bilties contained in the said folders pertained to the kraft papers manufactured by M/s.Meenu Paper Mills. Statement of Shri Allam Tyagi, Accountant was also recorded and investigations were also made at some of the suppliers of the raw materials end and from the buyers of craft papers of M/s.Meenu Paper Mills.

8. Based upon the result of the investigations, proceedings were initiated against the said appellant by way of issuance of a show cause notice dated 04.03.2016 proposing to confirm Central Excise Duty of around Rs.8.96 Crores on the allegations of clandestine removal of the goods. The notice also proposed to recover duty of Rs.98,620/- involved in respect of shortages detected in their factory. Further proposal was made in the notice to impose penalty upon the said appellant as also on the other co-noticees.

9. The said show cause notice was contested by the assessee making a request for supply of relied upon documents; for cross-examination of persons whose statements were recorded by the

department and later on retracted; cross-examination of the departmental officers as also of the buyers and suppliers. They also made their pleas on the merits of the case by submitting that there is no positive evidence on record to show the unaccounted manufacture and removal of the goods. They also contested that the inputs received by them were sludge and cannot be used for making kraft paper. The other co-noticees in their reply pleaded that they never supplied or purchased any unaccounted goods from the appellants and their statements were recorded by the department under threat of arrest and coercion. Some of the noticees also contended that the copies of the alleged statements were never supplied to them by the Revenue.

10. The Commissioner did not find favour with the above submissions of the appellant and vide his impugned order dated 16.01.2018 confirmed the demands, as proposed in the notice along with confirmation of interest, without accepting the assessee's plea of cross-examination and supply of Pendrive etc. allegedly recovered from the premise of the Director of the company as also from other sources. He also imposed penalties of varying amounts on the other co-noticees who were either the alleged supplier of the raw material or

the purchaser of the clandestinely cleared goods. The said order is impugned before us.

11. Ms.Seema Jain, learned Advocate appearing for M/s.Meenu Paper Mills Pvt.Ltd. as also for other appellants has assailed the impugned order on number of grounds. After detailing the factual position she submits that the entire case of the Revenue is based upon the seizure of Pendrive, laptop, hard discs, server etc. either from the residential premises of Shri Manish Kapoor, Director of the said company or from the residential premises of the various employees and the statements recorded during the further investigations. She clarifies that the search and seizure conducted by the Revenue officers is not proper inasmuch as the same has not been done in accordance with the provisions of the Central Excise Act. By drawing our attention to the provisions of section 12F and 18 of Central Excise Act, 1944 she submits that the said provisions state that the provisions of Code of Criminal Procedure, 1973 relating to search and seizure shall apply to the search and seizure proceedings under the Central Excise Act. She further submits that section 100 of CRPC, 1973 states that before making a search, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the

locality in which the place to be searched is situated or of any other locality, if no such inhabitant of the said locality is available or willing to be a witness to the search. As such she submits that a search has to take place in accordance with the provisions of CRPC and section 100 of CRPC requires the search to be witnessed by a person who is a local person. Panchas, who were associated by the Revenue to witness search and seizure in the present case were neither the inhabitants of the locality in which the premises of search were located and the same very persons were specifically summoned to the Panchnamas drawn on different dates and in different premises and different cities. By drawing our attention to a chart prepared by her, she demonstrates that one Rinku Singh, son of Mahipal Singh and resident of House No.191, Geetanjali vihar, Khoda Colony, Ghaziabad was the witness while drawing the Panchnama in the residence of Shri Manish Kapoor on 02.12.2014. The same very Rinku Singh was the witness for conducting the search in the premises of M/s.Shikhar Paper on 23.04.2015. Further the same person was made the witness on 15.02.2016 in the office of the Assistant Commissioner while retrieving the data from the various electronic items. It is her contention that the person who has been made witness in different stages of proceedings and on different dates, at different places is the same Shri Rinku Singh, which indicates his closeness to Revenue officers and establishes the fact that he was specifically called witness for different proceedings at different places. The legal requirement of calling a local witness in terms of the provisions of section 100 of CRPC was not adhered to by the Revenue for the reasons best known to them. Similarly she has shown the other persons to be the witnesses at different places and on different dates. It is the contention of the learned Advocate that the fact that no person who was inhabitant of the locality where the search was to take place stands summoned for being a witness to the proceedings. On the contrary Revenue has used their own witnesses for conducting the searches and consequent seizures. This fact itself establishes a motive on the part of the Revenue and there is no explanation as to why a local inhabitant was not called for to be a witness to the proceedings. It is not the Revenue's case that some local inhabitants were called and they refused to participate. She submits that when the search itself was not in accordance with the provisions of law, the seizure is vitiated and seized records are not admissible evidence. For the above proposition she relied upon the following case laws..:-

(a) Yeduru Sreeniasulu Reddy vs. The State of Andhra Pradesh [Manu/AP/1238/2001]
(b) Pradeep Narayan Madgonkar & Ors vs. State of Maharashtra [MANU/SC/0372/1995]
(c) State vs. Om Prakash and Ors. [MANU/DE/3584/2013]

(d) Prem lata vs. State of Himachal Pradesh [MANU/HP/0116/1986]

(e) State of Madhya Pradesh vs. Ram Prakash & Ors. [MANU/MP/0203/1988]
(f) Abid Khan vs. State of Rajasthan [MANU/RH/0056/2006]

As such the contention of the learned Advocate is that inasmuch as the demand is solely based on the data in the Pendrive seized from the residential premises of Shri Manish Kapoor and Shri Ravinder Kumar, the seizure of the same being vitiated, the said documents/data cannot be held to be of any evidentiary value.

12. She further raised the following contentions in support of her arguments, by way of written submissions :-

**(i) Electronic devices seized from residence of Manish Kapoor (Director) and Ravinder Kumar (Accountant & Computer Operator not sealed at the time of seizure, electronic devices seized from other premises duly seized.**

Demand is based on 16 GB Sandisk make pendrive seized from residence of Manish Kapoor supported by Sony Pendrive 4 GB seized from residence of Ravinder Kumar, both of which were not sealed at the time of seizure. All electronic devices seized from other premises had been duly sealed and when opened did not have any data implicating the Appellant in any manner. The detailed submissions on each and every issue were filed by the ld.Advocate, which for the sake of ready reference are being reproduced below:-

| **Date of Panchnama & premises** | **Electronic devices seized** | **Whether sealed and Whether electronic devices had incriminating data** |
|---|---|---|
| 2.12.2014 Residential premises of Manish Kapoor, Director, Meenu Paper Mills at Muzaffarnagar | Pendrive 16 GB Sandisk make Laptop Mac Book Pro Apple Make<br><br>500 GB External Hard disc Seagate Make S/N NA315MQP<br><br>Server Inspiration DELL MODEL 009516 GB pen drive (Sandisk) | **Nothing sealed.**<br>Data from Pendrive taken out by computer expert in O/o Commissioner at Noida. Pendrive had data of sale and purchase for 2011-12 to 2014-15<br><br>No incriminating data in other seized electronic devices. |
| 2.12.2014 in the residential premises of Ravinder Kumar at Ankit Vihar, Muzaffarnagar | Laptop E Machines – E732z S/No 03410691625<br><br>Pendrive Sandisk – Cruzer Micro 4 GB<br><br>Sony Pendrive 4GB | **Nothing sealed**<br>Data from Pendrive taken out in O/o Commissioner at Noida. Sony pendrive had data of sale for 2014-15<br><br>No incriminating data in the other seized pendrive and Laptop. |
| 2.12.2014 in the premises of Arora Pahuja & Co CA's Gandhi Colony, Muzaffarnagar | Laptop Model Dell Vostro 15, Service Tag (S/N) DZXT712; Express Service Code 30471275990.<br><br>Laptop Model Lenovo S/N EB07140729; P/N R3NO37B23014<br><br>2 pen drives (red and yellow) | Both laptops **sealed** with paper seal with signature of officers and party.<br><br>Pendrives kept in envelope and duly signed by officers and party |
| 23.4.2015 in the residential premises of Deepak Maheshwari at | One hard disc of and Seagate 320 GB S No.9VMFYQ3F<br><br>Seven Pen drives | Pen drives put in individual **sealed** envelopes and further **sealed** with paper seal<br>Two pendrives opened on 27.4.2015 |

| | | |
|---|---|---|
| Pitampura Delhi | | Five pendrives opened on 1.5.2015 |
| 23.4.2015<br>in the premises of Shikar Paper, Lawrence Road, Delhi | One Black computer of Dell brand Reg Model No. W01B Reg Type W01B001<br><br>One "Busy" accounting software dongle S No 08110025 | Computer was **sealed** with paper seal |

**<u>(ii) Printouts from the seized unsealed pendrives was not taken out at the time of seizure in the Appellant's premises, but later in the O/O Chief Commissioner at Noida using the computer installed there.</u>**

Section 36(B) (2) prescribes following conditions for admissibility of a computer print out

*36(B)(2)(a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried over that period by the person having lawful control over the user of the computer.*

The seized pendrives were inserted in the Computer of the Department in the Office of the Commissioner, Noida and printout of the data from the pendrive was taken out there. The persons from whom the pendrives were seized did not have lawful control of the computer in the O/o the Commissioner and the printouts do not satisfy the condition for admissibility prescribed in Section 36(b)(2)

The information in the laptop was not secure as the pendrives were not sealed at the time of seizure. The unsealed seized pendrives were accessible to any person who could tamper with the data in them. A computer expert from a private company, Sanjay Roy was called to gain access to the data. Request for cross examination of the said person and for forensic examination of the data has not be acceded to. The data in the pendrives was not secure and not reliable evidence

**(iii) Print out of Data from Pen drives cannot be relied upon without certificate mandated in Section 36 B(4) of the Central Excise Act**

*SECTION 36B.*

*(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -*

*(a) Identifying the document containing the statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*

*(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,*

*and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

It is her contention that as per the settled law when a print out from a computer is relied upon, then a certificate as prescribed has to be taken. No certificate was taken as prescribed although the persons from whom the certificate was to be taken were available. The certificate is mandatory and print out cannot be relied upon in its absence. Reliance is placed on the following decisions:-

Anvar P.V. vs P.K.Basheer 2017 (352) ELT 416 (SC)

Super Fashion Fasteners Pvt.Ltd. vs. Pr Commr C.Ex Meerut-1
2018 (363) ELT 952

S N Agrotech vs. C. Cus, New Delhi 2018 (361) ELT 761

Shafi Mohammad vs State of Himachal Pradesh MANU/SC/0058/2018

Premier instruments & Controls Ltd. vs CCE Coimbatore
2005(183)ELT 65

**(iv) No evidence that the pen drives that were opened to retrieve data were the same as the pen drive that were seized.**

The Panchnama merely states the name of the manufacturer of the pen drive, and the memory of the pen drive. Pen drives of same manufacturer and the memory are easily available in the market. Just like computer and laptop, pen drives also have a unique number for identification. The number on the seized laptops and hard disk has been recorded in the Panchnama but the **product code** on the pen drive has not been recorded. Therefore there is no evidence that the pen drive seized and the pen drive that was presented for examination in the office of the Commissioner, CIU was the same.

The 16 GB Sandisk pen drive allegedly seized from residence of Director Manish Kapoor maintained upto 26.11.2014, whereas the 4 GB Sandisk Cruser Micro Pen drive allegedly seized from residence of Accountant cum Computer operator of Appellant, Ravinder Kumar maintained for the year 2014-15 upto 20.11.2014. If the Appellant was maintaining the data of sale and purchase in the pendrives, then why was the data not updated after 26.11.2014/20.11.2014. The data in the pendrives taken out in the O/o the Commissioner from the pendrives did not belong to the Appellant and are denied by the Appellant as belonging to it.

**(v) Data was taken out from the 16 GB Sandisk pendrive seized from residence of Manish Kapoor on two occasions, data taken out at later time in 2016 has extra information.**

The department took out the data from the 16GB Sandisk pendrive seized from residence of Manish Kapoor on 3.12.2014 in the O/o Chief Commissioner at Noida in the presence of Manish Kapoor (reproduced at pages 6-10 of SCN vide panchnama dt.3.12.2014 (RUD10).(Pages 38-54)

Data from the same pendrive was taken out again on 15.02.2016 in the office of the Asst Commissioner in the presence of Ravinder Kumar (Pages 59-62)

A perusal of the data taken out at both times shows that the data taken out in 2016 had more details, like quantity and rate, whereas the data taken out on 3.12.2014 did not have the said details. There is no explanation for additional information in the data. The data must have been tampered with even after its first printout. The printout of the data from the computers of the department is not reliable.

**(vi) Appellant does not have production capacity to manufacture Qty of finished goods allegedly sold.**

The quantification of qty allegedly sold as per the seized pendrive is

| Year | Qty sold as per pendrive | Qty removes as per ER-1 Returns |
|---|---|---|
| 2010-11 (Feb & March) | 4468.59 | 2023.9 |

| | | |
|---|---|---|
| 2011-12 | 16095.45 | 10959.21 |
| 2012-13 | 30361.22 | 12704 |
| 2013-14 | 32129.36 | 13047.07 |
| 2014-15 (upto Nov) | 25443.4 | 8540.22 |
| **TOTAL** | **108491** | **47265** |

The production capacity of the Appellant was in the knowledge of the Department

The appellant initially had a capacity of 5000 MT per annum which was increased to 15000 MT in 2009. This is evident from the letter dt 28.10.2009 of the Department to the Appellant and the Appellants Reply dt.4.11.2009. The issue of Cenvat Credit on inputs at the time of enhancement of installed capacity was before CESTAT, Allahabad wherein the Department had admitted the fact that M/s.Meenu Paper has enhanced their capacity from 5000 MT to 15000 MT. 2016 (344) ELT 894

The expansion of capacity from 15000 MT to 21000 MT was intimated to the Department vide Letter dt 8/7/2015 which is after the period in dispute

The Production capacity of the factory was 15000 MT per Annum in the period in dispute. As per the SCN, Appellant manufactured more than twice its production capacity which is not possible.

**(vii) Nothing incriminatory found in the laptops resumed from the residence of Shri Manish Kapoor, Director Meenu Paper Mills and from the laptop seized from residence of Shri Ravinder Kumar or from the factory premises of Appellant.**

There is no trace of the data in any electronic device seized from premises of Director, Manish Kapoor and Ravinder Kumar.. The two pendrives are the standalone electronic storage devices that carry the data. Had the Appellant being indulging in clandestine manufacture and sale and keeping record of the same, some evidence would have been found in some electronic device apart from the pendrives.

**(viii) No document of unaccounted sale found in any premise.**

The documents found in the premises of Shri Ravinder Kumar were loose sheets which were placed in 6 made up files (page 8 of SCN Page 184)(Pages 72-91)

(1) Waste paper report Pg 1-583

(2) (3) & (4) freight bilties/GRs

(5) Purchase bills of Century Pulp & Paper

(6) Misc Papers

There were no sale bills/invoice/kaccha perchies to any buyer.

The documents seized from residential premises of Director, Shri Manish Kapoor were waste paper reports and waste paper bills.

**(ix) Averment in SCN that all GR'S matching with sale data in pendrives is without actual comparison**

The SCN makes an averment that all GR,S/bilties found in the residence of Ravinder Kumar match with the sale data in the pendrives. It is submitted that there is no one to one co relation in the Show cause notice. Two GR'S are sought to be co related with the data, the GR of the unaccounted sale itself shows that it was not a GR on which goods can be transported. (internal pages of SCN 12 to 16).

**(x) Presumption in SCN that sludge used as input to manufacture Kraft Paper not supported with any evidence.**

The SCN proceeds under the presumption that Appellant purchased 265273.85 MT of waste paper and pulp in the period in dispute and manufactured and sold 108491 MT of Kraft paper.

Employees and Director of Appellant in their statements have stated that the craft paper was manufactured from waste paper.

| Date of statement | Statement of | Submission |
|---|---|---|
| 03.12.2014 (Pg No.92-97) | Ravinder Kumar, Accountant cum Computer Operator in Meenu Paper Mills | Meenu Paper Mills manufactures craft paper from waste paper which is purchased from various traders and dealers. |
| 03.12.2014 (Pg.No.98-102) | Manish Kapoor, Director M/s.Meenu Paper Mills | They manufacture craft paper from waste paper. Craft paper is used in packaging industry. |
| 20.03.2015 (Pg No.113-115) | Aslam Tyagi, Accountant M/s.Meenu Paper Mills | Meenu Paper Mills manufactures kraft paper from waste paper. |

There is no investigation regarding the use of sludge in the factory of the Appellant. The offices visited the factory on 2.12.2014 and stayed in the factory for 12 hours from 8:25 am to 8:25 pm, but did not ascertain the process of manufacture or undertake stocktaking of raw materials/fuels.

The officers again visited the premises of Appellant on 15.02.2016 , and they could have seen whether the kraft paper manufactured by the Appellant could be manufactured from the sludge. However, they did not do so. There is no evidence on record to prove that slugde can be used for manufacture of Kraft paper..

The Appellant was visited by the Income Tax Authority on 29.12.2012 wherein the survey diary of the Commercial Tax Department has the report of Shri Anil Sharma, waste paper reporter which furnished an inventory of the raw materials, fuel and chemicals. Stock of 60MT of waste sludge was inventorised as fuel and has recorded to be kept near the boiler. This proves that sludge is actually used for fuel and not as a raw material. If sludge is not used as fuel, then there is no investigation as to what was used as fuel in its place.

The Appellant in its Income Tax Returns has shown the waste sludge used as fuel, the other items used as fuel are baggase, fire wood and electricity.

The Appellant sent sample of the sludge to Central Pulp and Paper Research Institute and IIT Roorkee for opinion as to the use that the sludge can be put to. Both the institutes stated that the sludge can be used for Board making/ egg tray making or incineration in boiler as per CPCB Charter ( Pages 275-276)

The **CPCB Charter** issued by Central Pollution Control Board for the Ganga River basin states states that the Primary Sludge from Wastewater Treatment has to be used either by supply to secondary manufacture of cardboards, moulded fibre packing material (like Egg Trays) or Co-combustion in mill's main boilers. The Appellant purchased the sludge for combustion in boilers. The sludge cannot be used to manufacture Kraft paper.

**(xi) QTY OF WASTE PAPER PURCHASED AS PER THE DATA IN THE PENDRIVE CANNOT MANUFACTURE THE QTY OF KRAFT PAPER ALLEGEDLY SOLD AS PER PEN DRIVE.**

The value of the input as per the data in the pendrive fall into 3 categories , between 50 paisa to 2 Rupees and between 9 Rupees and 12 Rupees. Two suppliers sale price is between Rs 5 & Rs 6. (Pages 243-245 of Appeal Paperbook) ( Internal Page 21-23 of Show Cause Notice)

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| Value of raw material as per pendrive data | Less than Rs 2.75/- | More than Rs 2.75/- |
|---|---|---|

| | | |
|---|---|---|
| No of suppliers | 34 | 24 |
| Total Qty Supplied | 194588.44 MT | 70685.41 MT |
| Total Value | Rs 24,37,98,813/- | Rs 75,42,58,115/- |
| Ratio of qty of waste paper and sludge allegedly used | 73% | 27% |

The price of sludge sold by Century pulp and paper is round Rs 1800 /MT (Rs1.80 per kg)(pages 84-87). The price of waste paper depends on the quality of waste paper and varies from Rs 9/kg to Rs 12/kg or even Rs 6 or 5/kg

The quantity of finished goods allegedly manufactured by Appellant is 108491MT. The said quantity cannot be manufactured out of 70685.41MT of waste paper. Even as per the data in the pen drive, the Appellant could not have manufactured the quantity of Kraft paper as mentioned in the pen drive.

The data in the pen drive was not entirely that of the Appellant also because the waste paper procurement as per the pen drive is 61,000 MT, whereas as per Appellants records is 68,361 MT.

13. She has further submitted that reliance on the statements of various persons by the adjudicating authority was not appropriate inasmuch as their request for cross-examination was not considered by the adjudicating authority and thus is in violation of the provisions of section 9(D) of the Central Excise Act. The same has no evidentiary value and cannot be relied upon by the department as held in the following cases:-

| | |
|---|---|
| CCE, Meerut-1 vs Parmarth Iron Pvt Ltd | 2010 (260) ELT 514 (All) |
| J K Cigarettes Ltd vs CCE | 2011 (22) STR 225 (Del) |
| Jindal Drugs Pvt Ltd vs UOI | 2016(340) ELT 67 (P & H) |
| Ambika International vs UOI | 2018 (361) ELT 90 (P& H) |
| Hi Tech Abrasives Ltd vs CCE & Cus Raipur | 2018 (362) ELT 961 (Chattisgath) |

14. Similarly she submits that the adjudicating authority denied the appellant request to provide soft copies of Pendrive on the ground that print outs have been supplied as relied upon documents. She submits that documents/data relied upon has to be supplied in full and it is not the prerogative of the Revenue to select the intermittent data, which is

in violation of principles of natural justice. She also submits that the Director as also many of the employees of the appellant company retracted their statements and filed the following chart on record, which is being reproduced for ready reference:-

**Director/ employees of Appellant retracted their statements**

| Statement | Submissions |
|---|---|
| **Ravinder Kumar**, Accountant cum Computer Operator in his statement dt 03.12.2014 | . |
| On being shown Waste Paper report file stated that the reports were given to him by Shri Manish Kapoor for data feeding and the reports are for unaccounted and accounted purchase of waste paper. | No data of waste paper report found in the data recovered from the pen drive seized from Ravinder Kumar. |
| On being shown transport documents recovered from his premises he stated that the documents are for transport of accounted and unaccounted finished goods which were given by Manish Kapoor for data entry. | No data of transport found in the data recovered from the pen drive seized from Ravinder Kumar. |
| On being shown the print out of the data in the pen drive resumed from his premises which was sale data for 2014-15, he stated that it is an account of unaccounted and accounted sale/ purchase of M/s Meenu Paper Mills which he entered on the instructions of | No bills/ kaccha parchi /any other sale document /purchase document corresponding to the sale in the data in the pen drive found in the documents resumed from his premises. |

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| Manish Kapoor.<br><br>On being shown the printouts for the years 2010-11 to 2014-15 taken from the pen drive seized from Manish Kapoor he stated that the printouts for the year 2014-15 are identical to the printouts taken out from his pen drive except that the data from pen drive of Manish Kapoor 26.11.2014 and his data was upto 21.11.2014.<br>stated that | No statement that he was the person who entered the data for the years 2010-11 to 2013-14.<br>His statement is restricted to the data for the year 2014-15 Statement not reliable being contrary to the facts |
| **Manish Kapoor**, Director, in his statement dt 04.12.2014<br><br>On being shown the printouts taken from the pen drive retrieved from his home and Ravinder Kumar's Home and Statement of Ravinder Kumar, agreed with the statement of Ravinder Kumar that he used to provide him accounted and unaccounted sale records for data keeping.<br><br>For the ledger accounts of the previous years 2010-11 to 2013-14 recovered from pen drive seized from his premises he stated that he has nothing to explain and conclusion can be made. | Manish Kapoor was in continous custodt of the department fron 2.12.2014 to 4.12.2014, when he was arrested. Statement recorded when in custody of the Department cannot be relied upon without corroborative evidence.<br><br>Manish Kapoor did not admit that the data of 2010-11 to 2013-14 . |
| **Nishant Garg**, Excise Asst. In his statement dt 20.03.2015 stated that<br><br>he was in charge of making | Retracted his statement on 21.3.2015.<br>Retracted statement cannot be relied upon |

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| invoices and dispatching the goods.<br><br>On being shown the transport bilties in a folder resumed from residence of Ravinder Kumar he stated that the bilities are of transportation of goods of Meenu Paper.<br>On being asked about the transporters, he stated that he had no knowledge and that all bilties are fake, that for transportation of craft paper they hired vehicles from the market and used fake GRs of the transporters. | The transport documents seized from residence of Ravinder Kumar have not been endorsed by Nishant Garg , Excise Assistant and have not been corroborated. |
| **Aslam Tyagi** in his statement dt 20.03.2015was statement of Ravinder Kumar, Manish Kapoor and Nishant Garg and he signed the same in agreement . | Aslam Tyagi retracted his statement on 21.3.2015<br>.Retracted statement cannot be used as corroborative evidence. |

She further submits that out of 57 suppliers mentioned in the Pendrive data, only 7 stand investigated and Penalty of Rs.1.00 Lakh each stand imposed on the 7 suppliers. She pleads that if according to the Revenue the 57 suppliers in the Pendrive were the suppliers of clandestine raw materials, the proceeding of the Revenue against 7 and not against remaining 50 suppliers only goes to show that the data in the Pendrive against them has not been relied upon. This exercise done by the Revenue in the manner of pick and choose indicates that they themselves were not sure of the correctness of the data in the Pendrive. In any case she submits that statements of the suppliers recorded are not reliable being contrary to facts and draws our attention to the following table submitted by her to indicate such discrepancies:

| **Statement** | **Submissions** |
|---|---|
| Deepak Maheshwari, Prop Shikhar Paper in his Statement dt 1.05.2015 stated that Shikhar Paper is engaged in trading of paper waste.<br>He was shown the printouts of data taken from the pen drives seized from Manish Kapoor and his statement.<br>He agreed and that he sold paper waste from his firm as well as from Kartik Mills.<br><br>In his statement dt 06.05.2015 he stated that that the combined sale of Shikhar paper and Kartik paper is entered in the name of Durga<br><br>In his statement dt 07.05..2015 he agreed to the quantity of waste paper supplied to<br>M/s Meenu Paper as quantified from the pen drives seized from his premises. | Seven pen drives were seized from Deepak Maheshwari's residence and were examined. The pendrives were found to contain data of a company's named Durga.<br>On the basis of the statement of Deepak Maheshwari dt 6.5.2016, chart of sale to various parties was made, to which Deepak Maheshwari agreed.<br>The data in the pendrive under the name Durga not supplied as RUD with SCN<br>The said quantification was made unilaterally, behind the back of the Appellant and the Appellant was not even confronted with or supplied the data on the basis of which the quantification was made.<br><br>If a document is sought to be relied upon by a party, the said document has to be supplied to the party against<br>which it is used |
| Jai Veer Singh, Proprietor Kartik | Three statements of Jaiveer Singh , all in |

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| Paper<br>In his statement dt 01.05.2015 stated that they are engaged in trading waste paper.<br>He was shown the printouts taken from the pen drives resumed from Manish Kapoor as well as his statements.<br>He stated that the ledger account of M/s Meenu Paper shows sale to Meenu Paper in the name of Deepak Maheshwari.<br>He stated that he agreed with the statement of Deepak Maheshwari.<br><br>In his statement dt 06.05.2015 he agreed with the statement of Deepak Maheshwari that there was under valuation of goods.<br><br>In his statement dt 07.05.2015 he agreed with the statement dated 07.05.2015 of Deepak Maheshwari . | Hindi, all three statements are in three different handwritings. Signatures are also different. Cannot be relied upon<br>Not reliable (Pages 161-167) |
| Statement of Arshad Ali Khan, Proprietor Jai Bharat Trading dt 08.06.2015 wherein he stated that he is engaged in selling Road sweep ( Mill Borad) to Appellant. On being shown the data from pendrive, he admitted that the data in the name of Arshad Waste paper and Arshad (WP) Temp was that of his firm . | .The data in the name of Arshad is for waste paper, not Mill Borad. Mill borad is used for burning in furnace. Statement of Arshad Ali Khan cannot be relied upon. |
| Statement of Pradeep Kumar Jindal, Proprietor M/s Aastha Traders dt 01.05.2015 (202-207) | Said consignment prior to period in dispute. Neither the name Pradeep, nor Aastha Traders in the list of suppliers in the pen |

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| wherein he stated that he supplied only one consignment of waste paper to M/s Meenu Paper Mills on bill No 144 dt 8.10.2011. | drive data. |
| Statement of Rakesh Kumar, M/s Gautam Enterprises dt 20.10.2015 wherein he stated that the data in the name of Rakesh is that of his firm. He admitted to unaccounted sale and under valuation of waste paper stating that they supplied waste paper at Rs 3 to Rs 5 / kg, actual price is Rs 4 to Rs 6 /kg | .The data from the pendrive shows the rate of waste paper as Rs 11.65/kg.<br>Statement of Rakesh Kumar does not corroborate with data in pen drive |
| Statement of Mukesh Kumar Aggarwal, Garg Enterprises dt 20.10.2015 wherein he admitted to unaccounted sale and under valuation of waste paper stating that they supplied waste paper at Rs 3 to Rs 5 / kg, actual price is Rs 4 to Rs 6 /kg | .The data from the pendrive shows the rate of waste paper as Rs 11.63/kg.<br>Statement of Mukesh Kumar does not corroborate with data in pen drive |
| Statement of Vinod K Khanna, Proprietor Bharat Traders dt 06.11.2015 wherein he stated that the entry in the name of Khanna Traders is of his firm. He admitted to unaccounted sale and under valuation of waste paper | |
| Statement of Deepak Goel, Director Neeraj Paper Marketing Ltd dt 15.06.2015 wherein he stated that the entry in the name of Neeraj is of his firm. He admitted to unaccounted sale and under valuation of waste paper<br>He stated that his sale for 2012-13 | The Ledger from pen drive shows total sale of Neeraj to Appellant as Rs 27,05,058/- which is lesser than the accounted sale of Neeraj.<br>As per the data in pendrive the rate of supply is Rs 0.32 / kg which could be for waste/ sludge, not waste paper.<br>Statement of Deepak cannot be relied upon |

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| to 2014-15 is Rs 60,91,215/-.<br>The actual rate of waste paper is Rs 10 to Rs 12/- | |
| Statement of Amrish Kumar, Proprietor Ginni Enterprises dt 06.05.2015 wherein he stated that the entry in the name of Ginni is of his firm. he admitted to unaccounted sale of waste paper | Statement written by one Shirish Kumar whose identity has not been disclosed . Statement signed by Amrish Kumar in English. No reason given as to why Amrish Kumar did not write his own statement.<br>Statement written by another person without assigning reason not admissible |

Similarly statement of only 17 buyers, commission agents stand recorded out of huge number of such buyers mentioned in the Pendrive and penalty of Rs.1.00 lakh has been imposed only on 6 out of 17 buyers. Non-proceedings of the Revenue against the balance 100 of buyers only indicate that the data was not proper and the Revenue itself doubted the correctness of the same.

15. Learned Advocate further submits that the allegations of clandestine removal are serious allegations and are required to be proved by production of positive and sufficient evidences.

**No evidence of cash transaction found**

All the buyers who were investigated produced their ledgers reflecting their purchase of Kraft paper from the Appellant. On being shown the print out of the data, statements of Manish Kapoor and Ravinder

Kumar, they agreed that they had made unaccounted purchases from Appellant and made payment in cash. No cash was found in the Appellant’s premises, residence of the Director or residence of the accountant.

Most transporters whose bilties were found in the premises of Ravinder Kumar were non-existent. There is also no evidence that GRs/Bilties corroborate the data in the Pendrive. She submits that they are selling their product within the state as well as outside the state and it is not possible for them to transport such a huge quantity of finished goods without cover of Bills over such a long distance or period of time. No trace of any sale bill was found in the premises. The GRs found from the premises was issued in the name of transporter which were not found to exist and no co-relation of the same with the data in the Pendrive was shown by the Revenue.

16. In view of the foregoing, prayer is made to set aside the impugned order.

17. Countering the arguments Shri Sandeep Kumar Singh, learned Dy.Commr. (A.R.) for the Revenue has drawn our attention to the detailed discussion of the adjudicating authority as regards various

issues. He submits that the findings of clandestine removal by M/s.Meenu Paper Mills during the period February 2011 to November 2014 are based upon the recovery of data from various premises during the course of search read with the statements of various persons. As regards the appellant's grievance of non-supply of Pendrive resumed from the residential premises of Shri Manish Kapoor, Director of M/s.Meenu Paper Mills and from the residential premises of their accountant etc., there is a clear finding by the adjudicating authority that the data was retrieved from the said electronic equipments in the presence of Shri Manish Kapoor as also Shri Ravinder Kumar. The data so retrieved stand supplied to the assessee along with the show cause notice listed as "list of relied upon documents". As such appellant's grievance has no stand.

As regards cross-examination of various witnesses, learned A.R. submits that inasmuch as the appellant did not give any cogent reason for seeking cross-examination of various deponents of statements or the officers etc., the adjudicating authority has rightly rejected the request for cross-examination by observing that the same was a ploy for delaying the proceedings. The Commissioner has also referred to various decisions of the Hon'ble judicial forums to impress upon its decision of not giving the cross-examination. Specific reference stands made to the Hon'ble Apex Court decision in the case of Surjit Singh Chabra v. UOI [1997 (89) E.L.T. 646 (S.C.)] which stands followed by the Tribunal in the case of Jagdish Shankar Trivedi v. Commissioner of Customs, Kanpur reported as 206 (194) E.L.T. 290 (Tri.-Del.)]. It stands held in the said decision that admission made by an assessee binds him and therefore failure to give him the opportunity to cross-examine the witnesses was not violative of the principals of natural justice. It was specifically held that "principals of natural justice do not require that in matters like this, persons who had given information should be allowed to be cross-examined by the co-noticees on the statements made before the Customs authorities". If cross-examination is to be allowed as a matter of right then in all cases of conspiracy and joint dealings between the co-noticees in the commission of the offence in connection with the contraband goods, they can bring about a situation of failure of natural justice by joint strategic efforts of such co-noticees by each one refusing to be cross-examined. As such submits the learned A.R. that adjudicating authority has rightly concluded that the appellant has asked for the cross-examination of various witnesses in a routine way, without giving any cogent reasons and hence in view of the above, cross-examination stands rightly disallowed.

Similarly in respect of the assessee’s plea of statements having been retracted and as such of not being of any evidentiary value, the Commissioner has observed that such retractions were after a gap of 1-2 years and as such late retraction are nothing but an after-thought to vitiate the proceedings.

Arguing further, the learned A.R. has drawn our attention to the reasoning adopted by the adjudicating authority for upholding the charges of clandestine removal, which are primarily based upon the incriminating documents recovered from the residence of Shri Ravinder Kumar, Accountant cum Computer Operator as also form the retrieved data from the Pendrive recovered from Shri Manish Kapoor, Director of M/s.Meenu Paper Mills as also other places. He submits that comparison with the data retrieved from the Pendrive and other computers with the ledgers maintained by the assessee and the statutory records, it becomes clear that the appellant was indulging in clandestine activities. The various persons, during the course of investigations have also admitted such clandestine activities of M/s.Meenu Paper Mills. Further the Revenue has made investigations at the end of the input suppliers and have found the unaccounted receipt of the various raw materials. Similarly investigations made at the end of the customers have also substantiated the Revenue's stand of clandestine clearance of the goods. As regards the plea of the learned Advocate that it is only few of the raw material suppliers and the customers, which were investigated by the Revenue, as against huge number of such suppliers of customers learned A.R. submits that the Revenue is not expected to investigate each and every supplier and customer and such sample investigations are sufficient to tilt the weight of the evidence in favour of the Revenue.

In view of the foregoing he prays for rejecting all the appeals.

18. We have considered the submissions made by both the sides and have gone through the impugned order.

19. It is seen that the entire case of the Revenue for arriving at the findings of clandestine removal is based upon the data retrieved from the various Pendrives and the computers recovered either from the residential premises of the Director of M/s.Meenu Paper Mills or their residential premises of their employees, read with statements of various persons recorded during the course of investigations. The Revenue, based upon the said evidences has alleged that whereas

during the period from 2010-11 to 2014-15, the appellants have shown removal of their final products as per their ER-1 returns as 47,265 MT, the actual removal as per Pendrive is to the extent of Rs.108491 MT. As such it stands concluded that they have clandestinely removed their final product to the extent of 61476 MT involving duty of Rs.8,96,88,272/-.

20. First of all we deal with the appellant's contention of search and seizure not being in accordance with the provisions of the Central Excise Act. Learned Advocate has referred to Section 12F as also Section 18 of the Central Excise Act, 1944 which are as under:-

> **SECTION 12F. Power of Search and seizure.** – (1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things.
>
> (2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words [Principal Commissioner of Central Excise or Commissioner of Central Excise] were substituted.]
>
> **SECTION 18. Searches and arrests how to be made.** – All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the

provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating respectively to searches and arrests made under that Code.

In terms of the said sections, search has to be conducted in accordance with the provisions of the Code of Criminal Procedure 1973. Section 100 of CRPC 1973 states as under:-

Section 100 of Cr.PC, 1973 states that :

*(4) Before making a search under this chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them to do so*

*(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.*

21. A joint reading of both the provisions show that the searches to be conducted at a particular place require witnesses from the inhabitants of that locality. It is only if no such inhabitant of the locality is available or is willing to be a witness in the search, another witness, as available may be invited to witness the proceedings. The appellants have filed a detailed chart showing that in various searches undertaken at different places, the same witness stand associated. For example one Shri Rinku Singh, son of Shri Mahipal Singh and resident

of House No.191, Gitanjali Vihar, Khoda Colony, Ghaziabad stand invited to be a witness in the search of residential premises of Shri Manish Kapoor, Director, at Bhopa Road, Muzaffarnagar, conducted on 02.12.2014. The same Shri Rinku Singh is witness in the search conducted on 23.04.2015 to M/s.Shikar Paper, which is located at B-4/7A, Kesabpuram, Delhi. Further same Shri Rinku Singh has been shown as an witness on 15.02.2016 in the office of the Assistant Commissioner, CIU, Meerut Zone, Central Excise Division-II Muzaffarnagar. We really fail to understand as to how same Shri Rinku Singh, who is a resident of Khoda Colony Ghaziabad was called upon by the Revenue to be a witness in the searches on 02.12.2014, 23.04.2015 and 15.02.2016 at three different places.

It is not only that the said person was made a witness at three different places on three different dates, the same is the case in respect of other searches conducted by the Revenue. One Shri Chouhan, son of Shri Satyapal Singh, Vill. Sikhera, P.O. Khas, Meerut was made witness to the search proceedings conducted on 02.12.2014, 24.04.2015, 01.05.2015 and 06.05.2015 in the office of the Chief Commissioner at Sector 62 Noida, Chief Commissioner, CIU Meerut Zone, Sector 62 Noida.

Similarly one Shri Sanjay Chouhan, son of Shri Birpal Singh, 211, New Meenakshi, Meerut was made the witness at four different places in respect of proceedings conducted on 02.12.2014, 03.12.2014 and 01.05.2014.

We are not referring to each and every witness, which is self-evident from the chart reproduced in the preceding paragraphs of the order while reproducing the submissions of the learned Advocate, but the fact remains that at different places of search on different dates, a common witness stands called upon by the Revenue and associated with the seizure. Not only the said fact is in violation of Section 12F and Section 18 of the Central Excise Act read with Section 100 of CRPC 1973, but the same also leads to the questionable actions & intentions of the Revenue officers. These preferred witnesses by the Revenue in respect of searches conducted at various places on various dates leads to the doubts, as rightly contested by the learned Advocate and also casts aspersions on the searches so conducted and the consequent seizures. The Hon'ble Andhra Pradesh High Court in the case of Yeduru Siri Nivasulu Reddy reported as MANU/AP/1238/2001 has observed that inasmuch as search involves fundamental right of citizens, provisions of Section 55 of Andhra

Pradesh Excise Act, 1968, which require following of Section 100(4) of Criminal Procedure Code must be adhered to and searches not in consonance with mandatory provisions were not justified. By observing so Hon'ble High Court held that consequently, for this lacunae, the search and seizure is vitiated and the conviction is wholly unsustainable. Similarly Hon'ble Supreme Court in the case of Pradip Narayan Madgaonkar And Others v. State of Maharashtra reported in MANU/SC/0372/1995 observed that Section 100(4) of the CRPC requires that before making a search, the officers or other person about to make it, shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate. The Courts generally look for compliance of the aforesaid provisions. By referring to the witnesses, the Hon'ble Supreme Court observed that if the witnesses did not belong to the locality where the search was conducted, what was the occasion for them to be present near the building at the time of search so as to be joined as Panch witnesses. The very fact that those witnesses were joined in the raids, creates a doubt about the fairness of the investigation.

22. By applying the ratio of the above decision to the facts of the present case, we note that not only the witnesses were not from the locality, but as discussed, the same witnesses were used on different dates at different places. There is no explanation given by the Revenue on the aspect as to why the same very witness (not only one, but number of them were used as witnesses repeatedly) were associated in different raids at different places and on different dates & timings. This fact admittedly leads to the doubts about the fairness of the searches and the consequent seizures made by the Revenue. Such non-observance of procedure and repeated calling of the same very witnesses is fatal to the prosecution case and casts serious doubt against the Revenue.

23. In any case and in any view of the matter we also note that the demand is primarily based on 16 GB Sandisk make Pendrive seized from the residence of Shri Manish Kapoor, Director of the unit as also one Sony Pendrive 4 GB seized from the residence of Shri Ravinder Kumar. As per the learned Advocate the said two Pendrives were not sealed at the time of seizure whereas all other electronic devices seized from the premises of other employees were duly sealed. The other sealed electronic devices were not having any data implicating

the appellant. The non-sealing of said two Pendrives is evident from the Panchnama drawn at the spot. There is no explanation by the Revenue as to why the said two pendrives were not sealed whereas all other electronic devices were put under seal. Was this an unintended mistake or an intentional act? In any case, the data retrieved from such unsealed Pendrive cannot be relied upon by the Revenue. Learned Advocate has also drawn our attention to the provisions of section 37(B)(2) of the Central Excise Act which prescribes the conditions for admissibility of a computer print out. As such she submits that unsecured information received from the said unsealed Pendrive cannot be used against them inasmuch as the said un-sealed seized Pendrive were accessible to any person who could tamper the data with the same. A computer expert from a private company Shri Sanjay Roy was called upon by the Revenue to gain access to the said data and request for cross-examination of the said person and for forensic examination of the data was not acceeded to. As such submits that this is not a reliable data. There is no evidence to establish that the Pendrives that were opened to retrieve the data were the same Pendrives which were seized. She submits that the computers as also Laptops and Pendrives have a unique number for identification.

Whereas the said number on the seized Laptop and hard disc has been recorded in the Pendrive, but the product code has not been mentioned in the Pendrive. The 16 GB Sandisk Pendrive allegedly recovered from residence of Director Manish Kapoor was seized on 03.12.2014 and the same was opened in the office of the Chief Commissioner on the said date. Subsequently, data from the same Pendrive was taken out again on 15.02.2016 and the data retrieved on both the occasions was different inasmuch as there was additional information in the data retrieved on 15.02.2016.

While examining the above aspect of discrepancies in the data retrieved from the same Pendrive on two different occasions and the fact of unsealing of the same, we find favour with the submissions of learned Advocate. It is not understood as to why two Pendrive seized from the residence of Shri Manish Kapoor, Director and Shri Ravinder Kumar were not put under seal, whereas all the other electronic devices recovered from the residence of other employees were properly sealed. It may not be out of place to mention here that incriminating data was recovered from the electronic devices seized from the premises of the Director & his accountant and the Revenue's entire case is based upon the data retrieved from the said two unsealed Pendrive recovered from the residence of Shri Manish Kapoor and Shri Ravinder Kumar. That also the data retrieved from the Pendrive allegedly recovered from the residence of Shri Manish Kapoor on two different dates show two different informations. These facts admittedly lead to the doubt about correctness of the data so recovered from the said two Pendrives.

24. Otherwise also we find that the evidentiary value of the computer print outs or the data recovered from the Pendrives has to satisfy the conditions of Section 36(B)(2) of Central Excise Act, which are as under:-

> *Section 36 (B) (2) prescribes the conditions for admissibility of a computer print out*
>
> *36(B) (2) (a) the computer print out containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried over that period by the person having lawful control over the use of the computer.*

The data from the Pendrive was recovered by using the computers installed in the office of the Commissioner Noida, over which the appellant did not have any control. As such the data so recovered becomes of doubtful nature. Further the provisions of

Section 36(4) of the Central Excise Act, which are to the following effect are required to be satisfied.

*SECTION 36B*

*(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -*

*(a) Identifying the document containing the statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*

*(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relates,*

*and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

25. As is seen from above provisions of Section 36B, electronic evidence to be referred to and relied upon by the Revenue, there are

certain conditions which are required to be satisfied. The said provision prescribes that wherever in any proceedings, the computer print outs are to be relied upon, a certificate identifying the document containing the statement and describing the manner in which it was produced is required to be obtained. In the present case we have seen that apart from the fact that Pendrive recovered from the premises of Shri Manish Kapoor as also from Shri Ravinder Kumar were not sealed by the officers, the data was also retrieved in a manner, which was not in consonance with the prescribed procedure in terms of the above reproduced Section 36B. There is also no evidence on record to reflect upon the fact that the Pendrive from which the data has been retrieved were the same Pendrive which was seized from the premises of the Director and employee. Admittedly identical type of electronic equipments including the Pendrive are available in the market. The appellants have strongly contended that whereas the seized Laptop and harddiscs have reflected the unique number for identification, the Pendrive seized from the Director's residence has not reflected the product code number of the said Pendrives. As such there is a serious doubt about the data allegedly retrieved from said Pendrive. It is also seen that the Pendrive 16GB Sandisk recovered from the residence of the Director was opened in the office of the Chief Commissioner, Noida on two different dates i.e. on 03.12.2014 as also on 15.02.2016 and data was retrieved from therein. However, the data retrieved on two different dates is not exactly similar and the retrieved data on 15.02.2016 contains some additional information, which has not been shown in the first retrieved data on 03.12.2014. This fact itself raises doubt about the data having been tampered at some point of time. The question is as to whether such tampered data can be held to be appropriate and legal evidence so as to hold against the assessee.

26. The Hon'ble Supreme Court in the case of Anwar P.V. v. P.K.Basir [2017 (352) E.L.T. 416 (S.C.)] had the occasion to deal with the electronic evidence and has observed that charges of corrupt practices in an election have to be equated with criminal charges and proof required in support thereof has to be a sufficient admissible evidences and not pre-ponderence of probabilities. The Tribunal has also considered the said Section 36B of Central Excise Act in a number of decisions and has observed that in terms of the provisions of Section 36A read with 36B of Central Excise Act, the presumption of truth in respect of documents i.e. computer print outs, the conditions specified therein are required to be satisfied. One such reference can

be made to Tribunal's decision in the case of Surya Board Ltd. v. Commissioner of Central Excise, Rohtak [2014 (318) E.L.T. 282 (Tri.Del.)] wherein after taking note of the various decisions of the higher courts as also of the precedent decisions of the Tribunal, it was observed that presumption under Section 36A of Central Excise Act read with Section 36B has to be made in regard to computer print out seized and not in respect of computer taken from the seized computer. For better appreciation the relevant paragraph from the said decision is reproduced below:-

> *"17. The Tribunal in the case of S.Namasivayam v. CC, Chennai reported in <u>2009 (240) E.L.T. 255</u> (Tri.-Chennai) has observed that the Revenue's case built on the basis of data contained in the hard disk of the computer, the integrity of which is challenged by the assessee cannot be relied upon, without cross-examining GEQD. We further take into consideration the Tribunal's decision in the case of Premier Instruments & Controls Ltd. v. CCE, Coimbatore reported in <u>2005 (183) E.L.T. 65</u> (Tri.-Chennai). In para 9 of their decision, the Tribunal has examined the provisions of Section 36B of the Central Excise Act, which dealt with admissibility of computer Printouts and has analyzed the conditions as contained in sub-section (2). It was observed that inasmuch as the computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the company and it was also not shown that information of the kind contained in the computer print out was regularly supplied by the company to the*

*personal computer of Shri Sampat Kumar, a Junior officer of the company, in the ordinary course of activities and it was not shown that the computer was operating in the above manner properly, conditions cannot be held to be satisfied by the Revenue. The said provisions cast a burden on the party who wants to rely on the computer print out to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. For arriving at the above conclusion, Tribunal relied upon the precedent decision in the case of International Computer Ribbon Corporation v. CCE, Chennai reported in 2004 (165) E.LT. 186, wherein after observing that the printouts were neither authentic not recovered in Muzzaaffarnagar and the assessee having disowned the same, Revenue's finding of clandestine manufacture and clearances on the same basis was rejected. …………..."*

Inasmuch as in the present case also we find that the print outs relied upon by the Revenue have neither been taken in a proper manner, nor adhered to the conditions of the Section 36A and 36B of Central Excise Act nor has been retrieved in a proper manner, the authenticity of the same is doubtful and as such the same cannot be relied upon for upholding the charges and findings of clandestine removal.

27. At this stage we may also refer to the Hon'ble Supreme Court's decision in the case of Shafhi Mohd. V. State of Himachal Pradesh [MANI/SC/0058/2018] wherein while dealing with the videography

evidence, it was observed by the Hon'ble Apex Court that the question of admissibility of videography of scene of crime or scene of recovery during investigation is necessary to inspire confidence in evidence collected. The applicability of procedural requirement under Section 65B(4) of Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person, who is in a position to produce such certificate being in control of the said device. In a case where electronic evidence is produced by a party, who was not in possession of a device, applicability of section 63 and 65 of the Evidence Act could not be held to be excluded.

28. We may also refer to the Tribunal's majority decision in the case of Flex Industries Ltd. v. Commissioner of Central Excise, Lucknow. Originally there was difference of opinion between Member(Judicial) and Member(Technical), as regards the admissibility of the computer print outs retrived from the computers seized from the manufacturers unit as also from various distributors and dealers of the manufacturers. By taking note of the Hon'ble Delhi High Court decision in the case of Dharam Veer v. Central Bureau of Investigation vide its order dated 11.03.2008, as also by taking note of the fact that the computers seized from the manufacturers units were not sealed

properly and there was a gap between the seizure and the retrieval of the data, it was held by Member(Judicial) that such retrieved data cannot be a relied upon. It was observed that there was no explanation put forth by the Revenue as to why the computers were not properly sealed; as to where the same were kept during intervening period of seizure and retrieval of data. Accordingly it was held that there is every possibility of mischief done with the retrieved data by any interested person. When there are glaring procedural lapses in following proper procedure prescribed under the law, reliance on the retrieved data was not proper.

The said findings by Member(Judicial) were not agreed upon by Member(Technical), who observed that since the retrieved data stands corroborated by the other independent evidences, the same would be an admissible evidence. Accordingly difference of opinion was recorded.

The said difference of opinion was decided by the then Hon'ble President of the Tribunal, agreeing with Member(Judicial). It was held that there being lacunas in procedure of retrieval of data from the computers and potential tempering is not ruled out, demand of duty based on the said data is not sustainable. Accordingly by majority decision, it was held that the allegations of clandestine activities cannot be upheld against the manufacturers.

29. As regards the adjudicating authority's reliance on the statements of various persons, it is seen that first of all only sample statements from some of the selected deponents were recorded by the Revenue. The appellants were procuring raw materials from a huge number of raw material suppliers. Similarly the sales were being effected to various customers. The Revenue has chosen to examine only a few of them out of huge number of suppliers and customers and the proceedings stand initiated against such suppliers only, resulting in imposition of penalties upon them. We find favour with the contention of the learned Advocate that if the data itself revealed the identity of the number of other raw material suppliers, why the Revenue has initiated proceedings only against those suppliers, whose statements they recorded and have not proceeded against the other raw material suppliers even though their names were found in the data retrieved from the Pendrive. There is no answer to such question, by the Revenue.

However, in any case and in any view of the matter we find that the appellant's request for cross-examination of the said witnesses, upon whose statements the adjudicating authority has relied upon, stands denied by him on a frivolous ground. The Commissioner has observed that the appellants have made the request for cross-examination only with an intention to delay the proceedings. Cross-examination of the deponents of the statements, in the present case, was necessary to test the veracity of the statements of such deponents and was a necessary requirement of fair and just adjudication. If the Revenue intended to rely upon the said statements, this could not have been done by them unilaterally by recording the statements and then relying upon the same, without affording the appellant to cross-examine such deponents, especially when some of the deponents has retracted their statements subsequently.

The issue of cross-examination of witnesses, as prescribed in Section 9D(1) of Central Excise Act, 1944 was the subject matter of various precedent decisions. The Hon'ble Allahabad High Court in the case of CCE, Meerut-I v. Parmarth Iron Pvt.Ltd. [2010 (260) E.L.T. 514(All.)  has held that if Revenue seeks to rely on statements of various witnesses recorded, the same have to be made available for cross-examination to establish whether such statements stand voluntarily given and/ór are relevant for the issue. The findings cannot be arrived at against the assessee on the basis of uncontested material. The Court further observed that if the Revenue choses not to examine any witness in adjudication, their statements are not considerable as evidence.

To the same effect is the Delhi High Court's decision in the case of J.K.Cigarette v. Collector of Central Excise [2011 (22) S.T.R. 225 (Del.)]. The Hon'ble High Court observed that quasi-judicial authority can rely upon statements only when stated ground is proved and Section 9D does not confer arbitrary powers upon quasi-judicial authorities. Right to cross-examine in quasi-judicial proceedings can be taken away only in certain exceptional circumstances.

Further the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd. v. UOI [2016 (342) E.L.T. 67] has observed that the procedure prescribed in Section 9D(1) of Central Excise Act, 1944 providing cross-examination has to be scrupulously followed as much as in an adjudication proceedings as in criminal proceedings relating to prosecution. The adjudicating authority cannot straightway rely on statements recorded during investigation/enquiry before Central Excise officers and such statement can be relied upon only after the same is admitted in evidence in accordance with the provisions of Section 9D(1) of Central Excise Act. Further in the case of Ambica International v. UOI reported as 2018 (361) E.L.T. 90 (P & H), the Hon'ble High Court observed that not only cross-examination, but examination in chief is also required to be done by the adjudicating authority.

The Hon'ble Chhastisgarh High Court in the case of Hitech Abrasives Ltd. v. Commissioner of Central Excise & Customs, Raipur [2018 (362) ELT 961 (Chhastishgarh)] has again observed that the proceedings under the Central Excise Act being quasi-criminal as they result in imposition of penalty and lead to prosecution in some cases, the provisions of Section 9D are not merely directory, but the same are mandatory to be observed. It is only when a person, who gave statement is examined by the adjudicating authority as also cross-examined, the same can be admitted as an evidence. Otherwise the evidentiary value of the said statements cannot be upheld.

Further, the Hon'ble Allahabad High Court in the case of Commissioner of C.Ex., Meerut vs. R.A. Castings Pvt.Ltd. [2011 (269) E.L.T. 337 (All.)] also held that it was incumbent upon the Revenue to produce the share brokers upon whose incriminating statements, the

Revenue was relying upon as also investigating officers, for cross-examination, in the absence of which, the statements could not be relied upon.

30. Applying the ratio of all the decisions discussed above, it can be safely concluded that the statements recorded during investigation, which have not been tested on the touchstone of cross-examination and examination in chief in terms of the provisions of section 9D of Central Excise Act, cannot be referred to and relied upon as an admissible evidence in the adjudication proceedings. The result of the same would be that the said statements have to be taken out of the consideration and no reliance can be placed upon the same. The Revenue's entire case is based upon the print outs retrieved from the seized electronic documents, which have already been discussed by us in the preceding paragraphs and have been found to be of doubtful nature, read with the statements of various persons recorded during investigations, which have not been tested by the tool of cross-examination, and as such are not admissible, we note that nothing remains as an evidence so as to uphold the charges of clandestine removal.

31. It is a well settled law that clandestine removal allegations are required to be based upon legal, positive and sufficient evidences so as to inspire confidence in the Revenue's allegations or to at least show the evidences, which may tilt the case in favour of the Revenue on the principle of preponderance of probabilities. The clandestine allegations, being in the nature of quasi-criminal proceedings, cannot be upheld on the basis of assumptions and presumptions and require sufficient evidences. At this stage we may refer to the Tribunal's decision in the case of M/s.Arya Fibre Pvt.Ltd. v. Commissioner of Central Excise, Ahmedabad [2014 (311) E.L.T. 592(Tri.-Ahmd.)], wherein after considering the various precedent decisions, certain fundamental criterias which should be established by the Revenue to uphold the charges of clandestine removal were laid down. For better appreciation we reproduce the same:-

> *"40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submission made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following:*

*(i) There should be tangible evidences of clandestine manufacture and clearance and nor merely inferences or unwarranted assumptions;*

*(ii) Evidence in support thereof should be of:*

*(a) raw materials, in excess of that contained as per the statutory records;*

*(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*

*(c) discovery of such finished goods outside the facotory;*

*(d) instances of sale of such goods to identified parties;*

*(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*

*(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;*

*(g) statement of buyers with some details of illicit manufacture and clearance;*

*(h) proof of actual transportation of goods, cleared without payment of duty;*

*(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc."*

While examining the present case in the light of fundamental criteria laid down in the said decision, we note that if the computer print out and statements are kept out of consideration, as discussed in the previous para as not being admissible evidences, there is virtually no other evidence produced by the Revenue to establish the charges of clandestine removal.

32. We also note that the appellants have contested that they do not have capacity to manufacture such a huge quantum of paper, as alleged by the Revenue. Learned Advocate has drawn our attention to the Tribunal's decision in their own case reported as M/s.Meenu Paper [2016 (344) E.L.T. 894] vide which it was admitted that M/s.Meenu Paper has enhanced their capacity from 5000 MT per annum to 15,000 MT per annum in the year 2009. Further expansion of capacity from 15,000 MT per annum to 21,000 MT per annum was intimated to the department vide their letter dated 08.07.2015, which is after the period in dispute. As such it is established that the production capacity of the factory, during the relevant period was 15,000 MT per annum. Whereas the allegations are that the appellant during the said period has produced almost double the production than their production capacity. Admittedly when the appellant was not having production capacity to manufacture such a huge quantum of alleged clandestine production, the Revenue's case looses its stand.

33. By applying the above principles to the facts of the present case we note that though there may be certain doubts against the

appellant, but the evidences produced by the Revenue cannot be considered to be sufficient so as to uphold the huge demand of duty against the appellant.

34. It is well settled law that allegations and findings of clandestine removal are required to be upheld on the basis of sufficient and tangible evidences and not merely on the basis of assumptions and presumptions. The Hon’ble Allahabad High Court in the case of Continental Cement Co. v. Union of India [2014 (309) E.L.T. 411 (All.)] has observed that clinching evidences as regards purchase of raw materials, use of extra electricity, sale of final products, transportation, payment, realization of sale proceeds, mode and flow back of funds are required to be produced by the Revenue to establish the charge of clandestine removal, which cannot be confirmed based on presumptions and assumptions. The court further observed that it is a serious charge required to be proved by Revenue by tangible and sufficient evidence. Mere statements of the buyers based on their memories were insufficient without support of any documentary evidences. Further Hon’ble Allahabad High Court in the case of CCE, Meerut v. R.A. Castings Pvt.Ltd. [2011 (269) E.L.T. 337 (All.)], while upholding the decision of the Tribunal again reiterated the law that the

charges of clandestine removal are required to be established on the basis of documentary evidences. In the case of Sharma Chemicals v. C.C.E., Calcutta [2001 (130) E.L.T. 270 (Tri-Cal.)], it was observed that distance between "may be true" and "must be true" is long and whole of it must be covered by legal evidences before a person is convicted. It has been repeatedly held by the Courts that clandestine manufacture and clearance cannot be readily inferred from few documents and statements unless the allegations are also corroborated and establishe3d on evidence, relatable to or linked with actual manufacturing operations. In the present case there is no such evidence forthcoming in the records before us to suggest clandestine manufacture and consequent clearance by the appellant. We have already observed about the production capacity of the appellant. Admittedly for clearing the final product in a clandestine manner, the same is required to be first manufactured in the factory. Revenue has not produced any evidence of procurement of various raw materials required for manufacture of excess goods in the appellant's factory, especially when they have contested the fact of their production capacity, based upon the Tribunal decisions in their own case. The evidences of procurement of sludge, which can only be used as fuel as per chemical examiners report also does not advance Revenue's case. We really fail to understand that in the absence of the manufacture of the paper in question, how the same could be cleared by the assessee in a clandestine manner. We also find that there is no evidence of movement of cash or receipt of consideration by the appellant from the buyers.

35. At this stage we also take note of the Tribunal's decision in the case of M/s.Kurele Fragrances Pvt.Ltd. & Others v. Commissioner of Central Excise, Kanpur vide its Final Order No.70730-70734/2017 dated 24.07.2017, where the findings of clandestine removal were set aside by the Tribunal on the ground of insufficiency of evidences. The said decision stands upheld by the Hon'ble High Court of Allahabad vide their Order dated 05.02.2019 in Central Excise Appeal No.24/2018 filed by the Revenue.

36. Further demand of Rs.98,620/- stands confirmed against the manufacturing unit on the alleged shortages of the finished goods detected at the time of visit of the officers. Apart from the shortages, we do not find any other evidence to reflect upon the fact that such shortages were on account of the clandestine removal of the final product. Statement of Shri Aslam Tyagi, Accountant of the appellant

recorded on the spot has only accepted the shortages, but has not admitted any clandestine removal of the same. The Hon'ble Allahabad High Court in the case of Commissioner of Central Excise, Kanpur v. Minakshi Castings reported at 2011 (274) E.L.T. 180 (All.) has observed that mere shortages do not lead to the conclusion of the same having been removed without payment of duty unless there are evidences to show the manufacture and removal of the goods. As such we find no reasons to confirm the same demand also.

37. In view of our foregoing discussion, we hold that the impugned order of Commissioner upholding the allegations of clandestine removal against M/s.Meenu Paper Mills Pvt.Ltd. are unsustainable and accordingly set aside the demand confirmed against them along with setting aside of personal penalty. Inasmuch as the appeal of M/s.Meenu Paper Mills Pvt.Ltd. stands allowed, the penalties imposed upon the other appellants who are either the Director, Proprietor or partner or the raw material supplier or the alleged buyers are also set aside and their appeal are allowed.

38. In a nutshell the impugned order is set aside and all the appeals are allowed.

(Pronounced in open Court on 23.04.2019)

SD/

**(Anil G. Shakkarwar)**
**Member (Technical)**

SD/

**(Archana Wadhwa)**
**Member (Judicial)**

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