CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70503 of 2020

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-009-2020-21 dated 07/09/2020 passed by Commissioner of Central Excise & CGST, Kanpur)

M/s Raghunath International Ltd., ...Appellant

(84/12 Fazal Ganj, Industrial Area, Kanpur)

VERSUS

Commissioner of Central Excise, Kanpur ....Respondent

(117/7, Sarvodaya Nagar, Kanpur)

WITH

Sl. No.	**Appeal Nos.**	**Appellants**	**Respondents**
1	Excise/70504/2020	M/s Shankar Enterprises	Commissioner of Central Excise, Kanpur
2	Excise/70505/2020	M/s Seema Enterprises	Commissioner of Central Excise, Kanpur
3	Excise/70506/2020	M/s Vinayak Ultraflex Pvt Ltd	Commissioner of Central Excise, Kanpur
4	Excise/70507/2020	M/s Aanand Sales	Commissioner of Central Excise, Kanpur
5	Excise/70508/2020	M/s Bee Gee Projects India Pvt Ltd	Commissioner of Central Excise, Kanpur
6	Excise/70509/2020	M/s Prateek International	Commissioner of Central Excise, Kanpur
7	Excise/70510/2020	Sri Prakash Agarwal	Commissioner of Central Excise, Kanpur
8	Excise/70511/2020	Shiv Kumar Paliwal	Commissioner of Central Excise, Kanpur
9	Excise/70512/2020	M/s Vinod and Co	Commissioner of Central Excise,

			Kanpur
10	Excise/70513/2020	Alok Krishna Gupta	Commissioner of Central Excise, Kanpur
11	Excise/70514/2020	M/s Chetan Enterprises	Commissioner of Central Excise, Kanpur
12	Excise/70515/2020	M/s Purvanchal General Store	Commissioner of Central Excise, Kanpur
13	Excise/70516/2020	M/s Poona Zarda Stores	Commissioner of Central Excise, Kanpur
14	Excise/70517/2020	M/s Bajaj and Sons	Commissioner of Central Excise, Kanpur
15	Excise/70518/2020	M/s D S Enterprises	Commissioner of Central Excise, Kanpur
16	Excise/70519/2020	M/s Mohan Lal and Sons	Commissioner of Central Excise, Kanpur
17	Excise/70520/2020	M/s Shiv Babu Chaurasia and Sons	Commissioner of Central Excise, Kanpur
18	Excise/70521/2020	Dilip Kumar Gupta	Commissioner of Central Excise, Kanpur
19	Excise/70522/2020	M/s Bihar Traders	Commissioner of Central Excise, Kanpur
20	Excise/70523/2020	M/s S K Supply Agency	Commissioner of Central Excise, Kanpur
21	Excise/70524/2020	Nadeem Ahsan Khan	Commissioner of Central Excise, Kanpur
22	Excise/70525/2020	Shyam Sunder Chaurasia	Commissioner of Central Excise, Kanpur
23	Excise/70526/2020	M/s Singhal Agencies	Commissioner of Central Excise, Kanpur
24	Excise/70527/2020	Ravindra Kumar	Commissioner of Central Excise, Kanpur

25	Excise/70528/2020	Gopal Chaurasia	Commissioner of Central Excise, Kanpur
26	Excise/70529/2020	Ashok Kumar Jain	Commissioner of Central Excise, Kanpur
27	Excise/70530/2020	Waziruddin	Commissioner of Central Excise, Kanpur
28	Excise/70531/2020	Sushil Kumar Gupta	Commissioner of Central Excise, Kanpur
29	Excise/70532/2020	Prashant Agarwal	Commissioner of Central Excise, Kanpur
30	Excise/70533/2020	M/s New Vikas Goods Carrier	Commissioner of Central Excise, Kanpur
31	Excise/70534/2020	M/s Shiva Group of Agencies	Commissioner of Central Excise, Kanpur
32	Excise/70535/2020	Subhash Mishra	Commissioner of Central Excise, Kanpur
33	Excise/70536/2020	Uma Shanker Awasthi	Commissioner of Central Excise, Kanpur
34	Excise/70537/2020	M/s Kanchan Udyog	Commissioner of Central Excise, Kanpur
35	Excise/70538/2020	M/s Trimurti Roadlines	Commissioner of Central Excise, Kanpur
36	Excise/70539/2020	Ms Gopinath Sahu	Commissioner of Central Excise, Kanpur
37	Excise/70540/2020	M/s Hari Om Khadi Gramodyog Sansthan	Commissioner of Central Excise, Kanpur
38	Excise/70541/2020	Pawan Kumar Agarwal	Commissioner of Central Excise, Kanpur
39	Excise/70542/2020	M/s Naseemuddin and Sons	Commissioner of Central Excise, Kanpur
40	Excise/70020/2021	Shri Rajesh Agarwal	Commissioner of Central Excise, Kanpur

41	Excise/70021/2021	G N Chaudhary	Commissioner of Central Excise, Kanpur
42	Excise/70022/2021	Atal Behari Bajpai	Commissioner of Central Excise, Kanpur
43	Excise/70023/2021	Samar Bahadur Singh	Commissioner of Central Excise, Kanpur
44	Excise/70024/2021	Shiv Prakash Trivedi	Commissioner of Central Excise, Kanpur
45	Excise/70025/2021	Ram Kumar Sharma	Commissioner of Central Excise, Kanpur
46	Excise/70026/2021	M/s Keyman Laminators Pvt Ltd	Commissioner of Central Excise, Kanpur
47	Excise/70027/2021	Surya Kumar	Commissioner of Central Excise, Kanpur
48	Excise/70028/2021	M/s Bihar Carrying Company P. Ltd	Commissioner of Central Excise, Kanpur
49	Excise/70029/2021	M/s Abhishek Sales	Commissioner of Central Excise, Kanpur
50	Excise/70031/2021	Jayan Kumar	Commissioner of Central Excise, Kanpur
51	Excise/70081/2021 (By Revenue)	Commissioner of Central Excise, Kanpur	M/s Raghunath International Ltd.,
52	Excise/70082/2021 (By Revenue)	Commissioner of Central Excise, Kanpur	M/s Seema Enterprises
53	Excise/70083/2021 (By Revenue)	Commissioner of Central Excise, Kanpur	M/s Shanker Enterprises

(Arising out of common Order-in-Original No.KNP-EXCUS-000-COM-009-2020-21 dated 07/09/2020 passed by Commissioner of Central Excise & CGST, Kanpur)

APPEARANCE:

Shri Hari Om Tiwari, Advocate,

Shri Amit Awasthi, Advocate &

Shri Sandeep Saraogi, Chartered Accountant, for the assessee(s)

Shri Gyanendra Kumar Tripathi, Shri T.M. Siddiqui, Authorised Representatives for the Revenue

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOS.- **70006-70059/2022**

DATE OF HEARING : 05.08.2021

DATE OF DECISION: 18.01.2022

ANIL CHOUDHARY:

These cross appeals arise from the common order-in-original dated 07.09.2020, whereby four show cause notices have been adjudicated/ disposed of. The main show cause notice dated 01.10.2009 proposed demand and penalty against the three main appellant(s) viz.:- i) M/s. Raghunath International Ltd. ii) M/s Seema Enterprises and iii) M/s Shankar Enterprises (manufacturers of Sir Brand Gutka/Pan Masala), on allegation of clandestine manufacture and clearance. The remaining 3 show cause notices pertained to seizure of goods and raw materials made by the officers at the time of search and stock verification at the factories of the appellant and also goods seized at the railway station/transporter's godown etc. The details of the duty demand as per show cause notice, confirmed and/or dropped in the impugned order on the main appellant (s) and others is as follows:-

Table of Appellants					
S No.	Appeal No.	Name of the Party/ Appellants	Amount Involved		
			Duty demanded along with applicable interest u/s 11AB	Cenvat demanded along with applicable interest u/s 11AB r/w Rule 14	Penalty imposed

1	E/70503/2020-EX[DB]	Raghunath International Ltd.	250,410,860	-	250,410,860
2	E/70505/2020-EX[DB]	Seema Enterprises	88,848,828	137,668	88,986,496
3	E/70504/2020-EX[DB]	Shankar Enterprises	5,346,956	28,090	5,375,046
4	E/70506/2020-EX[DB]	Vinayak ultraflex Pvt. Ltd.	2,760,134	-	3,760,134
5	E/70510/2020-EX[DB]	Shri Prakash Agarwal	-	-	50,000,000
6	E/70020/2021-EX[DB]	Rajesh Agarwal	-	-	10,000,000
7	E/70513/2020-EX[DB]	Alok Krishna Gupta	-	-	10,000,000
8	E/70531/2020-EX[DB]	Sushil Kumar Gupta	-	-	500,000
9	E/70087/2021-EX[DB]	Rajesh Dixit	-	-	200,000
10	E/70031/2021-EX[DB]	Jayan Kumar	-	-	100,000
11	E/70027/2021-EX[DB]	Surya Kumar	-	-	100,000
12	E/70021/2021-EX[DB]	G N Chaudhary - Director in RIL	-	-	500,000
13	E/70022/2021-EX[DB]	Atal Bihari Bajapai	-	-	500,000
14	E/70024/2021-EX[DB]	Shiv Prakash Trivedi	-	-	500,000
15	E/70023/2021-EX[DB]	Samar Bahadur Singh	-	-	500,000
16	E/70508/2020-EX[DB]	Bee Gee Projects Pvt. Ltd.	-	-	10,000,000
17	E/70517/2020-EX[DB]	Bajaj and Sons – Kolkata	-	-	1,000,000
18	E/70526/2020-EX[DB]	Singhal Agencies – Jaipur	-	-	1,000,000
19	E/70522/2020-EX[DB]	Bihar Traders, Ranchi	-	-	1,000,000
20	E/70516/2020-EX[DB]	Poona Zarda Store, Pune	-	-	1,000,000
21	E/70090/2021-EX[DB]	Nath and Co, Varanasi	-	-	1,000,000
22	E/70539/2020-EX[DB]	Gopinath Sahu, Jamshedpur	-	-	1,000,000
23	E/70029/2021-EX[DB]	Abhishek Sales, Lucknow	-	-	1,000,000
24	E/70514/2020-EX[DB]	Chetan Enterprise, Patna	-	-	1,000,000
25	E/70520/2020-EX[DB]	Shiv Babu Chaurasia, Bhadoi	-	-	1,000,000
26	E/70519/2020-EX[DB]	Mohan Lal and Sons, Mirzapur	-	-	1,000,000
27	E/70518/2020-EX[DB]	D S Enterprise, Chopan	-	-	1,000,000
28	E/70523/2020-EX[DB]	S K Supply, Gopiganj	-	-	1,000,000
29	E/70515/2020-EX[DB]	Purvanchal General Store, Yusufpur	-	-	1,000,000
30	E/70086/2021-EX[DB]	Kaka Enterprise, Allahabad	-	-	1,000,000
31	E/70542/2020-EX[DB]	Naseemuddin and Sons, Sasaram	-	-	1,000,000
32	E/70529/2020-EX[DB]	Ashok Kumar Jain, Kolkata	-	-	500,000
33	E/70089/2021-EX[DB]	Naseem Ahmed, Bihar Traders, Ranchi	-	-	500,000
34	E/70524/2020-EX[DB]	Nadeem Khan, Poona Zarda, Pune	-	-	500,000

35	E/70527/2020-EX[DB]	Ravindra Kumar, Abhishek Sales, Lucknow	-	-	500,000
36	E/70528/2020-EX[DB]	Gopal Chaurasia, Mohan Lal and Sons, Mirzapur	-	-	500,000
37	E/70525/2020-EX[DB]	Shyam Sunder Chaurasia, D. S Enterrpise, Chopan	-	-	500,000
38	E/70530/2020-EX[DB]	Waziruddin, Naseemuddin and Sons	-	-	500,000
39	E/70534/2020-EX[DB]	Shiva Group of agencies	-	-	1,000,000
40	E/70484/2020-EX[DB]	H M Sales Corporation	-	-	1,000,000
41	E/70532/2020-EX[DB]	Prashant Agarwal	-	-	500,000
42	E/70537/2020-EX[DB]	Kanchan Udyod	-	-	1,000,000
43	E/70540/2020-EX[DB]	Hari Om Khadi Gram Udyog	-	-	1,000,000
44	E/70541/2020-EX[DB]	Pawan Agarwal	-	-	500,000
45	E/70026/2021-EX[DB]	Keyman Laminators	-		1,000,000
46	E/70511/2020-EX[DB]	Shiv Kumar Paliwal	-	-	500,000
47	E/70092/2021-EX[DB]	Siddharth Gupta	-	-	500,000
48	E/70507/2020-EX[DB]	Anand Sales	-	-	1,000,000
49	E/70088/2021-EX[DB]	Swetanshu Dwivedi	-	-	500,000
50	E/70512/2020-EX[DB]	Vinod and Co.	-	-	1,000,000
51	E/70509/2020-EX[DB]	Prateek International	-	-	1,000,000
52	E/70030/2021-EX[DB]	Mayur International	-	-	1,000,000
53	E/70028/2021-EX[DB]	Bihar Carrying Co	-	-	2,500,000
54	E/70538/2020-EX[DB]	Trimurti Roadlines	-	-	2,500,000
55	E/70533/2021-EX[DB]	New Vikas Goods Carrier	-	-	2,500,000
56	E/70025/2021-EX[DB]	Ram Kumar Sharma, Bihar Carring	-	-	1,000,000
57	E/70536/2020-EX[DB]	Uma Shankar Awasthi, Bihar Carrying	-	-	500,000
58	E/70535/2020-EX[DB]	Subhash Mishra, New Vikas	-	-	500,000
59	E/70521/2020-EX[DB]	Dilip Kumar Gupta	-	-	200,000
60	E/70091/2021-EX[DB]	Binda Tiwari	-	-	1,000,000
S No.		**Order in respect of Demand cum-scn issued vide C No. V (30) 18-Adj/Div-III/08/1352-57 dated 22.05.2008**	**Duty demanded**	**Redemption fine**	**Penalty imposed**
1	E/70505/2020-EX[DB]	Seema Enterprises	298,262.00	-	298,262.00
S No.		**Order in respect of Demand cum-scn issued vide C No. 121/INT/DGCEI/HQ/07/4153-4156 dated 28.05.2008**	**Duty demanded**	**Redemption fine**	**Penalty imposed**
2	E/70505/2020-EX[DB]	Seema Enterprises	160,377.00	975,000.00	160,377.00

3	E/70503/2020-EX[DB]	Raghunath International	-	0	5,000.00
4	E/70029/2021-EX[DB]	Abhishek Sales	-	-	50,000.00
5	E/70090/2021-EX[DB]	Nath and Co, Varanasi	-	-	100,000.00
S No.		**Order in respect of Demand cum-scn issued vide C No.121/INT/DGCEI/HQ/07/9033-40 dated 07.11.2008**	**Duty demanded**	**Redemption fine**	**Penalty imposed**
6	E/70504/2020-EX[DB]	Shankar Enterprises	2,160,745.00	2,250,000.00	2,160,745.00
7	E/70505/2020-EX[DB]	Seema Enterprises	340,019.00	200,000.00	340,019.00
8	E/70026/2021-EX[DB]	Keyman Laminators	8,501.00	12,000.00	8,501.00
9	E/70028/2021-EX[DB]	Bihar Carrying Co.	-	-	500,000.00

2. The appeals of the other appellants (arising from common impugned order) were also heard together along with the appeals of the Revenue, and are being disposed of by this common order.

3. On intelligence that the aforementioned main appellants(s) were involved in the manufacture of 'Sir Brand' Pan Masala and Gutka, and have resorted to clandestine clearance to evade central excise duty, search was conducted in the premises along with others on 01.12.2007. A second search was also conducted at the factory premises on 9.5.2008. In the search, several documents, and the raw materials as well as finished goods were seized. Some finished goods were lying at the premises of the dealers/distributors, and those lying at the premises of the transporters/Railway were also seized. It also appeared to Revenue that such goods (seized in premises of transporters, dealers) were cleared without payment of duty. It also appeared to Revenue that

there was shortage of cenvatable inputs being used in the manufacture of finished goods as per stock record, being the packing materials/laminates. The details are as follows:-

Sl. No.	Date of seizure	Place of seizure	Description of goods and qty. Seized.	Unit rate	Value MRP (Rs.)	Duty involved (Rs.)
1	1.12.07	M/s Raghunath Intl. Ltd. 84/12, Fazal Ganj Indl. Area, Kanpur.	Supari-19257 kgs. Kattha-676 kgs. Masala-892 kg. Fragrances-1305.60 kgs. Chhuara-2674.50 kgs.	Not applicable	1880873/-	Not applicable
2	1.12.07	M/s Seema Enterprises, 123/778, Fazal Ganj Indl. Area, Kanpur.	Various varieties of 'Sir' branded finished goods collectively weighing 6106.48 kgs.	Rs.1/-	2588360/-	879784/-
			314.65 kgs. of laminates (packing material)	Not applicable	40905/-	6741/-
3	1.12.07	M/s Abhishek Sales, 86/73-A, Katra Maqbool Ganj, Sarojani Devi Lane, Lucknow.	2539 packets of Sir Gold Finest Gutkha.	Rs.1/-	165035/-	56095/-
4	1.12.07	M/s Nath & Co., 1st Floor, above M/s Abhishek Building Materials, Lehartara Crossing, Varasasi.	Sir Mini Black Gutkha 29 bags and 80 packets (4720 x 65 pouches)	Rs.1/-	306800/-	104281/-
5	09.05.08	M/s Shankar Enterprises, 84/12, Fazal Ganj Indl. Area, Kanpur.	Mini Black Gutkha 3877.9 kgs. (190 Bags)	Rs.1/-	1938950/-	659049/-
			Sir Gold Finest Gutkha - 2404.48 Kgs. (68 bags)	Rs.1/	1202240/-	408641/-
			Mini Sir Sada -351.68 Kgs. (16 Bags)	Rs.1/	175840/-	43612/-
			2 gms. current Gutkha 1710.28 kgs. (92 bags)	Rs.1/	855140	290662/-
			Sir 1000 Black Gutkha 913.92 kgs. (24 bags)	Rs.1/	456960/-	155321/-
			Betal Nuts - 605 kgs.	Not applicable	27225/-	N/A

			1757.32 Kgs. of laminates (packing material)	Not applicable	237238/-	34210/-
			3200 Ns. Of Zipper pouch.	Not applicable	4,750/-	685/-
6	09.05.08	M/s Seema Enterprises, 123/778, Fazal Ganj Indl. Area, Kanpur.	406.24 kgs. of laminates of Sir Gold Finest Gutkha (packing matrial)	Not applicable	55,655/-	8,025/-
7	09.05.08	Goods pertaining to M/s Key Man Laminators (P) Ltd., 66-B, Co-operative Indl. Estate, Kanpur at the factory gate of M/s Seema Enterprises, 123/778, Fazal Ganj Indl. Area, Kanpur.	400 Kgs. of printed laminated rolls of Sir brand Gutkha (packing material)	Not applicable	58,954/-	8,501/-
			Vehicle No. UP 78 AN-4563 (Vikram Tempo)	Not applicable	30,000/-	N/A
8	09.05.08	M/s Bihar Carrying Co. P. Ltd., 133/165 P, Rattupurvwa, Transport Nagar, Kanpur.	Sir Gold finest Gutkha – 3394.56 Kgs. (96 bags).	Rs.1/-	1684800/-	572664/-
9	09.05.08	Chaar Bagh, Railway Station, Lucknow	Sir Gold finest Gutkha – 7441.20 kgs. (212 bags)	Rs.1/	3720600/-	1264632/-
10	09.05.08	Kanpur Railway Station	Sir Current Gutkha 632.06 kgs. (17 bags)	Rs.1/	316030/-	107419/-
11	10.05.08	Jodhpur Railway Station	Sir Current Gutkha 3271.84 kgs. (88 bags)	Rs.1/	1635920/-	556049/-

4. During the course of stock taking in the factory premises of M/s Raghunath International Ltd., (RIL) on 1.12.2007, various raw materials were found valued at Rs.18,80,873/-. In absence of stock register or proper records, the raw materials appeared liable for confiscation and as such, were detained. The Supervisor stated that after closure of the production (since Oct., 2007), in RIL, they were only doing betel nut cutting work, on job

work basis for M/s Seema Enterprises. The detained goods were seized vide seizure memo dated 3.4.2008.

5. During the search at M/s Shankar Enterprises on 9.5.2008, physical stock was taken in presence of Mr. Sunil Gupta, Clerk of the factory, wherein the finished goods of 'Sir Brand' Gutka and raw materials were found over and above the quantity as per RG-I Register (RUD), Form-IV (RUD-32) Register. Upon enquiry, Mr. Sushil Gupta, Clerk, *inter alia,* stated that he was working for M/s Shankar Enterprises since April, 2008, and prior to April, 2008, he was working with M/s Seema Enterprises, and looking after the despatch for both M/s Seema Enterprises and M/s. Shankar Enterprises. It appeared to Revenue that the stock of finished goods found in excess was due to showing less production in their RG-I Register, than the actual production. Thus, they were evading payment of duty by clandestine removal(s) of the goods without bills and without payment of duty, and it further appeared to Revenue that they were making entries in the RG-I Register and preparing production slips on the basis of the accounted finished goods cleared from the factory, as no bills were found issued on 8.5.2008, and the last invoice issued was dated 7.5.2008. Thus, it appeared to Revenue that the appellant was purposely keeping their stock register incomplete, for the purpose of manipulation, as finished goods found in excess, valued at Rs.46,29,130/- which were seized under Panchnama dated 09.05.2008, as it appeared to Revenue that such finished goods were stored unaccounted, to be cleared without payment of duty. The excess stock of duty paid raw materials being Laminates and Zipper Pouches, were also seized.

6. During the search at M/s Seema Enterprises on 9.5.2008, on physical verification - stock taking, some quantity of 406.24 kg. of laminates valued at Rs.55,655/- was found in excess than the recorded quantity in Form-IV Register. Further, on verification of Form-IV Register maintained by M/s Seema Enterprises revealed that, the last entry for receipt of laminates was made on 8.5.2008 and the last entry for issue of laminates was made on 7.5.2008. Thus, it appeared to Revenue that the appellant - M/s Seema Enterprises purposely kept their stock register incomplete, so as to manipulate with ease, in order to evade payment of duty.

7. During the course of search of M/s Seema Enterprises on 9.5.2008, a Tempo-Registration No.UP78AN4568, loaded with 400 kgs. of printed laminate rolls and outer packing of 'Sir Brand' entered the said premises. It was found that the said tempo with the goods was not accompanied with any challan/bills or invoice. Mr. Ashish Sharma, Driver of the Tempo stated that he had loaded the said goods from the factory premises of 'Key Man Laminators Pvt. Ltd.', Cooperative Industrial Estate, Kanpur. Further, stated he was not given any invoice or bills by the Supervisor - Mr. Ajay Singh. Upon enquiry from the said Ajay Singh and Shri Sushil Gupta-Director of M/s. Key Man Laminators, they admitted in their statement dated 9.5.2008, that the said goods were manufactured in their factory and were cleared without any supporting invoice. Accordingly, the said consignment of 400 kgs. printed rolls were seized on 9.5.2008. The said tempo No.UP78AN4563, valued at

Rs.30,000/- (thirty thousand) was also liable to confiscation, and it was also seized.

8. <u>Transporter – Bihar Carrying Co. (P) Ltd.</u>

On 9.5.2008, the search was also made at the premises of the transporter- M/s Bihar Carrying Co. Pvt. Ltd. (BCC), Transport Nagar, Kanpur 96 bags of 'Sir Brand' Gutka were found for which the Manager of Transport, Mr. U. S. Awasthi could not provide copy of the bills/invoice pertaining to the same. On verification of the name of the manufacturer-as printed on the pouches, it appeared that 57 bags of 'Sir Brand Gold Silk' were manufactured by M/s Seema Enterprises and 39 bags were manufactured by M/s Shankar, and the same were seized under Panchnama, as it appeared to Revenue that these bags have been cleared from the factory of the appellants-manufacturer(s) without payment of duty.

9. Further, Mr. Shushil Gupta, Clerk of assessee in his statement dated 9.5.2008 admitted that he has dispatched 57 bags and 39 bags of Sir Brand Gutka from M/s Seema Enterprises and M/s Shankar respectively, to M/s Bihar Carrying Co. Pvt. Ltd.

10. On the basis of loading registers of BCC for the period April, 2006 to November, 2006, JST slips were found mentioned in the goods manifest and private diary pads, showing transportation of gutka to Ranchi and other destinations. Consolidated chart was prepared by the Revenue. As per chart, it appeared that BCC, Kanpur have transported 17,084 bags and 5095 bags of gutka /pan masala during the period April, 2006 to November, 2007 and

December, 2007 to May, 2008 respectively. Such goods it appeared were received by the transporter without bills from the factory of the appellant. The total duty allegedly evaded was estimated on the total bags of 21,879 at Rs.12,72,32,657/- (RIL Rs.8,02,06,819, M/s Seema Rs.4,58,23,952/- and Mr. Shankar Rs.12,01,886/-).

11. <u>Transportation by New Vikas Goods Carrier, Kanpur</u>

On the basis of Lorry challans maintained by M/s.New Vikas Goods Carrier, Kanpur and the disclosures made in this regard, a Chart showing details of Lorry Challans and its comparison with its parallel Lorry Challans was prepared, which revealed that M/s. New Vikas Goods Carrier, Kanpur had transported 3,040 bags of 'Sir 2 gms Black Gutkha' and 46,960 bags of 'Sir Gold Gutkha' to Patna, Muzaffarpur, Sasaram, Gaya, etc. during the period from Feb., 2005 to April, 2005 and April, 2006 to April, 2008, respectively, which appeared to be cleared clandestinely without bills by the manufacturers of Sir Brand Gutkha/Pan Masala. Thus, M/s. New Vikas Goods Carrier, Kanpur appeared to have transported 50,000 bags of Sir Brand Gutkha/Pan Masala during the period from Feb., 2005 to April, 2008, which were cleared clandestinely without issuing bills by the manufacturers. The total duty evaded by M/s. RIL, M/s. Seema and M/s. Shankar on 50000 bags of Sir 2 Black Gutkha/Sir Gold Gutkha, transported by M/s. New Vikas Goods Carrier, Kanpur was calculated to Rs.29,78,41,226/- [M/s.RIL : Rs.21,17,77,322/- M/s. Seema : Rs. 6,80,35,608/- and M/s. Shankar : Rs.1,80,28,296/-].

12. <u>Transportation Made by M/s Trimurti Roadlines, 109/369, R.K. Nagar, GT Road, Kanpur</u>.

The GRs/ Bilties issued by M/s Trimurti Roadlines, Kanpur for transportation of Sir Brand Gutkha/ Pan Masala during the year 2005-06 to 2008-09 (up to 07.05.2008) were identified. The identification and quantification of Sir brand Gutkha transported by M/s Trimurti Roadlines, Kanpur was made on the basis of 'the capacity of trucks used for transportation, destination, and variety of Sir brand Gutkha/ Pan Masala, as emerged from the statements of Shri Alok Krishan Gupta and various dealers of U.P. Accordingly, Charts were prepared which quantified that M/s Trimurti Roadlines, Kanpur had transported 49,420 bags of Sir Brand Gutkha/ Pan Masala during the period from April'2005 to March'2008, which were cleared clandestinely without issuing bills, involving Central Excise duty to the tune of Rs.17,88,74,208/-[M/s RIL: Rs.13,40,29,548/- and M/s Seema: Rs. 4,48,44,660/-]

13. **<u>Estimated evasion of duty on purchase of unaccounted (input)Outer Pouch Laminates from M/s. Vinayak Ultraflex, Kanpur.</u>**

Investigations further revealed that 14,346.30 Kg of `Plain polyfilms' and 64,405.90 Kgs of Holographic films of SIR Brand Gutkha had been clandestinely cleared by M/s Vinay Wires & Poly Products Pvt. Ltd. and by M/s Aanand Sales respectively, to M/s Vinayak Ultraflex (P) Ltd. Accordingly, a chart has been prepared, which reflected no. of outer pouches presumably cleared clandestinely by M/s Vinayak Ultraflex Pvt. Ltd. to M/s Shanker during May,2008 and June, 2008, no. of Sir Brand Gutkha pouches packed in such outer pouches so supplied and

Central Excise duty involved on such “Sir” brand of Gutkha. The said chart reflects that during May, 2008 and June, 2008, M/s Shanker presumably received 24,30,540 outer pouches from M/s Vinayak Ultraflex Pvt. Ltd., in which they allegedly packed 15,79,85,100 nos. of `Sir' brand Gutkha (having MRP of Rs. 1/ - each), which were cleared by them clandestinely without payment of duty of Rs. 5,36,99,135/-.

14. **<u>Purchase of Unaccounted Raw Materials and Packing Materials.</u>**

Investigations made from raw material/ packaging material suppliers, if appeared that M/s RIL, M/s Seema and M/s Shanker Enterprises were engaged in purchase of unaccounted raw material and packaging material in collusion with the said suppliers, for clandestine manufacturing and sale without payment of duty. Further, the bills issued by aforesaid supplier firms, have no correlation with the actual supplies made to M/s RIL, M/s Seema and M/s Shanker.

15. **<u>Transportation made through Indian Railways</u>**

In the searches conducted at the Lucknow, Kanpur and Jodhpur Railway stations, resulted in the seizure of consignments of Sir Brand Gutkha, further enquiries were conducted from various persons from which also it appeared that the manufacturers of Sir Brand Gutkha were transporting clandestinely cleared Gutkha from their factory to dealers by Railways.

16. During the investigation, it appeared that the manufacturers of Sir Brand Gutkha/ Pan Masala namely, M/s

RIL, M/s Seema and M/s Shanker during the period September' 2004 to May' 2008 (upto07.05.2008) have clandestinely cleared 44,410 bags of Sir Brand Gutkha/ Pan Masala, without payment of duty from their respective factories, to their dealers based in Howrah, Jodhpur, Jaipur, Pune, Hubli. Based on the quantity of 44,410 bags of Sir Brand Gutkha/ Pan Masala cleared clandestinely by M/s RIL, M/s Seema and M/s Shanker, on the RRs of Railways during the period September' 2004 to May' 2008 (upto 07.05.2008), and nature of packing adopted by them from time to time, and as deposed by different concerned persons in their statements, a Chart was prepared, which indicated the total duty evaded by M/s.RIL, M/s Seema and M/s Shanker on 44410 bags of Sir Brand Gutkha/ Pan Masala transported through Railways was Rs.33,18,54,918/- [M/s RIL: Rs. 29,31,43,072/-, M/s Seema: Rs. 3,28,63,367/- and M/s Shanker: Rs. 58,48,479].

17. Accordingly, show cause notices were issued. Show cause notice dated 1.10.2009 was issued proposing of demand central excise duty as mentioned below for alleged manufacture and removal of Pan Masala and Gutkha, clandestinely removed during the period September, 2004 to May, 2008.

Name of the Party	**Duty Demand proposed (Rs.)**
Raghunath International Limited (RIL)	Rs.71,91,56,761/-
Seema Enterprises (Proprietor) Seema Agarwal	Rs.19,15,67,587/-

Shankar Enterprises (Proprietor) Uma Shankar Yadav	Rs.07,87,77,796/-
Total	Rs.98,95,02,144/-

18. Further, demand of Rs.1,36,668/- and Rs.28,090/- was proposed on dutiable inputs being laminates (packaging materials) found short in the factory of M/s.Seema Enterprises and M/s.Shankar Enterprises respectively. Further, interest and penalty were also proposed. Further, individual penalties were also proposed on the Directors, Proprietors, Transporters, buyers of the goods, buyers and re-sellers of the goods, etc. etc. under Rule 26/27 of the Central Excise Rules as well as Rule 25 of the Central Excise Rules. As regards, the three other show cause notices (for seizure part), the details have been given hereinabove in para 1.

19. The Adjudicating Authority adjudicated all the four show cause notices vide common order-in-original nos.KNP-EXCUS-000-COM-009-20-21 dated 07.09.2020. He confirmed the demand in part and dropped in part, also imposed penalties.

19.1. Being aggrieved, the appellants are in appeal.

20. The details of the amount of duty and penalty confirmed have been given hereinabove, in para 1.

21. Revenue is also in cross appeal(s) in the case of the three manufacturers with regard to the part of the demand and the penalties (proposed), which were dropped by the ld. Commissioner.

22. Heard the parties and perused the written submissions filed by both the parties and also perused the evidences, which have been filed in separate paper books, which were referred at the time of hearing.

23. Ld. Counsel for the appellant /assessee urges as follows:-

23.1 The main SCN dated 01.10.2009 alleged evasion of duty basically on three alleged modus-operandi of evasion and raised demand of Central Excise duty under three counts, which have been adjudicated as under:

Count A **–** Clandestine removal of goods (Sir Brand Gutkha/ Pan Masala) allegedly **transported through Railways – Total Duty demanded Rs. 33,18,54,918/-**, quantified on the basis of **2993 Railway Receipts** allegedly used for transporting the goods. Amount of **Demand confirmed under the impugned order Rs. 13,69,17,210/-** worked out **on the basis of 1005 Railway Receipts** (out of total 2993 RRs) which are claimed to have been found by the Respondent Commissioner to be supportive of the Department’s case.

Count B(i) - Clandestine removal of goods (Sir Brand Gutkha/ Pan Masala) allegedly **transported through Road Transport Co**. namely **M/s Bihar Carrying Co., total duty demanded in the SCN : Rs. 12,72,32,657/-**quantified on the basis of 21,879 bags of Sir Brand Gutkha, allegedly transported through M/s Bihar Carrying Co. Pvt. Ltd. The Respondent Commissioner has in the impugned order **confirmed demand of duty for only the part amounting to Rs. 2,88,15,226/-** ,in respect of 4795 number of bags Gutkha/ Pan Masala allegedly transported in guise of Kachri Papad by M/s Bihar Carrying Co. during Feb 2008 to April 2008.

Count B(ii) - Clandestine removal of goods (Sir Brand Gutkha/ Pan Masala) allegedly transported through Road Transport Co. namely **M/s New Vikas Goods Carrier, Kanpur. Total duty demanded: Rs. 29,78,41,226**/-, quantified on the basis of 50,000 bags allegedly cleared clandestinely and transported to the various destinations. **Demand confirmed = NIL**. Respondent Commissioner has found the aforesaid demand to be legally unsustainable.

Count B(iii) - Clandestine removal of goods (Sir Brand Gutkha/ Pan Masala) allegedly transported through Road Transport Co. namely **M/s Trimurti Roadlines**. **Total Duty demanded Rs. 17,88,74,208/-** quantified on the basis of 49420 bags allegedly cleared clandestinely during April 2005 to March 2008. Amount of **Demand confirmed in the impugned order,** same as demanded in the SCNi:e**Rs.17,88,74,208/-.**

Count C – **Demand of Rs. 5,36,99,135/- on M/s Shankar,** raised in the SCN in respect of 15,79,85,100 number of Sir Brand Gutkha Pouches allegedly removed after having been manufactured and packed in 24,30,540 **outer pouch laminates,** alleged to have been received clandestinely from M/s Vinayak Ultraflex Pvt. Ltd. During May 2008 to June 2008**.** Amount of **Demand confirmed** under the impugned order: **NIL** as the Respondent Commissioner found the demand to be unsustainable in law.

Additional Demand in the SCN – Apart from the demand of CE duty under the counts mentioned above, the SCN also raised demands of **CENVAT Credit amounting to Rs. 37,668/- and Rs. 28,090/-** which have been **confirmed** by the Respondent Commissioner in the impugned order.

24. **(A) GROUNDS OF APPEAL AGAINST DEMAND OF DUTY CONFIRMED AND PENALTIES IMPOSED IN RELATION TO GOODS ALLEGEDLY TRANSPORTED THROUGH RAILWAYS.**

24.1 The Respondent Commissioner has in his impugned order failed to give due consideration and failed to properly appreciate the defence submissions made before him **despite having agreed with the Appellant's submission on several issues and held that out of 2993 RRs relied upon by the Department for raising demand of duty, as many as 1988 (2/3rd of the RRs) cannot be said to be fulfilling the four point indicator based criterion** relied upon by the investigating officers to identify and segregate the RRs and 'Forwarding Notes' allegedly used for transporting clandestinely removed goods, through the Railways. He has been manifestly adamant in taking a prejudicial in upholding the sanctity of the four point indicator based criterion and erroneously confirmed the demand of duty amounting of Rs. 13,69,17,210/- quantified in relation to 1005 RRs/F.N.'s.

24.2 As a matter of fact, the Respondent Commissioner has in the impugned order, acknowledged that the SCN issued to the Appellants was itself gravely flawed and defective in as much as the total demand of duty of Rs. 33,18,54,918/- was not based on **2993 RRs**, which as stated repeatedly in the SCN, were allegedly segregated and identified on the basis of identification criterion, but was actually based on **2583 RRs.** only as relevant details of **410 RRs** along with serial nos. for the same were omitted to be mentioned in the chart listing 2993 RRs, and enclosed as **Annexure 9 to the SCN**.

24.3 The fact that xerox copies of only 2583 RRs and Forwarding Notes were made available by the Railway Authorities, and not 2993/ 2999 RRs, as wrongly claimed to have been made available by the Railway Authorities and further claimed to have been shown to Shri Dilip Kumar Gupta, Railway booking agent, while recording his statement dated 24.09.2008, and obtaining his confirmation to the correctness of the chart (**Annexure 9**), as prepared and shown to him itself shows and proves that Shri Dilip Kumar Gupta was compelled to write a tutored statement containing factual errors, as neither 2993 or 2999 RRs along with their forwarding notes were shown to him, nor there did actually exist 2993 RRs/ Forwarding Notes, as there existed only 2583 RRs/ Forwarding Notes (after correctly calculating the total number of RRs/ Forwarding Notes listed in the chart marked as Annexure 9 to the SCN).

24.4 Out of **2583 RRs/ FNs**, the Respondent Commissioner has **excluded a total of 1566 entries (Table A1** of the impugned order) **on account of non -fulfillment of criterion of handwriting, 09 entries on account of non-fulfillment of criterion of "Description" and 03 entries on account of non-fulfillment of criterion of "weight"**. Thus, the Respondent Commissioner has **confirmed the demand of duty in respect of 1005 RRs which works out to Rs. 13,69,17,210/-**. The Appellant's (assessee) Appeal is against confirmation of the aforesaid amount of demand quantified on the basis of 1005 RRs which are considered by the Learned Adjudicating Authority as fully satisfying the identification criterion, relied by the investigating officers.

24.5. The impugned order passed by the Respondent Commissioner is cryptic **and improper** to the extent it **firstly**, unreasonably and illogically upholds the criterion devised for identifying and segregating the relevant RRs and **secondly**, it unjustifiably and illogically confirms the demand of Central Excise duty, quantified on the basis of 1005 RRs/ FNs considered by the Adjudicating Authority as admissible evidence sufficient enough to conclude and establish clandestine removal of Sir Brand Gutkha/ Pan Masala.

25. It is further urged that in relation to 1005 RRs, the Commissioner has not properly considered the evidences relied upon by the Revenue, admittedly, as these are third party documents, not related to the appellant/manufacturers. Only on the basis of statements of various person(s), (which have been retracted in the course of cross examination in the adjudication proceedings), the demand in part has been upheld.

26. On the issue regarding Admissibility and reliability of third party documents such as RRs and FNs etc. alone to establish evasion of duty :-

26.1 The sole and exclusive basis of the entire case made out by the department against the Appellants rests on **xerox copies of Railway Receipts and Forwarding Notes procured through dubious methods from the Railway Authorities**. Respondent

Commissioner failed to appreciate the Appellant's contention that Railway Receipts and the FNs are mere transport documents created by the Railways or Railway Booking Agents and none of such documents or copy of the same, had been recovered from the possession of the Appellants. The Respondent Commissioner has failed to record any finding on the Appellant's contention that all such documents **being the third party documents, presumption as to admissibility of such documents as envisaged under Section 36A of the Central Excise Act, 1944, is not available,** and therefore, the said third party documents are not at all admissible and reliable as evidence against the Appellants unless the Department discharges the onus of clearly establishing a link between such documents and the Appellant's through independent and directly affirmative documentary evidence with requisite supporting corroborative evidence.

26.2 The Respondent Commissioner has recorded no observation and findings on the contention of the Appellants that **there exists absolutely no documentary evidence whatsoever to establish any link between the relied upon xerox copies of RRs/ FNs and the Appellants, nor their exist any documentary evidence to establish the movement of finished goods from the factory premises of the Appellants to the Railway Station**. It is an undisputable fact that **there was no resumption of any incriminating transport document such as RRs/ FN or any such document (supporting the case of revenue) from the premises of the Appellants.** Further, there was also no recovery whatsoever of any kind of incriminating documents from the possession of the Appellants or the employees at the time of searches conducted twice at their office and factory premises to establish any link with the relied upon RRs/ FNs.

26.3 The said third party documents (RRs/FNs) are utterly inadequate to constitute requisite proof to establish such grave and serious charges as suppression of production and clandestine removal of finished excisable goods. **The whole thrust and focus of the Respondent Commissioner** while recording his observations and findings on the allegation concerning transportation of clandestinely removed goods through Railways **is entirely and exclusively based on oral testimonies of some persons which** included mainly the Railway Booking Agents and his associates. The oral statements of the Railway Booking Agents and his associates **remained totally uncorroborated and unsubstantiated with any other independent, affirmative and substantial evidence**.

26.4 The Respondent Commissioner in **Para 89(6) of the impugned order** has recorded a **factually incorrect and untenable observation that*"…..these statements were not contradictory to each other, and rather these statements are mutually corroborative and therefore possessed a very high evidentiary value. The statements are confessional and have been recorded without any pressure, threat or duress, for which no retractions have been filed".*** The Respondent Commissioner has completely disregarded and dismissed the Appellant's contention that the **multiple oral statements of**

various persons relied upon by the department were not only full of factual errors, inconsistencies and inherent contradictions manifest in themselves, but were also contradictory amongst and between themselves, as also vis-à-vis the facts and evidences placed on record. The veracity, truthfulness and voluntary character of these statements was therefore clearly questionable and hence being devoid of requisite creditability, no reliance could be placed on all such oral statements as mutually corroborative evidence, to lend support to any of the inferences and allegations drawn up on the basis of such statements. Furthermore, each one of the aforesaid persons, during the course of their respective cross-examination, categorically retracted from their original statements and clearly affirmed that their original statements were involuntary, having been obtained under 'duress' as per the 'dictates' of the officers.

26.5 Further, **the Respondent Commissioner has recorded a factually incorrect and untenable finding that a clear link gets established between the Appellants and the relied upon Railway Receipts by making a factually erroneous and unsubstantiated observation** that ***"in my view there is enough documentary evidence on record to prove the duty evasion committed by the party by transporting clandestinely cleared Sir Brand Gutkha/ Pan Masala to various cities by Railways".*** **However, it is amply evident on perusal of the entire documentary evidence relied upon in the SCN that apart from the dubiously procured Xerox**

copies of Railway Receipts and the Forwarding Notes, there is not even a shred of documentary evidence relied upon to establish any link between the Appellants and identified Railway Receipts allegedly used for transporting of Sir Brand Gutkha/ Pan Masala.

26.6 None of the Railway Receipts or the corresponding Forwarding Notes recovered in relation to the seized goods anywhere indicate the name of the Appellants or any of their employees as either the consignor or consignee. **No enquiries were conducted** and no material evidence was gathered by investigating officers to establish that the seized consignments were actually removed from the factory of the Appellants to the Railway Stations by or on behalf of the Appellants.

26.7 The Respondent Commissioner has completely overlooked the fact that none of the Railway Booking Agents or any of their employees or any tempo driver who allegedly transported goods from the factory premises to the Railway Station, has anywhere admitted to have received any payments for the services rendered by them from the Appellants or any employee of the Appellant.

26.8 The Respondent Commissioner has ignored the legal position that once the oral statement of any person is admitted in evidence then, following the mandatory procedure, stipulated under Rule 9D of the Central Excise Act, all such persons, on whose oral statements, reliance is placed, are necessarily subjected to cross examination to assess the truth and veracity of their statements. Furthermore, the Respondent Commissioner has failed to consider the settled legal position that **if an oral statement is**

<u>**controverted and retracted**</u> **while deposing during the course of cross examination before the Respondent Commissioner, then the oral statement originally made cannot be made sole or even primary basis to establish any alleged fact, unless it is substantiated with independent, corroborative, affirmative and tangible evidence.**

26.9 The Appellants would like to further emphasise that while recording his observations in Para 89(6) of the OIO, the Respondent Commissioner has merely attempted to establish and uphold the entire case made out by the department by solely and exclusively relying upon the various oral statements, as originally relied upon in the SCN, thereby wholly brushing aside the contentions put forth by the Appellants. Keeping in view the legal imperative in terms of the mandatory provisions stipulated under Section 9D of Central Excise Act, 1944, the depositions made during their respective cross examination by the persons on whose statement reliance was sought to be placed by the department, needed to be necessarily given due consideration and weightage, and not out-rightly dismissed as has been done by the Respondent Commissioner.

26.9 In support of the above contention, the Appellants placed reliance on the following judgements:-

(i) Sainul Abideen Neelam Vs. Commissioner of Customs (import), Chennai reported in 2014 (300) ELT 342 (HC – Madras).

(The Hon'ble High Court have distinguished the judgement in the case of Surjeet Singh Chabra Vs. UOI [1997 (89) ELT 646 SC], relied by the Respondent Commissioner)

(ii) Commissioner of Central Excise, Meerut – Vs. Parmarth Iron Pvt. Ltd. reported in 2010 (260) ELT 514 (All.)

27. It is further urged that the appellant has sold the goods ex-factory gate at ex-factory price.

On the issue regarding Inadmissibility and irrelevance of transport documents such as RRs/ FNs in view of all sales being ex-factory gate exclusively at ex-factory price.

27.1 The Respondent Commissioner has failed to give due consideration and has recorded no specific finding on the Appellants contention, that that it is an incontrovertible fact that the Appellants have **always sold their finished goods *ex-factory* gate at *ex-factory* price**. There does not arise therefore any question of the Appellants having made any arrangements for transportation of goods from the factory premises to the railway station and thereafter for booking of the consignments for onward-transmission to various destinations through Railways. Once the goods are sold at the factory gate, it is the buyers who have always made their own arrangements for lifting the consignments at the factory gate and onward movement to their respective business premises located either within the same city of Kanpur or elsewhere.

27.2 There exists absolutely no documentary, or otherwise reliable oral evidence to prove that the Appellants had at any point of time undertaken any steps to arrange movement of the so-called clandestinely removed SIR Brand Gutkha/ Pan Masala from the factory premises of the Appellants to the business premises of the buyers or to the Railway station, for booking the consignments to the buyers' destinations.

27.3 It can be easily verified from the books of account/ sale ledger/ sale invoices of the Appellants that all the sales of finished goods to the various buyers, irrespective of the fact whether said buyers were located within the city of Kanpur or at different places in UP or outside UP, were always made at the factory gate**.** The Appellants never incurred or claimed to have ever incurred any expenditure towards freight for outward movement of the finished goods from the factory premises and hence there does not arise any question of the Appellants having arranged or undertaken transportation of any finished excisable goods sold by them at the factory gate. Also, there did not exist any evidence whatsoever to prove that the Appellants had arranged or undertaken transportation of any finished excisable goods through railways.

27.4 The Respondent Commissioner has not at all discussed or even touched upon the issue arising from the defence contention that all the sales of finished excisable goods were invariably at the factory gate at ex-factory price and therefore, there did not arise any question of any arrangements being made by the Appellants for transportation through Railways, [even though the Respondent Commissioner has touched upon the issue regarding the sales being at ex-factory gate in the context of transportation of finished goods by road transport companies].

27.5 No factual evidence whatsoever, whether direct or supported through corroborative evidence, had been relied upon in the SCN to establish link between relied upon RRs/Forwarding Notes and the Appellants or even otherwise to show any business dealings by the Appellants, or any of their employees with Railways. **The investigating officers, had clearly overlooked or disregarded the facts evidently manifest during the investigations and acknowledged by them in the SCN, that the Appellants have been selling their goods with the place of delivery being invariably the 'factory gate'**, irrespective of the fact whether such sales are made against payment in cash or in cheque.

27.6 Since the title as to the ownership to the goods passes on to the buyers at the factory gate itself, the Appellants had therefore absolutely no concern with the arrangements made by the buyers for transportation of the sold goods from the factory gate, to their premises, whether located within the same city or outside in any other city/state. The investigating officers had further overlooked and disregarded the fact that **the Appellants had absolutely no concern with the payments said to have admittedly been received by Shri Binda Tiwari, Railway Booking Agent**, from one Shri Alok Krishna Gupta or the payments admitted to have been received by Shri Dilip Kumar Gupta or Jitendra Kumar Rathore through Shri Binda Tiwari, at the behest of Shri Alok Krishna Gupta. Shri Alok Krishna Gupta is no doubt a wholesale dealer who is having an independent Company by the name of M/s Bee Gee Project (India) Pvt. Ltd., to whom the Appellants have sold their goods as one of their dealers. However, all the goods sold by the Appellants to Shri Alok Krishna Gupta or

M/s Bee Gee Projects (India) Pvt. Ltd., and others had always and invariably been sold under properly issued bills/invoices and are duly accounted for in the books of accounts of the Appellants.

27.7 The Appellants had therefore absolutely no concern as to how the goods i.e. 'Sir' Brand Gutkha/ Pan Masala were further sold by M/s Bee Gee Projects (India) Pvt. Ltd., and others, and how such sold goods were transported onwards to purchasing dealers (of Bee Gee), once the title to the ownership of the goods sold at the factory gate stood transferred in favour of M/s Bee Gee Projects India Pvt. Ltd. or any other such wholesale dealer, who bought at the factory gate. The Revenue have adduced no evidence, or instance where any unaccounted goods may have been sold without bills and without payment of duty to M/s Bee Gee Products India Pvt. Ltd. or any such wholesale dealer purchasing any such goods from the Appellants at the factory gate. In view of such facts and circumstances, it was amply evident that the Appellants had absolutely no concern whatsoever with the seizure of the Bags said to be containing Sir Brand Gutkha, found lying unclaimed on 09.05.2008 at Kanpur, Lucknow and Jodhpur Railway Stations.

27.8 The whole thrust and focus of the Respondent Commissioner while recording his observations and findings on the allegation concerning transportation of clandestinely removed goods through Railways **is almost entirely and exclusively on oral testimonies** of large number of persons, which included mainly the railway booking agents. The Learned Respondent

Commissioner failed to appreciate the numerous defence contentions put forth by the Appellants to demonstrate and establish that the entire foundational basis of the alleged modus-operandi of evasion is totally base-less and the whole case has been built up on totally fictitious and bogus exercise to link up 2993 RRs with the Appellants, on the basis of tutored statements involuntarily obtained from the Railway Booking Agents, their employees, tempo drivers and certain other persons.

28. In spite of such categorical denial by the appellant and their responsible staff, the Revenue have not even got the documents verified from the handwriting experts and/or 'Government examiner of Questioned Documents'. Further, it is urged that show cause notice does not disclose or explain clearly the methodology adopted for identification and segregation for RRs alleged to be related to the appellant/manufacturers. No criteria has been mentioned as to how the Railways identified and segregated the alleged 2995 RRs as relatable to the appellant /manufacturers. Ld. Commissioner has erred in observing that it is immaterial to discuss and ponder over as to how and who carried out the segregation part of RRs and Forwarding Note and on the basis of which criteria.

29. The appellant further urges that the criteria adopted by investigation for segregation of railway receipts, allegedly relating to the appellant is flaunt, without any logical reasoning and highly speculative. At the same time, it is based on the assumptions and presumptions only supported by the statement of some of the persons, who all have retracted their statements in the cross

examinations. Such persons have categorically stated that the statement given earlier at the time of investigation was under coercion and undue influence and such statements are not reliable. It is urged that the respondent-Commissioner appreciating the defects in the investigation and lack of proper identification norms have been pleased to discard almost 51% or more of the 'railway receipts' but have erred in upholding the demand with respect to the 1005 railway receipts. Thus, the ld. Commissioner has erred in upholding the duty of Rs.13,69,17,210/- from the three manufacturers. The entire allegation of the Department is made out only on the basis of third party documents viz. RRs/Forwarding Notes, procured in a dubious manner from the Railway Authorities. Such RRs and FN's are said to have been provided by the Chief Parcel Officer (record), NC Railways, Kanpur vide letter No.D/Record/CNB/Parcel/NC/Rly/2008 dated 12.09.2008. These are all Xerox and photocopies, which are unsigned and or un-authenticated by the Railway Authorities. <u>Such unsigned and un-authenticated Xerox copies are at the most secondary evidences</u>, which are not at all admissible. Further, admittedly, the aforementioned forwarding letter of the Chief Parcel Officer dated 12.09.2008 has not been made RUD, and nor a copy of the said letter has been made available to the appellants. This letter has been repeatedly mentioned in several paragraphs of the show cause notice. Despite the request made by the appellant for supplying the copy of the same, no such copy was provided. Thus, in absence of legally authenticated copies of the Railway receipts and forwarding notes, the alleged demand in dispute is fit to be set aside. Further, no correspondence(s) entered by the Investigating Officer with the Railway Officers have been brought on record as relied upon documents (RUD). There is no such requisition letter brought on record issued by the Revenue Authority for supply of any documents and/or criteria for identifying and supplying the copies of such RRs and Forwarding Notes, from amongst thousands and lakhs of such documents lying with the Railways. Thus, the allegation of Revenue is based on some hypothetical model for evasion of duty and thereafter, with pre-meditated attitude, some documents have been procured from the Railways and with the help of the statements of some of the persons obtained under undue influence and coercion, the allegation has been levelled against the appellant of clandestine removal.

30. The appellant have urged before the ld. Commissioner, in the course of search on 1.12.2007, no incriminatory documentary evidence was found indicating any clandestine activity. Even in the subsequent search, after four months on 9.5.2008, no incriminatory documentary evidence has been recovered from the appellant. However, the seizure of allegedly unaccounted goods at the factory premises and the seizure of few unclaimed consignments (at Railway station) in which Sir Brand Gutka was found at the Railway Station viz. Kanpur, Jodhpur and Jaipur, have given rise to suspicion by the investigation. It is admitted case that the appellant have been selling their goods ex factory. It is the buyer of the goods, who after taking delivery ex factory, arranged for transportation on their own. The allegation on the appellant is on the basis of the statements of Railway Booking

Agents and their helpers, who have allegedly identified some of the RRs/FNs to be in their handwriting. But admittedly, there is neither the name of the appellant as consignor or consignee, nor there is mention of any of the finished products manufactured by the appellants in such RRs and FNs. That not a single consignment has been intercepted by the investigation allegedly removed from the factory premises without payment of duty. Admittedly, Kanpur is the city, where there are hundreds of manufacturers of gutka and Pan Masala. Several of them despatch their finished products through Railways. Thus, prima facie, Revenue erred in drawing a general view that these appellants are also involved in removing their finished goods in a clandestine manner through the Railways. Further, according to the investigation, the Four Point-Criteria/formula has been suggested by the Railway Booking Agents viz. Dilip Kumar Gupta/ Jitendra Rathore, who in the course of their statements have suggested that these can be identified on the basis of the i) description, ii) weight per bag, iii) destination and the iv) handwriting of the Assistants of the Railway Booking Agents, who fill in the forwarding notes.

31. Thus, it appears that investigation has blindly relied on the statements of the booking agent, Dilip Kumar Gupta and Jitendra Rathore. Admittedly, such booking agents have never themselves prepared any forwarding notes but have allegedly got the FN prepared by their assistants working under them. Such identification is full of ambiguity and not reliable in support of the allegation of clandestine removal. Admittedly, the assistants of the Railway Booking Agent keep changing and thus, the alleged

identification of several RRs with the help of such booking agents is a wild guess, having no legs to stand, 'Save and Except' the incriminating statements of such persons, recorded by the Revenue under undue influence. Thus, show cause notice on this score is presumptive and the demand is not sustainable. As per the allegation in the show cause notice, for the first time, it was D.K. Gupta alias Pappu Mitha, Railway Booking Agent, who suggested criteria (Four Point) on 24.09.2008 to the investigation officers being –

(i) Handwriting of the Assistants on the Forwarding Notes,

(ii) Destination,

(iii) Weight per bag; and

(iv) description of goods, as shown by them on the Forwarding Note.

The said D.K. Gupta also suggested the name(s) of the destination(s) to which Sir Brand Gutka is dispatched, the average weight per bag of each variety of gutka/pan masala and the description of the goods mentioned on the Forwarding Note from time to time. Shri D.K. Gupta also stated that he could recognize the handwriting of the Assistants on the forwarding notes. Similar statement was also given by another agent- Shri J.K. Rathore, who was working under one Shri Binda Tiwari, who had also engaged Shri D.K. Gupta.

32. It is further urged that it is evident from para 11.18 of the show cause notice, that even while the investigating officers were in the process of making inquiries from Shri J.K. Rathore and Shri Binda on 6.10.2008, so as to form a conclusive view on the

correctness etc. of the four-point criteria, to identify the RRs, the officers already had such data and had already taken a conclusive view and prepared a chart, listing out the identified and segregated RRs, much prior to the recording of the statement of D.K. Gupta on 24.09.2008. Thus, evidently the investigation is motivated and based on conjectures and surmises, as on one hand the four-point criteria was disclosed by D.K. Gupta on 24.09.2008, on which date itself or prior, the investigating officers already had a list of 2999 RRs. Thus, evidently the investigation has been done in a pre-meditated manner. Such data compiled by Revenue have been simply got affirmed from the said D.K. Gupta and others under undue influence and coercion, and the same is fit to be discarded. This fact is also evident as it is mentioned in the show cause notice - that the Railway Authorities provided the Xerox copy of 2999 RRs as early as on 12.09.2008 (much before the recording of the statement of Shri D.K. Gupta on 24.09.2008).

33. Opposing the appellant - assessees, the Ld. D.R. states- its alleged in the SCN, seizure of 'Sir Brand Goods' effected at Kanpur, Lucknow and Jodhpur Railway Stations, also corroborates the aforementioned oral evidences.

33.1 As regards this issue, the ld. Departmental Representative for Revenue states that the search was conducted at Lucknow, Kanpur and Jodhpur Railway Stations, which resulted in seizure of consignments of 'Sir Brand Gutka' and further inquiries were conducted from various persons, which have revealed that the appellants/manufacturers were clearing and transporting clandestinely the goods manufactured in their factory.

33.2 Further, refers to the findings recorded by the ld. Commissioner that the freight for the transportation was paid by the appellants/manufacturers through one Shri Alok Krishan Gupta. Shri Alok Krishan Gupta was acting as a Clearing Agent and /or as a Distributor of the goods. Further, this person was also collecting the sale proceeds of the clandestinely cleared goods. Shri Alok Krishan Gupta was also a supplier of raw materials to the appellants/manufacturers, mainly of supari. After adjusting the amount towards transportation expenses and supply of supari, he was remitting the balance to these manufacturers. These facts have been corroborated in the statement of Shri Alok Krishan Gupta, recorded during investigation. The average weight of one jute bag of 'Sir Brand Gutka' or 'Sir Mini Black' is approximately 45-46 kg. that of Mini Sir Mawa or Sir Current Gutka, is 42 kg and 45-46 kgs respectively, as have been stated by Shri Jayan Kumar (employee) and also corroborated by Shri Dilip Kumar Gupta, Booking Agent. It is further urged by the ld. Departmental Representative that the goods were despatched under code words through Railways, such as 'Zarda', 'advertisement material', etc., instead of the actual description of the goods. The manufacturers had contacted one Shri Radhe Radhe @ Binda Tiwari for despatch through Railways, who further arranged the transportation with the help of Bada Bablu @ Jitendra Rathore and Pappu Mitha alias Dilip Kumar Gupta, facilitated the transportation to various destinations like Howrah, Jodhpur, Jaipur, Pune, etc. So far description of the goods and consignor/consignee are concerned, these were mentioned by the assistant/helpers as per codes, by mutual understanding. Such practice of clandestine removal was carried for over more than 2 accounting periods in view of the evidences, which have been found in the course of search and investigation from third parties. The fact of clandestine removal has also been admitted by Shri Rajesh Agarwal, Manager and the common Authorised Signatory for all the three manufacturers, who have been associated with the group for the last several years, prior to the date of search. Mr. Rajesh looked after the quality control of raw materials, work related to the tax compliance, general labour issue and other day-to-day administration matters. Further, Mr. Rajesh was directly reporting to Mr Shri Prakash Agarwal, who was the Director in RIL and also the main beneficiary. Further, Shri Rajesh has stated that Shri Alok Krishan Gupta was the sole selling dealer of 'Sir Brand Gutka/Pan Masala' for the entire State of Uttar Pradesh. It was Shri Alok Krishan Gupta, who arranged for transportation through rail and road and looked after the collection of sale proceeds.

33.3 Further, urges that Shri Alok Krishan Gupta, who is the Director in Bee Gee Pvt. Ltd., Kanpur, in his statements dated 30.06.2008 and 17.10.2008 has*, inter alia,* admitted that he was handling the distribution of the finished products of 'Sir Brand' and also supplying Supari to the appellant/manufacturers. He also admitted that he was making arrangements for transportation and the goods were being despatched by the appellants' factories, both with bills and without bills. He further stated that Shri Prakash Agarwal was in full control of all the three manufacturing units in the name of RIL/M/s.Seema/M/s.Shankar. He also handled all the cash collected for the sales made to various buyers and thereafter, handed over the same to Shri Prakash Agarwal, after adjusting his expenses and commission. He also admitted to have supplied supari to the factories of the appellants, both with and without bills. He was also despatching Gutka/Pan Masala received without bills from the factories of the appellant to various persons at different locations. Thus, the facts revealed by Shri Rajesh Agarwal, the Authorised Signatory and Shri Alok KrishanGutpa, the Distributor, are corroborated with the statement of Shri Binda Prasad Tiwari alias Radhe Radhe, Shri Dilip Kumar Gupta alias Pappu Mitha and Jitendra Kumar Rathore alias Bada Bablu.

33.4 It is further urged that Shri Binda Prasad Tiwari alias Radhe Radhe in his statement recorded on 21.08.2008 and 06.10.2008 has, *inter alia,* stated and admitted that he was earlier getting Rs.35/- per bag for booking through Railways, which was increased to Rs.45/- per bag. He was getting this amount from Shri Alok Krishna Gupta to meet out the expenses of booking, his helpers and coolie, etc. He further stated that Shri Jayan Kumar and Shri Surya Kumar used to accompany the goods coming from the factory to the Railway Station through tempo and these were delivered to Mr. Pappu Mitha and his staff. He was to settle his accounts for his services through Shri Alok Krishan Gupta. He was also in touch with Shri Rajesh Agarwal. Further, stated that the goods coming to the Railway Station for booking was never accompanied by invoice or bill. The Railways never asked for such documents while booking the goods. The helpers/assistants of Mr. Pappu Mitha used to mention the description of the goods, consignor/consignee as per their own will. Irrespective of the name of the factory from where the goods were coming, he was getting directions for booking from Shri Alok Krishan Gupta and sometimes from Shri Rajesh Agarwal. Further, on being shown copy of some of the RRs, which were forwarded by the Railway Parcel Office to the Revenue, he accepted that the transportation was done for 'Sir Brand Gutka' manufactured by the three appellants.

33.5 It is further urged that Shri Dilip Kumar Gupta alias Pappu Mitha in his statement recorded on 4 different dates has stated that he was working as helper at Kanpur Railway Station involved in booking of goods belonging to the various parties for various destinations. He also stated that Shri Binda Tiwari was getting Rs.45/-per bag for the expenses etc. and he was making payment to the persons accompanying the goods in the trains to various destinations viz. @Rs.1,000/- for Howrah, Rs.1,200/- for Jodhpur, Rs.1,900/- for Pune and Rs.2,900/- for Hubly. The expenses for unloading and freight used to be extra. He was getting the instructions from Shri Binda Tiwari and accordingly, he was doing the work. Further, Shri Dilip Kumar Gupta recognized the handwriting of his assistants or associates on the forwarding notes viz. Taukir, Paras Pandit, Vikas, Rakesh, etc. He also agreed with the statement of Shri Bindra Tiwari. He maintained the record of the booking(s) made for 'Sir Brand' products in the name of M/s. Vinod & Co., which is a firm of brother of Shri Alok Krishan Gupta. The name of consignor/consignee and address mentioned in the forwarding notes are fictitious and non-existent. Earlier, they were using code names for goods like Zarda, Sweet Supari, Mouth freshner, etc. till May, 2007 and thereafter, used names like

Supari, Supari Chura, Supari Mix. Supari Burada, Mehandi Powder, etc. He also agreed with the statement recorded by Revenue of Shri Taukir, Shri Rakesh, Shri Jitendra, Shri Vikas and Shri Paras and further, agreed with the charts of RRs prepared by Revenue as relating to the goods purportedly cleared by the three manufacturers and dispatched through rail. He further stated that out of 2994 forwarding notes, Shri Taukir, Shri Rakesh, Shri Jitendra, Shri Vikas and Shri Paras have prepared 1049 forwarding notes. Whereas the rest have been prepared by other boys, who have left the job. He, however can recognize their handwriting.

33.6 Ld. Departmental Representative further urges that Shri Jitendra Kumar Rathore alias Bada Babloo in his statement recorded on 9.5.2008, 6.10.2008 and 4.4.2009, *inter alia,* stated that his main work was to get the bags of the finished products unloaded at the Railway Station and then take the same inside and thereafter the preparation of the documentation, for which there is a team of 5-6 persons/boys, who prepared the forwarding notes. Whereas he himself kept the account of the dispatch to various destinations on daily basis, delivered the goods and the forwarding notes to the Railway Office, where the packages are counted and weighed and thereafter, the RRs are prepared. Thereafter ink markings are affixed of the RRs Nos. on the packages. Thereafter, they paid/deposited the freight amount and also got the goods loaded on the respective trains. Usually, the 'Sir Brand' goods are sent to Howrah, Jodhpur, Jaipur, Pune, Vardhman and Hubly. Usually the consignor/consignee names are fictitious and the description is mentioned as supari and supari mix, etc. All the work is handled by Shri Radhey Radhey, on the directions of Shri Alok Krishan Gupta and Shri D.K. Gupta. However, they do not have any record as to quantity etc. dispatched but the same may be ascertained on the basis of the destination stations and handwriting on the forwarding notes, weight per bag, code used for description of the goods. On seeing the forwarding notes, allegedly received from the Railway Parcel Office by Revenue, he recognized the handwriting of the persons working with him and identified with respect to the description of goods, weight per bag, destination stations, etc.

33.7 It is further urged that aforementioned evidences have been corroborated by the statement(s) of the buying dealers viz. Shri Ashok Kumar Jain, Partner of Bajaj & Sons at Kolkata, who has stated that he used to contact for purchase of gutka with Shri A.K. Gupta and sometimes with Shri Rajesh Agarwal telephonically. He was making cash payment for goods received without bills and vide demand draft or banking channels for the goods received with invoice. The goods booked for them from Kanpur, etc. are never in their names but in the name of some third person and the description on the RRs is mentioned as Zarda, Supari Chura, etc. On being shown the chart of RRs prepared by Revenue for the period Jan. 2007 to 8.5.2008, they stated that they do not have any record of the quantum of 'Sir Brand' goods received. Similar admission has been made by Shri Anil Singhal, Proprietor, Singhal Agency, Jaipur, Shri Jitendra Majethia, Director of Jala Ram Pure Products Pvt. Ltd., Hubly. Shri Nadim Khan alias Bilal of Pune Zarda Store, Pune.

33.8 Further, seizure of 'Sir Brand' goods effected at Kanpur/Lucknow and Jodhpur Railway Station also corroborates the aforementioned oral evidences. The name of the manufacturer on the seized goods was found to be M/s Shankar Enterprises, Kanpur. It was further found that the goods were dispatched with fictitious names of consignor and consignee and the description of the goods was mentioned as Supari and Supari Mix, etc. It is further urged that on the suggested criteria in consultation with the booking agents communicated by Revenue to the Railways, the Railways identified and segregated a total of 2999 nos. of RRs along with forwarding notes, which were provided to the Revenue by the Chief Parcel Officer (Record), North Central Railways, Kanpur vide letter dated 12.09.2008. Such Xerox copy of RRs with the forwarding notes was thereafter shown to the concerned booking agents and assistants viz. Shri J.K. Rathore, Paras, Vikas Kanojia, Rakesh Gupta, Taukir Khan. These persons identified their handwritings on the forwarding notes, which were prepared by them for booking of the goods and accordingly, the charts were prepared compiling the data. Based on such parameters, the quantum of clandestine clearance, cleared or transported through Railways was calculated.

33.9 Ld. Commissioner further observed that the allegation of Revenue is not based on the statements alone but is corroborated by the evidences in the form of seizure of the goods at the 3 Railway Stations, being the goods of 'Sir Brand', which were not accompanied by any bills/invoice or duty paying documents.

33.10 As regards the objection of the appellants/ manufacturers that handwriting of the person cannot be affirmed and certified with certainty, merely on the basis of the visual examination of Xerox copy or photocopy, unless the document is sent for Forensic testing and scientific verification. Ld. Commissioner observed that the concerned persons /booking agents and his associates have confessed the *modus operandi* in their statements and have even explained the contents of sample forwarding notes prepared by them. Such booking agents have recognized their handwritings and accepted the correctness of the chart of clandestinely cleared goods prepared on the basis of such forwarding notes and RRs. Further, criteria for identification of the RRs was also suggested by the booking agents, who were involved. Further, evidently, RRs were prepared by the Railways on the basis of the forwarding notes presented to them along with the goods. Ld. Commissioner further observed that Shri Jitendra Kumar Rathore in his statement dated 4.5.2009 has admitted that he was shown the copies of the RRs and their corresponding forwarding notes, which he identified and agreed to the list of 512 RRs prepared on the basis of forwarding notes written by him. Further, preparation of forwarding notes by Shri Jitendra Kumar Rathore has been corroborated by the statement of Shri Dilip Kumar Gupta.

33.11 As regards the objection of the appellants/ manufacturers that the booking agents/persons dispatched various goods to various places including Howrah, Pune, Jodhpur, Kanpur, Jaipur, etc. from Kanpur Railway Station and, therefore, it is absurd to presume that wherever the description of the goods on the RRs is Zarda, Zarda-Gutka, Sweet Supari, Mouth freshner till May, 2007 and thereafter, supari, supari chura, supari mix, pan masala, mehandi powder, advertisement materials, etc. destined for the aforementioned stations are necessarily 'Sir Brand' Gutka/Pan Masala, allegedly removed clandestinely. Further, the appellant/manufacturers are not the sole manufacturer of Pan Masala and Gutka in Kanpur and there are hundreds and thousands of manufacturers of such similar goods. To this, ld. Commissioner has observed in the impugned order that the allegation is based on the statements and identification of the forwarding notes by the booking agent and their helpers, who have claimed to have been dispatching the goods of 'Sir Brand Gutka.

33.12 Ld. Commissioner relied on the ruling in the case of **U.G. Sugar and Industries Ltd. Vs. CCE – 2011 (266) ELT 339 (Tribunal),** wherein it is held that once the defence is raised by the appellant, it was essential for the appellants to lead necessary evidences in that regard. Mere raising of plea in answer to the show cause notice, does not by itself establish the correctness of such plea.

33.13 As regards the plea taken by the appellant/ manufacturers, admittedly, the documents being relied upon by the Revenue are Xerox copy of the third party document, which have not been found or recovered from the possession of the appellant. Such documents have been collected by Revenue from third parties and thus, presumption as to the admissibility of such documents as envisaged under Section 36 A of the Central Excise Act is not available. Hence, it is for the Revenue to establish its case based on the third party documents, which are normally not admissible, nor a presumption available in law against the appellant. Ld. Commissioner observed that the third parties' documents are corroborated in view of the statements of various persons as aforementioned. He further observed that these statements are not contradictory to each other and rather corroborative to each other. It is also observed that the fictitious description of the goods as well as the code description were also found on the consignment/goods seized by Revenue at Kanpur, Lucknow and Jodhpur Railway Stations and thus, the allegations stand corroborated.

33.14 Ld. Commissioner out of the list of 2993 RRs annexed to the show cause notice held that as many as 1988 (nearly 2/3rd of such RRs) could not be held to be fulfilling the 4 Point Criteria. It was observed that handwriting appearing on as many as 1945 forwarding notes has not at all been verified on the criteria of similarity of handwriting etc. Since there is no verification nor confirmation of handwriting by the persons, who actually prepared the said 1945 forwarding notes, it was held that assertion of the Railway Agent-Shri Dilip Kumar Gupta that he could recognize the handwriting of all such persons, who had left the job, was held to be not reliable. He further observed that the helpers of the Booking Agents viz. Jitendra Kumar Rathore, Paras Tiwari, Taukir Khan, Rakesh Singh and Vikas Kanojia in their statements have admitted to have prepared, after seeing the exact number of forwarding notes, totaling to 1049, out of the total 2993 RRs plus forwarding notes. It was further observed that the persons, who have allegedly prepared the balance 1944 forwarding notes were not examined at any stage. It was further observed that there is nothing on record to indicate the basis of identification of such associates of the Booking Agents. It was accordingly observed by the ld. Commissioner that Revenue has not been able to establish the credibility of 1944 forwarding notes and the corresponding RRs. Ld. Commissioner also observed that the 4 Point Criteria was communicated to the Railway Officer by the Revenue to enable to identify and segregate the relevant RRs and accordingly, the Chief Parcel Officer has identified and supplied 2993 nos. of RRs with Forwarding Notes, vide his forwarding letter dated 12.09.2008. Ld. Commissioner also observed that it appears logical that samples of handwriting were obtained by the Investigating Officers and provided to the Railway Authority for comparing and segregating the relevant RRs for alleged clandestine removal of 'Sir Brand' of Pan Masala/Gutka. Accordingly, ld. Commissioner upheld the demand of duty with respect to the part of RRs considered to be reliable at Rs.13,69,17,210/- (liable to be recovered from RIL Rs.11,63,81,312/-, M/s. Seema Rs.1,63,90,828/- and M/s. Shankar Rs.41,45,070/-).

34. **<u>Transportation through Bihar Carrying Co. Pvt. Ltd.,</u>**

The allegation of Revenue is that during the period April, 2006 to December, 2007, 'Sir Brand Gutka/Pan Masala' were being cleared clandestinely without payment of duty and then booked for transportation, among others, through Bihar Carrying Co. Pvt. Ltd. ("BCC" in short) to various destinations particularly

Ranchi and Tata Nagar. Instead of preparing the normal GRs Note, the goods were dispatched on JST slips by mentioning description of goods in code like H.L. Cloth, Mouth Freshner, Supari, Meetha Masala, under fictitious names of consignor and consignee. Since December, 2007, the practice of use of JST slips were discontinued. Thereafter, in the subsequent period from Feb., 2008 to April, 2008, it is alleged that the goods have been transported through M/s. BCC by describing the goods in the Goods Manifest as 'Kachri Papad'. Total demand proposed for the period April, 2006 to April, 2008 was Rs.12,72,32,657/-.

34.1 Ld. Commissioner relied upon the statement of the staff of the transporter, wherein they have stated that they were transporting the "Sir Brand Gutka/pan masala" under JST slips as well as for some other brands. Some of the dealers mentioned in the JST slips, which were also found in loading registers, which contained the details of all the consignments booked and transported by them. It appeared to Revenue that both JST slips as well as loading registers contained date-wise quantities having specific description – code and destination, found in the premises of BCC- Transporter, on the basis of which, identification and segregation was carried out. The ld. Commissioner has observed that the fact of clandestine clearance and transportation by road has also been admitted by Shri Rajesh Agarwal, Authorised Signatory of the three appellants/manufacturers, who has, *inter alia,* stated that Mr. Sri Prakash Agarwal and Shri Alok Krishan Gupta used to give orders with regard to the quantity of goods for dispatch to a specific party with/without invoice on day-to-day basis. He also stated that Mr. Alok Krishan Gupta used to arrange for the transportation of clandestinely removed goods by road/rail to various buyers. Such statements of Rajesh Agarwal have also been corroborated by the statement of Shri Alok Krishan Gupta. Shri Rajesh Agarwal has also stated that freight for such transportation was paid either by Shri Alok Krishan Gupta or Mr. Shri Prakash Agarwal. Shri Rajesh Agarwal also agreed with the statement of Shri Uma Shankar Awasthi, Depot Manager of BCC at Kanpur. On being shown, the JST slip numbering 1308 resumed from the premises of the BCC office at Tatanagar, Shri Rajesh Agarwal accepted that they have cleared and transported 36 bags of 'Sir Brand Gutka/Pan Masala' and 14 bags of advertisement materials. He also accepted that 'Sir Brand' goods seized on 9.5.2008 from the premises of BCC, Kanpur and at the Railway Station- Kanpur/Lucknow/Jodhpur have been cleared by them clandestinely. On being shown the chart prepared by the Revenue as per statement and identification by the staff of BCC for alleged clearance of Sir Brand Goods during the period 2006-07 and 2007-08, Shri Rajesh Agarwal agreed to the same as well as with the quantification of 21879 bags of Sir Brand Gutka/Pan Masala through BCC. Further, reliance was placed on the statement of Shri Alok Krishna Gupta, Director of BEE GEE Projects, who admitted in his statement that he was making the arrangements for the transportation of clandestinely cleared 'Sir Brand Gutka/Pan Masala', and he was also making the payment for freight and expenses in cash. He was also handling the payment for unaccounted purchase of supari, tobacco, katha and packing materials by the appellants /manufacturers. He used to get instructions either from Shri Rajesh Agarwal or Mr. Shri Prakash Agarwal. He also agreed to the quantification as per the charts prepared by the Revenue on the documentary as well as oral information from the premises of BCC. The statements of Shri Uma Shankar Awasthi, Manager, BCC, Kanpur was also corroborated by Shri R.P. Singh-Booking Clerk, BCC at Kanpur. Further, Revenue made follow-up investigation wih Mr. Naseem Ahmed, Partner of Bihar Trader , Ranchi, who also in his statement admitted that he was in constant touch with Shri Rajesh Agarwal, the Authorised Signatory/Manager of Sir Brand Products and, also admitted to be receiving clandestinely removed goods of 'Sir Brand Gutka/Pan Masala'. He also stated that they were also receiving part of the goods along with invoices. He also stated that he used to visit Kanpur once or twice a month to hand over the cash to Shri Alok Krishan Gupta.

34.2 Further, Shri Narayan Sahu alias Babla, Proprietor of M/s. Gopi Nath Sahu, Tata Nagar was also examined, wherein he also stated that he was receiving 'Sir Brand' goods both with bills and without bills. He used to send purchase orders specifically to Shri Alok Krishan Gupta, who used to dispatch the goods to him through BCC. He used to visit Kanpur periodically to hand over the cash for the goods received without invoice. He also admitted that 36 bags of 'Sir Brand Gutka/Pan Masala' and 14 bags of advertisement materials were seized at the premises of BCC, Tata Nagar, which have arrived from Kanpur under JST Slip No.1308, as he was not having any licit document of such products, he did not claim the ownership of the goods. The ld. Commissioner observed that the allegation of clandestine removal and transportation of the goods by the appellant/manufacturers stands established from the records found in the premises of BCC, which has been corroborated by the statements of the aforementioned various persons. Ld. Commissioner further observed that the allegation of clandestine removal and transportation by BCC is also corroborated from the seizure of 'Sir Brand' goods at the premises of BCC, both at Tata Nagar and Kanpur respectively.

34.3 Ld. Commissioner further observed that it is admitted by the staff of the BCC that they were transporting clandestinely cleared goods Gutka/Pan Masala of 5 different brands/ manufacturers and were making entries pertaining to all of them in common set of transport records. Further, observed that the investigation has not laid-down any clear cut identification criteria or parameters for identification and segregation of quantities alleged to be clandestinely removed by the appellant /manufacturers, as have been done in the case of clandestine removal/transportation through Indian Railways. Under such facts and situation and after going through the relied upon documents, the ld. Commissioner has found that segregation and identification is possible only after taking into consideration the details mentioned in their records by the staff of BCC, Kanpur viz. Shri U.S. Awasthi and Shri R.P. Singh, and further considering the destination to which the goods of a particular brand were being transported. It was further observed that for the purpose of identification as to which consignment pertains to which of the 5 brands of Gutka and Pan Masala, the two main indicators appear to have been used (i) destination and, (ii) description code. Regarding destination based identification, Shri U.S. Awasthi and Shri R.P. Singh in their statements have mentioned and on perusal of the resumed records – JST slips, loading registers, goods manifest and private diary pads, wherein both these destinations (Ranchi and Tata Nagar) are apparent. It was further observed that although 'Sir Brand Gutka/Pan Masala' was being transported only to Ranchi and Tata Nagar, however, three more brands viz. 'Tiranga Gutka', 'Pan Parag Gutka' and 'Madhu Sweet Supari' were also being transported to the same two destinations i.e. Ranch and Tata Nagar. Therefore, in such a situation, segregation of 'Sir Brand Gutka/Pan Masala' solely on the basis of the destination alone is not possible.

34.4 The Adjudicating Authority further found that description code is erroneous inasmuch as the codes for goods are the sole pin pointing criteria for identification of different brands of Gutka/Pan Masala. The error in reproducing of description code mentioned in 50 available JST slips, against the corresponding entry in loading registers, puts a serious question mark on the reliability of identification with the help of the loading registers. It is alleged that specific codes are allotted to specific brand of Gutka/Pan Masala. In this case, it is evident that the description codes have been jumbled while mentioning in the resumed /relied upon records. Based on which, the demand has been raised. It has been further observed that the investigation has considered the goods transported under the description code of 'CP goods', 'C.P.', 'C. Cloth', Cotton Cloth, Cloth, Cotton, HDPE, SG, Tobacco or Footwear are those pertaining to 'Sir Brand Gutka/Pan Masala. Hundreds and thousands of entries with the same or similar description and destination codes have not been considered for inclusion in the Annexure, prepared for computation of demand. There is absolutely no factual or logical reason whatsoever to treat the consignment of goods having ambiguous description codes as being those pertaining to 'Sir Brand Gutka/Pan Masala'. Further, the description code deviced for different brand of Gutka/Pan Masala are not unique for a specific brand, and has been most casually and carelessly used. Ld. Commissioner thus, concluded that the records of the transporter –BCC are not reliable for the demand computation as such. Accordingly, the Adjudicating Authority re-computed the demand of duty for the alleged clandestinely cleared goods through BCC, relying on 'Goods Manifest' and upheld the demand for Rs.2,88,15,226/-(M/s.Seema Rs.2,76,13,340/- and M/s. Shankar Rs.12,01,886/-).

35. Assailing the confirmation of demand as regards the alleged clandestine clearance and transportation of goods through BCC, it is urged that the ld. Commissioner has taken inconsistent view and has passed a cryptic or self-contradictory order. On the one hand, he accepted the contention of the appellant and held that no credence can be given or reliance can be placed on the transporter's documents on account of numerous contradiction(s) or discrepancies. The ld. Commissioner has erred in upholding the demand pertaining to the period Feb., 2008 to April, 2008 based on the transporter's documents and 'goods manifest', which also

being third party document or transporter's documents, lacks credibility and /or reliability, as such data collected remains un-corroborated with any other independent evidence.

35.1 The appellant have also relied on the ruling/order under similar facts and circumstances in the case of **Trimurti Products, Kanpur- Order in Original No. 22/Commissioner/ 2011 dated 22.09.2011** (manufacturer of pan masala/ gutka), wherein under similar facts and circumstances, the 'loading registers, bill books and goods manifest registers' were held to be not reliable documents. Further, the ld. Commissioner has over-looked that the description of goods in the transporter's documents is 'kachri papad' (in the 'goods manifest') which does not constitute even a prima facie reliable evidence to conclude that 'Sir Brand Gutka/Pan Masala was being transported clandestinely by BCC. Apart from the goods manifest, no other records such as loading registers, lorry receipt/bill book have been relied upon to corroborate that the 'Sir Brand Gutka/Pan Masala was being transported in the guise of Kachri Papad.

35.2 The ld. Counsel for the appellant further urged that the alleged modus operandi of transporting the 'Sir Brand' goods under the guise of 'Kachri Papad' is based on conjectures and surmises and the demand is presumptive. There is admittedly no evidence that the appellants were packing their products with the outer package labelled as 'Kachri Papad'. In spite of two searches made in the premises of the appellant/manufacturers, Revenue has not found any evidence in support of their allegation. It is further urged that so called relied upon 'goods manifest' nowhere mentioned the name of any of the appellants/manufacturers as consignor/consignee. There is also no mention of the name of the alleged buyer of the goods, alleged to be 'Sir Brand Gutka/Pan Masala'. The investigation has with a pre-meditated mind, listed all such consignments having description of Kachri Papad, having destination Tata Nagar/Ranchi, have presumed to be clandestine removal of 'Sir Brand Gutka/Pan Masala, only on the basis of statements. Such statements not being voluntarily or freely given, but being tutored and/or given under duress, are not reliable. Such statements did not stand the test of cross-examination. Further, in absence of any corroboration with the records of the appellant, no demand can be fastened on these appellants, based on the third party records and/or statements. It is further urged that such transporters were transporting 'Kachri Papad' on behalf of numerous consignors/consignees. Further, BCC was also admittedly transporting Gutka/Pan Masala of various brands belonging to other manufacturers, including for the destination(s) – Ranchi and Tata Nagar. Thus, the whole demand is presumptive and fit to be set aside.

36. **TRANSPORTATION BY M/S NEW VIKAS GOODS CARRIER (**NVGC in short**)**

The demand proposed in the show cause notice was Rs.29.78 crores on the allegation that the appellant manufacturer(s) have clandestinely cleared and transported their finished products through NVGC to various cities of U.P., Bihar and Jharkhand. Search was carried out in the premises of NVGC situated at Transport Nagar, Kanpur and statement of some key persons was recorded. It appeared to investigation that Sh. Rajesh

Agarwal, Manager and common authorized signatory had agreed in his statement that they have transported their finished products and also transported through NVGC to various cities of Bihar. The expenses of transport were disbursed by Sh. Alok Krishna Gupta. Sh. Rajesh Agarwal also agreed with the discloser made by Sh. S. K. Mishra of NVGC, regarding transportation of Sir brand gutka and pan masala by them. Sh. Rajesh Agarwal had also shown his satisfaction to the quantum of clandestine clearance as detailed in the chart prepared by Revenue in consultation with the staff of NVGC.

36.1 Further, Sh. Alok Krishna Gupta, Director of M/s B. G. Products also agreed with the statement of Sh. Subhash Mishra of NVGC, as well as the quantum of clearance calculated on the basis of documents of the transporter.

36.2 Shri Subhash Mishra in the statement recorded under Section 14 on 16.05.2008, 04.10.2008 and 31.08.2009 inter alia stated that certain parties of Kanpur, who are dealers of Kachri Papad used to book 'kachri' and 'pisa bair' through their transport. But mostly the description 'kachri' and 'pisa bair' are used to transport pan masala/ gutka which do not have any supporting bill/ invoice with them. They usually used the description 'pisa bair' in the challan made for transportation of Sir brand gutka/pan masala. They do not use the word 'kachri' for the consignment of sir brand goods, but used it for other consignors. On receipt of the goods from the consignor/ manufacturer, they used to issue cover challan by mentioning the goods as pisa bair. They used to load 60 or 80 bags of sir brand gutka alongwith other goods of different consignors in one truck. For transportation of goods under the fictitious description of 'pisa bair', they have procured printed blank bill books, which they issued themselves and attached to the challan. After introduction of compounding levy, now the goods are received on proper bills and they mention the description of the goods in their challan/ builty as gutka / pan masala. It appeared to Revenue, as alleged in the show cause notice, that all entries in the records of the transporter mentioning transport of 'pisa bair' reflecting 60 or 80 bags, in the parallel lorry challan, pertained to 'Sir brand' gutka transported without bills by NVGC during the period February, 2005 to April, 2008.

36.3 Considering the explanations and clarifications given by the appellant/ manufacturers, ld. Commissioner have observed that proper and thorough investigation does not appear to have been done with regard to analysis of resumed records, cross verification of the different version made by different persons, in their statement, for arriving at a correct identification criteria, for segregation of various entries with the description 'pisa bair'. Ld. Commissioner further observed that the selection of entries for raising the demand has been done in an arbitrary and inconsistent manner, which is highly erroneous. He noticed that investigation has excluded hundreds of entries showing transportation of pisa bair with various quantities, gives rise to the possible definite indication that 'pisa bair' is a genuine item of trade only in event when it is transported in lot of 60 or 80 bags, all of them may not be goods with the same description, used for transporting some other product allegedly gutka/ pan masala. Such blatant exclusion and omission amply prove that the said resumed relied upon records by the name of lorry challans, totally lack in transparency and reliability as to the contents recorded therein. Thus, such documents can neither be relied upon as credible documents to prove the allegation to confirm the demand proposed. Learned Commissioner also observed that there is no corroboration with the records of the appellant - manufacturers. Accordingly, he was pleased to drop the proposed demand.

37. Assailing the dropping of demand, ld. Authorised Representative for Revenue urges that from over all perspective and the details mentioned in the show cause notice, it is evident that the appellants/ manufacturers were engaged in the unaccounted production and clandestine clearance with the connivance of other persons by adopting a unique modus-operandi/ device for transport of such clandestinely cleared sir brand gutka/ pan masala. The appellant / manufacturer have been allegedly booking their clandestinely cleared goods under description 'pisa bair' through NVGC, which is evident from the records of the transporter, but still the Adjudicating Authority found the exercise of identification and segregation done as arbitrary and not being precise to clearly distinguish the entries relatable to these manufacturers. It is further urged that the Adjudicating Authority found that there are mutually corroboratory statement of co-noticees, taken/recorded on different date and time. Evidently, the description – 'pisa bair' in the transporter's record should have been definitely considered as clandestine transportation of sir brand gutka/ pan masala.

38. **TRANSPORATION BY M/S TRIMURTI ROADLINES** (TRL in short)

It was alleged in the show cause notice that the appellant/ manufacturer have also clandestinely removed and transported such goods through TRL, Kanpur to various destinations in U.P., Bihar and Jharkhand through trucks. Pursuant to search in the premises of TRL, Kanpur and on the basis of resumed record and the statement recorded from some persons, demand of Rs.17,88,74,208/- was proposed in the show cause notice.

38.1 It appeared from the resumed records/ documents, being the third copy of GR/ bilty available in the GR books, did not reflect the name of consignor or consignee, description of goods, quantity, number of packages etc. What was reflected was only date, destination, vehicle number, freight and the name of Driver and owner of the vehicle.

38.2 After going through the evidences including the statement recorded and after considering the explanation and the reply of the appellant/ manufacturers, the learned Commissioner observed that the entire chain right from Sh. Rajesh Agarwal, the Authorised Signatory of the three manufacturers, Sh. Alok Krishna Gupta, Director of M/s B.G. Products, sole dealer for U.P., who is also the key person in managing the entire show from the procurement of raw material to sale/ distribution of finished goods, management of transportation and collection of cash as per the direction of Mr. Sri Prakash Agarwal, Sh. Sushil Kumar Gupta, the dispatch Clerk of M/s Seema and M/s Shankar, as well as the persons engaged in transporting the goods, all of them have categorically admitted the modus operandi adopted and have confessed their role in carrying out the same in movement of non-duty paid 'Sir brand' of gutka/ pan masala. The Adjudicating Authority has been pleased to confirm the proposed demand.

39. Opposing the demand learned Counsel for assessee – manufacturers states that the entire basis of the demand and the allegations made are factually and legally baseless. The Ld. Commissioner have failed to consider various contentions and cogent explanation given in opposition of the proposed demand.

40. The respondent Commissioner have failed to appreciate that the only documentary evidence relied upon in this case is third party record/ GR / bilty for the period April, 2005 to April, 2008. Further, the learned Commissioner erred in relying upon the statement of various persons who have all disputed their earlier statement at the time of the cross-examination, wherein it has been stated that their earlier statement during investigation was not voluntary and was given under duress, and they have signed on the dotted lines, under pressure. Further, inspite of search at the premises of the appellant/ manufacturers no incriminating documents or any original/ duplicate copy of any GR/ bilty have been found or recovered. Learned Counsel emphasized that the premises of the appellant/ manufacturer was searched twice by the Revenue officers.

40.1 The allegation in the show cause notice is that TRL used to send their trucks alongwith original & duplicate copy of GR/ bilty to the factory premises of the appellant. The trucks were loaded which the finished goods manufactured by the appellant. In view of categorical denial by the appellant/ manufacturers to have resorted to any clandestine clearance - transportation through TRL, the demand have been wrongly confirmed only on the basis of third party record, in which also there is no mention of the name of these appellant manufacturers either as consignor or consignee.

40.2 Learned Counsel further urges that the appellant have categorically stated that they have sold their goods at the factory gate at ex-factory price, which have not been found untrue. It was the buyer of the goods who arranged on their own the transportation. There does not exist any reliable evidence either documentary or oral to support the allegation of Revenue that the appellant had been arranging movement of their cleared finished goods from their factory premises to the premises of the buyers/ dealers. The entire case of Revenue is based on vague documents recovered from third party. Admittedly, TRL have transported goods for several other manufacturers. In absence of any identification, particularly for co-relating the transporter's records with the records of the appellant, the demand confirmed is presumptive and fit to be set aside. It is further urged that the statement was taken at the time of investigation from Md. Salim (person of TRL) and others under duress, in fear of arrest. It is further urged that the charge of clandestine removal cannot be sustained on the basis of documents/ record of the third party in absence of any corroboration with the records of the appellant. There is no iota of evidence that the goods mentioned in the GR/

bilty and the day booking register of the transporter, relate to the appellant manufacturers. Such third party records which are full of numerous lacuna and anomalies are unreliable evidence in absence of any corroborative evidence at the end of the appellant / manufacturers. The said record of the transporter relied upon by the Revenue, are neither proper records nor maintained in a systematic or reliable method. Thus, the said records of the transporter relate to transportation work done for various clients/ parties and are not attributable to the appellant/ manufacturers. The identification and segregation criteria are also vague and presumptive. Further, Revenue has failed to demonstrate that the statement of the person of TRL was given freely and voluntarily after understanding the consequences of the same. The said person of TRL have retracted the statement and also stated that his statement was recorded under duress. Admittedly, there is no mention of the goods manufactured by these appellants on the resumed records of the transporter. Thus, the demand confirmed by the Commissioner is on vague allegations and vague record of third party, is fit to be set aside. It is also pointed out that Md. Salim in his statement dated 14.10.2008 has categorically stated that he cannot identify GR/Bilties pertaining to the accounted and unaccounted goods. None of the tempo Driver examined, in their respective statement mentioned that they transported the goods of the appellant – manufacturers to godown of TRL.

40.2 Supporting the findings of the ld. Commissioner, the ld. AR for Revenue urges that the Adjudicating Authority after appreciating the entire evidence on record both documentary and the statements, have rightly concluded that TRL have transported 47660 bags. of Sir mini black pan masala, 1750 bags. of Sir mini pan masala, 190 bags of sir gold gutka to various cities like Varanasi, Allahabad, Bhadohi etc. during the period April, 2005 to April, 2008, which were not duty paid and clandestinely removed from the factory of RIL and Seema.

40.3 It is further urged that the Adjudicating Authority have observed that there is frequency of telephone calls between the key person(s) namely Sh. Rajesh Agarwal, the Manager-cum-Authorised Signatory, with Sh. Alok Gupta the sole distributor for entire U.P. on the landline numbers of all the three manufacturing units, with dealers, raw material and packaging material supplier and also Mr. Sri Prakash Agarwal.

41. <u>Regarding demand of Rs. 1,37,668/- against M/s. Seema and Rs. 28,090/- against M/s shankar on the quantity of inputs – laminates (packing material) found short during search.</u>

The aforementioned demand was proposed in the show cause notice on account of laminate (packing material) found short in physical verification at the time of search. It is alleged on presumption that the quantity found short has been used in clandestine manufacture of gutka/pan masala, and thereafter cleared without issue of invoices and without paying/reversing the amount equivalent to cenvat credit availed.

41.1 The ld. Counsel for the appellants urges that the learned Commissioner have erred in confirming this demand. He further urges that the show cause notice does not disclose as to how the so called shortage of said duty paid inputs was found or discovered. There is no narration as to how the stock verification was carried out and whether any punchnama was drawn in this respect. The SCN only mentions that the search resulted in detection of shortage of duty paid inputs, being used in the manufacture of finished goods.

41.2 As regards M/s Seema, in para-4.1 of the SCN it is stated that in the course of search on 1 December 2007, physical stock verification of finished goods and raw materials in the factory premises was conducted in presence of Shree S.S. Verma - the production supervisor. Finished goods collectively weighing 6106.48 KG was found and 314.65 KG laminates, valued at Rs. 40,905/- was found over and above the recorded balance in RG-I register and Form-IV for register respectively. Whereas in para-3.1 of the SCN it is alleged that there were shortage of 4, 500.5 KG of laminates and on the other hand in para-4.1 of the SCN it is alleged that 314.65 KG of laminates was found in excess.

41.3 As regards M/s Shanker, in the course of search on 9th May 2008, physical stock verification was done of finished goods and raw materials in presence of Mr. Sushil Gupta, Clerk of the factory. Various varieties of said finished goods as well as raw material were found over and above the recorded balance in the RG-I register and Form-IV register. The table in para-5.1 of the SCN states that laminates weighing 1,757.32 KG having market value Rs. 2,37,238/-, involving duty of Rs.34,210/- were found in excess. The alleged excess stock of laminates – packing material and zipper pouch valued at Rs. 2,37,238/- and Rs. 4,750/-

respectively, were seized under punchnama along with 605 KG of betel nuts on the reasonable belief that the same were unaccounted and stored with intention to indulge in clandestine manufacture and removal. Thus the allegation is self contradictory, as admittedly there is no shortage.

41.4 Therefore, it is urged that no demand of duty/reversal of cenvat credit can legally be made merrily on the basis of alleged detection of shortage in the stock of said dutiable inputs. That the demand is contrary to the facts on record, the same is fit to be set-aside. Further the allegation of having removed said dutiable inputs – laminates from the factory, without reversal of cenvat credit is wrong and not tenable.

42. **Regarding demand of duty Rs. 5,36,99,135/- on M/s Shanker raised in relation to alleged clandestine clearance on alleged receipt of packing material (outer pouches) received from Vinayak Ultraflex Pvt Ltd. Demand dropped by learned Commissioner.**

42.1 The show cause notice proposed the aforementioned demand against the appellant manufacturer – M/s Shanker, on the allegation that the appellant appears to have received clandestinely 24,30,540/- outer pouches-packing material, which was used presumably by the appellant in the manufacture of pan masala/gutka, presumably 15,79,100/- no. of Sir Brand Gutka Pouches (MRP Rs.1), which were clandestinely removed without payment of duty. It is alleged in the SCN that pursuant to investigation it appears that there has been clandestine clearance of 14,346.30 Kg of plain polyfilms by one M/s Vinay Wire & Ploy products Pvt Ltd and 64,4005.90 kg of holographic films, of Sir brand gutka, by M/s Aanand sales to M/s Vinayak Ultraflex Pvt. Ltd., (a manufacturer of laminate/ packing material). Revenue relied upon the statement S.K. Pallival Director of Vinayak Ultraflex, wherein he agreed to the facts stated by Shri Swetanshu Dwivedi Authorised Signatory of M/s Aanand Sales, and admitted that the material mentioned in the computer printouts was received by his unit for manufacturing laminate of Sir Brand Gutka. Mr. S.K. Pallival in the course of recording of statement has submitted a chart, marked as **Annexure -11** to show cause notice mentioning therein the month wise details of both accounted and unaccounted purchase of holographic film of Sir Brand from M/s. Aanand Sales and also stated the quantity of laminate manufactured resultantly. It appeared to Revenue that Shri S.K. Pallival admitted to have manufactured a quantity of 1,40,813kg of finished laminate or outer pouches of Sir Brand Gutka, and he cleared the same clandestinely to M/s. Shankar. The said fact was further admitted by Shri Rajesh Agarwal, the Authorised Signatory in his statement dated 17/09/2009. Mr. Rajesh Agarwal agreed that during the period September,2004 to April, 2008, unaccounted outer pouches were also received by the three manufacturing concerns from Vinayak Ultraflex. Further during May, 2008 & June 2008 the same were received in M/s Shankar. Thus, it appeared that during the month of May, 2008 & June 2008, M/s Shankar received 24,30,540, outer pouches from Vinayak Ultraflex, in which they presumably packed 15,79,85,100 number of Sir Brand Gutka (having M.R.P. Rs. 1/- each) which were cleared by them clandestinely, on which duty was payable Rs. 5,36,99,135/-.

42.2 The Respondent commissioner have been pleased to drop the proposed demand by observing that it is well settled law that demand cannot be raised on the basis of imagination and assumptions/presumptions. Suspicion, howsoever strong, cannot take place of proof. He further held that the investigation has not brought proof beyond reasonable doubt to substantiate the allegation of clandestine removal, based upon monthly manufacture of outer laminate from holographic films and resultant presumable monthly consumption in manufacture and clandestine clearance by M/s Shankar. Therefore, Learned Commissioner held that the duty have been demanded for these two months purely on the basis of hypothetical/mathematical calculation on the assumption that the entire procured material/laminate was consumed or utilized to produce final products, which have been clandestinely cleared. Accordingly, in absence of corroborative evidence on record, learned Commissioner dropped the demand as well as the penalty.

42.3 Learned Counsel urges that Aanand Sales is a trading concern and proprietorship of Mr. Dinesh Dwivedi. The Revenue have showed resumption of one CPU after drawal of Panchnama. Learned Counsel states that the Panchnama have been prepared on 30th June 2009 on the computer, and subsequently, there has been interpolation, the word 'CPU' have been added or inscripted by the intelligence/authorised officers, involved in search. Reliance have been placed on the statement of Mr. Swetanshu Dwivedi, but he has no *locus standi* or control on the affairs of M/s Aanand Sales. The proprietor of M/s Aanand Sales is Mr. Dinesh Dwivedi, who was never examined by the investigating officer. Mr. Swetanshu

Dwivedi have reverted his statement in the cross examination, during the adjudication proceedings, as well as during investigation have retracted his statement, at the very first opportunity. Further, the said CPU was sent for forensic examination by the Revenue to Central Forensic Science Laboratory, Hyderabad. As per the report of the laboratory, there is no existence of alleged data, on the basis of which the recovery of duty was proposed in the SCN. Thus, the adjudicating authority appreciating the interpolation in the panchnama (addition of 'CPU' later on) and on the basis of the report of the Central Forensic Science Laboratory, Hyderabad found the data wholly unreliable, accordingly, have been pleased to drop the demand. Further, such data is also not reliable in view of non-compliance of the provisions of Section 36B (2) of the Central Excise Act.

42.4 Learned Counsel for the appellant manufacturers supports the findings of the Learned Commissioner on this ground and urges that the proposed demand have been rightly dropped.

Contention of Revenue

42.5 Opposing the dropping of this demand, the learned AR for Revenue urges that this demand is mainly based on computer data recovered from the premises of Vinay Wire Poly Products Pvt. Ltd., and M/s Aanand Sales, Kanpur. Learned Commissioner have erred in observing that the entire demand is on presumptive basis, and alleged clandestine manufacture and removal, on the basis of just one raw material - holographic films or laminates. Learned Commissioner also held that other raw materials required for production have not been explained by the investigation, which are required to manufacture the alleged quantity. The learned Commissioner have further erred in observing that the demand have been confirmed for alleged clandestine removal and transportation through railway and other transporters, this demand on the basis of unaccounted receipt of input will tantamount of overlapping of demand, as well as duplicacy of the demand

42.6 The adjudicating authority have also observed in the impugned order that the multitude of evasion committed by the appellant manufactures was well planned and equally well executed. Such meticulous planning would not have been possible by the responsible person of the three manufacturers/appellants, without the active connivance of the key persons including Mr. Sri Prakash Agarwal.

42.7 The Counsel for the Appellant manufactures submits that the learned Commissioner have taken the correct view and rightly dropped the demand which is wholly presumptive. He further urges that there is no merit in the appeal of Revenue contesting the dropping of the demand. Admittedly, Revenue had proposed the demand on the basis of one element of production - alleged receipt of unaccounted laminates, without corroboration as regards the several other items/ inputs required for production. Learned Counsel also relies on the following Rulings in the case of -

i) ***Flavel International Vs. CCE***
2016 (332) ELT 416 (Delhi-HC)

ii) ***Arya Fibres (P) Ltd. Vs. CCE***
2014 (311) ELT 529 (Tri.-Ahd.)

iii) Continental Cement Co. Vs. UO.I.
2014 (309) ELT 411 (All.-HC)

43. **Regarding, imposition of penalty on the three manufacturing concerned as well as the other appellants.**

43.1 The learned Commissioner in the impugned order observed that the charge of clandestine manufacture and clearance have been established on the appellant manufacturers. It is urged that the Respondent Commissioner erred in conclusion, without proper consideration of the various/ different submissions put forth before him, as well as the rulings cited. The entire case made out by Revenue is wholly based on unsubstantiated facts and bad in law. All the demands of duty confirmed against these appellants is fit to be dropped and set aside.

43.2 In spite of two searches in the premises of the appellant/ manufacturer no incriminatory evidence was found by Revenue both in the factory premises as well as the residential premises of Director/ Proprietors. Further, admittedly Revenue has not established the manufacture of the huge quantity allegedly removed clandestinely through railway and other transporters. There is no matching on flow back of cash, in tune with the alleged clandestine removal. It is further urged that no reliance can be placed on third party documents in absence of corroboration with the records of the appellant manufacturers. Under the facts and circumstances, the whole demand confirmed against these appellants is based on third party documents and statements. As almost all the statements of various persons did not stand the test of cross-examination. That there is lack of sufficient evidence, and accordingly the demands are fit to be set aside. He further urged that the statement of such person(s), who have been examined in chief during the adjudication proceedings by the ld. Commissioner as well as offered for cross examination, their statements are not reliable, as these persons have even disputed their statement(s) recorded during investigation, as being not voluntary, and was dictated one, thus as these persons have even disputed their statement(s) recorded during investigation, as being not voluntary, and was dictated one, thus, as held in several judgments of the Hon'ble High Courts particularly, Allahabad High Court in C**CE Meerut vs. Parmarth Iron Pvt Ltd. 2010-260 ELT 514**, Punjab & Haryana High Court in **Jindal Drugs Pvt. Ltd., vs. Union of India 2016 340 ELT** also by Hon'ble Supreme Court in the case of **Andaman Timber Industries** -**2015 (324) ELT 641 (SC)** and **Vikram Cement (Allahbad High Court) -2014 (303) ELT A-82.**

43.3 Further, there is no co-relation established as to installed capacity to manufacture the alleged excess quantity, presumed to have been clandestinely removed.

43.4 The allegation of clandestine removal cannot be upheld merely on the basis of third party or transporters document. The Revenue has not brought on record conclusive evidence as to proof of production, alongwith evidence of availability of matching raw materials, power and labour, etc. There is no evidence that the alleged quantity was actually manufactured and/or could have been manufactured by the appellant manufacturers. Reliance is placed on the ruling of the Hon'ble Patna High Court in **CCE** vs. **Brims**

Products 2011 (271) ELT 184 and also on the ruling of M.P. High Court in **Union of India** vs**. M.S.S. Food Products Pvt. Ltd., 2011 (264) ELT 165**.

He further stated that the charge of clandestine removal must be corroborated by independent and unimpeachable evidence such as purchase or source of excess raw material, excess consumption of electricity/power, transport or delivery of goods to consignees/ purchasers as mentioned in the invoice, flow back of funds etc. The burden to prove the charge of clandestine manufacture and removal is on the Revenue. Clandestine removal is a serious charge which must be proved by the department, by adducing sufficient and tangible evidence. Duty demand cannot be based upon assumptions and presumptions.

In the circumstances, the allegation of clandestine manufacture and removal is not established against the three main appellants/manufactures of Pan Masala Gutka, Accordingly, the penalties imposed on the appellants as well as on all the other appellants are fit to be set aside.

44. **Discussions & findings on Demand-cum-Show cause notice issued C. No. V(30)18-Adj/Div-III(/08/1352-57 dated 22.05.2008.**

Duty Rs. 2,98,262/- on M/s Seema. The Adjudicating Authority found that no evidence with regard to the payment of duty on such goods, at the time of clearance, has been furnished either by the transporter (goods seized with transporter), or owner of the goods or by the manufacturer, i.e. M/s. Seema. Therefore, the Adjudicating Authority held that the seized 5,85,000 pouches of "Sir (Gold)", brand Gutkha manufactured by M/s. Seema, packed in 36 gunny bags valued at Rs.8,77,500/-, already auctioned through NCCF, Ranchi, are liable for confiscation, as per provisions of Rule 25 of Central Excise Rules, 2002 and also held that the Central Excise duty of Rs.2,98,262/- is thus demandable and recoverable from M/s. Seema under Section 11A (1) of the Central Excise Act.

45. Ld. Authorised Representative for the Revenue supports the findings of the ld. Commissioner.

45.1 Ld. Counsel for the appellant manufacturer opposing the demand of duty urges, that the demand is legally incorrect improper and unsustainable in law. The ld. Commissioner has failed to consider the cogent explanation and submissions made before him. No evidence whatsoever has been adduced and/or relied upon in the show cause notice, Save & Except the statements to establish a link between the stock of "Sir Brand Gutkha" seized at the godown-cum-office premises of the transporter - BCC at **Jugsalai, Jamshedpur** with the appellant manufacturer – Seema Enterprises. It is an admitted case that the appellant manufacturer cleared their goods at the factory gate, at ex factory price. It is the buyer of the goods, who arranges on his own for the transportation. Admittedly, the appellant manufacturer is neither the consignee nor the consignor of the goods in question. Neither the appellant have claimed such goods or taken any provisional release. It is not the appellant – manufacturer's, look out, as to how the buyer of the goods has arranged for transportation. In case of goods seized outside the factory premises, the presumption is that such goods are duty paid. It is the buyer of the goods, who is required to lead evidence in case such goods are found in his premises or he claims ownership of the goods lying with the transporter. The appellant manufacturer is only responsible in case, they are the consignor or the consignee of such goods. Revenue has not brought any evidence on record that such goods were actually dispatched by the appellant – manufacturers, save and except the statements, all of which have been retracted or did not stand the test of veracity in cross-examination.

45.2. Shri R.P. Singh, Manager of Transport Company-BCC has nowhere in his statement implicated the appellant – Seema Enterprises or that he had reason to believe that the goods received for transportation have been clandestinely removed and were liable to confiscation. There is no allegation in the show cause notice that the appellant – Seema Enterprises sold the goods without raising invoices to M/s. B.G. Projects India Pvt. Ltd. or to any other dealer.

45.3. Thus, no liability to pay the duty arises against the appellant manufacturer – Seema Enterprises, in the facts and circumstances of the case. Accordingly, the duty confirmed is fit to be set aside.

46. **Discussion & Findings in respect of Demand-cum-Show Cause Notice issued vide C.No.121/INT/DGCEI/HQ/0 153-4156 Dated 28.05.2008, Duty Rs. 1,60,377/- from M/s Seema Enterprises with penalty on i) RIL Rs. 5,000/- ii) Abhishek Sales Rs. 50,000/- iii) Nath & Co. Varanasi Rs. 1,00,000/-**.

The Adjudicating Authority observed that the seized goods have been manufactured and cleared in clandestine manner without issuing any invoice and without paying the duty leviable thereon by M/s.Seema. Consequently, the Adjudicating Authority held that the unaccounted finished goods found in excess in the factory premises of M/s. Seema, as well as at the premises of M/s. Abhishekh Sales, Lucknow and Nath & Company, Varanasi are liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002, and the Central Excise duty of Rs.1,60,377/- [Rs.1,04,281/- + Rs.56,095/-] as quantified in the show cause notice is demandable and recoverable from M/s. Seema under Section 11 A(1) of the Central Excise Act, 1944. Since the impugned goods have been manufactured and presumably cleared without payment of duty, the same is demandable from the manufacturer(s) as per the provisions of Section 3 of the Central Excise Act, 1944.

47. Opposing the demand, ld. Counsel for the appellant manufacturer – M/s. Seema Enterprises reiterated the aforementioned submissions in para 45.1 to 45.3. So far the demand of Rs.1,60,377/- is concerned, with regard to the excess finished goods found in the factory premises, than what is recorded in the RG-I Register, urges that no adverse inference can be drawn. There is no presumption under the law that such excess goods were intended to be clandestinely removed. At the best, an assessee/manufacturer is required to enter such finished goods found in excess in their RG-I Register. Thus, demand on this score is fit to be set aside. Similarly, the demand with regard to "Sir

Brand" goods found and seized in the premises of the 3rd party viz. Abhishekh Sales, Lucknow and Nath & Company, Varanasi cannot be demanded from the appellant manufacturer, as the appellant manufacturer makes all their sales at the factory gate at ex factory price under proper invoices.

48. Ld. Counsel further states that no physical stock taking report was prepared by the officers at the time of search, and thus, the whole demand is on the basis of estimation and presumption. The show cause notice and panchnama are silent as to how the finished goods, collectively weighing 6106.48 kgs. (as alleged) were weighed. Whether weighment was actually done or was ascertained on estimate basis. Further, the Panchnama is silent as to the nature of packing, in which the finished goods in question were found to be packed.

49. Ld. Counsel further urges that there is no provision under the scheme of the Central Excise Act and the Rules thereunder, empowering any Central Excise officer to seize any finished goods or raw materials lying in the factory premises. Rule 24 of the CER, 2002 empowers the Central Excise Officer to detain or seize only such finished excisable goods, as are found to have already been removed outside the factory with intent to evade duty. Thus, the seizure of 314.65 kgs of laminates and packing materials lying inside the factory premises is wholly illegal and fit to be set aside. Even in Rule 226 of the Erstwhile Central Excise Rules, 1944, the liability to confiscation cannot be fastened merely on the ground of failure to make entry in the RG-1 Register. Ld. Counsel further urges that the finished goods lying in the factory

premises were still subject to quality control test. It is only after the quality control test, that such goods on being found of good quality are finally packed in HDPE bags for dispatch. There is no allegation that such finished goods seized were found packed in HDPE bags, ready for dispatch. Thus, in the facts and circumstances, the provisions of Rule 25 (1)(b) read with Rule 10 of CER 2002 are not attracted and have been wrongly invoked. Further, as Rule 25 (1)(d) has not been invoked in the show cause notice, it clearly establishes that the Revenue was satisfied that there was no intent to evade payment of duty in the facts and circumstances. Accordingly, the penalty imposed under Rule 25(1)(b) is fit to be set aside.

50. **Discussion & Findings in respect of Demand-cum-Show Cause Notice issued vide C.No.121/INT/DGCEI/ HQ/07/9033-40 dated 07.11.2008**. (Details of demand in para 1, above).

50.1 The Adjudicating Authority held that the unaccounted finished goods found in excess in the factory premises of M/s. Shanker valued at Rs.46,29,130/-are liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002. Consequently, the **unaccounted raw materials and packaging materials** found in excess in the factory premises of M/s.Shanker valued at Rs.2,41,988/- & Rs.27,225/- respectively are also liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002.

50.2. Further, the Adjudicating Authority held that the seized goods (at transporter's premises) have been manufactured and cleared in clandestine manner without issuing any invoice and without paying the duty leviable thereon by M/s. Shanker. Consequently, the Adjudicating Authority held that the unaccounted 39 bags of finished goods found in the premises of M/s.Bihar Carrying Company (P) Ltd., Kanpur as well as 212 bags at Chaar Bagh Railway Station, Lucknow, 17 bags at Kanpur Railway Station and 88 bags at Jodhpur Railway Station, are liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002. And the Central Excise duty of Rs.21,60,745/- [Rs.2,32,645/-, Rs.12,64,632/-, Rs.1,07,419 + Rs.5,56,049/-] as quantified in the show cause notice is demandable and recoverable from M/s. Shanker, under Section 11 A (1) of the Central Excise Act, 1944.

50.3 Further, the excess found 406.24 kgs of packaging materials in the factory of M/s. Seema valued Rs.55,655/- is held liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002 and the Central Excise duty of Rs.3,40,019/- as quantified (on the basis of presumed manufacture of finished goods) in the show cause notice, is demandable and recoverable from M/s. Seema under Section 11 A(1) of the Central Excise Act, 1944.

51. Regarding penalties, the Adjudicating Authority has imposed equal penalties of the confirmed amount under Section 11 AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002. Regarding personal penalties, the Adjudicating Authority have imposed personal penalties on all co-noticees under Rule 26/27 of the Central Excise Rules, 2002, except on

Smt. Seema Agarwal and Shri Uma Shankar Yadav, as both are proprietors of the units, M/s.Shanker and M/s. Seema, therefore, the Adjudicating Authority observed that the law is settled on the issue that once a penalty has been imposed on the firm, simultaneous imposition of a separate penalty on the Proprietor is not imposable.

FINDINGS

52. Having considered the rival contentions, we find that the duties and penalties have been mainly imposed on the basis of the 3rd party records (mainly transporter's records) and the statements of the various persons being the staff of the transporters, the authorised persons of the 3 manufacturers, Mr. Alok Krishna Gupta (Dealer/Purchaser), Railway Booking Agent and his associates and some of the buyers/re-sellers of the goods, manufactured by the 3 appellant manufacturers.

52.1 We further find that it is the stand of the 3 appellant manufacturers that they have been selling their goods throughout ex factory, at ex factory price. It is the buyer, who after taking delivery, arranges for the transportation themselves. Under the admitted facts, the 3 appellant manufacturers are neither the consignor nor the consignee, in any of the third party transporter's records, including the Railways.

52.2 Almost all the persons, whose statements have been relied upon, have either retracted their statements, which were recorded during investigation and/or the veracity of their statements did not stand the test of cross examination during the adjudication proceedings. The ld. Commissioner has noted in para - 50 of the impugned order, that all the respective persons have retracted from the revelation /acceptance made by them earlier in their statements tendered under Section 14 of the Act, mainly on one pretext or the other by claiming that - they were compelled to write their earlier statements under pressure by the Departmental Officers; or they had no alternative but to write the statements as dictated by the officers and put their signatures; or that they accepted their role in alleged clandestine removal solely under pressure/duress, put by the Departmental Officers and out of fear arising from the threat of being sent to jail; and most of them also stated that they did not file retraction before any Authority as they did not know what is retraction and what is the legal procedure for retracting from their statements.

52.3 The ld. Commissioner erred and observed that only for the reason that a statement given has been retracted, it cannot be treated as involuntarily or unlawfully obtained. The mere retraction of the statements without any evidence of duress or coercion, do not reflect upon the evidentiary value of the statements. He further observed that when a confession or incriminatory statement is retracted, the burden is on the accused to prove that such confession was made under threat or inducement or coercion. The ld. Commissioner further observed that Section 9 D of the Act is testimonial too, available with the Adjudicating Authority to assess as to whether the earlier statement can be taken as reliable or not, in view of the emerging facts and circumstances during exercising of prescribed procedure under Section 9 D. Moreover, when the statements of the co-accused supports the version of each other, such statement(s) do have evidentiary value.

52.4 We find that such stand of the ld. Commissioner is bad and without authority of law, in view of the scope of inquiry or adjudication, particularly with respect to the reliability of the statements recorded during investigation, as clarified by the Hon'ble Punjab & Haryana High Court in the case of **Jindal Drugs (supra)** and also by the Hon'ble Supreme Court in the case of **Vinod Solanki Vs. Union of India - 2009 (233) ELT 157 (SC),** Order dated 18.12.2008 in Civil Appeal No.7407 of 2008, wherein it is held that – a person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority.

52.5 Shri Dilip Gupta, (Railway Booking Agent), who, in his statement recorded during investigation, had stated that he was engaged in booking of goods of Sir Brand Gutka/Pan Masala as well as other brands from Kanpur Railway Station. He is the person, who stated the 4 point identification criteria of RRs relating to Sir Brand of Gutka/Pan Masala manufacturers. In his cross examination on 4.1.2017, he has retracted from his original statement stating that at the time of investigation, the statements were recorded under duress and coercion, he had to write as dictated to him by the officers. This fact is also evident from several contradictions in his statement recorded during investigation. In his cross examination, he has also stated that he has no manner of concern with the manufacturers of Sir Brand Gutka/Pan Masala.

He was getting instructions for dispatch from Alok Krishan Gupta, who used to pay them for their services. He also stated that he was not aware if any of the goods dispatched through Railways were not duty paid. Further, during cross examination, he could not identify even a single forwarding note, which could be said to have been prepared by himself or his associates and/or related to the Sir Brand gutka/Pan Masala.

52.6 We further find that there is a serious anomaly in the allegation of clandestine removal through Railways. Admittedly, the 4 point criteria for identification of clandestine despatch of the goods through Railways from Kanpur Railway Station, which was revealed by Shri Dilip Kumar Gupta - Associate of the Booking Agent, for the first time in his statement dated 24.09.2008. Whereas according to the investigation, they had communicated the said 4 point criteria to the Railway Officer, and on the basis of such criteria, the Railway Officers identified and supplied copies of RR'S with forwarding notes vide forwarding letter of Chief Parcel Manager dated 12.09.2008. Further, admittedly, there is no name of the appellant manufacturer(s) either in the forwarding notes or in the RRs, by way of consignor or consignee. Further, in none of the RR's, the goods manufactured by the appellants i.e. Pan Masala or Gutka are mentioned. Further, we find the letters exchanged by Revenue with the Railway Authority have not been relied upon (not made RUD) in the show cause notice.

52.7 Shri Binda Tiwari alias Radhe Radhe is a Principal Railway Booking Agent, who had engaged under him the other persons and he was the person, who was under contract with Alok

Krishan Gupta for dispatch through Railways. He himself did not prepare any forwarding notes. In his cross examination held on 4.1.2017, he has retracted his earlier statement and stated that his earlier statement was involuntary and recorded under duress. He has emphatically denied the possibility of identifying the brand of Zarda/ Gutka/Pan Masala merely by looking at Railways bilty/forwarding note, as it refers to weight and destination recorded in the RRs, or the corresponding chart (prepared by Revenue) shown to him at the time of recording of his statement during investigation. On being asked by the Adjudicating Authority, has he filed retraction/letter/affidavit, in view of his assertions and answers. During the cross examination, he stated that his earlier statement was recorded under pressure applied by the officers. He also stated that he has not filed any letter/affidavit before any Authority as he does not know what is retraction and what is the legal procedure for the same.

52.8 Shri Jitendra Kumar Rathore alias Bada Babloo, Associates of Shri Binda Tiwari, whose statement was recorded during cross examination held on 4.1.2017, has stated that his earlier statement was written by one Shri Anand Kumar and another statement by Shri Manoj Kumar Tiwari, and he had merely signed on the dotted line, being under pressure of the officers. He also stated that he could not tell as to which brand of Zarda/Gutka/Pan Masala or any other goods have been booked through the Railways merely by looking at the forwarding notes. After looking at his earlier statements, he has stated that these are not reliable and the same have been recorded as per the dictates of the officers. He also stated that he could not tell the description of the goods merely by looking at the forwarding notes/RRs. It is not possible to say, which brand of gutka/tobacco/pan masala was booked by dispatcher, merely by looking at the forwarding notes and RRs. He also further stated that he does not have any interaction with any driver(s) of Vikram tempo or any other vehicle. He has used the words, "bags of gutka, etc." in his earlier statement under pressure of the officers. He also stated that he has no manner of concern with the manufacturers of the Sir Brand Gutka/Pan Masala.

52.9 Helpers of the Railway Booking Agents viz. Paras Tiwari, Taukir Khan, Rakesh Singh have stated in their cross examination that they never used to examine or inspect the goods brought to the Railways Parcel Office. Such work was carried out by the Railways officials/staff. That they did not have any knowledge about any goods brought for booking being related to Sir Brand Gutka/Pan Masala manufacturers. That they also stated that their earlier statement was recorded under pressure put by the investigating officers. They also stated that it is not possible for them to identify from the forwarding notes and RRs, if these were related to Sir Brand Gutka/Pan Masala, as they were handling work for several manufacturers of gutka/pan masala.

52.10 We further find that out of copy of RR's (2583) supplied by Railways, a big part have been discarded (1566 RRs) by the Adjudicating Authority as not reliable. Thus, the demand with respect to the alleged transport through Railways has been confirmed on the basis of the retracted statements, or the statements which have not stood the test in cross examination. Such statements are at best hearsay evidence. Further, admittedly, no money was paid by the appellant manufacturers to the said booking agents. Further, no reference was made by Revenue to the “Handwriting Expert” or the “Govt. Examiner of Questioned Documents” In the facts and circumstances, we find that the demand is wholly based on the assumption(s) and presumption(s). The charge of clandestine removal is a serious charge and altering the civil liability of the person, and as such, the duty liability and penalty cannot be fastened on the basis of the hearsay evidence, and assumptions and presumptions based on the same. The Xerox copy of the RRs supplied by the Railways are not reliable as per the provisions of Section 36 A of the Central Excise Act, as no presumption against the appellant manufacturer is available to the Revenue. We further observe that 3rd party evidence at best is a good ground for suspicion, but in absence of corroboration with the records, etc. of the appellant manufacturer(s), the demand of duty cannot be sustained.

52.11 Similarly, the demand confirmed for alleged clandestine clearance through Bihar Carrying Co. Pvt. Ltd. and Trimurti Roadlines (based on third party documents and statements) are also held to be unsustainable and accordingly are set aside.

52.12 So far appeals of Revenue are concerned against the dropping of proposed demand with respect to the alleged transportation of Sir Brand goods through New Vikas Goods Carrier Co., we find that the ld. Commissioner has rightly held that there is no substantial evidence corroborating the allegations in the show cause notice. The whole demand is based on the hearsay evidence and assumptions and presumptions, which has rightly been dropped in the impugned order. Accordingly, we uphold the findings of the ld. Commissioner and dismiss the grounds of Revenue.

52.13 So far the proposed demand of duty of Rs.5.37 Crores (appox.) is concerned on the allegation of unaccounted receipt of packing materials from M/s Vinayak Ultraflex, having considered the rival contentions, we find that the ld. Commissioner has observed that suspicion howsoever strong cannot be the proof of clandestine removal, in absence of corroborative evidence. It has been held in the impugned order that the basic allegation of receipt of unaccounted inputs by M/s. Vinayak Ultraflex does not stand, particularly in view of the report of the Central Forensic Laboratory, Hyderabad, and thus, there is no reliable data of alleged clandestine manufacture by M/s. Vinayak Ultraflex and its clearances to the appellant manufacturers. Accordingly, we uphold the findings of the Commissioner, and dismiss the grounds taken by the Revenue.

52.14. So far the demand of Rs.2,98,262/- on M/s. Seema Enterprises is concerned, we find that it is only alleged on presumption that the goods seized with the transporter have actually been despatched by M/s. Seema Enterprises. Further, we find that M/s. Seema Enterprises have not claimed such goods lying in seizure with the transporters, and such goods have already been auction sold by the Revenue. Accordingly, we hold that charge of alleged clandestine removal under the facts and circumstances, is not established. Further, the order of confiscation is bad as the goods are not available or in existence. Accordingly, we set aside the demand of duty and penalty as well as fine.

52.15 Shri Alok Krishan Gupta, Director of Bee Gee Projects, Kanpur in his cross examination on 24.01.2017 has, *inter alia,* stated that for the last few years, he has been purchasing Sir Brand Gutka/Pan Masala from the factory premises of the appellant –manufacturers on principal to principal basis. After purchase, he used to dispatch it to various places, to his buyers and used to meet the transportation cost for the same. He had no concern as regards sales made by the manufacturers of Sir Brand Gutka/Pan Masala to other parties, directly ex factory. Therefore, he or his companies are not responsible or concerned in making the arrangements for transportation by rail or truck in respect of the direct sales made by the manufacturing firms to other parties. He further stated that as regards the alleged clandestine removal by the manufacturer of Sir Brand Gutka/Pan Masala, he clarifies that he is an independent trader having his own business and he has never attended to any work of making arrangements of any kind or managing cash for or on behalf of the manufactures of Sir Brand Gutka/Pan Masala. He also stated that his earlier statement during investigation was recorded under pressure and coercion. Such statements are involuntary and are not reliable.

52.16 So far the demand of Rs.1,60,377/- is concerned from M/s. Seema Enterprises as regards the goods seized in the premises of the two traders, and also the excess stock found in the factory premises of M/s. Seema, for the aforementioned reasons as recorded in para 52.14, are held to be bad and accordingly, we set aside the same. We further observe that the finished goods lying inside the factory are not amenable to seizure, unless the same are found outside the factory or despatched. As per the provisions of the Act and the Rules thereunder, the excisable goods are liable to seizure only after such goods are cleared from the factory i.e. outside the factory premises, if found, have been removed without payment of duty. We also hold that there is no provisions for seizure and/ or confiscation of the raw materials lying inside the factory premises.

52.17 Shri Rajesh Agarwal, Authorised Signatory of the three appellant manufacturers in his cross examination on 07.02.2017 stated that the three appellant manufacturers were selling their finished goods at ex factory gate at ex factory price. The manufacturers of Sir Brand Gutka were not undertaking or arranging any transport of the finished goods. He also asserted that in spite of repeated visits of the investigating officers, no incriminating documents or unexplained cash was found. He further stated that his earlier statement recorded during investigation were involuntary as the same was recorded under pressure and as per dictates of the officers. He refuted the charge that the appellant – manufactures were removing their finished goods clandestinely and for such clandestine removal, transport was being arranged through Mr. Alok Krishna Gupta, who was also handling the sale proceeds of such sales. He categorically stated that they were receiving the sales price through cheque/ DD/ cash. He categorically denied that the three appellant – manufacturers were booking their clearances either through Railways or road transport agencies. As regards live consignment seized in the premises of the Railway/ transporters, he clarified that there was an independent dealer's network, who were purchasing the goods ex-factory gate, including M/s B. G. Projects. It was always the responsibility of the buyer to arrange for the transportation. As regards the clause 'read and agreed' appearing in his subsequent written statement during investigation, he explained that he never had the opportunity to read his earlier statement, whenever his subsequent statement was recorded. He explained the condition under which the statement was recorded, as he was surrounded by the Officers in DGCEI office, Delhi in the late hours of night, and then the statement was recorded as dictated by the officers.

52.18 As regards the demand proposed vide show cause notice dated 07.11.2008 for duty, fine and penalty, in view of our discussion & findings hereinabove, we set aside the demand of Rs.46,29,130/- (for excess finished goods, in the factory) on M/s. Shanker, along with fine and penalty on account of excess finished goods found inside the factory. We also hold that such goods are not liable for confiscation. Similarly, the demand for unaccounted raw materials and packing materials found inside the factory premises is also set aside.

52.19 Mr. Anil Kumar Singhal (trader of pan masala/ gutka), Prop. of M/s Singhal Agencies, Jaipur in his cross-examination conducted on 23.01.2017 categorically stated that he had no concern with the owners of the 'Sir brand gutaka/ pan masala'. He also categorically stated that manufacturer of 'Sir brand' gutka was not involved in dispatch or packing of the finished goods through railways/ transport. He also stated that his earlier statement recording during investigation was under pressure exerted by the officers.

52.20 We also set aside the seizure and confiscation of the goods seized at the premises of the transporters, being 39 bags in the premises of M/s Bihar Carrying Co., 212 bags at Lucknow Railway Station, 17 bags at Kanpur Railway Station and 88 bags at Jodhpur Railway Station, as such goods have not been claimed by the manufacturer - appellant, nor they are either consignor or consignee. The contention of the appellants that they have sold and cleared at factory gate, is not found untrue. Accordingly, the demand of Rs.2,16,745/- is set aside on M/s. Shankar along with fine and penalty.

53.21 Shri Subhash Kumar Mishra, Manager of NVGC, Kanpur in his cross-examination held on 07.02.2017 retracted from his earlier statement recorded during investigation, as being in voluntary or obtained under duress. In the adjudication proceeding he was examined by the Adjudicating Authority and he was questioned, if he had filed any retraction or any application with any Authority, bringing the facts to the notice that investigating Officer has exerted undue pressure or duress on him while recording his statement. In reply he stated that he has not filed any such letter/ retraction as he was not much educated and does not know the meaning of retraction. Nor he was aware of any legal process for retraction. He also stated that his wife had sent a letter to the Director General, DGCEI, New Delhi stating that he was being beaten and was mis-behaved by the Officers in their attempt to extort his statement, as per their dictates.

54.22. Shri Sushil Kumar Gupta, employee and dispatch incharge of M/s Shankar and M/s Seema in his cross-examination retracted from his earlier statement recorded during investigation and stated that his earlier statement was involuntary and was recorded under undue influence and duress exerted by the officers.

54.23 Shri Rajesh Kumar Pal (Tempo driver) in his cross-examination recorded on 04.01.2017 stated - retracting his earlier statement that he does not know either Mr. Jayan Kumar or Mr. Surya Kumar, employees of the appellant – manufacturer. He also categorically stated that he does not know any of the employees of the appellant manufacturers. He also stated that his earlier statement was involuntary or was obtained under duress.

54.24 Shri Rajesh Tiwari, Tempo Driver, in his cross-examination has categorically stated that he does not know any employee/ Manager of the manufacturers of 'Sir brand' gutka/ pan masala.

54.25 Shri Uma Shankar Awasthi, Manager of M/s Bihar Carrying Co., Kanpur in his cross examination conducted on 5.1.2017 has retracted from his earlier statement, stating that the same was recorded under undue influence and coercion and the same are involuntary and hence, not reliable. On being questioned, in his earlier statement dated 10.05.2008, he had given numbers and names of Vikram Tempo Drivers, who had brought Sir Brand Gutka/Pan Masala to his transport company. In reply, he stated that these nos. and names were dictated to him by the investigating officers. He also categorically stated that on a given day, several tempos/vehicles etc. come to their transport company and it is not possible to remember the name of drivers or their vehicle nos. On being further questioned whether various gutka factories used to book their goods through M/s.BCC, he replied in negative and stated that the goods were always booked by the buyers/dealers themselves, who used to bring their goods to the transport company on different kinds of conveyance like rickshaws, trolly/ thelas, etc.

54.26 Thus, from the aforementioned facts and circumstances emerging in the cross examination of the various key persons, whose statements have been relied upon, we are satisfied that in view of the facts emerging in the cross examination, the statements recorded during investigation are not reliable, being involuntary. It is, thus, established beyond any doubt that none of the oral statements obtained during investigation and relied upon documents (third party) can be given any credence or evidentiary value as the same have been found to be involuntary or tutored statements tendered under undue influence/duress/coercion exerted by the investigating officers. We also find that save and except the statements, there is absence of any substantial evidence to corroborate the third party evidences. Such oral evidences are not sufficient for confirmation of the charge of clandestine removal in absence of any corroboration, by way of some documentary evidence of the appellant - manufacturers.

54.27 Similarly, the demand of Rs.3,40,019/- is set aside being on account of the goods seized in the premises of the transporters and traders.

54.28 So far as the demand of Rs.8,501/- is concerned on Keyman Laminators, we find admittedly, on the day of search, (09.05.2008), they had cleared the laminates and packing materials without invoices to M/s. Seema Enterprises, which were intercepted by the investigating officers. Subsequently, on inquiry from the Director of Keyman Laminators, he agreed that they have not raised any challan or invoice. Accordingly, duty of Rs.8,501/- is confirmed along with equal penalty. However, redemption fine is reduced to Rs.5,000/-.

55. Under similar facts and circumstances, this Tribunal in the case of **P&J Aromatics Vs. CCE (Tribunal-Allahbad)** vide Final Order No.71062-71064/2016 dated 26.10.2016, where P&J were engaged in the manufacture of Pan Masala and Gutka. There were similar allegations of clandestine clearance through railways and road transport. The allegations were based mainly on the statements of the various persons and third party records, which did not stand the test of cross-examination and the Tribunal was pleased to allow the appeal setting aside the impugned order, and also the demand and penalty. The Hon'ble High Court of Allahbad in the case of **Continental Cement Co. Vs. CCE (supra),** has held that charge of clandestine removal is a serious charge and the same cannot be upheld on one element or thread of production. Revenue is required to establish all the factors of production available, like clandestine receipt of raw materials, availability of

labour and power, capacity of production, evidence of transportation, identification of buyers and flow back of proceeds of clandestine removal. It was categorically held that if all such relevant factors are not established, the charge of clandestine removal cannot be upheld.

56. Similar view was taken in the following cases of ***Flavel International Vs. CCE (supra)*** *and* ***Arya Fibres (P) Ltd. Vs. CCE (supra).***

57. In view of our aforementioned findings, as the demand(s) of duty and penalty have been set aside, against all the three manufacturers of 'Sir Brand' Gutkha and Pan Masala, we set aside the penalties imposed on all the co-accused. Accordingly, the appeals by the appellant manufacturers and the co-noticees/other appellants are allowed and the demands/penalties stand set aside (except M/s Keyman Laminators, Appeal No. E/70026/2021, which is allowed in part).

58. All the three appeals by Revenue are dismissed.

(Pronounced on-18/01/2022)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Ckp