IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. I

STAY Application Nos. E/Stay/54893, 54896, 54900, 54903, 54906 54909 54912 & 55232/2014 in Appeal Nos. E/54246, 54249, 54251, 54253, 54255, 54257, 54260 & 54589/2014-EX[DB]

Sr. No.	Appeal Nos.	Appellant(s)	Respondent(s)	Impugned Order
1.	E/54246/2014-EX[DB]	Shri Lalit Kumar Agarwal, Director	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
2.	E/54249/2014-EX[DB]	Shri Raj Kumar Agarwal, Director	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
3.	E/54251/2014-EX[DB]	Shri Sanjay Agarwal, Director	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
4.	E/54253/2014-EX[DB]	Shri Priyansh Agarwal Legal Heir Of Late Raj Kamal Agarwal, Director	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
5.	E/54255/2014-EX[DB]	M/s Parmarth Steel & Alloys (P) Ltd.	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
6.	E/54257/2014-EX[DB]	Shri Priyansh Agarwal Legal Heir Of Late Raj Kamal Agarwal, Director (Through Legal Heir)	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I
7.	E/54260/2014-EX[DB]	M/s Parmarth Iron (P) Ltd.,	Commissioner, Customs, Central Excise & Service Tax, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I

8.	E/54589/2014-EX[DB]	M/s. Kamakhya Steel P. Ltd.	CCE, Meerut-I	O-I-O No. 23/Commissioner/Meerut-I/2014 dated 23/06/2014 passed by Commissioner, Customs & Central Excise, Meerut-I

Appearance:

Shri Nishant Mishra (Advocate) (in Appeal Nos. E/54253, 54255, 54257 & 54260/2014),
Shri S.K. Mathur (Advocate) (in Appeal Nos. E/54246, 54249 & 54251/2014)**,**
Shri Shadman Hasan (Rep.) (in Appeal No. E/54260/2014) &
Shri Rajesh Chhibber, Advocate, (in Appeal No.E/54589/2014 for Appellant(s)
Shri Rajeev Ranjan (Joint Commr.) AR for Respondent(s)

CORAM:

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

Date of Hearing : 12/12/2017
Date of Pronouncement : 09/04/2018

FINAL ORDER NOs **71040-71047 / 2018**

Per: Anil Choudhary

The issue in these appeals relates to alleged clandestine manufacture and removal by the appellant companies and the directors, employees, etc.. This is the second round of litigation.

2. Earlier this matter had come before this tribunal and vide final order dated 31/12/2012 this tribunal had allowed the appeals by way of remand observing –

"after appreciating the submissions made by both the sides we find that directions were earlier made to

revenue to supply all the requisite documents to the appellants." In terms of the said directions Revenue has supplied all the data which fact also stands agreed-upon by the Ld. Counsels. As regards non-RUDs we have examined the list produced by the Ld.Advocate appearing for the Revenue. The preamble of the said list reveals that the said documents were supplied on 19/12/2011 whereas the signatures of Shri Atul Kumar Gupta, Liaison Officer appearing on the acknowledgement are 28/09/2011 i.e. before the date on which the said documents were supplied to the appellant. As such, the Revenue's contention that their authorized signatory has given acknowledgement for receipt of all the non-RUDs, cannot be accepted for the obvious reason that the signatures are dated 28 September 2011, whereas the documents were handed over on 19/12/2011. In any case, Ld. Advocate submits that most of the documents stand received by them and it is only balance 63 documents which are yet to be received.

To the same effect is the grievances of other appellants who have given the list of RUDs to the Revenue in office of CDR. Copies of the same have been provided to Ld. Advocates appearing for the appellants/parties. Inasmuch as the impugned order *stands passed by the adjudicating authority without supply of RUDs (most of which have been now supplied in terms of the directions of the Bench) and without there being any written detailed defence reply filed by the main appellant M/s. Parmarth Steel And Alloys Pvt. Ltd. and without there being any personal hearing, we are of the view that the impugned order is passed with gross violation of principles of natural Justice. Accordingly, we are of the view that the same is required to be set aside for the balance documents which are required to be supplied to the appellant/notices, would be supplied by the office of Commissioner within a period of two months from the date of receipt of this order. Further the appellant's request for cross-examination of the witnesses whose statements have been relied upon by the Revenue would also be examined by the adjudicating authority in the light of the Hon'ble Allahabad High Court division bench judgment."*

3. The directions of Hon'ble High Court in CCE vs. Parmarth Steel And Alloys Ltd. [2010 (260) ELT 514 are as follows: –

"We therefore have no hesitation in holding that there is no requirement in the Act or Rules, nor do the principles of natural Justice and fair play required that

the witnesses whose statements recorded and relied upon in the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross examination for the evidence or statement to be considered."

4. By the impugned order these appellants and others have been vested with demand of duty for alleged clandestine removal and also penalty under various provisions of the Act. Further Cenvat credit availed denied under rule 14 of Cenvat Credit Rules, 2004. The details of disallowance as regards these appellants are as follows: –

Name of the Appellant	Demand raised in SCN (Rs.)	CENVAT Demand (Rs.)	Penalty (Rs.)
M/s.Parmarth Iron Pvt.Ltd.	65,47,51,765	10,11,890	65,47,51,765 10,11,890
M/s.Parmarth Steel & Alloys (P) Ltd.	22,91,55,651		22,91,55,651
Shri Lalit Kumar Agarwal			2,00,00,000
Shri Sanjay Agarwal			1,00,00,000
Shri Raj Kumar Agarwal			1,00,00,000
Priyansh Agarwal Legal heir of Raj Kamal Agarwal			2,00,00,000
Priyansh Agarwal Legal heir of Raj Kamal Agarwal			2,00,00,000
M/s.Kamakhya Steels	6,76,31,129		6,76,31,129

Pvt.Ltd.			

5. The facts in brief are that are Parmarth Iron Pvt.Ltd., Biznor, U.P. (hereinafter referred to as PIPL) were registered under the Central Excise provisions and were engaged in manufacture of MS Bars, End Cutting, MS Ingots, Runner and Risers etc.. On the basis of intelligence that PIPL were evading Central Excise duty by undervaluation and clandestine removal, a search and seizure was conducted in their premises on 10/07/2007. The search along with the factory premises of PIPL was also conducted at various other places including residential premises of the Directors and also the premises of another company under the same management namely M/s.Parmarth Steel & Alloys (P) Ltd. and also in the factory premises of one M/s.Jain Steels, Bijnore and M/s.Reema Steels Pvt.Ltd. Bijnore.

6. Search was also conducted at the alleged office premises of PIPL situated at 1st Floor, H-8, Geeta Nagri, Bijnore and also one more premises at 107, 1st Floor, Navyug Market, Ghaziabad alleged to be the office of the appellant PIPL. From the alleged office premises at Geeta Nagri one Seagate Hard-disk bearing model number ST-340015A, SIN-5LA5R1R3 containing allegedly the details of all sales/purchases of M/s.PIPL and other incriminating documents were resumed. The details of the same were

reflected in the Panchnama dated 10/07/2007. The printouts of the Ledger accounts of PIPL relating to sales and purchase found in the said hard disk were taken under the Panchnama proceedings in the presence of Shri Atul Kumar Agarwal and Shri Lalit Kumar Agarwal, the Directors of PIPL on 11/07/2007 and 12/07/2007. The said hard disk contained complete data relating to sales and purchases since inception of PIPL till the date of search that is 10/07/2007.

7. The case of clandestine removal and confiscation of cash made against the appellants in the show cause notice and confirmed by the impugned order is primarily based on –

(1) Computer printouts allegedly taken from hard disk shown to be resumed from Geeta Nagri office, Bijnore.

(2) Statements of two persons (Shri Manmohan Gautam and Shri Bhagirath Roy) allegedly found present at Geeta Nagri, Bijnor office and three persons namely (Shri Shailendra Gupta, Pankaj Aggarwal and Rajesh Sharma) allegedly found present at the alleged office at Ghaziabad on 10/07/2007.

(3) Alleged confession by suppliers of MS ingots and buyers of Saria (M.S. Bars).

(4) Alleged confession by Shri Lalit Agarwal etc.

8. Accordingly show cause notice dated 07/07/2008 was issued by the Additional Director, DGCEI New Delhi alleging

evasion of duty in respect of excisable goods manufactured by PIPL by invoking the provisions of extended period of limitation under the proviso to sub-section (1) of section 11A of the Act for the recovery/demand of duty involving on final products allegedly cleared by them without payment of duty during the period from February 2004 to July 2007 along with interest alleging inter-alia : –

(1) That they cleared the final products without payment of duty of excise and without issue of invoices during the said period, meaning thereby that they had suppressed the facts from the Department.

(2) That they had not reflected the actual production of final products in their production/stock registers during the said period as huge quantities of their final products were cleared by them from their factory clandestinely without recording the same in their production/stock registers thereby suppressing their production.

(3) That they had suppressed the production of the finished goods and cleared the same clandestinely without issue of bills and without reflecting the requisite details of the same in their monthly ER-1 returns, thereby making willful mis-statement.

(4) That they have contravened the provisions of Central Excise Act and Central Excise Rules read with

Cenvat Credit Rules with intent to evade payment of duty.

and

(5) That the fact of non-payment of duty amounting to Rs.65,47,51,765/- on finished goods cleared clandestinely during the said period by PIPL came to light only when the premises of PIPL and other related concerns/premises was searched on 10/07/2007 and subsequently the case was investigated by the Revenue.

9. Similarly it was further alleged that the appellant PIPL is liable to demand of Rs. 10,11,890/- being Cenvat credit involved on the quantity of sponge iron found short at the time of inspection on 10/07/2007 inasmuch as they had not shown the actual disposal/consumption/inventory of the said quantity of sponge iron found short in their factory. In their records i.e. RG 23A part-I as required under Rule 9(5) of Cenvat Credit Rules, they have suppressed the fact that the huge quantity of iron had been cleared by them from their factory without issue of invoices and without paying/reversing the amount equivalent to Cenvat credit availed. Further alleging that such quantity of sponge iron found short have been utilized by them in manufacturing of MS ingots which were utilized in the manufacture of MS Bars etc. and the same have been clandestinely cleared.

The show cause notice also proposed penal action under Rule 26 against Shri Bhagirath Roy, Shri Manmohan Gautam alleging that these employees were working in the office of PIPL at Geeta Nagri, Bijnor alleging that these persons were maintaining all manual as well as computer records of PIPL which included the accounts of purchases without bills and sale of finished goods made without bills and without payment of duty.

10. Being aggrieved by the order the Ld. Commissioner, impugned herein imposing duty, penalty as well as confiscation as noticed hereinabove the appellants are in appeal before this tribunal amongst others on the following grounds, as argued by Shri Nishant Mishra, Advocate appearing for the appellants: –

(1) The impugned order extensively relies upon statements of Shri Manmohan Gautam and Shri Bhagirath Roy who were allegedly found at Geeta Nagri and also of Shri Shailendra Gupta, Shri Pankaj Aggarwal and Shri Rajesh Sharma who were allegedly found at the old office at Navyug Market, Ghaziabad. Cross-examination of all the aforesaid five persons was demanded before the Ld.Commissioner but the same was not granted. Because of this the appellant was constrained to approach Hon'ble Allahabad High Court and the Hon'ble High Court was pleased to give

directions as noticed herein above. In absence of any challenge to the directions in the judgement of Hon'ble Allahabad High Court, the same is stated to have become final and binding on the parties.

(2) Thus the impugned order-in-original is directly in teeth of the judgement of Hon'ble Allahabad High Court as well as the Final Order in the earlier round of this Tribunal inasmuch as Ld.Commissioner have extensively relied upon the statement of aforesaid five persons without providing opportunity of cross-examination of these persons. Even otherwise as per the Department's own case Shri Manmohan Gautam and Shri Bhagirath Roy were authors of daily sales Registers on the basis of which entries were made by them in computers installed at H-8, Geeta Nagri, Bijnor. Similarly 3 persons at Ghaziabad were authors of the documents resumed from office at Navyug Market, Ghaziabad. Once this is so, then cross-examination of these persons was mandatory as they were the authors of documents relied upon by Revenue. The Ld.Counsel have relied upon the ruling of Hon'ble Supreme Court in the case of Bareilly Electricity Supply Co. Ltd. Vs. Workmen and Ors - 1971 2 SCC 617 wherein the Hon'ble Supreme Court observed – "the application of principles of natural

Justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a court or Tribunal the questions that naturally arises, is it a genuine document, what are its contents and what are the statements can't paint therein true. When the appellants produce a balance sheet and profit and loss account of the company, it does not by its mere production amount to prove of it or the truth of the entry therein. If these entries are challenged the appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish on fact which is relevant to the entry, the appellant produced his affidavit in respect therein be filed and upon to the DFO afforded to the opposite party who challenges this fact. This is both in accordance with principles of natural Justice as also according to the passage or under order 90 Civil Procedure Code and the Evidence Act, both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permitted, it is inconceivable that if an act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and approved by one of the methods either by affidavit or by witness who have executed them, if they are alive and can be produced.

(3) It is further urged that it is the responsibility of the Revenue to produce the persons whose statements Revenue wants to rely upon. Since Revenue was relying on the statements of certain persons, hence it was the responsibility of the Revenue to produce the persons for examination and cross-examination. However, the Ld.Commissioner failed to produce such persons on the ground that the appellants failed to serve notice on them. The learned Counsel argued that this contention of the Ld. Commissioner is not tenable as they were the witnesses of Revenue and as such it was incumbent upon Revenue to produce and examine such persons in the course of the adjudication proceedings and

further offer them for cross-examination. The Ld.Counsel also relied upon the ruling in the case of CCE Vs. Vishnu & Co. Pvt. Ltd [2016(332) ELT 793 (Del.)] wherein the Delhi High Court was considering the issue of clandestine removal and the questions framed by the Hon'ble High Court was – *"whether statements recorded under provisions of Section 14 of Central Excise Act by the office of the Department can be taken as proof of the statutory violations by the respondent assessee. Further whether the CESTAT was justified in setting aside the case, demand, redemption fine and confiscation of goods by ignoring material facts and further whether the CESTAT was justified in ignoring the entire facts on record and the statements of the witnesses and concerned persons".* The Hon'ble High Court held that the contention that it is the responsibility of the noticee/assessee to produce the witnesses for cross-examination is a strange one considering that they are witnesses of the Department and that their statements are being relied upon by the Department in support of the show cause notices. Since it is relying on such statements, it is the responsibility of the Department to ensure the presence for cross-examination. Further taking notice that whenever such witnesses were produced for cross-examination they resiled from their earlier statements.

(4) It is further contended that section 9(D) of the Act specifically provides – a statement made and signed by a person before any Central Excise Officer or a Gazetted during the course of enquiry or proceeding under this Act shall be relevant, for the purpose of proving in any prosecution for an offence under this Act the truth of the facts which it contains – when the person who made the statement is examined the other witness in the case before the court and the court is of opinion that having regard to the circumstances of the case the statement should be admitted in evidence in the interest of justice. Sub-section (2) further provides that the provisions of sub Section (1) shall so far as may be, applied in relation to any proceedings under this Act, other than a proceeding before a court as they apply in relation to a proceeding before a court. Only an exception have been carved out in sub Section (1) Clause (a) of Section 9 (D) which provides that when the person who made the statement is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, whose presence cannot be obtained without an amount of delay or expense

which, under the circumstances of the case, the court considers unreasonable. As the learned Commissioner have not invoked Clause (a) to sub Section (1) of Section 9D in the proceedings before him the statement of such persons particularly the aforementioned five persons is not a piece of evidence which can be relied upon. Thus the learned Commissioner have erred in drawing adverse inference against these appellants by placing reliance on the statement of the aforementioned persons. As the aforementioned five persons were not produced by Revenue for examination and further cross-examination in the adjudication proceedings, thus, their statements cannot be admitted as evidence which was recorded at the investigation stage and consequently the same cannot be relied upon by the Revenue. It have been repeatedly held so by this Tribunal and the High courts.

(5) Reliance has also been placed on the ruling in the case of Kiran Nagindas Vora vs. CC 2015 (322) ELT 97 (Bom.-High Court) wherein the Hon'ble High Court in Para 14 of the judgment have observed – *"what is evidence is something about which party has given a writing in the form of an affidavit. Further such party is in cross-examined by the opponent or*

the adversary against whom the statement or material is sought to be relied upon. If the veracity of these tested in the cross-examination and the party stand the same then alone the version is found in the affidavit or the recorded statement can be termed as evidence and accepted and relied upon by an Adjudicating Authority."

(6) So far the alleged confession of suppliers of MS Ingots and buyers of saria/rods is concerned the appellant had sought cross-examination of 68 persons whose statements had been relied upon by the Revenue. These 68 persons include the five aforementioned persons whereas remaining 63 persons were alleged suppliers of MS Ingots and/or buyers of saria/rods. It was the responsibility of Revenue to produce these persons. Revenue could produce only 30 persons, hence the statements of remaining 38 persons cannot be read as evidence against the appellants. The 30 persons produced by Revenue for cross-examination have retracted from the relevant earlier statements, hence their statements recorded during investigation are not admissible in evidence.

(7) So far the confession of Shri Lalit Kumar Agarwal, Director is concerned, it was the onus on

Revenue to show that the confession was voluntary and not obtained as an outcome of threat etc. This burden have not been discharged by Revenue in the present case. Thus, the so-called confession of Shri Lalit Kumar Agarwal have got no evidentiary value. Reliance is placed on the ruling of the Apex Court in the case of Vinod Solanki vs. Union of India 2009 (233) ELT 157 (SC) wherein it have been observed –

"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. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. If the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Lord does not say that the accused has to prove that retraction of confession made by him was because of threat coercion etc., but the requirement is that it may appear to the court as such.”

(8) Further it was incumbent upon the Revenue to corroborate the confession from independent sources, which have not been done by the Revenue in the present case, in as much as the only material is, that as the documents are prepared by the said five persons allegedly at Geeta Nagri & Ghaziabad, are itself not evidence. Reliance is placed on the ruling in the case of Mohtesham Mohd. Ismail vs. Spl. Director reported in 2007 (220) ELT 3 (SC).

(9) It is further urged that the learned Commissioner have erred in relying upon statements of the persons, who have subsequently retracted the earlier statements. It is a settled law that the statements which have been retracted, cannot be relied upon as a substantive piece of evidence. Reliance is placed on the ruling in the case of CCE vs. Vishnu & Company Pvt. Ltd., reported in 2016 (332) ELT 793 (Del.)

(10) So far the charge of clandestine removal against ‘Parmarth Iron’ is concerned, the same is baseless. It is a settled law that clandestine removal is a serious charge, which is required to be discharged by production of sufficient and tangible evidence in the

nature of purchase of raw material, use of electricity, additional labour, sale of final product, clandestine removal, mode and flow of funds etc. Reliance is placed on the ruling of Hon'ble Allahabad High Court in the case of Continental Cement Company vs. Union of India reported in 2014 (309) ELT 411(Alld.-HC). The Hon'ble High Court have observed – further, unless there is clinching evidence of the nature of purchase of raw material, use of electricity, sale of final products, clandestine removal, the mode and flow back of funds, demands have been confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. In other words the Revenue is required to find out the details of excess production, whether excess raw material have been purchased, dispatch particulars from the regular transporters, their realization of such sale proceeds, finished product receipt details from regular dealers/buyers and to find out the excess power consumption.

(11) The learned counsel further points out that in the present case Revenue failed to produce any cogent and tangible evidence and clandestine removal is

alleged only on the ground of presumptions and assumptions, which is evident from the following observations in the impugned order: –

"As regards the electricity consumption adverse inference have been drawn on the basis of alleged allegation of the theft by the Electricity Department which resulted in Criminal Case No. 1010/2007 and vide order dated 20 July, 2013 plus order dated 23 August, 2017 passed by U.P. Electric Regulatory Commission. It have been held that there was no excess consumption of electricity and/or theft during the relevant period."

There is no allegation/finding as regards additional labour used for clandestine production.

(12) The appellant sources their furnace oil which is the source of fuel for running their furnace, the same is sourced from Indian Oil, Mathura which is the sole supplier of such furnace oil. The allegation in the SCN as regards excessive purchase of furnace oil is not based on any evidence.

(13) As regards the allegation of clandestine purchase of raw material – MS Ingots, it is urged that under Section 28 A of U.P. Trade Tax Act, 1948 provides for check post (s) during the relevant period in dispute. The U.P. Trade Tax Rules prescribes form 31 (road

permit) for import of raw material from outside state. Hence it was not possible to import raw material without the use of the said road permit in form 31. Such permits are pre-authenticated by the Sales Tax Department and the record of such authentication is maintained in the office of the Sales Tax Department and further the appellant is also obligated to maintain proper records of users of such permits. Similarly purchases from within the State cannot be done unaccounted in view of Section 8A and 13 A of U.P. Trade Tax Act, 1948, which provided for proper accountal and record of movement of goods from one dealer to another within the State of U.P. and on failure of which a dealer is subject to harsh penalty.

(14) In the show cause notice it is alleged that there is clandestine removal of MS Bars to the tune of Rs.701 crores. Repeating the provisions for use of road permit, the learned counsel states that there are similar provisions for use of road permit in other States also, which provide that the buyer purchasing interstate must use declaration form for import of goods as prescribed in their State. Further in view of State provisions of under Section 8 A read with Section 13 A of the U.P. Trade Tax Act, there is no such incident of seizure found and/or recorded in the

assessment order passed under the U.P. Trade Tax Act, 1948. Had the appellant been engaged in clandestine removal at a scale as alleged, there would have been several instances of violations under the State VAT laws.

(15) The learned counsel further urges that for the alleged clearance to the tune of Rs.701 crores, receipt of only Rs.85 crores is alleged which is also inconsistent. Statement of Shri Pankaj Agarwal, Chartered Accountant also cannot be considered as evidence, as he was not produced for cross-examination. Further the Revenue had not enquired from the bankers of the appellants. Thus when the law provides that charge of clandestine removal must be proved by Revenue, which have not been done in the present case, as such the demand raised on the basis of presumptions is not tenable and the benefit of doubt has to go to the appellants. Reliance is placed on the ruling in the case of CCE vs. Brims Products 2011 (271) ELT 184, where Hon'ble Patna High Court have observed – "in our opinion since the charge was for clandestine manufacture and surreptitious removal of finished final product, the same is required to be proved beyond doubt by the Revenue. One is to keep in mind that, though being the main ingredient, betel

nut is not the only raw material which is used in manufacture of Pan Masala, that apart since the investigation has been carried only at the transporter and no presumption could be drawn with regard to manufacture and removal of the final products. Presumptions and redemptions cannot take place of positive legal evidence, which are required for proving the charge. Even if, it is assumed that some raw materials were received in the factory of the respondent during the said period, the same cannot become conclusive proof of production and clandestine sale to different parties. Due to lack of evidence, benefit of doubt, is always to go in favour of the assessee."

(16) The learned counsel further urges that learned Commissioner have erred in invoking Section 36 A of the Act which provides that, where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall, (a) unless the contrary is proved by such person, presume the truth of the contents of such documents, that the signature

and every other part of such document which purports to be in the handwriting of the person or which the court may reasonably assume to have been signed by or to be in the handwriting of, any part of, the person is in that persons handwriting and in the case of a document executed and, attested that it was executed or attested either by person by whom it purports to have been so executed or attested; (b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence. The learned counsel states that the said provision is applicable in case of prosecution and not in case of adjudication. Reliance is placed on the ruling in Ballarpur Industries Ltd vs. Union of India 1991 51 ELT 30 (Bombay High Court) wherein the Hon'ble High Court in Para-38 of its judgment have observed – it is clear that the said section deals with a presumption in respect of a document tendered in evidence in prosecution. The said section is therefore not applicable in cases of other enquiries. Even in the case of prosecution the presumption raised is not an irrebuttable presumption but is a rebuttable presumption, as it is clear from the phraseology used therein, "unless the contrary is proved by such person". It is not, therefore, open to the respondent-Revenue to urge on the basis of Section 36 A that the presumption about the documents raised thereunder is conclusive, much less in the case of enquiry pursuant to the show cause notices issued.

(17) As regards confiscation of cash of Rs. 1.78 crores it is urged that the same is wholly without jurisdiction. Section 12 of the Central Excise Act provides that Central Government may by Notification declare that provisions of Customs Act, 1962, related to confiscation etc., be applicable in regard to like matters under the Central Excise Act, 1944. Section 121 of the Customs Act, 1962, provides as follows: –

"Section 121-confiscation of sale proceeds of smuggled goods – where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceeds thereof shall be liable to confiscation.

(18) In exercise of powers conferred under Section 12 of the Act, Central Government issued Notification No. 68/63 dated 4 May, 1963, as amended by Notification No. 48/97 by declaring that provisions of Section 121 of Customs Act shall be applicable in regard to like matters under the Central Excise Act, subject to the modifications and alterations mentioned therein. The

modifications and alteration provided in the Notification was as under: –

"(v) references to smuggled goods shall be deemed to be references to excisable goods which have been removed in contravention of the provisions of the Central Excise Rules 1944."

(19) Thus, the combined reading of Notification No. 68/63 as amended read with Section 12 of the Act read with Section 121 of the Customs Act shows that where any excisable goods are removed in contravention of any provisions of Central Excise Rules, 1944, the sale proceeds of such goods are liable to be confiscated.

(20) It is pertinent to mention that the Central Excise Rules, 1944 were substituted or repeated by Central Excise Rules, 2002, but no corresponding notification was issued by the Central Government, amending the notifications issued under Section 12 of the Central Excise Act, 1944. Thus during the relevant period from February, 2004 to July, 2007 (disputed period) Central Excise Rules, 1944 were not in existence and there being no further amendment to Notification No. 68/63 as amended, power to confiscate cash on the ground that same is sale proceeds of excisable goods,

clandestinely removed in contravention of the Central Excise Rules, 2002, is wholly without jurisdiction.

(21) The learned counsel further urges that the amount of Rs.1.78 crores found and seized at the time of search/inspection was not the sale proceeds of clandestine removed excisable goods but was advance received in respect of 'agreement to sale' of immovable property and the said agreement had also been produced in the adjudication proceedings before the learned Commissioner, but the same was brushed aside arbitrarily. In view of this contention, this Tribunal vide Interim Order No. 25/2017 dated 07 November, 2017, directed Revenue to submit a report as to whether said Notification No. 68/63 – CE is further amended subsequent to 02 September, 1997, and if so the most recent amended copy of the said notification may be submitted. We also directed Revenue to submit a report on whether said amount of Rs.1.78 crores was deposited with bank in term deposits and if so Revenue may report total interest earned on the said till date, calling for the report to be submitted on or before 29 November, 2017.

In reply the Assistant Commissioner, Central Goods and Service Tax, Meerut by his Letter No. C. No. V (15) REV – 1/CESTAT/19/15 dated 29

November, 2017, have replied – the Notification No. 68/63 – CE dated 04 May, 1963 was last amended vide Notification No. 33/1999 – CENT dated 11 May, 1999. Further reporting that the amount of Rs.1.78 crores which was confiscated in the subject mentioned case by DGCEI, New Delhi, was deposited with the bank in three numbers of term deposit (s). The total interest earned on the said deposits as on date is Rs.65,53,735/-, as ascertained from the bank.

(22) The learned counsel for the appellants have further urged that once the confiscation of Rs.1.78 crore is held to be without any jurisdiction, than the same is liable to be immediately returned to the appellants alongwith the interest earned on the same, under the doctrine of restitution. The learned counsel also relies on the ruling in the case of Union of India vs. Tata Chemicals Ltd. 2014 (6) SCC 335. The learned counsel further points out that, in the aforementioned report of the Assistant Commissioner review, wherein he has referred that Notification No. 68/63 – CE, was last amended vide Notification No. 33/1999 – CE, is misplaced and wrong. He has produced a copy of the said Notification No. 33/1999 – CE, before this Tribunal and upon examination of the same we find that the same is in respect of only

reference to the Central Excise Authorities as it was existing earlier and the substituted reference.

In the ruling of Tata Chemicals Ltd., the Hon'ble Supreme Court have observed in Para-38 of the judgment that "providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and the provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by Revenue, cannot shrug off its apparent obligation to reimburse the directors and lawful money with the accrued interest for the period of undue retention of such moneys. The State having received the money without right and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course".

11. Shri S.K.Mathur, Advocate, who is also appearing for Appellants has contended that following prosecution witnesses were not produced for cross examination by Revenue and they are Shri Manmohan Gautam and Shri Bhagirath Roy, Shri Mohan Aggarwal, Cashier, Shri Mukesh Chaudhary, Sales Executive, Shri Pankaj Aggarwal and Shri Rajesh Sharma and Shri Shravan Kumar Singhal partner of S.M. Computers and Shri Ram Mohan Jindal-Landlord of premises at Geeta Nagri, Bijnore. He has further contended that statements of the above stated persons are not admissible in evidence, in view of the ruling of Hon'ble Allahabad High Court, in the appellants case. Therefore, all the evidence relied upon by relying on the statements recorded in respect of above stated persons, are not the piece of evidence and, therefore, any finding arrived at on the basis of statements of the above persons during investigation, is not sustainable, in view of clear directions of Hon'ble High Court of Allahabad, in the present case. He has further submitted that statement of Shri Singhal was relied upon by Revenue to make allegation that the personal computer from which hard disk was retrieved or removed at Geeta Nagri, Bijnore was purchased by appellant, and that since Shri Singhal could not be

produced for cross examination, it cannot be established that the computer from which hard disk was removed at Geeta Nagri, Bijnore belonged to appellant. He has further submitted that the Landlord of the premises at Geeta Nagri, Bijnore. Shri Ram Mohan Jindal was not produced for cross examination as prosecution witness by Revenue. Therefore, the statement of Shri Ram Mohan Jindal that the premises at Geeta Nagri, Bijnore was taken on rent by the appellant is not established. He has further submitted that Revenue could not produce any evidence in respect of Shri Manmohan Gautam and Shri Bhagirath Roy, as to being on the payroll of the appellant (PIPL). He further contended that the Mobile No. 9997196932 which was in the possession of Shri Manmohan Gautam was not investigated by Revenue to establish its ownership, and bill being paid by the appellant (PIPL). He argued that Shri Manmohan Gautam and Shri Bhagirath Roy from whose possession hard disk was retrieved and print outs taken from, they being not produced for cross examination, therefore, statements of Shri Manmohan Gautam and Shri Bhagirath Roy, that data retrieved from the hard disk recovered from the computer at Geeta Nagri, Bijnore relates to appellant, cannot be accepted because both of them were not produced for cross examination and their statements are not evidences under Section 9D of the Act. He has further stated that the Panch witnesses were not local and they were brought alongwith the searching party from Delhi, and the finding by the Adjudicating Authority, that it is a usual practice, is a serious matter because the same is contrary to section 100(4) of CrPC. He further contended that it cannot be established that the print outs were from the same hard disk which was collected from Geeta Nagri, Bijnore because when hard disk was collected at Geeta Nagri, Bijnore, the same was sealed, whereas when the hard disk was used for taking out the print out, Panchnama indicates that the hard disk was not sealed. He has further argued that at Geeta Nagri, Bijnore, there were many hard disks and CDs, but a particular hard disk was picked up by the Investigating Officers, which arise suspicion that the said hard disk was planted by the Investigating Officers at the premises, which was not taken on rent by the appellants, and which was not a part of the factory premises or registered office of the appellant, and it was seized from such persons who were not on the pay-roll of the company and, therefore, he has argued that the entire allegation by Revenue is Pre-planned by Investigating Officers against the appellant (s).

12. As regards Parmarth Steel & Alloys (P) Ltd., the learned Counsel states and adopts the arguments made in the matter Parmarth Iron Pvt. Ltd. They further added that

admittedly no incriminating documents were found by the Investigating Officers during search in the premises of Parmarth Steel. The demand of duty is confirmed in the impugned Order-in-Original, solely based on the statement of one Shri Sheru Malik, Aas Mohd. & Idris, who were not produced by Revenue for examination and cross-examination in the adjudication proceedings. Hence in view of the law discussed hereinabove, the demand of duty based on their statements (of such persons) is not sustainable.

13. So far penalty imposed on the appellant company and the directors are concerned, the whole demand against the company-appellants is not sustainable. Thus there is no question of imposition of penalty on the appellant company and the directors.

14. So far the disallowance of Cenvat Credit for shortage of Sponge Iron, in the case of PIPL is concerned, the learned counsel states that the verification is only by way of eye estimation and no actual weighment and/or measurement was done. In this view of the matter no reliance can be placed on such eye estimation done, by the Original Authority and thus adverse inference drawn and the disallowance of Cenvat Credit is fit to be set aside.

15. As regards the appellant- Kamakhya Steel Pvt. Ltd., Shri Rajesh Chhibber appearing for the appellant states

that, for the same period the appellant have been visited with duty demand of Rs.6,76,31,129/- with equal amount of penalty, on the allegation of clandestine removal and undervaluation. The learned counsel states that prima facie the show cause notice to them is time barred, for the demand raised for the period from February, 2004 to June, 2007 vide the SCN issued on 7 July, 2008. The learned counsel further points out that for the period from April, 2001 to March, 2005, the Department had already issued another show cause notice dated 15 December, 2006 demanding duty of Rs.1,13,43,636/- by adopting the formula of standard consumption of electricity for the manufacture of ingots, on per ton basis. It was further alleged in the SCN that the allegation of clandestine removal is supported by declaration of income from other sources for such period. The allegation of Revenue was of higher consumption of electricity. To cover up the clandestine production and removal and to cover the loss in the books of accounts, income from other sources were shown. The demand confirmed by the Original Authority in that case stands set aside by this Tribunal in the appeal by R.A. Casting and others, wherein the appeal of Kamakhya Steel Pvt. Ltd. was also disposed of together. Further in the present case it is alleged against, Kamakhya Steel that they have manufactured 25,812.425 MT of Ingots out of which only 5,226.96 MT was cleared under proper invoice and the balance was cleared clandestinely. In other words for the period from December, 2004 to March, 2005 the Department demanded duty vide separate show cause notice and obviously for several reasons. Surprisingly there is no mention in the subsequent show cause notice about the earlier notice and as such the whole allegation against them is bad and ab-initio void. It is further pointed out that the ruling in the case of R.A. castings have been upheld by Hon'ble Allahabad High Court. It is further urged that in the course of investigation in the premises of Kamakhya Steel, no incriminating documents were found and/or seized. The whole allegation and confirmation of demand by Revenue is by way of third-party evidence, and the statement of the said Shri Sheru Malik and Idris. As these persons have not been examined in the adjudication proceedings, thus the demand against them is not sustainable and accordingly prays for setting aside the demand and penalty.

16. The Learned A.R. for Revenue has argued as follows:-

16.1 The present appeals have been preferred against OIO No. 23/Commr./M-I/2014 dated 23.06.2014 passed by Commissioner, Customs and Central Excise, Meerut-I, in respect of M/s Parmarth Iron Pvt. Limited, 10th KM Stone, Nagina Road, Bijnore(U.P.) & Others in adjudication proceedings, investigated by of DGCEI, New Delhi, SCN No.68/INT/DGCEI/HQ/07 dated 07.07.2008. There were total 108 noticees in the SCN.

16.2 The impugned OIO confirmed (1) demand of central Excise duty amounting to Rs.65,47,51,765/- against PIPL for the period February 2004 to July 2007 along with interest, (2) demand of cenvat credit of Rs.10,11,890/-on the quantity of sponge iron found short on 10.07.2007, along with interest,(3) confiscated the cash amount of Rs.1,78,07,797/- as amount of sale proceeds of clandestinely removed saria (M.S. Rods) by PIPL . M/s PIPL and others were imposed penalty under Rule 25 and 26(2) of CER, 2002.

16.3 The OIO also confirmed (1)demand of central Excise duty amounting to Rs. 229155651/- against M/S Parmarth Steel & Alloys (P) Ltd. (PSAPL for short), along with confirmation of interest for the period February 2004 to July 2007, with penalty imposed on M/s PSAPL and others under Rule 25 and 26(2).

16.4 Further, OIO also confirmed demands of central Excise duty of various amounts against other parties and imposed penalty under Rule 25 and 26 of Central Excise as detailed in operative part of the impugned order in Para 6.21.

16.5 M/s PIPL were engaged in manufacture of M.S Bars, End Cutting, M.S. Ingots, Runners and Risers, etc. under chapter heading 72149990 &72061090. Searches were conducted on 10.07.2007 by DGCEI at 09 places including 04 premises of M/s PIPL, residences of Shri Raj Kumar Agarwal and Sh. Atul Kumar Agarwal, Directors of M/s PIPL, factory premises of M/s Parmarth Steel and Alloys Pvt Ltd (PSAPL), M/s Jain Steels and M/s Reema Steels and search proceedings and recoveries thereof recorded in panchnama (s) drawn on the spot. The records maintained by M/s PIPL and seized during the searches on 10.07.2007 are exhaustive and cover both the goods cleared on payment of duty as well as the goods cleared without payment of duty. At office premises of M/s PIPL at 1st floor,H-8,Geeta Nagari, Bijnore,One Seagate hard disc bearing Model No.ST-340015A,SIN-5LA5R1R3 containing the details of all sales/purchases of M/s PIPL and other incriminating documents were resumed. The print outs of the ledger accounts of M/s PIPL, relating to sale and purchase, found in the said hard disc, were taken under panchanama proceedings in the presence of Shri Atul Kumar Agarwal and Shri Lalit kumar Agarwal, the Directors of M/s PIPL on 11.07.2007 and

12.07.2007.The said hard disc contained the complete data relating to sales and purchases, since inception of M/s PIPL i.e. February 2004 till date of search i.e.10.07.2007.

16.6 The case is based on records resumed from factory and office premises of M/s PIPL, residential premises of directors of M/s PIPL, business premises of suppliers of M.S. Ingots, business premises of buyers of 'saria', records summoned from suppliers of M.S. Ingots and buyers of 'saria', statement of directors of M/s PIPL, suppliers/manufacturers of M.S. Ingots, buyers of 'saria' etc and others supported evidence, as detailed in the SCN and discussed in the OIO. After extensive investigation, the above referred SCN was issued and adjudicated vide impugned OIO.

16.7 Following issues were found to be involved in the case by adjudicating authority-

(1)Whether during period from 02/2004 to 07/2007 M/s PIPL and M/s PSAPL were engaged in production and removal of excisable goods without its accountal in statutory records, without issue of invoices and without payment of central excise duty payable thereon?

(2) Whether during the period in question, M/s PIPL and other manufacturers of M.S. Ingots including M/s

PSAPL who supplied M.S. Ingots to M/s PIPL undervalued their excisable goods on statutory invoices and made removals of the same without payment of appropriate excise duty payable thereon?

(3) Whether during the period in question, M/s PIPL and manufacturers of M.S. Ingots including M/s PSAPL recovered cash from their customers directly or through agents/dealers (a) value of excisable goods supplied without issue of invoice and without payment of duty, and (b) differential amount against removal of undervalued excisable goods on statutory invoices?

(4) Whether during the period in question, PIPL maintained parallel set of private records/accounts for unaccounted cash transactions mentioned at Sl. No.(1) to (3) above?

(5) Whether recovered/seized cash, amounting to Rs. 17807797/- was sale proceeds of clandestine removal of M.S. Bars(Saria) by M/s PIPL?

(6)Whether during the period in question, M/s PIPL wrongly availed cenvat credit on short found sponge iron in their factory on 10.07.2007 during stock taking of raw materials?

(7) Whether M/s PIPL and other manufacturers of M.S. Ingots willfully and deliberately suppressed the fact of actual production, removal of excisable goods alleged

to be cleared clandestinely and realization in cash of the (a) value of excisable goods supplied without issue of invoice and without payment of duty, and (b) differential amount against removal of undervalued excisable goods on statutory invoices?

After elaborately discussing each of the above issues, adjudicating authority confirmed the proposed demands and imposed penalty under rule 25 and 26 of Central Excise Rules/15 of CCR, 2004 as applicable.

(A) Regarding non-admissibility/admissibility as evidence of the computer print outs retrieved from hard disc recovered from 1st floor,H-8,Geeta Nagari, Bijnore under section 36A and 36 B of the central excise act,1944

In addition to the records that have been obtained in form of print outs of the data contained in hard disc, the hard copies of various records that were maintained for procurement of raw material, production and sale of finished goods, accounts of payments made and received for purchase and sale of goods etc. in the premises that were searched and from where such records were resumed, have also been relied upon. The entries contained in resumed records also tally with the print outs of the data retrieved from the hard disc recovered from the computer installed at premises located at Ist floor,H-8,Geeta Nagari, Bijnore, which confirms that the data retrieved from the said hard disc pertains to M/s PIPL.

The ownership of computer system from which said hard disc was retrieved, was purchases by M/s PIPL from M/s S.N. Computers, Muzaffarnagar and the premises from where it was recovered was in possession of M/s PIPL. The sale of said CPU is also corroborated by statement dated 20.08.07 of Sh. Shravan Kumar Singhal, partner of M/s S.N. Computer. The statement of the owner of the premises and ownership of the scooter parked at Geeta Nagari also corroborate that the said premises was in possession of M/s PIPL. The premises at Geeta Nagari was used as office premises of M/s PIPL and the hard disc resumed from the said premises containing the relied on data were records pertaining to sale and purchase made by M/s PIPL during the period in question.

The computer hard disc bearing No.ST340015A SIN 5LASRI3 resumed during search at the premises at H8, Geeta Nagari, Bijnore was sealed in an envelope bearing signature of panchas and representatives of PIPL and PSAPL available on spot, and it is immaterial if said activity was not covered in Panchanama, since, recovery of the same along with the other items is covered in Annexure A to Panchanama. Regarding Panchas (not independent) it is usual practice by the investigating agencies to accompany independent Panchas with them.

The conditions of admissibility of evidentiary value of computer print outs as laid down in Section 36B stands fulfilled in the instant case. The arguments put forth by PIPL are academic and not legally sustainable. Data available in print outs with regard to alleged receipt of raw material i.e. M.S. Ingots and the manufacture of final products i.e. 'saria' by M/s PIPL has been corroborated by the records maintained by the employees of PIPL manually and statements of various persons including directors, employees, suppliers, purchasers, buyers etc., of M/s PIPL.

The print outs of the data relied on in the Show Cause notice, as RUD 4 and RUD5 for proving the charge of clandestine purchase of raw material and manufacture of the final products by M/s PIPL were produced from the hard disc in the office of DGCEI in New Delhi in the presence of Sh.Lalit Kumar Agarwal and Shri Atul Agarwal and in presence of two independent witnesses. Such data is beyond suspicion of having been tampered by the DGCEI officials or anyone else. These are admissible evidence within the provisions of Section 36B read with Section 36A(b) of the Act, and do not require corroboration.

(B) Regarding non admissibility of confessional statements as evidence due to retraction of confessional statements either before or during cross examination- 69 persons (actually 68 as one name got repeated) were desired to be cross examined, out of which 65 persons were allowed to be cross examined. The statement of three persons were not made RUD and therefore not allowed. 05 persons who were ex employees of M/s PIPL did not receive letters for cross examination and did not turn up for cross examination. 08 Panchas were also not found at their addresses as letters sent to them were returned back by postal authorities and also did not appear for cross examination. Out of total witnesses called for cross examination, 32 were cross examined.

Retractions were not made within reasonable period, retracted after 05-06 years (without any reasonable grounds) while submitting defence replies or during the course of cross examination are unreliable, cannot be accepted. Further, deposition made by director of M/s PIPL and other suppliers and proprietors/partners/employees of traders/buyers of M/s PIPL in their initial statements, found corroboration with data retrieved from Hard Disc resumed from premises at H8, Geeta Nagari, Bijnore. Hence, initial statements are reliable evidences given under Section 14 of Central Excise Act,1944, and admissible as evidence.

(C)Regarding non-admissibility of statements of some vital witnesses including the 08 Panchas for their non-production/non-availability for cross examination –

The witnessing of the panchanama proceedings at the relevant time by Panch witnesses who could not be found or whose presence could not be obtained for cross examination for want of their present locations, was legally proper in the eyes of law.

(D)Regarding allegations of manipulations/tempering by investigating officers and denial of cross examination of departmental officers-.

M/s PIPL also sought the cross examination of Departmental officers, which was not allowed as it was considered to be unwarranted, unjustified and uncalled for.

The cross examination of the investigating officers cannot be allowed unless there is sufficient evidence to indicate that the investigating officer has predilection of mind and has bias against the person being investigated. There is no such charge leveled against any officer. The Departmental officers did not add anything during search proceedings, and they simply performed their official duties and throughout the search proceedings, two independent witnesses were present along with representatives of M/s PIPL. It is not a sine qua non for the adjudicating authority to allow cross examination in every case.

(E)Evidence in form of confession of suppliers of M.S. Ingots and buyers of Saria

The purchase ledgers of 42 suppliers of M.S. Ingots were retrieved from hard disc and quantity and value of M.S. Ingots are entered in the retrieved ledgers. The entries in the said ledgers are in respect of the M.S. Ingots accounted for in RG23A part-I register of PIPL and also in respect of M.S. Ingots which have not been accounted for in the said statutory records. On the basis of purchase ledgers retrieved from hard disc vis-à-vis data of purchase of M.S. Ingots available in RG 23A Part-I registers of PIPL, as well as information supplied by PIPL vide letters dated 15.05.08 and others under different letters, M/s PIPL is alleged to have purchased 2,92,800.430 MT of M.S. Ingots including the ingots manufactured in their own Induction furnace and out of which only 98,766.575 MT of M.S. Ingots was accounted for in the statutory records and a quantity of 94,033.845 M.T of M.S. Ingots was not accounted for by M/s PIPL.

(F)Admissibility of the statement of Shri Lalit Kumar Agarwal ,Director of PIPL as Evidence

Shri Lalit Kumar Agarwal in his statement dated 21.01.2008 and 13.06.2008, shown his agreement with the statements of various manufacturers/brokers without issuance of bills/invoices and without payment of central excise duty; and that the payments were being received in cash from M/s PIPL and the same was not being accounted for either by the suppliers or by M/s PIPL in their statutory records.Further, sales made under bills and invoices were being undervalued and there was short payment of central excise duty on removal of such goods. Shri Lalit Kumar Agarwal has categorically admitted the facts divulged in the statements of the manufacturers/brokers and has thus admitted the the fact of the receipt of the unaccounted M.S.Ingots supplied by the manufacturers directly or received by M/s PIPL through brokers, as appearing in the said purchase ledgers of the said suppliers/brokers maintained by M/s PIPL.

Shri Lalit Kumar Agarwal in his statement dated 11.07.2007,24.09.2007 and 12.06.2007 has concurred with the statements of Shri Man Mohan Gautam dated 10.07.2007, Shri Mukesh Chaudhary dated 22.08.2007 and Shri Shamshad Ahmad dated 05.10.2008 and has also deposed that the cash received from the sale of goods without invoice was used for payment of raw materials which they purchased without invoice; that in case of sale to dealers/ market, the rates of saria were more than the rates shown in the invoices and the excess amount was taken in cash, and the difference in such rates was appro.Rs.2000/ per MT… When sellers and buyers have admitted the transactions to have taken place between them, nothing remains to be inferred and only plausible explanation that can be given is that clandestine removal of goods, not accounted for in the records of M/s PIPL, have been made to the buyers appearing in sales ledgers and other documents resumed during search proceedings.

(G) Contention reg. cash confiscation

The cash in hand at M/s PIPL premises on the day of search on 10.07.2007 was Rs.2,16,30,258/- as per cash book resumed at Sl.no.19 of Panchnama whereas actual recovery of cash from the cashier Mr. Mohan Agarwal was Rs.1717797/-only. The cashier stated that balance amount was with Mr. Lalit Agarwal. The cashier stated that M/s PIPL received cash in hand as per cash book on account of sale of saria. The alleged agreement to sell the property against which a sum of Rs.1,55,00,000/- was stated to have been received, was never produced. The difference of Rs.38,22,461/- between the cash in hand and the cash recovered during search proceedings can be assigned to the regular payments made to the suppliers of unaccounted raw materials. The cash of Rs.1,78,07,797/- recovered and seized from the persons of M/s PIPL are the proceeds of clandestine sale of the finished goods on which no central excise duty has been paid.

(H) Contention reg. Production capacity based on total production of saria, consumption of furnace oil and electricity consumption.

The total production of Saria since the inception of M/s PIPL till the date of search i.e.10.07.07 had been ascertained at 2,88,21,857 MT and the average daily production as 228 MT. The total cumulative production of saria undertaken by M/s PIPL has been ascertained in the SCN on the basis of sales ledger retrieved from the resumed hard disc of M/s PIPL. The production slips for 01.06.07 and 31.05.07 of M/s PIPL, production report of M/s PIPL for the month of April 07,May 07 and June 2007 recovered and seized on 10.07.2007 have been relied upon to arrive at the daily average production. The responsible persons entrusted for and looking after the production in the factory of M/s PIPL as well as the directors of M/s PIPL have agreed regarding daily average production figures and the documents associated therewith. The clearances mentioned in the slips/reports were tallied with the respective clearances in the ledger printouts retrieved from the hard disc at Geeta Nagari office of M/s PIPL and the comparison clearly establishes that the said records are records of actual production and the SCN has incorporated the outcome.

The records of production of M/s PIPL shows an average consumption of 34.57 liters of furnace oil for manufacture of one MT of saria. The directors have stated that an average of 30-35 liters of furnace oil was consumed for production of one MT of Saria. M/s PIPL has grossly suppressed the actual purchase and consumption of furnace oil. Total recorded purchase of furnace oil is 91,36,627 litres during the period from February, 04 to June, 07 out of which consumption is shown as 88,42,091 litres. The computer hard disc purchase ledger accounts show the purchase of Furnace oil during said period as 95,23,924 litres. Hence, during the period, 3,87,297 ltrs of furnace oil were not accounted for which was purchased clandestinely. The actual receipt and consumption of furnace oil with the average consumption of 34.57 litres per MT would have yielded 2,69,028 MT of Saria which is commensurate with the production of 2,88,218.57 MT appearing in the data from the hard disc of M/s PIPL.

On the basis of actual production report for the month of May, 2007 of M/s PIPL and the number of units of electricity consumed as per the electricity bill for the same period, the units of electricity consumed for manufacture of one MT of Saria has been computed as 177 units whereas average per MT consumption of electricity for manufacture of saria when computed on the basis of production recorded in statutory records for the months of Feb06 and May 2007 come to 424 and 422 units respectively. The average per MT consumption of 424 and 422 units on the basis of recorded production and electricity consumption in bills are too high on comparison with the average of 177 units per MT arrived on the basis of the actual production

M/s PIPL was undertaking production of 229 MT of Saria per day on an average basis and therefore they were having capacity to manufacture the total clearances, that has been shown in the ledger print outs of the data retrieved from the computer hard disc.

(I) Findings reg. sponge iron shortage

The cenvat credit on 682.235 MT of sponge Iron found short was utilized towards manufacture of Saria, which was not accounted for in the statutory records and clandestinely removed from factory of M/s PIPL without payment of central excise duty. Hence, cenvat credit of Rs.10,11,890-/-, is recoverable.

Findings at Para 6.12.8 (Page 906-917) of impugned order reg. buyers and brokers of saria who have been held liable for penalty under Rule 26(2) are not being elaborated.

As succinctly submitted supra, the OIO has elaborately considered and discussed each and every argument/defence of the appellants under the relevant provisions of law and passed a very reasoned, just and detailed order which This Tribunal be pleased to uphold in the interest of justice.

17. In continuation of written submission dated 04.10.2017, the following further submissions are hereby made by Revenue in reply to the contention of the appellants made during arguments:-

(A) Although Mr. Man Mohan Gautam and Mr. Bhagirath Roy were not available for cross examination at the time of adjudication, this remains an established fact that they were employees of PIPL and they were making entries of data furnished by PIPL. Mr Bhagirath Roy was working as computer operator as employee of M/s PIPL which is also an admitted fact in Appeal No.E/54053/2014 of Mr. Bhagirath Roy. Mr. Man Mohan Gautam also in his appeal No.E/54899/2014 contends that he got a fixed salary from PIPL and was an employee of PIPL. Hence, the contention of appellants that they were planted by DGCEI is pure fiction and imagination as the appellants did not furnish any positive evidence to single out any specific person/officer/manufacturer said to be instrumental in manipulation of documents. Hence, the story of implantation of employees and manipulation of data by DGCEI officers is a pure ridiculous afterthought as the appellants had no defence and therefore cooked a story of manipulation without any evidence.

(B) The remarks column of recovery of Seagate Model contains remark-"Hard disc installed in Vintron CPU operated by Shri Bhagirath Rai, A/c Assistant" in annexure A to Panchanama dated 10.07.2007. Hence, it is established beyond doubt that hard disc containing data of sale/purchase of PIPL was installed in the Computer/ CPU operated by Mr. Bhagirath Rai, Account assistant and the emphasis of the appellants on frivolous technical points like non-recording of computer Serial Number or non-mentioning of sealing of computer hard disc in the Panchanama are attempts to confuse the Hon'ble court. These technical points raised by the appellants do not negate the substantial evidence in form of duly drawn recovery Memo (Panchnama) of hard disc and other records/devices. Further, the linkage between computer invoiced by Bill No.056 to the Hard Disc resumed from premises of 1st Floor Geeta Nagari on 10.07.2007 is well established by statements of the concerned persons.

(C) The contents of the Hard Disc are material evidence in the instant case and it is immaterial as to from which computer the Hard was retrieved on 10.07.2007. The recovery of Hard Disc on 10.07.2007 from 1st Floor, GeetaNagari, Bijnore is established. The contents of Hard Disc are like contents of a Pen Drive and the contents will be same whether it is retrieved from one computer or other computer.

(D) The argument of the appellants that there is lack of direct linkage between company and Sh. Man Mohan Gautam as no investigation was made by DGCEI regarding Mobile No.9997196932 , its ownership, its SIM purchase, its bill payment, is of no significance as linkage of PIPL and Mr. Man Mohan Gautam has been very well established by presence of Sh Man Mohan Gautam at the time of search at 1st Floor Geeta Nagari on 10.07.2007 and 18.07.2007, recovery of data pertaining to M/s PIPL, the unequivocal acceptance of Mr. Man Mohan Gautam that he was an employee of PIPL on fixed salary,statements of director and other circumstantial evidences. There was no need to make investigations regarding source of mobile and its SIM purchase, bill payment, etc. The admitted linkage in statement under Section 14 of Central Excise Act, 1944 is sufficient evidence to accept the admissibility of the facts.

(E) The possession of the premises 1st floor, H-8, Geeta Nagri, Bijnore is established by statement dated 18.07.2007 of Sh. Ram Mohan Jindal who admitted to have given the said premises on rent on recommendation of Shri

Sanjay Agarwal whose brother is owner of M/s Parmarth Iron Factory. Sh. Sanjay Agarwal is also the director of PIPL. Shri Sanjay Agarwal unequivocally admitted in his statement dated 18.07.2007 before DGCEI U/S 14 of Central Excise Act, 1944 that he had recommended to his friend Mr. Ram Mohan Jindal for giving the first floor of H8,Geeta Nagari, Bijnore to Mr. Man Mohan Gautam, that Mr Man Mohan Gautam and Mr. Bhagirath Rai was known to him to be employees of PIPL , that he was also the director of PIPL and also facilitated the exchange of documents between factory of PIPL and 1st floor,H-8, Geeta Nagri, Bijnore on the instructions of Mr. Lalit Mohan Agarwal, Director. He subsequently retracted his admission vide letter dated 19.07.2007 and then readmitted and confirmed the facts admitted on 18.07.2007 before SIO in his statement on 22.08.2007 under Section 14 of Central Excise Act, 1944. Hence, initial statement of Sh. Sanjay Agarwal dated 18.07.2007, recorded after 01 week of the initial search on 10.07.2007 is very much admissible and reliable. Hence, the linkage of PIPL with the First Floor, H8, Geeta Nagari, Bijnore is established beyond any reasonable doubt.

(F) The investigation established beyond any reasonable doubt that the premises 1st floor,H-8, Geeta Nagri, Bijnore was rented to M/s PIPL and was being used by them as a secret place, to account for and keep the records of their duty paid as well as non duty paid clearances . The premises was first searched on 10.07.2007 and was left by DGCEI officers after conclusion of search proceedings on 10.07.2007. Again, on 18.07.2007, it was searched by DGCEI officers and Mr. Man Mohan Gautam was again found in the premises. As Mr. Man Mohan Gautam was employee of PIPL, naturally, the premises was under control of PIPL during the period from 10.07.2007 to 18.07.2007.

(G) The conduct of search proceeding in presence of witnesses (Panchas) belonging to the immediate vicinity/locality of searched premises is desirable in view of Hon'ble Apex Court guidelines. However, Hon'ble Apex Court has not ruled that if the search proceedings have not been conducted in presence of local witnesses of repute, then, such search proceedings would be void or without authority of law. As lucidly admitted in the adjudication order, this has been usual practice by Investigating Agencies to accompany the independent witnesses along with search party and therefore, veracity and authenticity of the search proceedings cannot be challenged on the grounds that the witnesses did not belong to the locality/vicinity of the searched premises.

(H) All the witnesses desired to be cross examined were allowed to be cross examined except (i) the three persons whose statements were not relied upon and (ii) the departmental officers. The cross examination of the departmental officers was not allowed on the ground that no specific officer has been singled out for any predilection of mind or any bias against the person being investigated and officers were performing their statutory duty as per law. Hence, the disallowance of cross examination of these persons did not cause any prejudice to the appellants. The reliance is also placed on following case laws by the adjudicating authority-

(i) Harvinder Singh Vs. ACC, Amritsar-2010(256)ELT714(P&H)

(ii) Mani Bhadras Trading Co. Vs.CC-2010(251) ELT194(Mad.)

(I) Some of the witnesses sought to be cross examined by the appellants did not turn up for cross examination which included Mr. Man Mohan Gautam, Mr. Bhagirath Roy, Sh. Mohan Agarwal (cashier), Shri Mukesh Chaudhary (Sales Executive) ,Shri Shamshad Ahmad (Despatch Clerk), Mr Shailendra Gupta,Mr. Pankaj Agarwal & Mr. Rajesh Sharma who were ex-employees of PIPL. The statements are challenged to be not admissible as evidence on the ground that they were not produced by the Revenue for cross examination in spite of the directions of Hon'ble High Court, Allahabad and the principles of natural justice were not complied. In this regard, kind attention is drawn to the directions of Hon'ble Tribunal in the Remand Final Order No. A/55223-55311/2013-Ex[DB] dated 31.12.2012-

> *"…….. the appellants' request for cross examination of the witnesses whose statements are being relied upon by the Revenue would also be examined by the adjudicating authority in the light of Hon'ble High Court (Division Bench) Judgement. As the matter is almost four years old, we expect the Commissioner to complete the adjudication as expeditiously as possible. We make it clear that all the principles of natural justice would be adhered to by him and the appellants would also cooperate in the adjudication of matter."*

The appellant did not cooperate in securing the presence of the witnesses in spite of the the fact that all these persons were employees of M/s PIPL at the time of the visit of the officers of DGCEI in the factory of M/s PIPL and intimation letters were sent to them at the address of M/s PIPL as well as their residential addresses as per record of the case. However, (i) PIPL refused to receive the said letters and thereafter, all these letters were returned by the postal authorities with the remark**-" company official told**

that addressee has left the company" (ii) the letters sent to their residential addresses were also returned by the postal authorities with the remarks- "**Addressee has left/Address not existing/incomplete address etc."** Hence, intimation letters for cross examination could not be served for want of their present address and the cross examination could not be undertaken by the counsel of PIPL for want of presence of such witnesses for cross examination in spite of fixing more than 03 dates separately and by issuing letters to them. Hon'ble High Court had also directed to complete the adjudication expeditiously. Further, the instant case is not solely based on the statements recorded and there is sufficient material to corroborate the facts stated in the statements. Here, the case has been built up on the basis of the documentary evidences and statements have been relied upon only in corroboration of such facts. **In the aforesaid circumstances, if any witness did not turn up for cross examination, then it cannot be said that his statement cannot be relied.**

(J) A co-noticee cannot be forced to be cross-examined unless he so desires. The reliance is placed on following case laws-

(i) Maya Mahal Industries Vs. CCE-1995(80)ELT118(Tribunal)

(ii) Jagdish Shankar Trivedi Vs. CC-@006(194)ELT290(Tri-Del)

Hence, the cross examination issue has been duly examined by the adjudicating authority and cross examination opportunity given to appellants. The appellants also did not cooperate in securing presence of witnesses who did not appear for cross examination. The Revenue cannot force the witnesses to appear for cross examination.

(K) The statements including inculpatory statements made before a proper officer under Section 14 of the Act are admissible as evidence. It is also legally settled issue that there is no bar in using the statement as evidence in legal proceedings. A confessional statement was held binding even if retracted later in the case of **Surjeet Singh Chhabra V. UOI, 1997(089)ELT646(SC)** Hon'ble Supreme Court pronounced that the authority intending to act upon inculpatory statement as voluntary one should apply its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. In case of **K.L.Pavunny V. ACCE, 1997(90)ELT241(SC),** Hon'ble Supreme court while holding that there is no prohibition under the Evidence Act to rely upon the retracted confession, clarified that the court is required to examine both whether the confessional statement is voluntary and whether it is true. It was also held that even when any retracted confession is sought to be relied upon, prudence and practice require that court would seek assurance by getting corroboration from other evidence adduced by prosecution. The references and findings drawn by Hon'ble Supreme court in case of **Vinod Solanki V. UOI 2009 (233) ELT 157 (SC)** were also taken into consideration by the adjudicating authority and thereafter **adjudicating authority has rightly concluded that if the said persons were forced to give incriminating statements against M/s PIPL, they all should have retracted the same without delay.**

(L) Following case laws relied upon by the adjudicating authority also support the stand of the Revenue **that retraction of statement is not always acceptable.**

(i) Commissioner Vs. K.Manickam-2001(128)ELTA66(SC)

(ii) Ekramuddin V. Collector-2003(155)ELTA244(SC)

(iii) Kalema Tumba Versus State of Maharashtra-2000(115) ELT38(SC)

(iv) Laxmi Tex. Chem versus Commissioner of Central Excise,Surat I2008ELT677(Tri.-Ahmd)

18. We have carefully gone through the records of the case and heard the submissions made by both sides.

19. After service of SCN, PIPL submitted letter dated 20/01/2009 requesting the Commissioner, Central Excise, Meerut-1 seeking hard copies of the documents relied upon by the department. It also appears from record that Commissioner, Central Excise, Meerut-I vide his order dated 27/10/2009 indicated that a CD containing these documents has already been made available, after which PIPL filed two applications on 23/11/2009, one for supply of photostat copies of relied upon documents and the other seeking cross examination of persons, whose statements have been relied upon by the department.

20. It appears that 10/06/2010 was fixed as the date of final hearing of SCN and hence PIPL approached Hon'ble High Court by filing Writ Petition No. 898 of 2010, which was disposed of by Ld. Single Judge and vide judgment dated 15/6/2010 [***Parmarth Iron Pvt. Ltd. v. Commissioner of Central Excise-I*** - 2010 (255) ELT 496 (All)] with a direction that original and non-relied documents be returned to PIPL, hard/photo copies of relied upon documents to be provided to PIPL and PIPL be allowed an opportunity of cross-examination of persons, whose statements have been relied upon in the show cause notice.

21. The judgment of Ld. Single Judge was challenged by department in Special Appeal No. 741 of 2010 before the division bench of Hon'ble Allahabad High Court which was disposed of by the division bench vide judgment dated 29/11/2010 [***Commissioner of Central Excise, Meerut-I v. Parmarth Iron Pvt. Ltd.*** 2010 (260) ELT 514 (All)] with the direction that if the revenue chose to rely on the statements, then in that event the persons whose statements are relied upon have to be made available for cross examination for their statement/evidence to be considered.

22. PIPL then filed Writ Petition No. 1685 of 2011 seeking compliance of the directions contained in judgment dated 29/11/2010 passed by Hon'ble High Court in Special Appeal No. 741 of 2010 and also restraining the department from adjudicating the SCN till clear and legible copies of all relied upon documents are supplied. During the pendency of aforesaid Writ Petition No. 1685 of 2011, Order in Original No. 31/Commr/M-I/2011dated 08/12/2011 was passed by Commissioner, Central Excise, Meerut-I confirming the demands proposed in the SCN dated 7.7.2008 and hence the writ petition was amended by challenging the Order in Original dated 8/12/2011 also.

23. Writ Petition No. 1685 of 2011 filed by PIPL was dismissed by Hon'ble High Court on 28.2.2012 [***Parmarth Iron Pvt. Ltd. v. Commissioner of Central Excise-I***2017 (346) ELT 570 (All)] with the following directions:-

> *"12. In the facts and circumstances, in which the petitioner is raising an issue in the writ petition under Article 226 of the Constitution of India to record findings on the compliance of the directions issued by this Court, as well as the question, whether the non-relied upon documents were actually supplied, failing which the opportunity of cross examination was a futility, can also be looked into by the Appellate Authority. These are questions of facts, which will require findings, after scrutiny of records, to examine the plea of denial of opportunity given to the petitioner in the proceedings of adjudication.*
>
> *13. The writ petition is dismissed relegating the petitioner to file statutory appeal against the order, in the Customs, Central Excise and Service Tax Appellate Tribunal. As this writ petition was pending since 1.2.2011, in case the*

> *petitioner files an appeal along with the application for condonation of delay within a week, the question of delay may be considered by the Tribunal, in accordance with law, taking into account the time spent in pursing the writ petition in the High Court."*

24. Thereafter, PIPL and other Appellants challenged the Order in Original dated 8/12/2011 before this Tribunal and by Final Order No.A/55223-55311-EX (DB) dated 31/12/2012, the appeals were allowed by this Tribunal with the following observation:-

> *"13. In as much as the impugned order stands passed by the adjudicating authority without supply of RUDs (most of which have now been supplied in terms of the directions of Bench) and without there being any written detailed defence reply filed by the main appellant M/s Parmarth Iron Pvt. Ltd. and without there being any personal hearing, we are of the view that the impugned order is passed with gross violation of principles of natural justice. Accordingly, we are of the view that the same is required to be set aside. The balance documents which are*

> *required to be supplied to the appellants/ noticees would be supplied by the office of Commissioner within a period of two months from the date of receipt of the order. Further the appellants request for cross examination of the witnesses whose statements are being relied upon by the Revenue would also be examined by the adjudicating authority in the light of the Hon'ble Allahabad High Court (Division Bench)'s judgment. As the matter is almost four years old, we expect the Commissioner to complete the adjudication as expeditiously as possible. We make it clear that all the principles of natural justice would be adhered by him and theappellants would also cooperate in the adjudication of the matters."*

25. Since the present appeal involves question of confiscation of cash and release of the same, hence it is also necessary to record that PIPL filed another Writ Petition No. 880 of 2013 before Hon'ble Allahabad High Court, challenging the order passed by Commissioner, by which PIPL's application for release of cash seized vide Seizure Memo dated 26/12/2007, was deferred, until adjudication of the matter. This writ petition was also dismissed by

judgment dated 9/10/2013 [**Parmarth Iron (P) Ltd. vs. Union of India** 2014 (303) ELT 59 (All)] with the following observations:-

> *"10. We may observe that the Commissioner of Central Excise, Meerut has not rejected the application for release of cash. He has only deferred the application until the adjudication is complete.*
>
> *11. In view of the fact, that the petitioner had not filed reply to the show cause notice for the last five years, we do not propose to interfere in the matter.*
>
> *13 The writ petition is dismissed."*

Thereafter, PIPL vide letter dated 4/12/2013 filed interim defence reply and also sought cross-examination of 69 persons. Other co-noticees filed final defence reply, which was followed by submissions and additional submissions etc. by PIPL and other co-noticees.

26. During the course of hearing of stay applications, Supplementary Affidavits were filed by PIPL & PSAPL bringing on record documents showing financial hardship,

copy of order dated 20/07/2013 passed in Criminal Case No. 101/2007 under Section 135 of the Electricity Act and also the copies of assessment orders passed under the U.P Trade Tax Act, 1948.

Second Supplementary Affidavit was also filed by PIPL bringing on record the orders by which bail was granted to Sri Lalit Kumar Agarwal and Sri Raj Kamal Agarwal, copy of order dated 23.8.2017 passed by U.P Electricity Commission, copies of registration certificates issued under the U.P Trade Tax Act, 1948, Central Sales Tax Act, 1956 and U.P VAT Act, 2008, copy of Form 6-A under EPF Act, 1952 and retractions dated 12.7.2007 and 25.10.2007 made by Sri Lalit Kumar Agarwal and Sri Raj Kamal Agarwal before the Ld. Magistrate at Patiala House Court, New Delhi including retraction dated 16.7.2007 made to Additional Director, DGCEI, New Delhi.

27. During the course of hearing of appeals, Sri Raj Kamal Agarwal expired on 29/07/2017. Appropriate applications along with death certificate dated 22/08/2017 were filed by his son Sri Priyansh Agarwal seeking substitution in the appeals, which was allowed.

28. It is clear from the facts stated in the SCN and the findings recorded in the order that the case of the revenue is based on ;

(i) alleged statements of Shri Manmohan Gautam and Shri Bhagirath Roy, who prepared handwritten partywise ledgers, made entries in the alleged computer installed at H-8, Geeta Nagari, Bijnore and also allegedly explained such entries and accounting procedure.

(ii) alleged data retrived from harddisc seized from H-8, Geeta Nagari, Bijnore, on the basis of which alleged manufacturers and suppliers of M.S. INGOTS, brokers and scrap dealers and also buyers of finished goods were identified.

(iii) alleged statements of Shri Shailendra Gupta, Shri Pankaj Agarwal and Shri Rajesh Sharma, who as per Revenue's case were employees of PIPL and collected sale proceeds of clandestinely cleared saria at Ghaziabad.

(iv) Alleged statements of Shri Ram Mohan Jindal and Shri Shravan Kumar Singhal, on the basis of which the alleged premises at H-8, Geeta Nagari, Bijnore and computer found at that place was related to appellant.

(v) Alleged statements of Shri Mukesh Chowdhury, Shri Samshad Ahmed and Shri Mohan Agarwal, who as per revenue made entries in order book diary, dispatch sheets, daily sale register and cash book for 3 months.

(vi) Alleged confession made by directors and suppliers of M.S. Ingots and purchasers of saria.

29. Law regarding opportunity of cross-examination is well settled. Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE, Kolkata [2015 (324) ELT 641] has held that an order passed by denying cross-examination of witnesses whose statements have been relied upon, violates principles of natural justice and is a nullity. Similarly in the case of Arya Abhusan Bhandar v. UOI [2002 (143) ELT 25], Hon'ble Supreme Court has held that non-production of material witnesses for cross-examination, results in breach of principles of natural justice.

30. Apart from the aforesaid settled law, in the present case there was a specific direction of division Bench of Hon'ble Allahabad High Court in the case of appellant itself i.e. CCE, Meerut-I v. Parmarth Iron Pvt.Ltd. [2010 (260) ELT 514(All.)] as under:-

> *"16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon in the*

> *show cause notice, are liable to be examined at that stage. If the Revenue chose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue chose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross examination for the evidence or statement to be considered."*

It has also been informed at Bar that the aforesaid judgment has attained finality, as none of the party challenged the aforesaid judgment before Hon'ble Supreme Court. Thus, the direction was very clear i.e. if the revenue does not chose to examine any witnesses in adjudication, their statements cannot be considered as evidence and if revenue chose to rely upon statement of any person, than in that event, the person whose statement is relied upon have to be made available for cross-examination, for the evidence or statement to be considered.

31. However, it is clear from the records of the case that Sri Manmohan Gautam, Sri Bhagirath Roy, Sri Shailendra Gupta, Sri Pankaj Agarwal & Sri Rajesh Sharma, were never produced by revenue for cross-examination and hence in

view of the law laid down by Hon'ble High Court in the case of PIPL itself, their statements cannot be considered as evidence.

32. Finding recorded in the order that all these five persons were employees of PIPL and PIPL refused to receive the letters for service on these five persons, is also of no avail, since it is the specific case of PIPL since beginning that none of these persons was employee of PIPL. Inspite of this specific defence, no enquiry was conducted by revenue to find out whether these five person were on roll of PIPL. In absence of any such evidence on record, these five persons cannot be assumed to be employees of PIPL and hence PIPL was not under any obligation to accept the letters for service on these five persons.

33. Coming to the question as to whether these five persons namely Sri Manmohan Gautam, Sri Bhagirath Roy, Sri Shailendra Gupta, Sri Pankaj Agarwal & Sri Rajesh Sharma were employees of PIPL or not, records of the case shows that except statements of these persons there is no evidence to show these five persons were employees of PIPL at any point of time. Except from recording statements, revenue has not made any enquiry in this regard. On the contrary, PIPL in its reply to SCN and appeal

memo has categorically denied the same. In its Supplementary Affidavit, PIPL has also brought on record, Form 6-A i.e. Annual Contribution Statement, which is required to be filed by every employer under Clause 38 (3) of Employees Provident Fund Scheme, 1952 framed under the provisions of EPF Act, 1952. This Form 6-A contains Annual summary and shows the total amount of recoveries made during the period of dispute i.e. 2004-05 to 2007-08, wherein names of all the employees were disclosed, which does not include the names of Sri Manmohan Gautam, Sri Bhagirath Roy, Sri Pankaj Agarwal, Sri Mukesh Chaudhary, Sri Shailendra Gupta. Further, as per revenue, PIPL was maintaining parallel set of records containing all accounted and unaccounted transaction, but there is no allegation in the SCN that parallel accounts also shows expenses towards salaries of these persons, rent of Geeta Nagri House etc. Thus, the charge of revenue that these five persons were employees of PIPL cannot be sustained, in absence of any evidence in support of the charge.

34. Further, it was not the responsibility of PIPL to produce these persons but it was the responsibility of revenue to produce these persons for cross-examination, since it was the revenue who was relying on statements given by these persons. As held by Hon’ble Supreme Court

in the case of ***Union of India v. Sardar Bahadur*** (1972) 4 SCC 618, where while following the law laid down in the case of ***Bareilly Electricity Supply Co. Ltd. v. Workman and Ors***(1971) 2 SCC 61, it was held:-

> *"We do not think that the statements should have been received in evidence as the appellant had taken no step to produce the persons who made the statements, for cross- examination by the respondent. It was the duty of the appellant (revenue) to have produced the persons whose statements were sought to be relied/proved for the cross-examination of the respondent."*

Hon'ble Delhi High Court in the case of ***CCE v. Vishnu & Co. Pvt. Ltd.***2016 (232) ELT 793 (Del) has rejected similar contention of department in the following words:-

> *"42. The contention that it is the responsibility of the noticees to produce the witnesses for cross-examination is a strange one, considering that they are witnesses of the Department and that their statements are being relied upon by the Department in support of the SCNs. Since it is relying on such statements, it is the responsibility of the Department*

> *to ensure their presence for cross-examination. As already mentioned, whenever such witnesses (i.e. six of them) were produced for cross-examination they resiled from their earlier statements."*

35. Thus, it was the responsibility of the revenue to produce these five persons for cross-examination, which has apparently not been done in the present case. As regards, letters sent to their recorded address which were returned back by postal authorities with the remark "**Addressee has left/Addressee non-existing/Incomplete address etc."**, it is interesting to note that during investigation summons were issued to these persons at their address and all these persons appeared and tendered their statements a number of times. However, when their cross-examination was demanded, revenue failed to produce them on the ground of non-existing/incomplete address

36. Once it is held that the statements of Sri Manmohan Gautam, Sri Bhagirath Roy, Sri Shailendra Gupta, Sri Pankaj Agarwal & Sri Rajesh Sharma, cannot be read as evidence and cannot be relied upon by revenue, then statements made by them that they were employees of PIPL working at H-8, Geeta Nagri, Bijnore and 107, Navyug

Market, Ghaziabad respectively, H-8, Geeta Nagri, Bijnore was office of PIPL, hard disc resumed from Geeta Nargi pertains to PIPL, sales and purchase ledger accounts includes accounted and unaccounted clearances of PIPL, cash collected at Navyug Market, Ghaziabad against sales made by PIPL etc., cannot be accepted and cannot be considered as evidence against Appellant.

37. Further, law is well settled that in absence of cross-examination, statements relied upon by revenue has to be disregarded, as held by Hon'ble Bombay High Court in the case of ***Kiran Nagindas Vora v. Commissioner of Customs*** 2015 (322) ELT 97 (Bom), ***Pahar Chand & Sons v. State of Punjab*** (supra) and larger bench decision of this Tribunal in the case of ***Arsh Castings Pvt. Ltd. v. CCE*** (Tri LB).

38. It is important to note that as per revenue's own case, the data retrieved from hard disc was feeded in computer by Sri Manmohan Gautam and Sri Bhagirath Roy only and not by any other person. Since the data retrieved from computer hard disc has important bearing on the case, hence it is necessary to refer to the law on the subject.

39. Hon'ble Supreme Court in the case of ***Bareilly Electricity Supply Co. Ltd. v. Workman and Ors***(1971) 2 SCC 61 has held that if a document is produced to establish some fact than its writer must be produced for giving opportunity to the party who challenges such fact. The relevant part of the judgment is reproduced hereunder:-

> *"......But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the*

entries made therein. <u>If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact</u>. This is both in accord with principles of natural justice as also according to the procedure -under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act 1947 and the rules prescribed therein permit, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced. Again if a party wants an inspection, it is incumbent on the Tribunal to give inspection in so far as that is relevant to the enquiry. The applicability of these principles are well recognised and admit of no doubt."

Thus, law is clear that when anydocument produced to establish some fact which is relevant to the enquiry, the writer of such document must be produced or his affidavit in respect thereof must be filed and opportunity must be afforded to the opposite party who challenges such fact.

40. The ratio propounded by Hon'ble Supreme Court will also apply in respect of data retrieved from hard disc, seized from H-8, Geeta Nagri, Bijnore. Since admittedly the sales, purchase and other accounts retrieved from hard disc, were prepared by Sri Manmohan Gautam and Sri Bhagirath Roy and since such accounts were being relied upon and used against the Appellant, hence it was incumbent upon the revenue to produce the author/writer of such accounts for cross-examination in view of the law laid down in the case of ***Bareilly Electric Supply*** case (supra), followed in ***Sardar Bahadur*** case (supra). However, inspite of the specific requests made by Appellants for cross-examination of Sri Manmohan Gautam and Sri Bhagirath Roy, none of them were produced for cross-examination. Thus, when the writer of entries made in computer from which hard disc was allegedly retrieved, was not produced by revenue for cross-examination, then the accounts retrieved from hard disc cannot be used as evidence against the Appellants.

41. On the same reasoning, since the three persons viz Sri Shailendra Gupta, Sri Pankaj Agarwal & Sri Rajesh Sharma, were the authors of documents resumed from 107, Ist Floor, Navyug Market, Ghaziabad, were also not produced for cross-examination and hence documents resumed from 107, Ist Floor, Navyug Market, Ghaziabad, also cannot be used against the Appellants.

42. Finding recorded by the Ld. Commissioner that the revenue case is not solely based on the statements recorded and there is 'sufficient material' to corroborate the facts stated in the statements, is also incorrect, as the only other material to corroborate the statements is printouts of data, which in absence of cross-examination of writer, cannot be regarded as evidence. There is no other material on record, let alone 'sufficient material' and the entire case of revenue has been set up on statements only.

Once it is held that the data retrieved from hard disc cannot be considered as evidence and cannot be relied against PIPL, then the argument of PIPL that in view of Section 36B (1) (c), computer printouts cannot be considered evidence and conditions of sub-section (2) and other conditions are not complied with, becomes an academic issue and the same need not require any decision.

43. Regarding the premises situated at H-8, Geeta Nagri, Bijnore, revenue has relied upon the statement of one Sri Ram Mohan Jindal to allege that the said premises was given on rent to PIPL and that the scooter belonging to Sri Atul Kumar Agarwal was being used by Sri Manmohan Gautam. However, Sri Ram Mohan Jindal was also not produced for cross-examination and hence his statement has no evidentiary value. Similarly, Sri Shravan Kumar Singhal, Partner of M/s S.N Computers, whose statement has been relied upon to show that Vintron CPU & Monitor found at H-8, Geeta Nagri, Bijnore belongs to PIPL, has also not been produced for cross-examination by revenue. Except the statement of Sri Ram Mohan Jindal, revenue has not conducted any enquiry to show that the alleged premises at H-8, Geeta Nagri Bijnore was used by PIPL. Hence in absence of any other evidence, it is difficult to uphold the finding recorded by the Ld. Commissioner in the impugned order.

In view of the above, there is no necessity in dealing with the argument of PIPL regarding panchas and their cross-examination and legality of search dated 10/07/2007 at H-8, Geeta Nagri, Bijnore. The argument of PIPL regarding cross-examination of officers, who conducted search and who took printouts, is also not required.

44. Next ground of revenue's case is the confessional statements made by Sri Lalit Kumar Agarwal, who was arrested on 12.7.2007 and was released on bail only on 10.9.2007 whereas Late Raj Kamal Agarwal was also arrested on 24.10.2007 and was released on bail only on 23.1.2008. The retractions made by them on 12/07/2007 & 25/10/2007 before the Ld. Court at Patiala House Court, New Delhi, is also on record showing that immediately upon arrest both these persons retracted from their statements which were given when they were in the custody of DGCEI. Further, Sri Lalit Kumar Agarwal again made retractions from his earlier statement on 16/7/2007 before Additional Director, DGCEI, New Delhi. Thus, the retraction of both these persons was at the first available opportunity and therefore cannot be brushed aside in absence of reliable independent material to corroborates the confession, as held in ***Vishnu & Co.*** (supra).

45. Further, the defence of Sri Lalit Kumar Agarwal that his confession was not voluntary but obtained under duress and coercion cannot be taken lightly. In the case like this,

where the statements of alleged employees and data retrieved from hard disc, cannot be read as evidence, and there is no independent reliable material to corroborate the alleged confession, then the burden was clearly on revenue to show that confession was voluntary and not obtained as an outcome of threat etc. Hon'ble Supreme Court in the case of ***Vinod Solanki v. Union of India*** 2009 (233) ELT 157 has considered this aspect of the matter and has held that:-

> "*34. 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. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was*

because of threat, coercion, etc. but the requirement is that it may appear to the court as such."

46. Thus once the person whose confession is relied upon by the revenue and confession was retracted, then the burden was on the revenue to show that confession was voluntary in nature and not obtained as an outcome of threat etc. This position of law has also been reiterated by Hon'ble Supreme Court in the case of ***Francis Stanly@ Stalin v. Intelligence Officer*** 2006 (13) SCALE 386 wherein it has been held that confession purported to have been made before an authority would require deeper scrutiny and Court must seek corroboration of the purported confession from independent sources.

In the present case, no such effort has been made by revenue and thus, no evidentiary value can be assigned to the alleged confession of directors of PIPL & PSAPL. It was for the revenue to corroborate the confession from independent sources, which has not been done by the Revenue in the present case, in as much as the only material, the statements of alleged employees and data retrieved from hard disc, are itself not admissible as evidence.

47. Regarding confessions made by suppliers and buyers, it is clear from record that initially most of them rendered

their confessional statement but when PIPL sought their cross-examination, revenue could produce only 30 persons for cross-examination and during cross-examination all of them retracted from their earlier statement. Once this is so, then their statements cannot be relied in absence of some other reliable material which corroborates such statements, as held by Hon'ble Delhi High Court in the ***Vishnu & Co.*** (supra), wherein after considering the Apex Court judgments in the case of ***Collector of Customs v. D. Bhoormull*** AIR 1974 SC 859, ***Sujeet Singh Chabbra*** (supra) &***K.I Pavunny*** (supra) has held that :-

> *"40. In fact Ms. Sharma too insisted upon reading from such retracted statements in order to persuade the Court to hold that the impugned order of the CESTAT is perverse. According to her the retraction made more than 20 months after the making of the initial statements "would have no effect in the eye of law". She too submitted that the responsibility of ensuring the presence of such persons for cross-examination was of the noticees themselves.*
>
> *41. What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no*

> *longer safe to rely upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard*."

48. Further, enquiry against such suppliers and buyers was initiated on the basis of purchase and sales ledger accounts allegedly retrieved from hard disc. Such accounts, in absence of cross-examination of their writer, cannot be held to be an 'evidence', then the confessional statements are also of no avail.Furthermore, such alleged manufacturers-suppliers of M.S Ingot, M.S Scrap, other scrap dealers and buyers of finished goods are nothing but co-accused persons. It is a settled law as held by Hon'ble Supreme Court in the case of ***MohteshamMohd. Ismail v. Spl. Director***2007 (220) ELT 3 SC that, confession of co-accused persons cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidences.

Finding recorded by Ld. Commissioner that a co-noticee cannot be forced to be co-examined, is also incorrect in view of the law laid down above and statements of co-accused being not substantive evidence, cannot be relied upon in absence of any other reliable independent material. Since, in the present case, the statements of co-accused was heavily relied upon, hence it was the duty of the revenue to produce them for cross-examination.

49. This takes us to the next question regarding the three order books prepared by Sri Mukesh Chaudhary, dispatch sheets prepared by Sri Shamshad Ahemad, three sales registers and three cash books prepared by Sri Mohan Aggarwal. In this respect, the defence of PIPL is that, these records are not related to PIPL but were prepared by these persons on the instance of Sri Mohan Aggarwal who was lured by Sri Manmohan Gautam to malign the company. All the three persons namely Sri Mukesh Chaudhary, Sri Shamshad Ahemad and Sri Mohan Aggarwal also submitted affidavits to this effect, but the same has been rejected by the Ld. Commissioner in the impugned order in original. Admittedly, the contents of the entries contained in these records were denied by the three persons by filing affidavits. Revenue was having notice of these affidavits but neither the admissibility of these affidavits nor the contents of these affidavits was challenged by revenue, but the same

were merely brushed aside by Ld. Commissioner, which is not proper in view of the law laid down by Hon'ble Supreme Court in the case of ***CIT, Calcutta v. T.I & M Sales Ltd.*** (1987) 3 SCC 132. Further, these records contains entries for only three months, which are not corroborated by any other independent material except statements, which are itself not admissible. Thus, Ld. Commissioner erred in not considering the three affidavits.

50. Now coming to the charge of clandestine clearances made by the revenue against PIPL & PSAPL. Law is now well settled on the subject and reliance in this regard on the judgment of jurisdictional High Court would suffice. In the case of ***Continental Cement Company v. Union of India*** 2014 (309) ELT 411 (All), a division bench of Hon'ble Allahabad High Court has held that:-

> "*12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with*

regard to alleged removals, the department has not investigated the following aspects:

(i). To find out the excess production details.

(ii). To find out whether the excess raw materials have been purchased.

(iii). To find out the dispatch particulars from the regular transporters.

(iv). To find out the realization of sale proceeds.

(v). To find out finished product receipt details from regular dealers/buyers.

(vi). To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department."

Thus, as per the law laid down by the jurisdictional High Court, charge of clandestine removal can be sustained only on sufficient and tangible evidence such as evidence of excess production details, excess raw material, transport details, realization of sale proceeds, receipt of sale proceeds and excess power consumption, etc.

51. In the present case, there has been no investigation regarding excess consumption of electricity and excess consumption has been presumed only on the basis of

statement of Sri Raj Kumar Agarwal wherein he stated that PIPL was resorting to 'adjustment' in electricity. On the contrary, order dated 22/06/2013 passed by Ld. Special Judge/Additional District Judge shows that a FIR was registered against the Director and Authorized Signatory of PIPL for electricity theft, being Criminal Case No. 1010/2007 under Section 135 of the Electricity Act, where finding has been recorded that there was no electricity theft during the period 04/01/2004 to 21/06/2007, which covers the period for which SCN was issued. To the same effect is the order dated 23/08/2017 passed by U.P Electricity Regulatory Commission in Petition No. 488/2017, shows that there was no excess consumption of electricity. There being no enquiry and consequently no evidence for excess consumption of electricity.

To find out excess purchase of raw material and excess clearance of final product, revenue has made enquiries from dealers by identifying them on the basis of data allegedly retrieved from hard disc. Once it is held that such data cannot be considered as evidence, then it is difficult to sustain the outcome of enquiry made from such dealers. For a moment, even if it is assumed that enquiry was made from right persons, then also revenue has not collected any evidence from such dealers except their confessional statements. Such confessional statements, are not supported by opportunity of cross-examination and thus cannot be considered as evidence in view of law laid down by Hon'ble Allahabad High Court in PIPL's case or were retracted during cross-examination, and hence not admissible as evidence in absence of any independent reliable material which corroborates such statements. Thus, the enquiry conducted by the revenue does not lead to any credible or tangible evidence regarding extra purchase of raw material or sale of finished goods.

52. Similarly, neither there is any allegation in SCN nor any evidence on record that extra labour was employed by PIPL for clandestine production. Allegation regarding clandestine purchase of furnace oil is not supported by any evidence. Regarding transportation also, there is no enquiry except a statement that vehicle owned by PIPL were used for transporting goods. In respect of cash receipts also, revenue has relied upon statements of alleged employees and CA but have not produced them for cross-examination, which further makes the case of revenue weak. Similarly in respect of production capacity also no positive material was brought on record and the case of revenue is simply based on the data allegedly retrieved from hard disc. Thus, in view of law laid down by jurisdictional High Court (as regards admissibility of statement), the charge of clandestine removal cannot be upheld against PIPL.

53. Regarding shortage of 682.235 MT of Sponge Iron, PIPL has submitted that the quantity was assessed on eye estimation, therefore demand was not sustainable. Having gone through the Panchanama dated 10/07/2007, it is clear that the shortage was detected or calculated by way of eye-estimation, without any physical verification and therefore the finding recorded by Ld. Commissioner is perverse.

54. This leads us to the next question regarding confiscation of amount of Rs. 1,78,07,797.00 under Section 121 of Customs Act, 1962 r/w Notification No. 68/63 dated 4.5.1963, as amended, issued under Section 12 of Central Excise Act, 1944. Section 12 of C.E Act, 1944 provides that Central Govt. may by notification declare that provisions of Customs Act, 1962 relating to confiscation etc. be applicable in regard to like matters under the C.E Act, 1944. In exercise of power conferred under Section 12, Central Govt. issued Notification No. 68/63 dated 4.5.1963, as amended by Notification No. 48/97 dated 2.9.1997, by declaring that provisions of Section 121 of Customs Act, 1962, shall be applicable in regard to like matters under the C.E Act, subject to the modifications and alterations mentioned therein. The modification and alteration provided in the notification was as under:-

> *(v) references to "smuggled goods' shall be deemed to be references to 'excisable goods which have been*

removed in contravention of any of the provisions of the Central Excise Rules, 1944'

55. A combined reading of Notification No. 68/63 dated 4.5.1963 (as amended) r/w Section 12 of C.E Act, 1944 r/w Section 121 of Customs Act, 1962 shows that, where any excisable goods are removed in contravention of any provisions of Central Excise Rules, 1944, the sale-proceeds of such goods are liable to be confiscated.However, Central Excise Rules, 1944 were rescinded by Central Excise Rules, 2002, but no corresponding notification was issued by the Central Govt. amending the Notifications issued under Section 12 of the C.E Act, 1944. Notification No. 68/63 dated 4/5/1963 was last amended by Notification No. 48/97 dated 02/09/1997, which could also not be denied by revenue. When during the period in question i.e. Feb'2004 to July'2007, Central Excise Rules, 2002 were in existence and there being no further amendment to Notification No. 68/63 (as amended), power to confiscate cash of Rs. 1,78,07,797.00 on the ground that the same is sale-proceeds of excisable goods clandestinely removed in contravention of Central Excise Rules, 2002, is wholly illegal. Although during the course of hearing, PIPL has produced agreement for sale of immovable property and has contended that the said agreement was produced before Ld. Commissioner but the same was brushed aside,

illegally, this question need not required to be answered once the confiscation of the amount is held to be illegal and without authority of law.

56. Once the confiscation of the amount of Rs 1,78,07,797.00 is held to be illegal, then the same is liable to be immediately returned to PIPL at the earliest. However PIPL has also contended that since department has earned interest on illegally confiscated amount as the said amount was was deposited by DGCEI in term deposit, bearing interest, hence the said amount be returned along with interest. For this plea, PIPL has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Union of India v. Tata Chemicals Limited*** (2014) 6 SCC 335 and judgment of Hon'ble Allahabad High Court in the case of ***R.H.L Profiles Ltd. v. CCE, Kanpur*** (2017) 352 ELT 349, wherein a similar direction has been issued by Hon'ble High Court while exercising appellate power under Section 35 of the Central Excise Act. Having examined the judgment of jurisdictional High Court, we are bound by the law declared and hence it is directed that amount of interest earned by department be also returned to PIPL at the earliest.

57. We have carefully gone through the records of the case and submissions made by both sides. We find that the Hon'ble High Court of Delhi in the case of CCE vs. Vishnu & Co. Pvt. Ltd. (supra), has held, that it was the responsibility

of the Revenue to produce prosecution witnesses for cross examination, therefore, we do not find the finding by the Original Authority tenable that cross examination could not be offered because the appellant could not produce the prosecution witnesses. We, therefore, hold that it was obligation on the part of the Revenue to produce its witnesses for cross examination. We also find that in the present case Hon'ble High Court of Allahabad has categorically directed in Para 16 of its ruling in the present case, ruled on 29.11.2010 in Special Appeal No. 741 of 2010, that if Revenue chooses not to examine any witnesses in adjudication, their statements cannot be considered as evidence. We have come to the conclusion that by not producing the prosecution witnesses for cross examination Revenue chose not to examine witnesses, whose names are mentioned as follows:-

Shri Manmohan Gautam and Shri Bhagirath Roy, Shri Mohan Aggarwal-Cashier, Shri Mukesh Chaudhary-Sales Executive, Shri Pankaj Aggarwal and Shri Rajesh Sharma and Shri Shravan Kumar Singhal partner of S.M. Computers and Shri Ram Mohan Jindal, Landlord of premises at H-8, Geeta Nagri, Bijnore, Shri Sheru Malik, Shri Aas Mohd and Shri Idris.

58. From the impugned Order-in-Original if the statements recorded in respect of the above stated persons

are removed, then there is no evidence left for arriving at the conclusions drawn by the Original Authority. The statements of above stated persons were relied upon for alleging that the Geeta Nagari, Bijnore premises was taken on rent by the appellant, the computer was purchased by the appellant, Shri Bhagirath Roy, Shri Monmohan Gautam were employees of appellant and they were making entries in the computer on behalf of appellant and that the said entries revealed that the extra/unaccounted goods were manufactured by the appellant and clandestinely removed. All these conclusions do not have any other basis, than the statements of above stated persons, and as directed and ruled by Hon'ble Allahabad High Court, the statements of above stated persons cannot be relied as evidence, since they were not produced for cross examination. Therefore, we find that the findings by the Original Authority to arrive at a conclusion and passing of the present order has no basis. We, therefore, set aside the impugned Order-in-Original, insofar as it relates to the present appellants. Insofar as the present appeals are concerned, we allow the appeal and also direct the Revenue to refund Rs.1.78 crores (Rs.1,78,07,797/-) to the appellant alongwith interest by following ruling of the Hon'ble Supreme Court in the case of Union of India vs. Tata Chemical Limited (supra). We also observe that there were no investigations carried out in respect of clandestine manufacture, clandestine removal and realization of such sale proceeds and, therefore, relying on the ruling in the case of Continental Cement Company vs. Union of India (supra) ruled by Hon'ble Allahabad High Court, the charge of clandestine manufacture and clandestine clearance is not established. We further accept arguments of learned counsel in respect of return of amount, which may be granted to appellant at the earliest from the date of production of certified copy of this order.

59. Regarding Parmarth Steel & Alloys Pvt. Ltd., it is clear from the records that the case of Revenue against Parmarth Steel & Alloys Pvt. Ltd., is not based on any record resumed during search at the factory premises of Parmarth Steel & Alloys Pvt. Ltd., but is based solely on the statements of Sheeru Malik, AasMohd. & Idris, who were not produced by Revenue for cross-examination, hence in view of the law discussed above, demand of duty against Parmarth Steel cannot be sustained.

60. In respect of Kamakhya Steel Pvt. Ltd., also we find that the whole demand is based on assumption and on the basis of statements which are not a good piece of evidence as discussed hereinabove. Accordingly, demand in respect of Kamakhya Steel Pvt. Ltd., is also set aside alongwith penalty. They shall also be entitled to consequential

benefits. Since the demands are not sustainable no penalties are sustainable.

61. In view of the above all the appeals are allowed and demand of duty, interest and imposition of penalty in respect of companies and directors are set aside and all the appellants are entitled for consequential relief in terms of the directions given above. Stay Applications also stand disposed of as infructutous.

(Pronounced in Court on-09/04/2018)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Anil Choudhary)**
Member (Technical)	**Member (Judicial)**

Ankit