# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# ALLAHABAD

REGIONAL BENCH - COURT NO.I

**Excise Appeal No.70117 of 2017**

(Arising out of Order-In-Original No.LKO-EXCUS-000-COM-EX-011-2016-17, dated -18/11/2016 passed by Commissioner, Central Excise & Service Tax, Lucknow)

**M/s Kundan Castings Pvt. Ltd.** **.....Appellant**
(B-52-53,UPSIDC Industrial Area, Malwan
Fatehpur, U.P.)

*VERSUS*

**Commissioner, Central Excise, Lucknow** **....Respondent**
( 7A, Ashok Marg, Lucknow)

**WITH**

**Excise Appeal No.70118 of 2017**

(Arising out of Order-In-Original No.LKO-EXCUS-000-COM-EX-011-2016-17, dated -18/11/2016 passed by Commissioner, Central Excise & Service Tax, Lucknow)

**Shri Naveen Jain, Director** **.....Appellant**
**(M/s Kundan Castings Pvt. Ltd.)**
(B-52-53, UPSIDC Industrial Area, Malwan
Distt.-Fatehpur, U.P.)

*VERSUS*

**Commissioner, Central Excise, Lucknow** **....Respondent**
(7A, Ashok Marg, Lucknow)

**APPEARANCE:**
Shri Amit Awasthi, Advocate & Shri Ashish Kumar Shukla, Advocate for the Appellant
Shri A.K. Choudhary, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO.-70923-70924/2024**

DATE OF HEARING : 08.10.2024
DATE OF DECISION : 08.10.2024

**SANJIV SRIVASTAVA:**

This Appeal is directed against the Order-In-Original No. LKO-EXCUS-000-COM-EX-011-2016-17, dated -18/11/2016 passed by Commissioner, Central Excise & Service Tax, Lucknow. By the impugned order following has been held:-

ORDER

*"I) I confirm the demand of Central Excise duty amounting to Rs.3,43,89,580/-(Rupees Three crores forty three lakhs, eighty nine thousand five hundred and eighty only) under proviso to erstwhile section 11A(1) read with present section 11A(4) of the Central Excise Act, 1944. Since out of this amount the party has already deposited Rs 10 lakh towards the duty, I order to appropriate the said amount to Government exchequer.*

*II) I confirm the demand of interest leviable at the appropriate rate, on the aforesaid amount and order for recovery of the same from M/s KCPL under Section 11AB read with present Section 11AA of the Central Excise Act, 1944 for delayed payment of duty leviable on clandestinely removed goods.*

*III) I impose an equal penalty of Rs. 3,43,89.580/- (Rupees Three crores forty three lakhs, eighty nine thousand five hundred and eighty only) under Section 11 AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.*

*IV) I also impose a penalty of Rs. 50,00,000/- (Rupees Fifty Lakhs only) on Shri Navin Jain, Director of M/s Kundan Casting Pvt. Ltd., B-52, 53 UPSIDC Industrial Area, Malwan, Distt Fatehpur under Rule 26 of the Central Excise Rules, 2002.."*

2.1 The Appellant is engaged in the manufacture and clearance of M.S. Ingots falling under Chapter Sub Heading 72061090 of the Central Excise Tariff Act, 1985.

2.2 Searches were conducted in the factory and adjunct premises of Appellant No.1 under Panchanama dated 14.12.2012. Searches were also conducted at premises of the related persons of Appellant No.1.

2.3 During search in the factory premises of Appellant No.1, under panchnama dated 14.12.2012 the officers physically verified the stock. Some documents were resumed for further scrutiny. An electronic weighment reading machine was also resumed by the officers. Shri Triveni Shankar Pandey. Authorized Signatory of Appellant No.1 in his statement dated 14.12.2012 (RUD-2), recorded on the spot, stated that

- he was the office in charge and authorized signatory for the purpose of maintenance of Central Excise records;
- on the directions of owner Shri Navin Jain, he also looked after day to day work of the company:
- there are 2 furnaces, each of 6 MT and average time taken in one heat is three hours;
- only one furnace is operational and the other furnace is on maintenance;
- he was satisfied with the manner and result of stock verification and the contents of the panchnama:
- there is no mechanism to issue raw materials on production floor and to record production details,
- in their production record RG-1 is mentioned as per directions;
- the whole work is done on the directions of Shri Navin Jain, the owner of the company.

2.4 Shri N.K. Jain, Director in his statement dated 14.12.2012, stated that

- he was Director in the three companies i.e., M/s SRRIPL, Appellant 1 and M/s SCL;
- Appellant and M/s SCL are engaged in the manufacturing of Ingots whereas M/s SRRIPL manufactures Saria (MS bars):
- M/s SRRIPL manufactures only 'Kamdhenu' brand saria;
- Ingots produced in the factory of Appellant 1 and M/s SCL is mainly supplied to M/s SRRIPL;

- Shri Navin Jain (Appellant 2) can provide detailed information about the daily activities, burning loss etc,

2.5 During search at the common office of M/s M/s KCPL, SRRIPL and M/s SCL voluminous records were resumed. These documents included three computer hard discs. Shri Navin Jain, who was present in the office, introduced himself as Authorised Signatory of M/s KCPL and Director of M/s SRRIPL and M/s SCL. Shri Navin Jain in his statement dated 14.12.2012, stated that

- he was Authorized Representative of Appellant 1;
- administration and accounts office of M/s KCPL, M/s SCL and M/s SRRIPL is in the same building 122/235 Fazalganj, Kanpur;
- he looked after day to day work of the three factories and was in full knowledge of their complete activities;
- there may be some documents of unaccounted transactions on which duty was not paid.

Appellant 1 informed vide letter dated 01.04.2013 that they had deposited Rs.5 lakh on 15.12.2012 and Rs.5 lakh on 31.03.2013 vide e-receipts

2.6 During search at the residential premises of Shri Sanjay Tewari, 80 loose papers were resumed for further scrutiny vide panchnama dated 14.12.2012. Statement of Shri Sanjay Tewari was also recorded on 14.12.2012 wherein he stated that

- he was employed in M/s SCL as Liasioning Officer;
- in addition he used to look after store and raw material related work assigned to him;
- mainly Shri Navin Jain looks after the work of the three factories (M/s SRRIPL M/s SCL and M/s KCPL) and accordingly, he also looks after the work of the three factories on the orders of Shri Navin Jain;
- he has seen the panchnama and the records resumed thereunder:

- the resumed records relate to the firms for which he works:
- page no. 2 is related to purchase of sponge iron by Appellant 1 and M/s Sigma Castings during 25.04.2010 to 29.03.2011
- sponge iron was purchased from out of U.P.;
- purchase receipt of Appellant 1 is 192.330 MT
- page no. 3 related to store material purchase record of Appellant 1 for the period April, 2010 to March, 2011 related
- page nos. 9 to 13 related to purchase and consumption of store consumable for 2010-11 but he could not name the factory;
- page no. 17 is store consumption per heat;
- page no. 18 is record of consumption of ferro alloy per kg by Appellant 1 during 02.04.2010 to 03.04.2011;
- page no. 29 is related to store consumption but he did not remember the factory. (RUD-9- Page nos. 2, 9, 10, 12, 17 and 29 resumed from the residence of Shri Sanjay Tewari)

2.7 Appellant No.2 in his statement dated 18.12.2012 stated that,-

- Appellant No.1 is engaged in the manufacture of MS Ingots with the help of one furnace (with two crucibles) having capacity of 6MT per heat;
- average input output ratio in the manufacturing of MS Ingots in M/s KCPL between raw materials (MS Scrap and Sponge Iron) and finished goods (MS Ingot) is 88% approx. more the sponge iron less the recovery;
- the quantity of MS Ingots issued is derived by multiplying number of Ingots with their average weight;

- he agreed with the contents of the panchnamas dated 14.12.2012 drawn at the factory premises of Appellant 1, office premises at 122/235, Plot No.17, Fazalganj, Kanpur (RUD 4), and residential premises of Shri Sanjay Tewari at 112, Meerpur, Cantt., Kanpur (RUD 7);
- on being shown the statements dated 14.12.2012 of Shri Triveni Shankar Pandey and Shri Sanjay Tiwari (RUD 8), he agreed with the contents and appended his signatures on the same.

2.8 The computer hard disc resumed from the office were cloned on 08.04.2013 and 09.04.2013 under panchnama proceedings in the presence of Shri Nitin Kedia, Authorised Representative of M/s SRRIPL

2.9 On comparison of the stock physically verified on 14.12.2013 by form-IV, RG-I register, it was noticed that there was difference in the quantities verified and the quantities as per records. Shri Navin Jain, Authorised Signatory in his statement recorded on 19.12.2013 stated that

- weight of Ingot has been taken as 95 Kgs per pc. As weight of ingot varies per piece this might be the reason for difference.
- Regarding shortage of 170.560 MT in the stock of sponge iron & scrap Shri Navin Jain stated that pulled iron 25 MT is actually a part of raw material and is melted in forming ingot;
- pulled iron comes under sponge iron and scrap.

However, he could not explain the shortage. Shri Jain also could not explain the shortage of 1.468MT in the stock of silico manganese

2.10 Shri Sanjay Tewari in his statement recorded on 24.12.2013 stated that,-

- the documents resumed from his house on 14.12.2012 were prepared by him and were in his own handwriting

- that he looks after the work of M/s Sigma Casting Ltd and Appellant 1 as per the directions of Appellant 2;
- he explained page No.9 & 10 of the resumed documents that this is production material list for the period from 01.04.2010 to 21.03.2011 of Appellant 1;
- that page no.12 contains details of month wise receipts of consumables and raw materials by Appellant 1 for year 2010-11 and total quantity of Silico Manganese is 242.340 MT which is the same as mentioned on page no.9 by pencil against entry at SI.No.21;
- page no.29 contains 2 parts of double columns, over one column 'K' is written which is for Appellant 1 and S written in second part which stands for Sigma Castings Ltd.
- this page contains comparison of quantity and cost of various raw materials consumed per unit in the two factories, and at S. No. 2 quantity of 10.5 in Appellant 1 and 10.2 Kgs in Sigma of S Manganese is mentioned this detail is for the year 2010-11;
- he compared the entries of page no.2 with RG 23 A Part-1 for sponge iron and the entries do not match
- in page no. 17 cost of Silico Manganese @ Rs.61000 PMT for 10 Kgs. has been worked out as. Rs.610/-;
- on being asked about the presence of records of factory in his house, he stated that the documents of 2010-11 were left in his house which were resumed by the officers on 14.12.2012 under panchnama;
- the records do not match with the factories records

2.11 Appellant No.2 in his statement recorded on 20.03.2014 expressed his inability to comment on the statement of Shri Sanjay Tewari.

2.12 In his statement dated 01.05.2015 Appellant No.2 stated that

- Mr Sanjay Tewari is an employee of Ms Sigma Castings Ltd, however, he also looks after the work of Appellant No.1;
- Sanjay Tewari mainly looks after purchase of raw materials and any other work assigned to him;
- approximately 10 Kgs. (ten kgs.) Silico Manganese is consumed in the production of 1 (one) MT of MS Ingots by Appellant 1;
- in respect of the records resumed from the residence of Shri Sanjay Tewari he signed the documents resumed from the residence of Shri Sanjay Tewari and stated that he cannot explain the documents resumed from the residence of Shri Sanjay Tewari and the difference in the silico manganese received as per company records and as per the documents of Mr. Sanjay Tewari;
- they do not maintain separate stock position of aluminum, ferro silicon, and CI mould;
- the recovery from sponge iron is approx. 90% (ninety percent) in the manufacture of MS Ingots in their factory:
- on being asked that in the documents of Shri Sanjay Tewari, a quantity of 192.330 MTs of sponge iron has been shown as receipt on various dates during 2010-11 and in his statement dated 24.12.2013 he stated that the entries of receipt and consumption in the documents resumed from his house do not match with the factory records and that it appears that the purchase of sponge iron in the resumed records is not accounted for in the factory records, and on being asked to comment he stated that he cannot explain the documents resumed from the residence of Shri Sanjay Tewari;
- on being asked about the letters sent to their raw material suppliers viz. M/s Shri Mahakali Trading Co., Allahabad and M/s Shri Krishna Steels, Lucknow which have been returned undelivered Shri Jain stated that they had

procured raw material from these suppliers who were existing at the given addresses at the relevant period of time and that he cannot comment about the return of letters

2.13 On the basis of above investigations, it was observed that as per the records resumed from the various premises, Appellant has evaded payment of duty as indicated in the chart below:-

A. Duty evaded on MS Ingots manufactured from less quantities of Silico Manganese and Sponge Iron shown as received during 2010-11

| Silico Manganese | Quantity in MT |
|---|---|
| Quantity received as per records (page no. 12) of Shri Sanjay Tewari (RUD-9) | 242.340 |
| Quantity received as per Form-IV register (RUD-20) | 94.89 |
| Short shown in Raw material stock register Form-IV | 147.450 |
| Production of MS Ingots from unaccounted Silico Manganese as per page no. 17 which shows consumption of Silico Manganese in the production of Ingots as 10 Kg. per Ton and as per statement dated 01.05.2015 of Shri Navin Jain, Authorised Signatory | 14745 |
| Assessable Value @21840.5 PMT | 322038173 |
| Central Excise duty @ 10% | 32203817 |
| z Education Cess @2% of 10% | 644076 |
| Secondary & Higher Education Cess @ 1% of 10% | 322038 |
| Total | 33169932 |

B. Duty involved in clandestine clearance of MS Ingots found short in factory

| Value of Short found MS Ingots (23.835 MT) | C. Ex. Duty @ 12% | EC | SHEC | Total |
|---|---|---|---|---|
| 643545 | 77225 | 1545 | 772 | 79542 |

C. Duty involved in Ingots manufactured and cleared clandestinely from short found sponge iron, scrap, runners & risers

| Value of ingots cleared clandestinely | C. Ex. Duty @ 12% | EC | SHEC | Total |
|---|---|---|---|---|
| 9224159 | 1106899 | 22138 | 11069 | 1140106 |

| Value of ingots cleared clandestinely | Central excise duty | Education cess | SHEC | Total |
|---|---|---|---|---|
| 331905876 | 33387941 | 667758 | 333879 | 34389580 |

Total duty demanded is as under (A+B+C)

2.14 Thus revenue was of the view that Appellant No.1 has evaded the payment of Central Excise duty and cesses amounting to Rs. 3,43,89,580/- contradicting the provisions of Rule 4, 6, 8, 10, 11 & 12 of the Central Excise Rules, 2002. Appellant 2 who is the person in charge of the operations in the unit has devised the modus opearndi and was actively involved in the said evasion of duty.

2.15 A Show Cause Notice dated 08.05.2015 was issued to the Appellant No.1 and Appellant No.2 and others asking them to show cause as to why:-

> *"(i) Central Excise duty amounting to Rs.3.33.87.941/-, Education Cess Rs.6.67.758/- and Secondary & Higher Education Cess Rs 3,33,879/- (total Rs.3,43,89,580/-) (Rs three crore forty three lakh eighty nine thousand five hundred eighty only) should not be demanded & recovered from them by invoking extended period under the proviso to erstwhile Section 11A(1) read with present Section 11A(4) of the Central Excise Act. 1944 and Rs 10 Lakhs deposited by M/s KCPL during investigation should not be appropriated towards duty payable by them,*
>
> *(II) interest under erstwhile Section 11AB read with present Section 11AA of the Central Excise Act, 1944, should not be recovered from them on delayed payment of duty leviable on clandestinely removed goods; and*
>
> *(iii) penalty should not be imposed upon them under Section 11AC of the Central Excise. Act, 1944 read with Rule 25 of Central Excise Rules, 2002 for contravention of the provisions of the Central Excise Act, 1944 and rules made thereunder, as discussed in the foregoing paras.*
>
> *(iv) Shri Navin Jain, Director of M/s Kundan Castings Pvt. Ltd., B-52,53 UPSIDC Industrial Area, Malwan, Fatehpur is further required to Show Cause to the Commissioner, Central Excise, 7A, Ashok Marg, Lucknow within thirty (30) days of the receipt of this notice as to why penalty should be imposed on him under Rule 26 of Central Excise Rules, 2002."*

2.16 The Show Cause Notice has been adjudicated as per the impugned Order-In-Original mentioned at Para 01 above.

2.17 Aggrieved, Appellant No.1 & 2 have filed these appeals.

3.1 Have heard Shri Amit Awasthi and Shri Ashish Kumar Shukla, Advocate for the Appellant and Shri A.K. Choudhary, Departmental Representative for the Revenue.

3.2 Arguing for the Appellant learned counsel submits that:-

- the induction furnace works at 1600$^{o}$C and following raw materials are fed to produce the ingots;
    - Sponge Iron
    - Mild Steel Scrap
    - Grey Iron Castings
    - Ferro Alloys
    - Pig Iron
    - Sand Mould
- The case has been made against the Appellant only on the basis of the certain documents with regards to receipt of ***"Silico Manganese",*** recovered from the residential premises of Shri Sanjay Tiwari an employee and authorized person of Appellant 1. Shri Sanjay Tiwari has not been made party in the entire proceedings and no penalty has been imposed on him.
- In absence of evidence in regards to receipt of any other raw material and their use in production the demand made alleging clandestine clearance is bad in law as has been held in the following decisions;
    - Mohan Steel [2004 (177) ELT 668 (T-Del)]
    - Auto Gallan Industries (P) Ltd [2015 (317) ELT 139 (T-Del)]
    - Amba Cement & Chemicals [2000 (115) ELT 502 (T-Del)]
    - Balashri Metals Pvt Ltd. [2017 (345) ELT 147 (Jhar)]
    - Triveni Rubber & Plastics [1994 (73) ELT 7 (SC)]
    - Galaxy Indo Fab [2010 (258) ELT 254 (T-Del)]
    - Dashmesh Castings [2010 (257) EL 225 (P & H)]
- Shortage detected during panchnama proceedings is based on eye estimation only. Such shortage determined

on the basis of eye estimation cannot be basis for demand as held in following cases:

  - Nitin Ispat (P) Ltd. [2014 (306) ELT 483 (T-Del)]
  - Shiv Steel Rolloing Mills [2005 (186) ELT 326 (T-Kol)]
  - Raghuveer Ispat Pvt Ltd. [2018 (360) ELT 535 (T-All)]
  - Kasha Laminators Pvt Ltd. [Final Order No 70434-70438/2017]
  - Shree Hanuman Loha Pvt Ltd. [2016 (337) ELT 311 (T-Del)]
  - K L Steels Ltd. [1998 (100) ELT 406 (T)]

- No investigations have been done from any transporter etc.
- No documents to the contrary alleged or shown to be recovered from the computers which were clone resumed, sealed, unsealed and data retrieved by the technical expert.
- Demand is based on reasonable suspect, bald and opaque allegations, wild inferences
- Such demand is not sustainable in view of the following decisions:
  - Flevel International [2016 (332) ELT 416 (Del)]
  - Arya Fibres Pvt Ltd. [2014 (311) ELT 529 (T)]
  - Raghunath Interenational Ltd. [Final Order No 70006-70059/2022 dated 18.01.2022] affirmed at [2023 (2) CENTAX 216 (ALL)]
  - Synergy Steels Ltd [2020 (372) ELT 129 (T-Del)]
  - Shakeen Alloys Pvt Ltd [2013 (296) ELT 392 (T)] upheld at [2014 (308) ELT 655 (Guj)] and affirmed at [2015 (319) ELT A 117 (SC)]
- Thus in absence of any investigations in respect of consumption of electricity, excess labour used, transport vehicles, payments made or amounts received against the clandestinely cleared goods, the demand made solely on the basis of certain documents recovered from the

premises of Shri Sanjay Tiwari, has no basis in law, as has been held in following decisions:

- Ramesh Kumar Baid and Sons [2020 (374) ELT 879 (Pat)]
- Jai Mata Ji Enterprises [Order Dated 22.10.2020 in Writ tax No 573/2020]

3.3 Authorized Representative reiterates the findings recorded in the impugned order.

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of argument.

4.2 We find that the impugned order records findings as follows:-

*"27. Now I proceed to decide the case. In order to arrive at the correct conclusion I have thoroughly examined the records of the case, Show Cause Notice and its Annexure, Relied Upon Documents to the show cause notice, defense replies, written submissions filed by the parties from time to time and the submissions made by them during personal hearing. The grounds taken by both the party's to challenge the subject Show Cause Notice is summarized as under:*

- *maintainability of Panchnama dated 14.12.2012 drawn in the factory premises of M/s Kundan Castings Pvt. Ltd. and statement of Shri T.S.Pandey (RUD No 1 arid 2 respectively)*

- *maintainability of Panchnama dated 14.12.2012 at the residential premises of Shri Sanjay Tiwari, 112, Meerpur Cantt, Kanpur and statement dated 14.12.2012 by Shri Sanjay Tiwari (RUD No 7 and 8 respectively)*

- *Allegation that Panch witnesses were not independent and has been challenged on the grounds of interested witnesses. They argued that if the witnesses have not been produced for giving their testimony before the adjudicating authority, then statement cannot be relied upon against them in view of the decision of Hon'ble Allahabad High Court in case of Parmarth Iron Pvt. Ltd. reported in 2010 (260) ELT 514 (All.)*

- *maintainability of RUD No 9 on the grounds that the calculation of duty evasion in the show cause notice is on the basis of Page No.12 of RUD No 9 which is a computer printout barred from being admitted as evidence under Section 36 B sub section 2 of Central, Excise Act, 1944* *read with Indian Evidence Act, 1872 on the basis of a third party private document recovered from third party premises. It has been contended that how can it be deciphered that the product Mild Steel M.S.Ingots can be manufactured and that too from alleged Sifico Manganese which is only one of the petty raw material and therefore the charge of clandestine removal cannot be upheld on the basis of such document. Several case laws of Hon'ble Tribunal have been cited by them in support of their argument.*

***28. Regarding maintainability of Panchnama dated 14.12.2012 drawn in the factory premises of M/s Kundan Castings Pvt. Ltd. and statements of Shri T.S.pandey (RUD No 1 and 2 respectively):***

*On perusal of records it is seen that the entire search in the factory premises of M/s Kundan Castings Pvt. Ltd. under Panchnama dated 14.12.2012, was conducted under the authority of valid search warrants issued by the competent authority and in presence of Shri T.S.Pandey, authorized signatory of the party, who in turn reported to the owner of the company Shri Navin Jain. In their own submissions in the defense reply, the party had accepted the fact that Shri T.S.Pandey is the in charge of the office for maintenance of records. It is clear therefore that Shri T.S.Pandey is not only responsible/authorized for signing on invoices but also looks after day to day work of the company like production of ingots, procurement of raw material and clearance of ingots as per his own admission in his statement.*

*I find that having made him authorized signatory for signing of invoices and responsible to look after day to day work of the company, the contention of the party that he is not a technical person and who may not be conversant with the actual weighment of MS. Ingots is only a cover up effort to shun the responsibility of non accountal and clandestine removal of the finished goods. The statement of Shri T.S. Pandey was not recorded under duress and he never retracted from his statement. Further, on perusal of Panchnama, I find that relevant description viz. detailed description of the premises to be searched, introduction of Panch witnesses, introduction of the persons available during search and the introduction of the officers, places from where the document recovered, detailed list of documents resumed etc. Each and every activity has been recorded in detail in the Panchnama.*

*Shri T.S. Pandey, in his statement dated 14.12.2012 expressed satisfaction over the manner of the search and verification and drawing of Panchnama. This fact has also been incorporated in the Panchnama which was signed by Shri T.S.Pandey. The physical verification of Raw material and the finished goods was jointly done by Shri T.S.Pandey and the DGCEI officers and he was fully satisfied over the manner and details of the joint stock taking as annexed in the Panchnama.*

*The party has not declined the recovery of those records and their authorized signatory who was well aware of the day to day working of the factory, signed on relevant Panchnama in token of their agreement with the contents of the Panchnama. The Panchnama proceedings 'and the statements recorded on the spot -Kad not been challenged within reasonable time.*

***29. Regarding maintainability of Panchnama dated 14.12.2012 at the residential premises of Shri Sanjay Tewari, 112, Meerpur Cantt, Kanpur; statement dated 14.12.2012 by Shri Sanjay Tiwari (RUD No 7 and 8 respectively)***

*The search of the residential premises of Shri Sanjay Tiwari, 112, Meerpur Cantt, was also conducted under the authority of valid search warrants issued by the competent authority under Panchnama dated 14.12.2012 (RUD-7) and in the presence of Shri Anil Tiwari, elder brother of Shri Sanjay Tiwari. Statement of Shri Sanjay Tiwari was also recorded on 14.12.2012 (RUD-8) under section 14 of the Central Excise Act. 1944 wherein he stated that he is working as liaison officer in M/s Sigma Casting Pvt. Ltd., and the documents recovered from the premises belongs to the firm in which he works.. He also submitted that Shri Navin Jain, primarily looks after the work of all the three firms namely, M/s KCPL, M/s SRRIPL and M/s SCL, all with a common office premises at 122/235, Plot No. 17, Fazalganj, Kanpur, where he works and looks after the work of all the aforementioned factories as per the directions of Shri Navin Jain.*

*In this case also, the statement of Shri Sanjay Tiwari was not recorded under duress and he never retracted from his statement. Again, on perusal of Panchnama, I find that relevant description viz. detailed description of the premises to be searched, introduction of Panch witnesses, introduction of the persons available during search and the introduction of the officers, places from where the document recovered, detailed list of documents resumed etc. Each and every activity has been recorded in detail in the Panchnama*

*On the contrary, I find that, in his statement dated 14.12.2012 and 18.12.12 (RUD No 5 and 10 respectively) Shri Navin Jain, Director and Authorised Signatory of M/s KCPL agrees with:*

- *the contents of the panchnamas dated 14.12.2012 drawn at the factory premises of M/s Kundan Casting Pvt. Ltd. Malwan (RUD 1).*
- *office premises at 122/235, Plot No. 17, Fazalganj, Kanpur (RUD 4).*

- *Residential premises of Shri Sanjay Tewari at 112, Meerpur, Cantt., Kanpur (RUD 7).*

*Further, on being shown the statements dated 14.12.2012 of Shri Triveni Shankar Pandey (RUD 2) and Shri Sanjay Tiwari (RUD 8), he agreed with its contents as well and appended his signatures on the same. He has neither challenged the above statement to be made under duress nor retracted upon*

*Therefore, on the basis of foregone discussion, the allegation of the party regarding maintainability of Panchnama dated 14.12.2012 drawn in the factory premises of M/s Kundan Castings Pvt. Ltd. (RUD No 1); statement of Shri T.S.Pandey (RUD No 2); Panchnama dated 14.12.2012 drawn at the residential premises of Shri Sanjay Tewari, 112, Meerpur Cantt. Kanpur (RUD No 7), statement dated 14.12.2012 by Shri Sanjay Tiwari (RUD No 8) is accordingly rejected.*

***30. Regarding opportunity of cross examination and the allegation that Panch witnesses therein were not independent:***

*After issuance of Show Cause Notice No DGCEI/LZU/KRU/B/CEX/46/2015 dated 08.05.2015 the party sought extension of six weeks for filing defense reply which was finally submitted on 17.11.2015 as interim defense reply. Later on party again sought two adjournments of personal hearings scheduled on 14.07.2016 and 29.07.2016. Finally when the personal hearing was held on 29.08.2016, the parties instead of concluding their defense argument on the date of hearing, filed request for cross examining the witness which is clearly an afterthought after a lapse of more than nine months from the date of filing of interim defense reply dated 17.11.2015. This afterthought is more evident from the fact that earlier while submitting their interim defense reply dated 17.11.2015 and while submissions, ad and 11 of its submissions, did not mention anything regarding their cross examination*

*However, on the principle of natural justice, the party's request for cross-examination was acceded to and letters were sent to them for cross examination of witness Shri Sanjay Tiwari on 14.10.2016. They were also informed telephonically several times about the said opportunity of cross examination and to submit the details of the witnesses they want to cross examine but they did not respond. However on the date of cross examination, the party did not turn up again as it has done in the past and instead submitted an adjournment letter dated 13.10.2016 producing a list of witnesses in addition to Shri Sanjay Tiwari, for cross examination on a later date. Shri Sanjay Tiwari also did not appear for cross examination and requested* *adjournment from appearance for cross examination. I find that the party has been using the adjournments for its benefit to buy time in the past as well and in the same corollary, the demand of cross examination at this stage is nothing but a delaying tactics to avoid adjudication proceedings and to delay justice. I also find that proper procedure for effecting search and detention of documents were followed and the Panchnama proceedings and the statements recorded on the spot had not been challenged within reasonable time. The allegation that Panch witnesses were not independent is found to be vague, indefinite and devoid of any material evidence and therefore, not acceptable. The Hon'ble Tribunal in case of Liyakat Shah Vs. CCE, Bhopal (2000 (120) ELT 556 (T.)] had observed in para 13 and 14 of its order that:*

> *In the facts and circumstances of the case we therefore find that refusal to allow cross-examination of the seizing officers did not amount any failure of principles of natural justice an to and in view of the detailed reasons given by the adjudicating officer for rejecting the said request, it cannot be said that he had arbitrarily dismissed the prayer for cross examination of the seizing officers. In the above view of the matter we do not find that the failure to cross examination of the seizing officer has resulted in any mis-carriage of justice or contravention of the principles of natural justice.......*

*I also find that the Hon'ble Allahabad High Court in Ashish Kumar Chaurasia vs Commissioner CESTAT reported in 2015 (325) E.L.T 250 (All.) followed the order of the Hon'ble Supreme Court in case of Surjeet Singh vs Union of India reported in AIR 1997 SC 2560 where the Hon'ble Supreme Court held that*

> *".........the confessional statements of the Appellant who made them are binding on them......*

*This decision of Allahabad High Court has been upheld by Supreme Court in 2016 (333) ELT A231, Further it is to mention that the Kerala High Court in the case of N.S. Mahesh vs. Commissioner of Customs, Cochin reported in 2016 (331) ELT 402 (Ker.) had held that*

> *".........denial of cross examination of witnesses where specific reasons are not given for cross examination will not vitiate the proceedings........"*

*The CESTAT in SAN International vs Commissioner of Customs, New Delhi reported in 2016 (337) ELT 92 (Tri. Del.) also held that*

> *".........it is a settled law that the denial of cross examination which does not cause any prejudiced to the final outcome is not violative of the principle of natural justice and it shall not vitiate the proceedings...".*

*In this case I find that the party did not give any specific reason for cross examination of Shri Sanjay Tiwari or any person. Shri Sanjay Tiwari is their own employee working under the same MD Shri Navin Jain. Shri Sanjay Tiwari clearly admitted the factual position in his statement which was only within his personal knowledge regarding the entries in the document recovered from him. He has neither alleged that such statement was taken under duress nor he had retracted his statement. Shri Navin Jain confirmed the statement of Shri Sanjay Tiwari and further explains, admitted and acknowledged the statement of Shri Sanjay Tiwari in his own statement. Shri Navin Jain further explained the quantum of inputs required for manufacture of finish product. Shri Naveen Jain neither retracted his statement nor alleged any coercive method while taking his statement. Therefore, at the stage of adjudication, Shri Jain being responsible for the operation of the company cannot be aggrieved against his very own admitted statement which has not been countered by any documentary proof from his side. Thus the stand of the party that cross examination is required to be given has no basis. Even when an opportunity was given, the party preferred to stay away from the proceedings.*

*In view of the observations and in the circumstances of the case, I therefore, proceed to decide the case on the basis of facts, records and merits of the case.*

***31. Regarding maintainability of RUD No 9 and calculation of duty:***

*The calculation of duty evasion in the show cause notice on the basis of Page No. 12 of RUD No 9 which is a computer printout has been challenged to be barred from being admitted as evidence under Section 36-B sub section 2 of Central Excise Act, 1944 read with Indian Evidence Act, 1872. They contend that on the basis of a third party private document recovered from third party premises, how can the product Mild Steel M.S.Ingots can be manufactured and that too from alleged Silico Manganese which is only one of the petty raw material and therefore the charge of clandestine removal can not be upheld on the basis of such document. Several case laws of Hon'ble Tribunal have been cited by the noticees in support of their argument.*

*In this regard. I would like to quote the statements of Shri Sanjay, Tiwari dated 24.12.2013 (RUD-14) from whose premises the said document was recovered and the statement of Shri Navin Jain dated 01.05.2015 (RUD-17) recorded under section 14 of the Central Excise Act, 1944. Shri Sanjay Tiwari has stated that he boks after the work of M/s SCL and M/s KCPL, Malwan as per the directions of Shri Navin Jain, Authorised Representative of M/s KCPL. Shri Navin Jain in his statement to Question No 1 has stated that Mr. Sanjay Tiwari is an employee of M/s Sigma Castings Ltd, however, he also looks after the work of*

*M/s KCPL which is mainly purchase of raw materials apart from any other work assigned to him. It is therefore amply clear that Shri Sanjay Tiwari has been actively involved in the working and activities of purchase of raw materials for M/s KCPL as well as*

*I find that the total unaccounted quantity of 242.340 MT Silico Manganese shown in the above document has been taken to calculate the production of MS Ingots and its subsequent clandestine removal has been done on the basis of above statement dated 01.05.2015 of Shri Navin Jain who stated that approximately 10 Kgs. Silico Manganese is consumed in the production of 1 (one) MT of MS Ingots in M/s KCPL. Shri Navin Jain cculd not satisfactorily explain difference in the Silico Manganese received as per company records and as per the documents of Mr. Sanjay Tiwari. Since the said 242.340 MT Silico Manganese was found unaccounted in the records it can only be deciphered that the MS Ingots produced by using this unaccounted raw material have been clandestinely removed evading Central Excise duty amounting to Rs 3,31,69,932/-.*

*The statements of Shri Sanjay Tiwari dated 24.12.2013 and that of Shri Navin Jain dated 01.05.2015 is exhaustive and by no means, it can be a stretch of imagination by anyone unless they are well versed with the day to day working of the unit.*

*On being asked about the entries of receipt and consumption of a quantity of 192.330 MTs of sponge iron on various dates during 2010-11 in the documents resumed from the house of Shri Sanjay Tiwari which do not match with the factory records, Shri Navir Jain canrot explain anything, However he stated that the recovery from sponge iron is approx. 90% (ninety percent) in the manufacture of MS Ingots in their factory. Letters were sent to their raw material suppliers viz. M/s Shri Mahakali Trading Co., Allahabad and M/s Shri Krishna Steels, Lucknow which have been returned undelivered which also proves the non accounted raw material received from fake suppliers and proves that the partys willfully suppressed the actual production of MS Ingots and its clearance without entering them in their statutory records with intent to evade payment of Central Excise Duty amounting of Rs. 11,40,106/-. Similarly, MS Ingots found short in the factory was also not explained and have been clandestinely removed evading Central Excise Duty amounting to Rs. 79,542/-.*

*The recovered private documents have been proved to be genuine and reliable having evidentiary value as per Section 36A of Central Excise Act, 1944 as nothing has been proved otherwise. In this regard, I would like to cite the judgment of the Hon'ble Tribunal in case of CCE, Surat-I Vs. Umiya Chem Industries The Hon'ble Tribunal in case of CCE, Surat-I Vs. Umiya Chem Industries [2005 (185) ELT 410 (T.)] which has held that*

> *"......as per Section 36A of Central Excise Act, 1944 the truth of such documents can be presumed to be true unless the contrary is proved.....*

*Further, Hon'ble Supreme Court In case of Khet Singh Vs. UOI [2002 (142) ELT 2013 (SC)], in Para 16 of its judgment has held that the evidence collected as above will not become inadmissible as follows;*

> *...law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused....'*

*Hence, in view of the Hon'ble Supreme Court's judgment referred above and the presumption of truthfulness of documents in terms of Section 36A of Central Excise Act, 1944, I hold that the documents recovered and resumed by the officers on 14.12.2012 from the premises of Shri Sanjay Tiwari are not sourced or fabricated and their truthfulness and genuineness is not questionable as they are well explained and have enough evidentiary value. The allegation of the party in this regard is accordingly rejected.*

*I also find through the various statements dated 14.12.2012, dated 18.12.12 and dated 01.05.2015 given by Shri Navin Jain, Director and Authorised Signatory of M/s Kundan Casting Pvt. Ltd., that he was fully aware of the working of the factory and was involved in the willful suppression and clandestine removal of goods from the factory premises rendering himself liable for punitive action under Rule 26 of the Central Excise Rules, 2002."*

4.3 The basic issues involved in the matter are evident from the chart of calculation of duty earlier reproduced in Para 2.13 above. The demand is basically made on the basis;

- of certain documents which were recovered from the residential premises of Shri Sanjay Tiwari and employee and authorized person of the Appellant 1;
- Shortages of finished goods detected during search of the factory premises 14.12.2012
- Shortages of some of the raw materials detected during search of the factory premises 14.12.2012

4.4 Though Shri Sanjay Tiwari is an employee and authorized person of the Appellant still he cannot in any way step into the shoes of Appellant. Appellant No.2 has not accepted the truth of such documents during the investigation and has refused to comment on said documents or the statements recorded from the Shri Sanjay Tiwari in respect of these documents. It is also evident that Shri Sanjay Tiwari from whose residential premises these documents have been recovered, has not been made party to these proceedings and no penalty under Rule 26 of the Central Excise Rules, 2002 was proposed against him or imposed by the Adjudicating Authority. The presumption under Section 36A with regards to the truth and correctness in respect of the documents recovered from such premises has been negated by various Courts and Tribunals. The truth of these documents needs to be established by way of corroborative evidence gathered during the investigation. Simple recovery of these documents does not establish the case against the Appellant.

4.5 Incidentally we also observe that Shri Sanjay Tiwari, from whose possession and premises these documents were recovered, has not been made noticee/ co-noticee in the matter. Not making him co-noticee in the matter the validity of these documents in evidence needs to be looked with pinch of suspicion. Not only he is not co-noticee, Appellants have not cross examined him during the adjudication proceedings.

4.6 Further we notice that the clandestine has been alleged on the basis of receipt of the one of ingredients (Silico Magnese) by the Appellants, of the finished goods manufactured and cleared by the Appellant. The consumption of the said ingredient as per the statement of Appellant No.2, and relied in show cause notice is about 10 kgs per ton of the finished goods, which works out to be 10*100/1000= 1%. No evidence has been produced in respect of any other ingredient used in the process of production.

4.7 From the discussions as above we are not in a position to make out how these documents recovered from the premises of Shri Sanjay Tiwari, become relevant for alleging clandestine clearance by the Appellant.

4.8 The basic input in any unit having induction furnace for production of ingots, is electricity, sponge iron and scrap. No investigation has been done in respect of these basic inputs or with regards to the furnace installed in the factory premises. The impugned order is totally silent on this aspect. In absence of any such evidence with regards to reheating furnace we are not in a position to determine the quantum of clandestine clearance alleged in the notice or confirmed by the Adjudicating Authority.

4.9 In absence of any corroboration about the factum of production, consumption of raw material etc, allegation of clandestine clearance on the basis of the 3rd Party documents recovered from the premises of Shri Sanjay Tiwari we are not in a position to uphold the demand made by the impugned order, in view of the decisions referred by the counsel for the Appellant at the time of argument reproduced earlier. In case of **Pan Parag India Ltd [2013 (291) ELT 81 (Tri.-Del.)]** Delhi bench has observed as follows:

> ***54.*** *By taking note of the legal positions as enunciated in the above referred decisions, we note that the confirmation of demand of duty against the assessee based upon the allegations of clandestine removal leading to the financial burden to the assessee as also resulting in criminal prosecution of the authorized persons is required to be done on the basis of evidences which generates confidence in the prosecution case. As observed in the majority order of the Tribunal in the case of M/s. Kuber Tobacco Products P. Ltd., the mathematical procedure to the last extent may not be required but the distance between "might have" and "must have" is required to be travelled and filled by the Revenue by producing independent evidences on record, which can lead to inevitable conclusion of clandestine activities. As already discussed in the preceding paras, we find absence of such evidences on record, in which case, confirmation*

*of demand against the Appellant and imposition of penalty on various persons would not be justified. We accordingly hold that confirmation of demand to the extent of Rs. 18,33,83,943.00 and imposition of penalty on the said count is unsustainable.*

4.10 In case of **Mahesh Silk Mills [2014 (304) E.L.T. 703 (Tri.-Ahmd.]** Ahmedabad bench observed as follows:

*"7. Appellants have relied upon several case laws on the issue of establishing case of clandestine manufacturing and clearance of excisable goods. We find that in the matter of Rajasthan Foils Pvt. Ltd. v. Commissioner of Central Excise, Jaipur [2005 (183) E.L.T. 101 (Tri.-Del.)], relied upon by the Appellant, CESTAT held as under :*

*"6. From the record, we find that the company is engaged in the manufacture of aluminium foils/sheets. The factory premises of the company was inspected by the Central Excise officers on 19-2-2000 and certain notebooks detailed at Sl. Nos. 1 to 5 of the resumption memo prepared on the date, at the spot, were seized. The entries contained in these notebooks had been tabulated in chart marked Annexure A, to the show cause notice which according to the Revenue, depicted details of clearances in condensed manner during the period in dispute to various buyers and also of the material sent for weighment and the raw material received for the manufacture of the goods during that period by the company. All the entries detailed in Annexure A, had also been shown in Annexure B. The details of the raw material received by the company had been given in Annexure C prepared from the notebook mentioned at Sl. No. 4 of the resumption memo. But it is quite evident even from the impugned order*

*itself that certain entries made in all the five seized notebooks tallied with the invoices issued under Rule 52A, by the company at the time of clearances of the goods. The entries in the notebooks mentioned at Sl. Nos. 4 and 5 of the resumption memo, pertains to goods sent for weighment by the company to the Dharamkanta and from these entries, it could not be inferred that these goods were cleared to the buyers without payment of duty specially when there is no evidence/statement of any buyer of having received the goods without cover of invoice or payment of duty from the company. In the entries of notebook mentioned at Sl. No. 4 of the resumption memo, at pages 20 to 40, only the names of the customers in short, quantity of the aluminium foils and figures showing certain amount in rupees equal to the quantity in kg., had been detailed and these had been tabulated in Annexure B, but no evidence has been collected whatsoever to connect these entries with a particular customer/buyer to whom the goods were allegedly cleared by the company during the period in dispute. No material/evidence has been collected from the transporter M/s. Baba Transport Company through whom the goods were allegedly booked on the basis of GRs in question. Only statement of Shri Vijaypal Singh, Proprietor of that transport company was recorded on 2-5-2001 who simply stated that he used to arrange the trucks from outside as and when required by the company for transportation of the goods and had been getting Rs. 25/- as commission from the driver of the vehicle. He had nowhere admitted that the goods booked did not accompany the invoices. No statement of any driver of the vehicle had been recorded who transported the goods. Shri Vijaypal Singh himself had no knowledge* *about the destination at which the goods were sent by the company."*

*8. Similarly, in the matter of Nova Petrochemicals v. CCE, Ahmedabad-II, this Tribunal in its Final Order Nos. A/11207-11219/2013, dated 26-9-2013 this bench has held as under in Para 40 :*

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

*(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*

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

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

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

*(c) Discovery of such finished goods outside the factory*

*(d) Instances of sales of such goods to identified parties.*

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

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

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

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

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

*Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What once could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons may even be responsible official of the manufacture or even of its Directors/partners' who are not even permitted to be cross-examined, as in the present case, without one or more of the evidence referred to above being present. In fact, this Bench has considered some of the case law on the subject in Centurion Laboratories v. CCE, Vadodara, 2013 (293) E.L.T. 689. It would appear that the decision though rendered on 3-5-2013 was reported in the issue of the E.L.T. dated 29-7-2013, when the present case being argued before us, perhaps, not available to the parties. However, we have in that decision, applied the law, as laid down in the cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchases, distributor or* *dealers. Record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entice case law on the subject [Hindustan Machines v. CCE, 2013 (294) E.L.T. 43]. Members of Bench having hearing initially differed, the matter was referred to a Third Member, who held that clandestine manufacturing and clearances were not established by the Revenue. We are not going into it in details, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case law, including most of the decisions cite before us now, considered them and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81] it has been held that the theory of preponderance of probability would be applicable only when there were strong evidence heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in case of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the art materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal."*

*9. In view of the above legal position and facts available on record, we are constrained to reiterate that* *evidence of only one diary cannot be made the basis of establishing clandestine manufacture and removal of the fabrics. It has been repeatedly held by the Courts that clandestine manufacture and clearance cannot be readily inferred from few documents and statements unless the allegations are also corroborated and established on evidences, relatable to or linked with actual manufacturing operations. As far as the present demand is concerned, there is no such evidence forthcoming in the records before us to suggest clandestine manufacture and clearance by the Appellants. Mere reliance on note books/diaries or statements cannot be considered as enough evidence for clandestine manufacture and clearances.*

4.11 In case of Sakeen Alloys Pvt Ltd. [2013 (296) ELT 392 (T-Ahmd)], Ahmedabad bench held as follows:

***"5.****We have carefully gone through the rival submissions and perused the records. In this case, the case of clandestine removal has been made out against the Appellant M/s. Sakeen Alloys Pvt. Limited on the basis of records/pen-drive recovered from the business premises of M/s. Sunrise Enterprises. In the statements of Managing Director and the Excise persons of M/s. Sakeen Alloys Pvt. Limited and Shri Mukeshbhai V. Patel of M/s. Sunrise Enterprises it has been admitted that they have clandestinely manufactured and cleared CTD/round bars but they have retracted their statements immediately after recording the statements. It is the case of the Appellants that request for cross-examination of the persons whose statements were recorded has not been made available to them by the adjudicating authority. In view of the various judgments relied upon, it was also argued that no investigation has been extended to the suppliers of raw materials or purchasers of finished goods to establish whether such clandestine removal of excisable goods have* *actually been undertaken by the Appellants or not. It was emphasized that cross-examination of the persons whose statements have relied upon is obligatory to be provided especially when the statements are retracted by the Appellants.*

***11.****From the above settled law, it is clear that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statements which are retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the Appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. In the present case also, it is observed, from the annexures to the show cause notice dated 1-5-2009 issued to the Appellants, that there were huge cash transactions to the tune of Rs. 11.23 Crores. When such large number of transactions involving huge amounts are being undertaken in clandestine removal activities, it is very likely that some cash would have been seized. There is not a single instance where either seizure of cash is made or any clandestinely removed goods are seized or raw materials/finished goods were found either short or in excess in the factory premises of the Appellant or at any other place. As per the Panchnama drawn at the factory premises it is shown that there was no excess/shortage of the raw materials or finished goods found. The documentary evidences collected from the business premises of M/s. Sunrise Enterprise and the statements recorded by investigation, can at the most raise a reasonable doubt that some clandestine removal activities are undertaken by the Appellant. However, such a suspicion or doubt has to be strengthened by positive evidences which seem to be lacking in this case. Any suspicion whosoever cannot take the place of evidence regarding clandestine removal of excisable goods. Moreover,* *after having positive evidences, quantification of duty on clandestinely removed goods also becomes essential. As already mentioned above, the stock lying in the stock yard of M/s. Sunrise Enterprise, Mehsana was found containing the goods received from M/s. Sakeen Alloys Pvt. Limited under proper invoices. When the goods received under proper invoices are found in the stock yard of M/s. Sunrise Enterprise, then it is possible that out of such goods certain quantities were sold to various customers by accepting payment in cash. In such a situation, the quantification undertaken by the investigation becomes doubtful and incorrect. For this purpose cross-examination of the person Incharge looking after the records of M/s. Sunrise Enterprise was must, which was not allowed by the adjudicating authority. In view of the above observations, the demand of duty of Rs. 1,85,10,861/- is not sustainable and is required to be set aside."*

Upholding this order Hon'ble Gujarat High Court observed as follows:

***"7.*** *As can be noted from the decision of the Tribunal, it has extensively dealt with the entire factual matrix presented before it. The Tribunal rightly concluded that in the case of clandestine removal of excisable goods, there needs to be positive evidences for establishing the evasion, though contended by the Revenue. In absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross-examination was also not made available so as to bring to the fore the true picture and* *therefore, it concluded against the Revenue observing that not permitting the cross-examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below.*

Appeal filed by the revenue against the decision of Hon'ble Gujarat High Court has been dismissed as reported at **[2015 (319) E.L.T. A117 (S.C.)]**

4.12 In case of **Flevel International [2016 (332) E.L.T. 416 (Del.)]**, Hon'ble Delhi High Court has observed as follows:

*"55. Mr. Hari Shanker, learned Senior counsel for the Appellant, has also drawn the attention of the Court to a decision of the CESTAT in Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II - 2014 (311) E.L.T. 529 (Tri.-Ahmd.) where the entire law concerning clandestine removal has been discussed and the legal position has been summarised as under :*

*(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*

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

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

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

*(iv) discovery of such finished goods outside the factory;*

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

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

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

*(viii) statements of buyers with some details of illicit manufacture and clearance;*

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

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

*56. In the present case, there is no attempt made by the Department to substantiate the allegation of manufacture of as many as 606 ACs by the Appellant. No evidence has been produced to show that the basic raw materials required for manufacturing such a large number of ACs was procured by the Appellant.*

*57. For all of the aforementioned reasons, the Court is satisfied that the impugned majority order of the CESTAT on the issue of clandestine removal of 606 ACs by the Appellant without payment of duty suffers from serious errors and, therefore, cannot be sustained in law."*

4.13 In respect of the demands made on the basis of shortages of finished goods and some raw material during the search proceedings on 14.12.2012 we find that the such shortages have been detected on the basis of eye estimation and not on the basis of actual weighment of the stocks of raw material or finished goods. In absence of any physical verification of the stocks by actual weighment, the demand made alleging clandestine clearance cannot be upheld in view of the decisions referred by the Appellant during the course of arguments. In case of Nitin Ispat, supra, Delhi Bench has observed as follows:

*"5. After hearing both sides, I find that Appellants are mainly objecting to recording of panchnama on the ground that it is not practical to weigh the goods without creating the inventory. Inasmuch as there was quite huge stock of*

*ingots available in the factory. I find force in the above contention of the learned advocate. In the absence of inventory, it is neither possible nor practical to weigh such huge quantum of final product. As such, there is every possibility of occurrence of an error in the physical verification of stock. Otherwise also, I find that there is virtually no evidence on record that such excess stock was not entered in the records with any mala fide to clear the same without payment of duty. There is no inculpatory statement of any authorised representative of the Appellant.*

*6. In the absence of any evidence to that effect, I fully agree with the learned advocate that as per declaration of law by various decisions of the Tribunal, confiscation of excess found goods is neither justified nor warranted. Reference can be made to majority decisions in the case of Bhillai Conductors (P) Ltd. v. CCE, Raipur [2000 (125) E.L.T. 781 (Tri)] as also to Tribunal's decision in the case of A. Kumar industries v. CCE Daman, Vapi [2010 (261) E.L.T. 486 (Tri-Ahmd)]. It stands held in the said decision that a simple failure of non-accounting of goods in the RG1 register do not invite confiscation of the same or imposition of penalty unless there is evidence to show that goods were meant for clandestine removal."*

4.14 In case of **Shiva Steel Rolling Mills [2005 (186) ELT 326 (T)]** Kolkata bench observed as follows:

*5. In the present case, no actual physical verification was done by the Anti Evasion Team. No actual weighments of the goods were done by the authority concerned and no such slips were provided to the Appellants even after their request. Whereas the physical stock report conducted on 20th July, 2000, represents the actual weighment of the shortages. How the authority arrived at such conclusion is not clear. They have not disclosed the basis on which the deficiency was arrived at. No doubt, the physical weighment is not the only method of verifying the stock but there must be some basis on which the stock can be verified. The goods may be counted and then multiplying it with certain weight. But in the present case, no such method was adopted nor any specific method has been described in the order-in-original or order-in-appeal. It was done only on the basis of eye estimation which cannot be the basis for quantifying the demand for deciding the charge of clandestine removal. Similar view has been expressed in the case of Micro Forge*

*(I) Pvt. Ltd. referred to above wherein the Tribunal has held as under :*

*"Demand - Clandestine manufacture and removal - Shortage of finished goods - Proof of - Average weight of a single forging of each type taken and multiplied by number of pieces of relevant items (unit) - Stock position arrived on basis of an estimation - Such method of stock taking can lead to a suspicion of shortage, but cannot be a substitute for proof of shortage - Unless the department is in a position to clearly demonstrate the fact of shortage through actual physical weighment of entire stock, allegation of shortage of stock and consequent illicit removal of finished goods not sustainable - Section 11A of Central Excise Act, 1944 read with Rule 9(2) of erstwhile Central Excise Rules, 1944 - Rule 4 of Central Excise Rules, 2002. [para 5)] - Appeal allowed."*

*The present case is squarely covered by the ratio rendered in the case of M/s. Micro Forge (I) Pvt. Ltd*

4.15 In case of **Surya Wires Pvt. Ltd [2021 (376) E.L.T. 550 (Tri. - Del.)]** Delhi Bench held as follows:

*7. From the above, it becomes clear that the stock verification on the basis of eye estimation and the statements recorded at the time of investigation are the only source of reliance for the adjudicating authority to confirm the demand. Though the documents as recovered at the time of search are also been held to be the evidence proving the clandestine removal by the Appellant, but I observe that documents explaining the noticed shortage were submitted by the Appellant at the very initial stage of replying the show cause notice. There is no denial about receipt of the said documents. However, same are alleged to be an afterthought. A verbal submission can definitely be an afterthought but the documents of the previous dates, irrespective submitted later cannot be a case of afterthought unless and until so proved with the cogent evidence. It is settled law that onus is on Revenue to prove otherwise with cogent evidences that the goods have been removed by the manufacturer without the duty paying invoices as was held in the case of Bharat Seats Ltd. v. CCE - 2009 (242) E.L.T. 308 (Tri. - Delhi).*

*8. The documents as relied upon by adjudicating authority below, while confirming the demand are delivery challan, estimated invoice, outgoing sheet etc. but these documents* *admittedly and apparently have not been co-related with the documents submitted by the Appellant. Perusal of said documents with the delivery challans recovered by the Department, as found annexed on record as well, it is abundantly clear that the delivery challans are in the name of Sona wires Pvt. Ltd. and document of Appellant are proving that Sona Wire were their job worker and the shortage as noticed by the Department at the time of investigation was purely on account of the goods being given to said job worker. This perusal makes it clear that the Department has ignored the supportive documents which are sufficient enough to falsify the opinion of the Revenue formed at the time of the investigation.*

*9. The another ground for confirming the demand is the shortage noticed after physical verification of the goods, admittedly the goods were verified on the basis of eye estimation. Tribunal Delhi in the case of CCE v. Sigma Castings Ltd. reported in 2012 (282) E.L.T. 414 has held that where the shortages have been made purely on eye estimation basis without any actual weighment of the goods the demand alleging clandestine removal cannot be upheld. In another decision of RHL Profiles Ltd. v. CCE, Kanpur - 2013 (290) E.L.T. 247 (Tri. - Delhi) it was held that the shortage detected on the basis of average weight of finished goods without any other corroborative evidence to reflect upon the clandestine removal cannot lead to confirmation of demand of duty against the Appellant.*

*10. The removal of inputs was also not taken into consideration while alleging the shortage of stock. The eye estimation of stock without any other corroborative evidence of removal of inputs cannot be the evidence for the quantity of inputs to be short or to have been clandestinely removed. Tribunal Delhi in the case of Sanco Plastics Pvt. Ltd. v. CCE, Delhi - 2004 (176) E.L.T. 740 has categorically held that allegations for inputs to have been disposed of as such and to have not been used in the manufacture of duty paid finished goods have to be proved with the cogent evidences. The onus is solely of the Revenue to prove as to how much inputs have been used or disposed of. In the absence thereof no charges of clandestine removal survives. The document as relied upon by the Department is absolutely insufficient to prove the removal of inputs clandestinely. No question arises of the confirmation of the demand. The explanation given by the Appellant in their reply to the show cause notices, that too* *twice, have totally been ignored by the adjudicating authority which otherwise contained the sufficient explanation with supporting documents to prove the case of the Appellant. Resultantly, it stands established on record that the demand has been confirmed merely on the basis of the presumption, which is absolutely not sustainable. The reliance placed on the decision of Raj Petroleum Products v. CCE - 2005 (192) E.L.T. 806 (Tri. - Mum.) is accepted. I also draw support from the decision of Allahabad Tribunal in the case of Radha Madhav Corporation Ltd. v. CCE, Daman - 2012 (284) E.L.T. 369 wherein it was specifically held that charge of clandestine removal is to be established on the basis of preponderance of probabilities, it cannot be merely on the basis of assumptions and presumptions. Clandestine removal has to be established beyond doubt by adducing strong, sufficient and positive evidence and the burden of proving the same is on the Department.*

*11. I further observe that there is no evidence of procurement of raw-material and consumption thereof. No single payment detail of clandestine sale has been discussed. Nor there is any evidence of any excessive power consumption which is otherwise required for the alleged large scale production. Nor there is any record of recruitment of workers or staff required for alleged massive production with no payment of record of salary and wages to such workers. No document in the form of receipts of any cash or kind on account of clandestine clearance and sale of goods has been seized from the parties. No evidences of removal of excisable goods or procurement of raw materials and its consumption are on record. I rely on the decision of Hon'ble Apex Court in the case of Continental Foundation Joint Venture v. CCE, Chandigarh-I - 2007 (216) E.L.T. 177, while hearing about decision of Allahabad High Court cited as Continental Cement Co. v. Union of India reported as 2014 (309) E.L.T. 411 (Allahabad), has laid down the criteria of investigation to prove the allegation of clandestine sale in following words :*

*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.*

*12. In the present case, I do not find any such evidence in corroboration to the presumption of the department, demand cannot be sustained.*

4.16 Thus we do not find any merits in the impugned order, confirming the demands made on above accounts.

4.17 As we do not find any reason to uphold the demand, we are also not in position to uphold the penalties imposed on the Appellant 1 and Appellant 2.

5.1 Appeals filed by the Appellants are allowed.

(Operative part of the order is pronounced in open court)

**Sd/-**

**(P.K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

**Sd/-**
**(SANJIV SRIVASTAVA)**
**MEMBER (TECHNICAL)**

*Nihal*