CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/70018-70022/2017-EX-[DB]
(Arising out of Order-in-Original No.AGA-EXCUS-000-COM-0023-16-17 dated 23/09/2016 passed by Commissioner of Customs, Central Excise & Service Tax, Agra)

M/s Trela Footwear Export Pvt. Ltd. (In Appeal No. E/70018/2017), Shri Nitin Sachdeva, Director (In Appeal No. E/70019/2017),
Shri Harsh Sachdeva, Director (In Appeal No. E/70020/2017),
M/s RCI (In Appeal No. E/70021/2017) &
Shri Surinder Khanna, Proprietor (In Appeal No. E/70022/2017),
Appellant

Vs.

Commissioner of Central Excise & Service Tax, Agra Respondent

Appearance:
Shri A. K. Prasad, Advocate (In Appeal No. 70018-70021/2017) &
Shri Anil Singh Sisodia, Advocate (In Appeal No. E/70022/2017),
for Appellant

Shri Rajeev Ranjan, Joint Commissioner (AR), for Respondent

CORAM:
Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 04/01/2018
Date of Pronouncement : 07/03/2018

FINAL ORDER NO. 70518-70522/2018

Per: Archana Wadhwa

All the appeals are being disposed of by a common order, as they arise out of same impugned order passed by the Commissioner vide which he has confirmed the duty of Rs.1.68 Crores approximately against M/s Trela Footwear Export Pvt. Ltd. (hereinafter referred as "M/s TEFPL" for short) and Rs.56.26 Lakhs approximately for M/s RCI along with confirmation of interest and imposition of penalties of identical amounts. In addition the goods seized from various premises stands confiscated with option to redeem the same on payment of redemption fines. Further penalty of Rs.50 Lakhs stands imposed on Shri Harsh Sachdeva & Shri NItin Sachdeva, both Director of appellants company namely M/s TEFPL. Further penalty of Rs.5 Lakhs stands imposed on Shri Surinder Khanna, Proprietor of one M/s BES Traders, Agra.

2. After hearing both the sides duly presented by Shri A. K. Prasad and Sri Anil Sisodia, Advocate for appellants & Shri Rajeev Ranjan, Joint Commissioner for Reveneu, we find that M/s TEFPL as also M/s RCI are manufacturers of PU, PVC & TPR Soles for Footwear products. Both the Units are located in Agra and registered with the Central Excise Department and were clearing their final product on payment of duty. Shri Harsh Sachdeva as also Shri NItin Sachdeva are Director of appellants company namely M/s TEFPL & Parners in M/s RCI. Shri Surinder Khanna is

Proprietor of one M/s BES Traders, Agra, dealing in the Soles, including Soles of the present two manufacturer appellant.

3. The Officers of DGCEI, New Delhi searched the factory premises of M/s TEFPL & M/s RCI on 26/10/2013 and conducted various checks and verifications. Their records were also scrutinized. However, the Officers did not find any discrepancy, either in their stocks of the raw-materials or in their final products. As per the ld. Counsel some documents were seized by the Officers but they are neither mentioned in the Panchnamas nor are relied upon in the Show Cause Notice.

The Officers also put to search the sales depots of M/s TEFPL & M/s RCI as also other dealers under the name of M/s Rubber Complex India & M/s BES Traders on the same date. The stock found at the said premises not entered in their records was put under seizure and various other documents along with some Kaccha Slips and Electronic records like – Laptops, Disc Drives & Pen Drives were seized from the said premises.

4. On the basis of the said Kaccha Parchies as also some post-dated cheques seized from the residence of Shri Harsh Sachdeva, whose premises was also put to search on 26/10/2013 itself, Revenue conducted further enquiries from the persons mentioned in the said Kaccha Parchies. However, out of the large number of Kaccha Parchies, statements of only 11 persons mentioned in the said Kaccha Parchies were recorded. The persons so contacted by the Revenue deposed that they used to procure Footwear Soles from M/s TEFPL & M/s RCI on the strength of post-dated cheques and no invoices were being raised for the same. They also stated that such Kaccha Parchies and post-dated cheques were like negotiable instrument, which were traded in the market and they used to honour the same, no matter who brought them for encashment. The total value in respect of Kaccha Parchies was around of Rs.2.15 Crores and post-dated cheques were of Rs.83.16 Lakhs approximately. Similarly, the said Kaccha Parchies were recovered from the premises of M/s BES Traders, which showed the total value of Rs.1.90 Lakhs of sales which according to the Revenue were manufactured by M/s TEFPL & M/s RCI and cleared without payment of duty.

5. The Pen Drives recovered from the premise of M/s BES Traders were seized and subsequently print outs were taken. Based upon the said print outs, Revenue entertained a view that the appellant, during the period 01/01/2011 to 22/10/2016 had sold the goods to the tune of Rs.112.91 Crores and out of the said total sales, sales of Rs.36.42 Crores were towards unaccounted/clandestine clearances from the factories of the two manufacturers.

6. During the course of further investigations, statements of Shri Harsh Sachdeva as also of Shri Nitin Sachdeva were recorded on various dates. Similarly, statements of Sanjeev Kakkar, Cashier of sales depot of the manufacturer as also of Shri Mohan Tiwari, Accountant of M/s Rubber Complex India were recorded. The said statements would be adverted to by us during the course of our discussions.

7. Based upon the above, Revenue entertained a view that the manufacturing units engaged in the manufacture of Footwear Soles were clearing their final product in a clandestine manner. As such based upon the print out obtained from the Pen Drives, proceedings were initiated against both the manufacturing units by way of issuance of Show Cause Notice dated 23/02/2015 raising demands against them as also proposing imposition of penalties. It is also seen that another Show Cause Notice dated 22/04/2014 was issued proposing confiscation of the seized goods from the trading premises. Both the Show Cause Notices were adjudicated

by the Commissioner by a common order, which is impugned before us, vide which he confirmed the demands along with confirmation of interest, imposed penalties and confiscated goods, as detailed in the preceding paragraphs. The said order of the Commissioner is impugned before us.

8. The ld. Advocate Sh. A. K. Prasad, appearing for the appellants raised the following grounds:-

A. The whole case of the department, including the demand, is based on the print outs allegedly taken from the pen-drives seized from the premises of M/s.BES Traders on 26.10.2013. As per Annexure ‘A’ to RUD-1, out of the 4 pen drives seized, two were of HP Brand, one of Kingston Brand and one was unbranded. However, as per RUD-26 (page-944), which is the panchnama drawn on 11.8.2014, at the time of unsealing of the seized/sealed pen-drives and taking printouts there-from, it is seen that print outs were taken from pen drives other than the seized ones. This shows that the seized pen-drives were substituted/replaced and print outs taken from the substituted pen drives.

B. The two panchas who had witnessed the seizure of the pen drives from the premises of M/s.BES Traders on 26.10.2013, were allowed to be cross examined by the adjudicating authority. Panch NO.1, Shri Narinder Singh, did not appear. However, it is to be noted that this panch was not from the locality in Agra, as is required by law, but was a resident of New Delhi. The second Panch, Shri Shammu Jafri, appeared for cross examination on 9.3.2016 (para 16 of O-in-O, page-104) and he categorically stated that he was not present during the search and seizures operations and he wsa also not aware of the nature of the proceedings. He joined the proceedings only at 9.00 pm when records show that the panchnama proceedings were concluded at 9.30 pm.

C. Further, the two witnesses who were allegedly present on 11.8.2014 duringt the unsealing of the four pen drives and taking a print outs (RUD-26), and who were also allowed to be cross examined, never turned up. Hence, their evidence is to be ignored.

D. Apart from the above, for these print-outs, takne from the pen drive, to be admissible as evidence, provisions of section 36B of the Central Excise, 1944, had tobe strictly complied with. None of these conditions were fulfilled in this case.

E. In view of this, the print outs from the pen drives cannot be relied upon for establisihign any case of unaccounted/clandestine clearances against the appellants.

F. The statements of Shri Harsh Sachdeva dated 11.8.2014 and of Shri Nitin Sachdeva dated 12.8.2014, in connection with the print-outs taken from the pen drives, were retracted at the earliest available opportunity, on 13.8.2014 and hence cannot be relied upon.

G. The defects in compliance with the provisions of section 36B cannot be cured or rectified through any corroborative oral statements.

H. The case of the department is also that M/s.BES Traders were a dummy unit of appellants NO.1 and 2 and, therefore, the pen drives seized from their premises related to unaccounted clearances of the appellants. In this context it is submitted that during the adjudicating proceedings itself, the proprietor of BES Traders, Shri Surinder Khanna, had filed 2 affidavits about his status and had also supplied all documents including his IT returns, VAT returns and balance sheet, etc. to establish his independent character. Though Shri Harsh Sachdeva had, right at the initial stage of investigations, informed the department that BES Traders was an independent entity whose proprietor was Shri Surinder Khanna, but neither was this aspect investigated by the department nor was any statement recorded of Shri Khanna. This was more important since the pen drives on the basis of which the whole demand has been raised, was found in these premises.

I. In this background, if the department wanted to prove that M/s.BES Traders were a 'dummy' unit of the appellants, a show casue notice should have been issued to them in this regard. Though the show cause notice dated 22.4.2014 records Shri Surinder Khanna as a co-noticees, he has not been made a co-noticee in the main show cause notices dt.23.2.2014. On this ground itself the show cause notice dated 23.2.2015 needs to be quashed.

J. M/s.BES traders furnished adequate evidence before the adjudicating authority that they were selling goods not only of the appellants but also of other supplier. But this was ignored.

K. To prove clandestine clearance only inculpatory statements or print outs taken from pen-drives is not enough. It is now established that to prove clandestine clearance the department should produce clinching evidence regarding the following:-

i) Discrepancy in stocks, both of finished goods and/or raw materials. The panchnamas drawn by the departmental officers at the two factory premises on 26.10.2013 (which are not RUDs in the proceedings) show that no discrepancies were found in stocks.

ii) The department should establish procurement of unaccounted raw-materials. In the present case there is no such investigation.

iii) To manufacture such additional unaccounted quantity there should be additional consumption of electricity. No such evidence was found.

iv) Investigations should have been done to ascertain whether it was possible for the unit to manufacture such additional quantity. The Chartered Engineer's Certificate (pages 750-753) show that with the installed capacity of the machines it would not have been possible to manufacture the additional quantity of soles as alleged by the department.

v) To sell over Rs.36 crores were of unaccounted goods it would involve cash transactions of huge amounts. No such cash trails have been found by the department.

vi) The print outs taken from the pen drives mentioned the names of the persons to whom various quantities of soles were sold. However, none of these persons were either identified by the department or contacted to establish any case of unaccounted sale/purchase (162 pages of these print outs allegedly show sales amounting to Rs.104,54,00,743/- at pages 958 to 1119 of Volume-3 of the Paper-Book, and pages 1120 to 1365, allegedly, show sales totaling Rs.8,37,26,568/-.

vii) There should have been some seizure of unaccounted goods during the course of transportation.

viii) The transporters/drives of vehicles should have been identified who would have transported the non-duty paid goods. There is no such evidence.

L. Statement dated 10.12.2013 of Shri Harch Sachdeva is contrary to the records submitted by Shri Surinder Khanna, the proprietor of BES Traders. In case of conflict, documents will prevail over statements.

M. Apportionment of duty demand between appellant No.1(TFEPL) AND Appellant No.2(RCI) done by the department in the ratio of 3:1 is erroneous. Since the print outs obtained from the pen drive are quite detailed it would have been possible for the department to ascertain whether the sales related to PUC soles, TPR soles or PVC soles. This was important since the value of soles are significantly different, with PU soles being the costliest. Since both the appellants had two machines each for manufacturing PU soles the duty demand in respect of PU soles should have been apportioned in the ratio 1:1. As regards TPR/PVC soles, the appellant NO.1 had 20 machines to 5machines of appellants No.2. Hence, of at all, ratio should have been taken as 4:1 in respect of these goods.

N. Cum-duty benefit should have been given.

O. Combined penalties have been imposed on Shri Harsh Sachdeva and Shri Nitin Sachdeva for their roles as Director TFEPL and Partner of RCI. Since the alleged evasion is in respect of two companies, combined penalties cannot be imposed.
P. No duty has been demanded on the basis of kachcha parchies and post dated cheques seized from the residential premises of Shri Harsh Sachdeva. Demands have also not been raised on the basis of kachcha slips seized from the premises of M/s.BES traders. Once these print outs are held to be not admissible as evidence, the demand does not survive the department cannot seek to demand or recover duty on the basis of any other evidence.
Q. The show cause notice dated 23.03.2015 suffers from the vice of non-joinder of 'necessary parties'. Since M/s.BES Traders were proposed to be declared as 'dummy' of Appellants 1 and 2, they were required to be made notice to the show cause notice. As per the case of the department some unaccounted and non-duty paid goods had also been sold form the premises of BES Traders and hence they were party to the evasion. They should also have been charged with the offence of abetment of evasion of huge amount of revenue.
R. Demand on seized goods cannot be raised only against TFEPL. It has to be apportioned between TFEPL and RCI.
S. No penalty can be imposed under Rule 26 of the Central Excise Rules, 2002, since no goods held liable to confiscation.
T. No penalty can be imposed on appellants 3 and 4, under Rule 26 of the Central Excise Rules, 2002, since these persons had never physically dealt with any of the offending goods.

9. The ld. Advocate also referred to and relied upon various decisions of the Tribunal as also of other courts to impress upon the issue that the allegation of clandestine activities cannot be upheld on the basis of assumptions and presumptions and require positive, tangible and strong evidence to show and prove such clandestine manufacture and removals. He submits that the Revenue has not produced any evidence to show that the appellants have actually manufactured huge quantity of goods, which stands cleared by them without payment of duty. No statements of any of the employees of the appellants, connected with the manufacturing activities, stand recorded by the visiting officers.

10. Shri Rajeev Ranjan, ld. AR appearing for the Revenue reiterated the reasoning adopted by Commissioner for arriving at a finding against the appellants. It was contended that the Revenue's case is based upon the pen drive recovered from the premises of M/s.BES Traders, Agra. The adjudicating authority has given a detailed finding that BES Traders is actually not the proprietory concern of Shri Surinder Khanna and is being controlled and managed by Shri Nitin Sachdeva, son of Shri Harsh Sachdeva. The ld. AR draws our attention to the evidences on record, as discussed by the adjudicating authority, to show that Shri Surinder Khanna was never seen at the premises of BES Traders and it was only Shri Nitin Sachdeva who was always found to be present in the said premises. He has also countered the Advocate's contention that Shri Surinder Khanna has placed on record an affidavit along with documentary evidences to show that the he was the proprietor of the said BES Traders by reiterating the findings of the adjudicating authority that such maintenance of records by M/s.BES Traders, in his own name was a camouflage inasmuch as nobody discloses his financial dealings with the other persons.

As regards the appellant's contention that print outs recovered from the pen drives by M/s.BES cannot relied upon inasmuch as the make of the pen drive which were seized is different from the make of the pen drive from which the print outs were taken, he submits that said print outs were taken before Shri Harsh Sachdeva and Shri Nitin Sachdeva, who never objected to the same. He also submits that at the time of taking out the print outs the independent witnesses were available and as such appellant cannot object to the same.

As regards the evidentiary value of the print outs in terms of the provisions of section 36B(2) and 36B(4) of the Central Excise Act, he submits that the said issue has been discussed in detail by the adjudicating authority and reiterates the same findings.

Ld.AR further submits that there are statements on record indicating that the appellants are indulging in clandestine activities. The retraction of statement of Shri Harsh Sachdeva and Shri Nitin Sachdeva by alleging undue pressure and coercion upon them cannot be appreciated inasmuch as they have not produced any evidence to show that the said statements were recorded under pressure. He also submits that the economic offences are worse than the criminal offences, as observed by the Hon'ble Supreme Court in the case of State of Gujarat v. Shri Mohanlal Jitamalji Porwal & Others [1987 (29) ELT 483 (SC)]. He also submits that the Revenue cannot be expected to decide the allegations of clandestine removal by mathematical precisions and it is the appreciation of the evidence produced on record in terms of the confessional statement and the print out drives which point out the appellant's activities of clandestine nature and the impugned order is liable to be upheld.

11. We have considered the submissions of both the sides. We, after going through the impugned orders and after appreciating the submissions made before us, note that the entire case of the Revenue is based upon the print outs taken from the Pen drives seized and recovered from the premises of one M/s. BES Traders Agara. Whether such evidence recovered from the said M/s.BES Traders is required to be considered as an evidence recovered from the third party premises or not, depends upon the status of M/s.BES Traders. Whereas the Revenue has contended that such M/s.BES Traders is not an independent proprietory unit of Shri Surinder Khanna, the appellants have strongly contested the said finding of the adjudicating authority.

12. The findings of the adjudicating authority that the said M/s.BES Traders is not proprietory unit of Shri Surinder Khanna and is being controlled by Shri Nitin Sachdeva is based upon statement of Shri Harch Sachdeva recorded on 26.10.2013, wherein he deposed that the day to day business activities of M/s.BES Traders is being looked after by him and his son. He also referred to the fact that none of the employees of M/s.BES Traders has ever seen Shri Surinder Khanna and it was only Shri Nitin Sachdeva, who was supervising the said premises. As against the above findings of the adjudicating authority we note that Shri Surinder Khanna, during the course of adjudication, filed an affidavit to the effect that he was the sole proprietor of M/s.BES Traders. He also enclosed copies of financial records of M/s.BES Traders i.e. ledger account of sale, VAT returns, Income Tax returns and balance sheets etc. The adjudicating authority has not considered the said documentary evidences so produced by observing that in similar trade or business, no one shares his financial records with any other person, who is also in same business. In the present case, Shri Surinder Khanna has not only given the financial records, but also given affidavit. This shows that Shri Surinder Khanna is well-wisher of the notices, who actually control the business of M/s.BES Traders.

We find that the said reasoning of the adjudicating authority cannot be appreciated. Admittedly the documents speaks much louder than the oral evidences. Admittedly M/s.BES Traders is in the name of Shri Surinder Khanna and all the financial records, which stand produced by them, are being maintained in the name of M/s.BES Traders. Based upon the retracted statement of Shri Sachdeva as also of some of the employees, it cannot be concluded that M/s.BES Traders is not the proprietory unit of Shri Surinder Khanna. It is also to be noted here very importantly that Shri Surinder Khanna was never examined during the course of investigations and his statements were never recorded inspite of the fact of M/s.BES Traders being the proprietory unit of Shri Surinder Khanna having come to the knowledge of the investigating officers. The proprietory concern cannot be held to be a dummy of other units without examining the proprietor of the same. It amounts to disregarding the status of the proprietory concern, without the knowledge and examination of the proprietor. We also find favour with the arguments of the ld.Advocate that in one of the show cause notices, Revenue has held the said M/s.BES Traders as dummy of manufacturing units and in the another show cause notice, he has been called upon to show action against the proposed confiscation of the goods recovered from his premises and he has been penalized. This action of the adjudicating authority is self-contradictory.

Further, during the course of cross-examination of one of the buyers, he has stated that he might have seen Shri Nitin Sachdeva sitting at M/s.BES Traders, but as far as he remembers that Shri Surinder Khanna is the proprietor of M/s.BES Traders. The said outcome of cross-examination has not been accepted by the adjudicating authority on account of the use of expression ‘as far as he remembers’. The Commissioner has observed that in his initial statement the said customer Shri Pradeep Ch. Gupta has clearly deposed that he has not seen Shri Surinder Khanna sitting at M/s. BES Traders. If the frequent presence of a particular person at a particular premises establishes his ownership of firm operating from the said premises, we are afraid that many people would be able to claim their ownership of the firms by frequently visiting the premises of that particular firm or unit. The adjudicating authority has not given any reasons to disprove the documentary evidences produced by Shri Surinder Khanna.

It has also been contended before us that M/s.BES is not only doing the trading of the two manufacturers but also trades in the goods of other manufacturers. As such we arrive at a finding that M/s.BES Traders is an independent trading unit.

13. Having held so, we proceed to decide the evidentiary value of the pen drives recovered from the premises of an independent trader vis-à-vis the two manufacturing units. Admittedly the factories of TFEPL and RCI were also visited by the central excise officers on the same very day and searches were conducted. No discrepancy either in the stock of the raw material/inputs/packing goods or in the final product was detected by the visiting officers. It is also seen that no incriminating documents, which stand relied upon in the show cause notices were recovered from their premises. The entire case of the Revenue is based upon the prints outs seized from the premises of M/s.BES, which is a third party premises.

It is well settled law that the documents recovered from the premises of the third parties are required to be dealt with, with a caution and requires further corroboration in the shape of the evidences directly related to the manufacturing units in question. Reference can be made to the Tribunal decision in the case of Rama Shyam Papers Ltd. vs. CCE, Lucknow reported as 2004 (168) ELT 494 (Tri. Del.) wherein it was observed that the records seized from third party premises cannot be made the sole basis for upholding the findings of the clandestine removal, even if it is proved that the assessee was having business relationship with that party. Similarly in the majority decision of the Tribunal in the case of Kuber Tobacco Products Ltd. v. CCE, delhi [2013 (290) ELT 545 (Tri.-Del.)], it was observed that documents not recovered from factory, office or residential premises of the assessee company require a link between such documents and activities of the assesses are required to be proved by relevant and creditable material.

Admittedly, in the present case the documents stand recovered from the third party premises and has not been established by the Revenue to have any link with the appellant's activities and as such cannot be relied upon.

14. Having held that the pen drives recovered from the premises of an independent trader cannot be held to be proper evidence for arriving at the findings of clandestine removal, nevertheless we proceed to decide the other arguments raised by the ld. Advocate in respect of evidentiary value of the print outs from the said pen drives. It has been shown to us by the ld. Advocate that the pen drive seized from the premises of M/s BES Traders was different from the pen drives from which the print outs were taken. In such a scenario, we agree with the ld. Advocate that such print outs cannot be made the basis for upholding the finding of clandestine removal of the appellant's final product.

Ld. Advocate has also submitted that the provisions of Section 36B of the Central Excise Act which deals with the evidentiary value of the computer print outs, have not been satisfied so as to adopt the said print outs as an evidence. We note that Section 36B(ii) lays down the condition for accepting a statement contained in a document produced by a computer subject to the condition that such print out was produced from a computer which was regularly to store or process the information for the purposes of any activities regularly carried out over that period by the person having lawful control over the use of the computer; during the said period there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of or of the kind from which the information so contained is derived; throughout of the material part of the said periodl, the computer was operating property; the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities. The said condition read with the subsequent clauses of the sub-section require the Revenue to satisfy the facts that the print outs taken from the pen drives were being fed by a person linked with the appellant, in the ordinary course of their business. The Tribunal in the case of Ambica Organics vs. CCE&C, Surat-I -2016 (334) ELT 97 (Tri. Ahmd) referred to the evidentiary value of the print outs of data obtained from a USB device and held that reliance on such material is impermissible in view of non fulfilling the condition contained in sub-section (ii) of Section 36B of the Central Excise Rules. The said order of the Tribunal stands upheld by the Hon'ble Gujarat High Court when the appeal filed by the revenue was rejected reported as Commissioner vs. Ambica Organics -2016 (334) ELT A67 (Guj.). While arriving at the above decision of the Ambica Organics, the Tribunal relied upon many precedent decisions holding that such print outs without satisfying the procedure as detailed in Section 36B of the Central Excise Act can have no evidentiary value. To the same effect is the Tribunal decision in the case of Premier Instruments & Controls Ltd. vs. CCE, Coimbatore -2005 (183) ELT 65 (Tri. Chennai) wherein it was held that print outs of personal computer of companies officer does not fulfill the statutory conditions laid down under Section 36B(2) of the Central Excise Act, 1944 and demand is on the said basis cannot be sustained. Inasmuch as the Revenue case is solely and entirely based upon such print outs, we are of the view that the finding of clandestine removal cannot be upheld.

15. We note that apart from the said print outs, the authenticity of which also is in doubt, Revenue has not made any efforts to establish the factum of clandestine manufacture of the goods by the appellants. No investigations stand made by the Revenue as regards procurement of the huge raw material, as also the packaging material and their actual manufacture in the appellant's factory. Statement of neither of their employees or production manager stand recorded. Apart from the fact that there is no evidence for manufacture, we also note that there is no evidence of actual clearance of the goods. No transporter have been identified by the Revenue as also no customer stand contacted. Admittedly in the said print outs the names of the customers were available but no efforts have been made to contact them. The Tribunal in the majority decision in the case of Tejwal Dyestaff Industries vs. Commissioner of C. Ex. Ahmedabad-2007 (6) TMI 351-CESTAT, Ahd. held that the Revenue after recording the confessional statements carries out no further investigations and such confessional statements are struck down by the higher courts thus leaving no evidence with the Revenue to prove the allegations. Reliance by the Revenue on the various statements of either directors which in any case stand retracted or the other statements of the co-noticees etc. cannot be appreciated inasmuch as it is a well settled case that the allegations of clandestine removal cannot be made solely on the basis of the statements and require further corroboration by independent tangible and positive evidences. Said decision of the Tribunal stand upheld by the Hon'ble Gujarat High Court, when the appeal filed by Revenue was rejected, reported as 2009 (234) ELT 242 (Guj.).

16. Apart from the fact that the Revenue has failed to establish the allegation of clandestine removal, we also note that the appellant have produced on record the Chartered Accountant certificate submitting that the production capacity of both the factories was incapable of producing such huge quantum of excisable goods as alleged by the Revenue. Further, as already observed, no excisable goods were found in the factory of both the manufacturing units at the time of visit of the Officers, either in the shape of raw material or the packing goods or the final products. If a manufacturer is indulging in any clandestine activities at such a huge level, there are bound to be discrepancies in the stocks available at the time of surprise visit of the Officers.

17. Further, the Revenue has also not been able to produce any evidence to show as to how the cash of more than Rs. 36 crores worth of alleged sale of unaccounted goods was managed by the appellant, there is no trail of any such financial dealing available on record. As already observed, it is well settled law that the onus to prove clandestine activities is on the Revenue and is required to be discharged by producing positive, cogent and justifiable evidences. In the present case, no such evidence being available, we are of the view that the findings of clandestine removal cannot be upheld against the two manufacturing units. Accordingly, the demand raised against them is set aside alongwith setting aside of penalties imposed upon them.

18. Further, we note that the adjudicating authority has imposed common penalties on both the Directors. Having held that the clandestine removal findings are unsustainable, penalties imposed on the Directors are also set aside.

19. Similarly, the confiscation of the goods seized from the trading premises of the appellant as also from M/s BES Traders, Agra cannot be

upheld in the absence of any evidence to show that the said goods were cleared from the manufacturing units of the two manufacturers, without payment of duty. Accordingly, confiscation is also set aside alongwith setting aside of penalty upon Sh. Surinder Khanna, Proprietor of M/s BES Traders.

20. In view of foregoing, the impugned order is set aside in its totality and also all the appeals are allowed with consequential relief, if any.
(Pronounced on 07/03/2018)

Sd/- Sd/-
(Anil G. Shakkarwar)
Member (Technical) (Archana Wadhwa)
Member (Judicial)Ansari
1