IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. E/147/2012-EX[DB]

(Arising out of Order-in-Original No. 22/CE/Commr/2011 dated 22/09/2011 passed by Commissioner of Central Excise, Kanpur)

Commissioner, Customs & Central Excise, Kanpur **Appellant**

Vs.

M/s Trimurti Products, Kanpur **Respondent**

Appearance:

Shri Mohd Altaf (Asstt. Commr.) for Appellant
Ms. Stuti Saggi (Advovate) & Shri S.R. Agrawal (Advocate)
for Respondent

CORAM:

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

Date of Hearing : 02/04/2018
Date of Decision : 02/04/2018

FINAL ORDER NO. 70881/2018

Per: Anil G. Shakkarwar

Present appeal filed by Revenue is arising out of Order-in-Original to 22/CE/COMMR/2011 dated 22.09.2011 passed by Commissioner of Central Excise, Kanpur

2. Brief facts of the case are that the respondents were engaged in the manufacture of 'Shikhar' brand of Gutkha, falling under Tariff Item 24039990 of the First Schedule to the Central Excise Act, 1985. Officers of DGCEI conducted

investigations in the business premises of M/s Bihar Carrying Company, Kanpur on and after 09.05.2008 and resume some records from the said transporter and statement of Shri Uma Shanker Awasthi, Manager of M/s Bihar Carrying Company, Kanpur was recorded. Further statement of Shri Ram Prakash Singh, Booking Clerk of M/s Bihar Carrying Company, Kanpur, was recorded. During the course of investigation the officers also recorded statement of Shri Shailendra Mittal, Proprietor of the respondent company on 19.02.2010. Statement of Shri Abhishek Gupta, Authorised Signatory of M/s Acchyut Packaging Pvt. Ltd., Kanpur was recorded and also of Shri Sushil Mishra, Authorised Signatory of M/s Sarvesh Polychem Pvt. Ltd., Kanpur. Further statement of Shri Tarun Kumar Pnadey, Authorised Signatory of M/s Sparsh Laminators Pvt. Ltd. and that of Shri Prashant Agarwal, Manager of M/s Shiva Group of Agencies, Kanpur and that of Shri Rishi Kumar Gupta, Director of M/s Southern Arecanut Pvt. Ltd., Kanpur was recorded on the basis of 'Private Diary Pad', 'JST Slips' recovered from M/s Bihar Carrying Company which were the documents maintained by Bihar Carrying Company, the transporter and on the basis of said various statements recorded it appeared to Revenue that the respondent had cleared 35,321 bags of Shikhar Gutkha for the period from April, 2007 to November, 2007, April 2006 to November, 2007 and February 2008 to April 2008, without payment of duty. Therefore, a show cause notice dated 29.04.2010 was issued to the respondents invoking extended period under proviso to sub Section (1) of Section 11 A of Central Excise Act, 1944 wherein the respondent were called upon to show cause as to why Central Excise Duty of Rs.24,93,92,466/- should not be recovered from them under proviso to sub Section 1 of Section 11 A of Central Excise Act, 1944 with proposal for imposition of penalty. Further there were proposals for imposition of personal penalty on other noticees. The said show cause notice was adjudicated through impugned Order-in-Original wherein the learned Commissioner has considered all the evidences available on record including the statements of Shri Uma Shanker Awasthi and that of statement of Shri R.P. Singh and also statement of Shir Shailendra Mittal. He had also taken into consideration various charts prepared from 'private diary pad', 'JST slips' and 'loading register' retrieved from the transporter and held that the demands raised on the basis of 'Charts-2, G and J' of show cause notice were not sustainable and demands raised on the basis of statements of Shri Uma Shanker Awasthi and Shri R.P. Singh were not sustainable. The Original Authority dropped the proceedings initiated through said show cause notice dated 29.04.2010. Aggrieved by the said order Revenue has preferred present appeal.

3. The grounds of appeal are reproduced below:-

"1. While raising the doubts on decoding of codes used for transportation of various brands of gutkha and has observed that the code 'CP Goods' referred to Tiranga brand of gutkha and not the Shikhar brand of gutkha and holding that the duty calculation chart shows that duty has been demanded from the party on goods covered under the code 'CP Goods' which does not pertain to 'Shikhar' brand of gutkha and pertains to 'Tiranga' brand of gutkha, the Adjudicating Authority has not appreciated the following facts:

> *(i) that Shri Uma Shanker Awasthi, in his statement dated 14.08.2008 stated that he did not mention the name and brand of gutkha transported by him. He stated that no code was used for transportation of Shikhar brand gutkha and that code 'CP Goods' was used to denote transportation of Tiranga brand gutkha. Further, in his subsequent statement dated 28.01.2010,he clarified that Tiranga brand gutkha was transported to Tata Nagar, Bhagalupur and Ranchi destinations only and Shikhar brand gutkha was transported to various places of Bihar viz. Samastipur, Sitamarih, Darbhanga, Muzaffarpur, Patna, Betiah, Katihar. Accordingly, in view of joint decoding the codes of brands of gutkha as well as various destinations, Charts 2/G/J were prepared for quantification of transportation of unaccounted Shikhar brand of gutkha. The aforesaid chart has been prepared*

in accordance with decoding done by Shri Uma shanker Awasthi. Further, a regular transporter of gutkha, who is transporting unaccounted gutkha, is not supposed to writ the correct details of gutkha i.e. brand name, name of manufacturer and name of consignee etc., in the records of his transport company like loading registers etc. The Adjudicating Authority has failed to properly appreciate the facts on records and had failed to appreciate the correct picture of unaccounted transportation of Shikhar gutkha.

(ii) that Shri Uma Shanker Awasthi, was shown the Private Diary Pad showing receipts of gutkha for the period April to November. He, in his statement dated 10.05.2008, stated that the Private Diary Pad shows receipt of gutkha for the period April 06 to November 06. In his subsequent statement dated 18.08.2008, he stated the said entries pertains to the year 2007 and stated that by mistake in his earlier statement, he had informed that it was related to the year 2006. Shri Uma Shanker Awasthi disclosed many facts regarding transportation of unaccounted gutkha of various brands and correction in one of many facts disclosed by him, could not lead to the conclusion that his entire statement was unreliable. Further, correction made by him that the quantity of 27886 (Chart-G) bags does not include 2330 bags of

Tiranga gutkha, was based on the fact that he transported Tiranga brand gutkha to Tata Nagar, Bhabalpur and Ranchi only and since Chart-G does not have entries for destinations namely Tata Nagar, Bhagalpur and Ranchi, therefore, the entire 27886 bags pertains to 'Shikhar' Gutkha only. Thus, such amendments, based on some factual positions and logical reasoning, cannot make the entire statement false and void of evidenciary value. The observation of the Adjudicating Authority not taking cognizance on the entire statement of Shri Uma Shanker Awasthi is incorrect.

(iii) that Shri Uma Shanker Awasthi, was shown the Charts marked as Chart-2, G & J prepared on the basis of entries available in the loading register and other private records of his transport company. On perusing the same, he stated that the unaccounted goods did not accompany any bill or bilty and no other record (other than seized & tendered records) of such transportation was maintained by them. Accordingly, he accepted the quantification of these charts on the basis of decoding the codes of brands of gutkha and different destinations where different brands of gutkha were transported. The above statement does not raise any doubt regarding

correctness of quantification of transportation of unaccounted gutkha.

2. The observation of the Adjudicating Authority that Shri Uma Shanker Awasthi has accepted the contents of aforesaid charts, as per his memory, is factually incorrect inasmuch as the contents of these charts have not been narrated by Shri Umas Shanker Awasthi as per his memory rather the same were recorded in black and white in records maintained by his transport company and he has submitted that the quantity shown in these charts were not accompanied by any bill of bilty and he did not maintain any other record for such kind of transportation. Thus, the Adjudicating Authority has failed to evaluate the statement of Shri Uma Shanker Awasthi in its true perspective.

2.1. The Adjudicating Authority has also not appreciated the fact that the statement of Shri Manoj Kumar Srivastava, Manager of M/s Bihar Carrying Co., Patna was recorded on 23.02.2010. During the statement Shri Manoj Kumar Srivastava accepted the contents of Chart-2, Chart-G and Chat-J showing transportation of unaccounted Shikhar brand of gutkha to various destinations. He also accepted the facts stated by Shri Uma Shanker Awasthi during his statements tendered on 10.05.2008, 14.08.2008 and 28.01.2010 and statement dated 20.11.2008 of Shri Ram Prakash Singh, Booking Clerk of M/s Bihar Carrying co. He further stated that *since he used to receive these goods at Patna in the office of M/s Bihar Carrying Co., hence he can say that these goods containing 'Shikhar' Brand of Gutkha were actually transported through M/s Bihar Carrying Co. He also stated that 'Shikhar' brand of Gutkha transported from Kanpur to Darbhanga, Samastipur, Muzaffarpur, Betiah and Sitamarih were also routed through Patna. He further stated that the entire Registers/Records maintained at his office at Patna for aforesaid period have not been preserved by his office, therefore, he is unable to produce the same. That he has seen Chart-2, Chart-G and Chart-J containing the details of 'Shikhar' Gutkha transported by M/s Bihar Carrying Co., Kanpur to various stations. That he agrees with the contents of the same. However, he is unable to correlate the entries of the aforesaid Charts with the records/register of his Patna branch, as such type of unaccounted goods were not accompanied with any builty, bill or any other document and the same were not entered in Entry Register maintained by them at Patna. However, on the basis of his memory, he presumes that such quantity of 'Shikhar' brand of Gutkha were transported from Kanpur to Patna/various destinations, enrooted through Patna and on the basis of this, he can say that the quantities shown in the aforesaid Chart-2, Chart-G and Chart-J are correct. He further stated that he used to get telephonic message from Shri Uma Shanker Awasthi, of his Kanpur branch, regarding number of bags of 'Shikhar' Gutkha booked from Kanpur to*

Patna. He was also getting directions from Kanpur, as to whom such goods were to be delivered. There was no specific person, and there were many different persons who were coming to collect such consignments of 'Shikhar' Gutkha, therefore, he is unable to give the names of such persons. Regarding payment of freight, he has to state that he was receiving such goods as 'freight paid', hence the question of realization of freight in these cases does not arise.

2.2. The non reliance on statement of Shri Manoj Kumar Srivastava by the Adjudicating Authority stating the same to be based on memory, is not correct as he has explained the method of receiving and delivering the unaccounted Shikhar brand of gutkha at Patna. As regards, accuracy of quantification of aforesaid charts, the same are prepared on the basis of entries available in the private records maintained by M/s Bihar Carrying Co., Kanpur.

2.3. The Adjudicating Authority has failed to appreciate that the Chart-J contained the details of Shikhar brand of gutkha transported by transporter namely M/s Bihar Carrying Corporation, Knapur under the guise of 'kachri' and 'papad' shown in the goods manifests. Shri U.S. Awasthi, Manager of the transport company and Shri R.P. Singh clerk of the transport company in their statements have categorically accepted that 440 bags of Shikhar brand gutkha, were transported by them under the guise of 'kachri'/'papad'. At no *stage of time they have retracted from their statements. The demand cannot be set aside merely on the basis of non mentioning of goods manifests in the list of relied documents, which has been discussed in the body of the notice, as held in the case of Ashok R. Mistry vs. Commissioner of Customs (Acc & Import), Mumbai reported in 2011 (266) ELT 58 (Tri.-Mumbai) wherein it was observed as under-*

"The learned counsel has objected to placing reliance on this affidavit which is not one of the documents relied upon in the show-cause notice. It is true that this affidavit does not figure in the list of annexed to the show-cause notice. However, it very much was mentioned in the body of the show-cuase notice vide para 13, which reads

"Shri Ashok Rashiklal Mistry sent an affidavit dated 27-7-06 to this office wherein he had stated that the entire import was handled by him and by no one else and he was solely responsible for it."

In this scenario, the objection raised by the counsel is overruled."

3. The Adjudicating Authority has observed that some of the consignments are common in Chart-2 and Chart-G, accordingly, the duty cannot be demanded on total quantity mentioned in both the charts. Accordingly, he has held that the demand on Chart-2 is not sustainable. In this regard, the finding of the

Adjudicating Authority is not correct and proper. Even if there were some instances where some consignments were common in both the Charts 2 & G, he should have reduced the demand to that extent only. Further, he has failed to appreciate the fact that Shri Uma Shanker Awasthi, in his statement dated 28.01.10 clarified that the consignments shown in Chart-G does not contain the consignments shown in Chart-2. Thus, setting aside of the entire demand is not just and proper.

4. The Adjudicating Authority has held that some of the consignments on which duty has been demanded, were duty paid. Thus, the entire demand is set aside. In this regard, it is submitted that the proprietor of the manufacturing unit was shown the Charts 2,G & J on 19.02.10, but he failed to produce any evidence regarding duty paid nature of any of the consignments. Further, even if the party had produced any evidence, at the time of adjudication, regarding duty paid nature of some of the consignments, then the Adjudicating Authority should have reduced the demand of duty to that extent only. Thus, setting aside of the entire demand is not just and proper.

5. The Adjudicating Authority has held that there is no evidence of unaccounted procurement of raw materials for production of alleged gutkha clandestinely removed by the party. The observation of the Adjudicating Authority is factually incorrect inasmuch as-

*(i) Shri **T.K. Pandey,** Authorised Signatory of M/s Sparsh Laminators Pvt. Ltd., Kanpur (**supplier of packaging materials**) in his statement dated 18.02.2010 stated that he has to state that as per instructions of Shri Shailendra Mittal (proprietor of M/s Trimurti Products, manufacturer of 'Shikhar' brand gutkha), he had sometimes supplied the packaging materials to them without cover of any invoice, due to some constraints of market. However, he can't furnish the details of such supplies as such types as records were not maintained/preserved.*

*(ii) **Shri Prashant Agarwal**, Manager of M/s Shiva Group of Agencies, Kanpur (**supplier of Tobacco**) was recorded on 19.02.10. He stated that he has sold tobacco to the manufacturer of 'Shikhar' brand of gutkha. He also sells tobacco to Gutkha manufacturers on cash payment basis. In such cases, name of customer is shown as CASH, in the cash memos, as per prevailing market practices. At present, he cannot segregate the cash memos which were pertained to sale of tobacco to M/s Trimurti Products, Kanpur since the cash memos does not bear the name of customer (Gutkha manufacturer). Further, he does not maintain any such record which can show the name of customer/Gutkha manufacturer, in cases of cash sale.*

*(iii) The statement of Shri **Rishi Kumar Gupta,** Director of M/s Southern Arecanut Pvt. Ltd., Kanpur (**supplier of Supari**) was recorded on 19.02.10. He stated that he sells supari to the manufacturers of Shikhar brand of gutkha and others. He also stated that he also sells supari to Gutkha manufactures on cash payment basis. In such cases, name of customer is shown as CASH, in the cash memos, as per prevailing market practices. At present, he cannot segregate the cash memos which were pertained to sale of tobacco to M/s Trimurit Products, Kanpur since the cash memos does not bear the name of costomer (Gutkha manufacture). Further, he does not maintain any such record which can show the name of customer/Gutkha manufacturer, in cases of cash sale.*

(iv) The Adjudicating Authority has held that there was no shortage or excess of sotck at the premises of manufacturer or supplier of raw materials, hence demand is not sustainable. The observation of the Adjudicating Authority is factually incorrect as during the physical stock taking at the factory premises of a raw material supplier (lamination film supplier) i.e. M/s Sparsh Laminators, a shortage of stock was detected and the authorized signatory of the unit accepted that as per instructions of Shri Shailendra Mittal (proprietor of M/s

Trimurti Products, manufacturer of 'Shikhar' brand gutkha), he had sometimes supplied the packaging materials to them without cover of any invoice, due to some constraints of market.

5.1. In view of the above, it is clear that M/s Trimurti Product were engaged in procurement of raw materials on cash payment basis also, however, on perusal of records of M/s Trimurti Product it was revealed that they have not shown the purchase of tobacco, betal nuts, laminates etc. on cash payment. Thus it reveals that party has suppressed the purchase of all the raw material which has been used in the manufacture of unaccounted Gutkha and cleared the same without payment of duty. Thus, the observation of the Adjudicating Authority that the department has failed to produce evidence regarding unaccounted purchase or raw materials, meant for unaccounted production of finished goods is factually incorrect. The case laws relied upon by the Adjudicating Authority are not applicable in the instant case due to different facts and circumstances of cases.

6. The Adjudicating Authority has not relied upon the corroborative evidence of excess production capacity of the party. He has observed that while quantifying the production capacity of the unit, the number of working hours have been taken to be 22 hrs. (against normal working hours of 8:00 am to 8:00 pm) and speed of pouch packing machine has been *taken to be 238 pouches per minute (verified during panchnama proceedings dated 04.11.09) whereas during panchnama proceedings dated 22.09.07, the speed was found to be 120 to 140 pouches per minute. In this regard, it is important to note that even if the working hours are 12 hrs in a day and the speed of machine is taken to be 120 pouches per minute, the suppression of production comes to nearly 70% of the total production (estimated on the basis of capacity), as per chart given below:-*

S. No.	*Period*	*Nos. of machines*	*Production capacity (kg)*	*Recorded production (kg)*	*Percentage of unrecorded production*
1.	*Apr'06 to Sept'06*	*71*	*1722539.52*	*354948*	*79%*
2.	*Oct'06 to Apr'08*	*77*	*5915669.76*	*1927692*	*67%*

7. The observation of the Adjudicating Authority that the demands cannot be confirmed on the basis of private registers maintained by third party, without corroborative evidence. The observation of the Adjudicating Authority is incorrect both in legal and factual terms. The case laws cited by the Adjudicating Authority are not applicable in the facts and circumstances of the instant case. In fact, the records of transporter showing unaccounted transportation of Shikhar *brand of gutkha are self explanatory and contains the systematic details of Shikhar brand of gutkha, as explained by the author of the said records as well as the manager of the transport company. The suppression of production of Shikhar brand of gutkha and its clandestine removal has been duly supported by corroborative evidences, which has been relied upon in the notice. The corroborative evidences supporting the charges of clandestine removal of Shikhar brand of gutkha are enumerated in the following paras:*

(i) Shri Ram Prakash Singh, the author of the 'Private Diary Pad', was interrogated in respect of transportation of 'Shikhar' brand of Gutkha, by his transport company. He disclosed in his statement dt. 20.11.08 that the 'Private Diary Pad' contains the details of, inter-alia, 'Shikhar' brand of Gutkha, received in his transport company at Kanpur, for transportation to various stations, as mentioned in the said diary. He also stated that, during the period April'07 to Nov'07, total 6,995 bags of 'Shikhar' brand Gutkha, as detailed in Chart-2, were transported from Kanpur to various destinations. He further admitted that they have transported 27,886 bags of 'Shikhar' brand of Gutkha to various stations, during the period April'06 to Nov'07, as detailed in Chart-G. Further, he also admitted that 440 bags of 'Shikhar' Gutkha were transported to various destinations, during

the period Feb'08 to April' 08, under the guise of 'Karchri' and 'Papad', as detailed in Chart-J.

(ii) Shri Uma Shanker Awasthi, the manager of M/s Bihar Transport Co., Kanpur was interrogated on various dates, who accepted that his transport company was engaged in transportation of unaccounted 'Shikhar' Gutkha, to various stations. He also accepted the contents of Chart-2, prepared on the basis of 'Private Diary Pad, Chart-G, prepared on the basis of 'Loading Registers' of his transport company and Chart-J, prepared on the basis of contents of 'Loading Registers'. He also admitted that 6995 bags (as per Chart-2), 27,886 bags (as per Chart-G) and 440 bags (as per Chart-J) of 'Shikhar' brand of Gutkha were transported through their transport company from Kanpur to other stations, during the period April'06 to April'08. He also accepted that the consignments shown in these Charts were transported through their transport company, without cover of any bill of manufacturer and without cover of any GR or builty.

(iii) The statement of Manoj Kumar Srivastava, Manager M/s Bihar Carrying Co. Patna was recorded on 23.02.10, wherein he stated that he agrees with the contents of the statements of Shri Uma Shanker Awasthi, manager of M/s Bihar Carrying Co., Kanpur, tendered on 10.05.08, 14.08.08 and 28.01.10 and statement of Shri Ram Prakash Singh, clerk of M/s Bihar Carrying Co.,

Kanpur, tendered on 20.11.08. He also accepted the contents of Chart-2, Chart-G and Chart-J, prepared on the basis of 'Private Diary Pad' and 'Loading Registers'. He also stated that Shikhar Gutkha was transported from Kanpur to Darbhanga, Samastipur, Muzaffarpur, Betish and Sitamarih and were also routed through Patna. He stated that Chart-2, Chart-G and Chart-J shows transportation of unaccounted 'Shikhar' Gutkha, which was not accompanied with any builty, bill or any other document and the same were not entered in Entry Register maintained by them at Patna. However, such quantity of 'Shikhar' brand of Gutkha were transported from Kanpur to Patna/various destinations en-routed through Patna and on the basis of this, he can say that the questions shown in the aforesaid Chart-2, Chart-G and Chart-J are correct.

(iv) A scrutiny of various incriminating records reveals that the entries showing the quantities of Gutkha, transported to various stations on various dates, as mentioned in different private records viz. 'Private Diary Pad', 'Loading Registers' and 'JST Slips', can be cross verified in some cases i.e. the specific entry mentioned in the 'Private Diary Pad' is also found available in other private records. For example – 'JST Slip' No.25 dated 25.04.06 was used to transport 80 bags of Shikhar Gutkha in the code name of 'CP Goods' to Muzaffarpur.

As per 'Loading Registers' for 25.04.06, 80 bags Gutkha in the name of 'C Cloth' was transported to Muzaffarpur by truck No. BR25 A-9961. This consignment is being reflected in Chart-G. Likewise, at page No.32 of 'Private Diary Pad', there is an entry of receipt of 50 bags of 'Shikhar' Gutkha on 02.09.07 for transportation to Muzaffarpur and there is another entry of 50 bags of 'Shikhar' Gutkha on 03.09.07 for transportation to Muzaffarpur. The aforesaid quantity of 100 bags of Shikhar Gutkha has been shown in 'Loading Registers' as loaded for transportation to Muzaffarpur on 04.09.07, vide truck No. UP78 BN-1743. These facts confirm the authenticity of the transportation details given in the pocket diary pad and 'Loading Registers' and they also confirm that these details represents the actual transportation of 'Shikhar' Gutkha.

(v) The statement of Shri Prashant Agarwal, manager of M/s Shiva Group of Agencies, Kanpur was recorded on 19.02.10,wherein he stated that he also sells zarda (tobacco) to Gutkha manufacturers. In cases of cash sale, the name of customer is shown as CASH, in the cash memos, as per prevailing market practices. At present, he cannot segregate the cash memos which were issued to M/s Trimurti Products, since the cash memos do not bear the name of customer (Gutkha manufacturer). However, on perusal of records of M/s Trimurti, it is found that they

have not shown the purchase of tobacco on cash payment basis. Thus, M/s Trimurti have suppressed the purchase of tobacco, which have been used in the manufacture of unaccounted Gutkha, which was cleared without cover of any invoice and without payment of Central Excise duty.

(vi) The statement of Shri Rishi Kumar Gupta, director of M/s Southern Arecanut Pvt. Ltd., 49/65, Nayaganj, Kanpur was recorded on 19.02.10, wherein he stated that he also sells supari to Gutkha manufacturers on cash payment basis. In such cases, name of customer is shown as CASH, in the cash memos, as per prevailing market practices. He further added that at present, he cannot segregate the cash memos, which were issued to M/s Trimurti Products, Kanpur, since the cash memos does not bear the name of customer (Gutkha manufacturer). Further, on perusal of records of M/s Trimurti Products, it is found that they have not shown the purchase of supari on cash payment basis. Thus, M/s Trimurti have suppressed the purchase of supari, which appear to have been used in the manufacture of unaccounted Gutkha, which was cleared without cover of any invoice and without payment of Central Excise duty.

(vii) The enquiry was also conducted at the end of suppliers of packaging materials. Shri T.K. Pandey, Authorised signatory of M/s Sparsh Laminators, in his

statement dated 18.02.10 stated that as per instructions of Shri Shailendra Mittal proprietor of M/s Trimurti Products, he had sometimes supplied the packaging materials to them without cover of any invoice, due to some constraints of market. However, he cannot furnish the details of such supplies as such type of records were not maintained/preserved.

(viii) The above detailed enquiries conducted at the end of suppliers of raw materials reveal that the orders supply of raw materials were not given in writing and the same were given on telephone by Shri Shailendra Mittal, proprietor of M/s Trimurti Products. Thus, it appears that the manufacture of 'Shikhar' brand of Gutkha have intentionally avoided to maintain records regarding the procurement of raw materials and have also avoided the relevant paper work to conceal the unaccounted purchase of raw materials. Further, the suppliers of tobacco and supari have accepted that in case of supply of tobacco/Gutkha through bills in the name of Gutkha manufacturers, the payments were received through cheques. However, these suppliers were also selling tobacco/supari to Gutkha manufacturers on cash payment basis and in such cases, the name of customer was shown as 'CASH' in the cash memos, as per prevailing market practices. On the basis of these facts, it appears that M/s Trimurti were procuring unaccounted

raw materials and such unaccounted raw materials were used in the unaccounted production of Gutkha, which was removed without payment of duty.

(ix) The statement of Shri Shailendra Mittal, proprietor of M/s Trimurti Products, was recorded on 19.02.10 wherein he accepted that, 'Shikhar' Gutkha might have been transported to Bihar and Jharkhand by M/s Bihar Carrying Company, Rattupurwa, T.P. Nagar, Kanpur, as per choice of the customers. He also accepted that Shri Neeraj might have been a contractor, who used to ensure transportation of Gutkha from factory to transported company, as stated by Shri Uma Shanker Awasthi, in his statement.

(x) Further, in the above statement, Shri Shailendra Mittal, stated that the normal working hours were 10 am to 5 pm. However, the manufacturing was also done in the second shift of 5 pm to 10 pm, as per demand of the product. He also stated that during the period April'06 to April'08, the number of labourers were 35 to 50, who were working on daily wages basis, in his factory. He also stated that during the period April'06 to April'08, there was one electricity connetion of 75 KVA and there was also one DG set of 160 KVA (as standby), which was used in his factory in the manufacturing activities. The enquiries conducted at the end of M/s Trimurti Products, also reveals that their unit was having a huge

infrastructure for manufacturing activities and a large number of pouch packing machines viz. 71 to 77 were installed during the material period. Further, the capacity and speed of the pouch sealing machines, installed in the factory premises were many times more than the recorded production of Gutkha, which indicates that more than 90% of the production was suppressed and clandestinely removed without payment of duty.

8. While adjudicating a similar case against M/s Kaya Fragrances & M/s H-Choice Collection Pvt. Ltd., Kanpur, which was based on the same 'private diary' and 'loading registers' and statements tendered by employees of same transport company (i.e. M/s Bihar Carrying Co., Kanpur) and other identical evidences, the same Adjudicating Authority has relied on such evidences and has confirmed the demand on the consignments of 'Tiranga' brand of gutkha, vide earlier OIO No.19&20/2011 dated 18.09.2011. Thus, non-reliance on same/identical evidences in instant case is not legal and proper.

9. Now coming to legal aspect of cases of clandestine removal in addition to case laws already reported above, following case laws can also be referred to:-

(i) Sai Chemicals Pvt. Ltd. vs. Commissioner of Central Excise, Raipur 2010(257) ELT 0457 (Tri.-Del.)

"It is true that the respondent had not conducted any investigation in relation to buyers of such final product,

nor in relation to the transporters, nor there is evidence collected in respect of electricity consumption as well as of any excess intake of raw materials. However, the fact remain that the entries in the private records maintained by the appellants themselves are neither disputed nor shown to be referring to any other material or having been made pertaining for any other purpose. It is settled law that to establish any charge or accusation, it is not the quantity of the evidence but it is the quality of the evidence which is material. Beside, once the basis facts which are relevant to establish the clandestine manufacture and removal of the final product are not disputed by the manufacturer, the question relating to the absence of further corroborating evidence does not arise. Once it is the case of the appellants themselves that they had maintained detailed records pertaining to the production in the factory and such records having been produced, which apparently revealed certain quantity of production of goods having been suppressed and not disclosed in the statutory records, it certainly amounts to discharge of the initial burden of the department in establishing the case of the department about clandestine manufacture and removal of the goods by the manufacturer. The onus then shifts upon the manufacturer to establish that the entries in such private records do not relate to the production in the factory or *that the entries do not relate to manufacture ad removal of the goods. In the case in hand, the appellants have totally failed to discharge his onus. In such circumstances, the question of further evidence in the form of buyer's records or transporters examination or electricity records or record pertaining to excessive raw material need not be referred to."*

The appellate authority simply mentioned that reliance on the decision in Sai Chemicals Pvt. Ltd. is wrong. In fact the charges against the noticee are fully corroborated with independent evidences.

(ii) Motorol Technologies Ltd. vs. Commissioner of C. Ex. Vadodara 2009(245) ELT 0278 (Tri.-Ahmd.)

"As such, the charges of clandestine removal further get corroborated from the labour contractor and the records maintained by him and the bills raised by him for the goods manufactured. Accordingly, we find that there is overwhelming evidence available in the present case establishing it beyond doubt that the appellant's use indulging in clandestine removals. All the statements recorded during investigation are corroborative of each other. Further, the records maintained by labour contractor fully tally with the pencil entries in private records, thus lending further corroboration to charges of clandestine removals. Shortages of raw material and

final product detected at the time of visit of the officers furthers the Revenue's stand.

In the backdrop of the above evidence, assessee's contention that procurement of raw material and consumption of electricity does not stand investigated and proved, cannot be appreciated. It is not that in each and every case of clandestine removals, such factors are required to be established. As already observed, it is the appreciation of various evidences available on record in a given case, which will from the basis of conclusion.

As discussed above, the evidence in the present case conclusively prove the charge of clandestine removal against the appellant. We, accordingly, uphold the findings of clandestine removal against M/s Motorol Technologies Ltd., as arrived at by the Adjudicating Authority."

(iii) Columbia Electronics Pvt. Ltd. vs. Commissioner of C.Ex. Indore 2002 (143) ELT 0635 (Tri. Delhi)

"7. …….In a case of clandestine manufacture and removal of goods, the Revenue cannot prove the case with mathematical precision. It was observed by the Supreme Court in Collector of Customs v. D. Bhoormul – 1983 (13) ELT 1546 (S.C.) that "in order to appreciate the scope and nature of the onus cast by it, due regard must

be paid to other kindred principles, no less fundamental of universal application. One of them being that the prosecution or Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue.""

(iv) Commissioner of C.Ex. vs. International Cylinders Pvt. Ltd. 2010 (255) ELT 68 (H.P.)

> *"No law can be interpreted in a manner so as to give premium to illegal and criminal activities. It is a basic common sense that no person will maintain authentic records of the illegal activities or manufacture being done by it."*

10. In view of the foregoing discussion, it appears that M/s Trimurti Products were engaged, in a well organized manner, in suppression of production of Gutkha, which was removed clandestinely, without cover of any invoice. They have clandestinely removed 35,321 bags of 'Shikhar'brand of Gutkha, which was transported from Kanpur to other places through M/s Bihar Carrying Co, Kanpur, the details of which are given in various incriminating documents recovered from the said transporter. The clandestine removal of Gutkha is also *corroborated with other evidences, discussed in foregoing paras.*

10.1. The case laws relied upon by the Adjudicating Authority are distinguished. These case laws are related to cases based on private records which were not corroborated with other corroborative evidences. On the other hand, the instant case is based on strong documentary evidences duly corroborated with other corroborative evidence, hence the case laws cited by the Adjudicating Authority are not applicable to the instant case.

10.2. Thus, in view of the foregoing paras, it is found that the clandestine removal of Shikhar brand of gutkha is duly supported by strong documentary and tangible evidence duly corroborated by other evidences. Thus, the order passed by the Adjudicating Authority is liable to be set aside and demand of duty is liable to be confirmed.

11. In view of the foregoing submissions, it appears that the party was engaged in willful suppression of production of Shikhar brand of gutkha an clandestine removal thereof without cover of invoice and without its accountal in statutory records with intent to evade payment of duty. Accordingly, they appears to be liable for penal action under Section 11 AC of the Central Excise Act, 1944 as well as penalty under Rule 25 of Central Excise Rules, 2002. Further, it also appears that the *party were engaged in evasion of duty accordingly they are required to pay duty not paid by them alongwith interest under Section 11AB of the Act."*

4. Heard the learned AR who has taken us through the aforementioned grounds of appeal.

5. Heard the learned counsel for the respondent. The learned counsel for the respondent has taken us through page 80 of impugned Order-in-Original wherein the Original Authority discussed the statement dated 19.02.2010 recorded of Shri Shailendra Mittal, Proprietor of respondent company wherein Shri Mittal has stated that he sold the goods at the factory gate on cash payment and that there was no evidence to prove that the goods were transported by them and that it was neither their duty nor obligation to chase the goods upto the level of transport of goods or consumption of goods. The Original Authority also recorded that Shri Shailendra Mittal has stated that, their firm manufactured of Shikhar Brand Gutkha and that he gave number of machines installed during the period. The learned Original Authority has found that there was one person by name Shri Neeraj who was responsible for booking Gutkha with the transporter and Original Authority has held that Revenue could not establish that Shri. Neeraj was an employee of the respondent. The Original Authority has further observed that it was difficult to ascertain the quantum of duty paid or not duty nature of

goods particularly because the show cause notice was issued by placing reliance on the statement dated 10.05.2008 of Shri Uma Shanker Awasthi and statement of Shri R.P. Singh recorded on 20.11.2008 wherein they had stated that duty paid goods were booked on GRs and non duty paid goods were booked on JST slips. The Original Authority has further observed that name of Shikhar Brand Gutkha has not been shown in the private records such as 'private diary pad', 'JST Slips' and 'Loading Register' maintained by the transporter. The learned counsel for the respondent has also taken us through RUD-17, which is statement dated 19.02.2010 of Shri Shailendra Mittal wherein he had stated that they were manufacturing Shikhar Brand Gutkha as franchisee. When he was asked to name the person from their firm responsible for dispatch of Shikhar Brand Gutkha , he replied that he himself used to dispatch Shikhar Brand Gutkha and further stated that they did not have any delivery van for transportation. He further stated that the goods manufactured by them were sold at factory gate and their customers made arrangements for transportation of the same. In respect of Charts marked as 2 G and J and statements of Shri Uma Shanker Awasthi, he replied that he was not able to offer commands on the quantity of Shikhar Gutkha shown in the said charts prepared on the basis of private records of transporter and also enable to explain about duty paid nature of such goods. Learned counsel for the respondent also has taken us through finding of Original Authority recorded on page 100 where the learned Original Authority has held that demands raised on the basis of Charts 2 G and J are not found to be sustainable on account of 13 reasons stated therein. The learned counsel for the respondent has submitted that the findings of Original Authority are detailed and reasoned and hence sustainable. The grounds of appeal raised by Revenue are more or less reproduction of show cause notice and there has been an allegation that the Original Authority did not appreciate the contentions of show cause notice. The learned counsel for the respondent has submitted that on the contrary the findings of Original Authority are reasoned and more detailed and, therefore, the grounds of appeal are not sustainable.

6. Having considered the rival contentions and on perusal of record we find that as submitted by the learned counsel for the respondent, the findings by the Original Authority are reasoned and on the basis of examination of evidences produced before him on the basis which the show cause notice was issued and we do not find any ground raised by Revenue satisfactorily contends non-sustainability of findings by the Original Authority. We, therefore, do not find any merit in the grounds of appeal. In result we dismiss the appeal filed by Revenue. Respondent shall be entitled for consequential relief as per law.

(Dictated and pronounced in Court)

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

Ankit