IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI REGIONAL BRANCH, ALLAHABAD

Date of Hearing: 18.09.2018
Date of Pronouncement: 09.04.2019

E/MISC/70320, 70321/2018
Appeal No. E/70638, 70669/2017-EX [DB]

[Arising out of Order-in-Original No. AGA-EXCUS-000-COM-0002-17-18 dated 08/06/2017 passed by Commissioner, CUSTOMS, Central Excise & Service Tax]

M/s SKJ Metals Co. (prop Santosh Kr. Jhawar)
M/s Rishabh International (Prop. Rashmi Jhawar) Appellants

Vs.

CCE & ST, Agra Respondent

Appearance:
Shri D.K. Pandey, Advocate for the Appellant
Shri Rajeev Ranjan, AR for the Respondent

CORAM:
Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

FINAL ORDER No-70756-70757/2019

Per Anil Choudhary:

1. These appeals are against the demand of duty towards alleged clandestine manufacture & removal, alongwith penalty, the brief facts are:-

2. Both the prop-concerns are owned by husband & wife. They are engaged in the business of importing mix scrap (zinc scrap) and reselling the same after sorting for the last 10-12 years. They maintain proper records of scrap purchased, bill of entry wise, and after reselling the same, seek refund of SAD (Special Additional Duty/ sales tax) paid at the time of import, in accordance with Notification No. 102/97-Cus. S.K.J. Metals is located at Vill. Ruheri, Aligarh Road, Hathras and Rishabh International is located at

Circular Rd. (near Canara Bank), Hathras, about 5 Km away from S.K.J. Metals.

3. Both the concerns are registered with sales tax/ VAT department, file regular returns and assessed to sales tax and Income Tax. That proper books of accounts are maintained, which are audited by C.A. and audit reports etc are filed with the Tax Authorities.

4. That S K J had acquired a new metal furnace (cupola) sometime in the middle of 2015 and the same was installed by the end of December, 2015 and production of ingots started from Jan, 2016.

5. That there was a search by the Central Excise officers on 07.01.2016 in the premises of S K J Metals. During the search, when the officers learnt about Rishabh International (sister concern), they also went to the premises of Rishabh and inspected the office & premises, without drawing any separate panchnama, withdrew the records/books of accounts, etc, in the presence one Smt. Sandhya Maheshwari and brought them to the premises of SKJ and included these in the panchnama of SKJ, as having been found and resumed from there. That physical stock of goods-scrap, ingots etc, was taken, and found as follows:-

S.No	**Description of goods**	**No. of pieces**	**Weight in Kgs.**	**Value in Rupees**	**Remarks**
Finished goods					
(i)	Zinc Ingot	4734	41798.400	5015808.00	(@ 120/- per kg.)
(ii)	Aluminium Ingots	672	2688.000	322560.00	(@ 120/- per kg.)

Imported Goods					
(iii)	Zinc Ingot	1160	23200.000	3480000.00	(@ 150/- per kg.)
Raw Material					
(iv)	Aluminium Wire		1500.00	225000.00	(@ 130/- per kg.)
(v)	Zinc Scrap		212100.000	23331000.00	(@ 110/- per kg.)
(vi)	Coal Stock (Approx)		3000.000	28500.00	(@ 9.5. /- per kg.)
(vii)	Wood Stock (Approx)		2000.000	8000.00	(@ 1/- per kg.)
Other Material					
(viii)	Moulds (Presently in use)	340			
(ix)	Moulds (Broken and not in use)	28			
(x)	Furnace (Working	7			
(xi)	Furnace (not in use)	1			
(xii)	No of fresh crucibles found in Godown	6			
(xiii)	No. of broken crucibles found in Godown	4			

Statements of following persons were recorded-

NAME	Date of recording
Mr. Ramesh Chandra Tiwari, Authorised signatory of SKJ Metals.	7/8-01-2016

Mr. Sandeep Maheshwari, Authorised signatory of Rishabh International	7/8-01-2016
Mr. Santosh Kumar Jhawar, proprietr of SKJ	15-01-2016

6. Based on the documents resumed and relied upon, and the statements recorded, it appeared to revenue:-

i. That both the concerns Rishabh and SKJ are defacto owned and managed by Mr. Santosh Kr. Jhawar, accordingly, the affairs were clubbed for duty determination.

ii. That both the firms are importing scrap, segregating the same, manufacturing zinc ingots and/or aluminium ingots and removing or clearing the manufactured ingots clandestinely in the garb of scrap.

7. Accordingly, taking the quantity of receipts and removal as per the audited records, and considered the removal of scrap as clearance of ingots, the duty was worked out and demanded invoking the extended period of limitation as follows:-

M/s SKJ Metals Co. Pvt. Ltd.

Financial Year	**period**	**Quantity cleared (in Kgs.) as per Balance Sheet)**	**Value (in Rs) (As per Balance Sheet)**	**Average Rate of goods as per incriminating documents**	**Dutiable Value (in Rs.)**	**Rate of Duty**	**Total Duty Liability (in Rs)**
1	**2**	**3**	**4**	**5**	**6.(3x5)**	**7**	**8**
2011-	01.04.11	1678624.8	16294827	126.88	21298391	10.30	2193734

12	to 16.03.12	1	9.21		6.00	%	3.00
2011-12	17.03.12 to 31.03.12	72983.69	7084707.79	126.88	9260171.00	12.36 %	1144557.00
2012-13	01.04.12 to 31.03.12	2144224.55	225375639.00	126.30	270815561.00	12.36 %	33472803.00
2013-14	01.04.13 to 31.03.14	2783669.80	290987367.00	139.31	387793040.00	12.36 %	47931220.00
2014-15	01.04.14 to 28.02.15	2531562.23	296214735.67	166.80	422264580.00	12.36 %	52191902.00
2014-15	01.03.15 to 31.12.15	230142.02	26928612.33	166.80	38387689.00	12.50 %	4798461.00
2015-16	01.04.15 to 31.12.15		164155001.00	160.40	164155001.00	12.50 %	20519375.00
Total		**9441207.10**	**1173694342.00**		**1505659957.00**		**181995662.00**

M/s Rishabh International

Financial Year	**period**	**Quantity cleared (in Kgs.) as per Balance Sheet)**	**Value (in Rs) (As per Balance Sheet)**	**Average Rate of goods as per incriminating documents**	**Dutiable Value (in Rs.)**	**Rate of Duty**	**Total Duty Liability (in Rs)**
1	**2**	**3**	**4**	**5**	**6.(3x5)**	**7**	**8**
2011-12	01.04.11 to 16.03.12	884052.44	81483416.75	126.88	112168574.00	10.30 %	11553363.00
2011-12	17.03.12 to 31.03.12	38437.06	3542757.25	126.88	4876894.00	12.36 %	602784.00

2012-13	01.04.12 to 31.03.12	955033.50	96242224.00	126.30	120620731.00	12.36 %	14908722.00
2013-14	01.04.13 to 31.03.14	1250466.55	124397833.00	139.31	174202495.00	12.36 %	21531428.00
2014-15	01.04.14 to 28.02.15	1356877.91	161997870.83	166.80	226327235.00	12.36 %	27974046.00
2014-15	01.03.15 to 31.12.15	123352.54	14727079.17	166.80	20575204.00	12.50 %	2571900.00
2015-16	01.04.15 to 31.12.15		71709595.00	160.40	71709595.00	12.50 %	8963699.00
Total		**4608220.00**	**554100776.00**		**730480728.00**		**88105944.00**

8. Thereafter common Show Cause Notice No. IV CE (9)CP/Agra/SKJ/03/2016/3091-96 dated 05.05.2016 was issued demanding duty & penalty for the period 01-4-2011 to 28-09-2015, with proposal for confiscation of goods of SKJ 44486.404 kg (zinc scrap).

9. The SCN was adjudicated on contest and the proposed demand confirmed with penalty and appropriation of Rs. 10 Lakhs towards duty, which was deposited during investigation. Being aggrieved, the appellants are in appeal.

10. Heard the parties.

11. **(a).** The ld Advocate took us through the impugned Order and various evidences relied by the Adjudicator to uphold the charges and contended that these evidences were totally bereft of any material to substantiate even the primafacie charge of manufacture of Ingots by the

Appellants, even for a single day during the disputed period in the SCN , much less from the alleged common premises, since inception. He therefore submitted that in the absence of any material evidence of manufacture , the question of clandestine removal of the Ingots does not arise . It is further urged that Ld. Commissioner have confirmed the demand of duty purely based on the assumption or philosophy of **'goods must have been produced and cleared'** by each of the Appellant and not the quantities actually produced/ cleared .

(b). Ld Advocate had further urged that, **in the absence of any documentary evidence to substantiate activities of manufacture of Zinc Ingots and in turn its unit sale price**, the Revenue , **for valuation and quantification of demand,** illegally treated the quantities of sale of **Zinc Scrap** in audited Balance Sheets as the quantities of **Zinc Ingots** and adopted pseudo unit sale price of some unidentified commodity from the irrelevant Note Pads (RUD) etc, as the unit sale price of Zinc Ingots.

(c). It was, further submitted that there is not even an iota of evidence of receipt of differential consideration on account of alleged sale of Zinc Ingots under the guise of Zinc Scrap. That the Revenue have failed to adduce even a single transport document evidencing transportation , transit seizure , instance of movement through Toll-gate, of the consignments of Zinc/Aluminum Ingots or of transit seizure on account of mis-declaration of the description of goods by the other Govt. departments like Sales Tax, etc.

12. Heard both the ld Advocate and the ld DR Shri Rajeev Ranjan , Additional Commissioner. The core issue for decision before us is as to whether the findings of the Adjudicator holding that both the Appellants were operating from the same common premises and were engaged in the manufacture and Clandestine removal the Zinc Ingots, **since inception,** by mis-declaring the same as Zinc scrap / Zinc in the respective invoices or without invoices, and consequent confirmation of Demand of duty and penalty, is tenable in the facts and circumstances of the case .

13 The ld Advocate took us through the relied upon evidences as mentioned **<u>in para 46 of the impugned Order, relied by the Revenue, to establish involvement of Appellants in the alleged manufacturing</u>** activities since inception . He had put forth various reasons and argued that the credibility and admissibility of the relied upon documents and statements do not stand on the legal anvil. **Ld DR** Shri Rajeev Ranjan , Additional Commissioner submitted that the present demand has been confirmed by the Adjudicating Authority for valid reasons and cannot be faulted.

14 (a). On perusal of the documents**,** we find that the witnesses to the Panchanama and representatives of the Appellants were not associated in the search proceedings, is also evident from their absence in the relied upon Photographs and Video-CD of the search operation. Our findings are further supported from the fact as narrated in the affidavit of the panch witnesses, who were called by the officers and informed, **that they had prepared some documents** and requested them to sign the documents. Evidently the witnesses were called after preparation of the Panchanama and obviously after completion of search. The affidavit of the said persons denying their association in search is a valid piece of evidence and erroneouly brushed aside by the Adjudicator.

(b). We further notice from the facts on record that Witnesses to the Panchanama (department's own Witnesses), officers who drew Panchanama and Shri Anil Malik, Director of one of the buyers M/s Cartoons Sanitation, Mathura, whose statement was relied against the Appellants, were unilaterally withheld /withdrawn from cross-examination , after having permitted their Cross-examination, on the Appellants request dated 18.01.2018 . **Thus by this act, the department had given up the reliance on their evidences** as consistently held, particularly in the case of Andaman Timber Industries Vs Commissioner of C.Ex., Kolkata-II [2015 (324) E.L.T. 641 (S.C)], Allahabad High Court in the case of C. C. E, Meerut V/s Parmarth Iron Pvt. Ltd [2010 (260) E.L.T. 514 (All.)] and International Electron Devices Ltd. Vs. Union of India [2010 (252) E.L.T. 352] and Hon'ble Delhi High Court in the case of Basudev Garg v/s Commissioner of Customs – 2013 (294) ELT 353 generally holding that

> **Evidence - Cross-examination** - Revenue if chooses not to examine any witnesses in adjudication, their statements are not considerable as evidence - Statements if relied, then persons whose statements is relied upon have to be made available for cross-examination, for evidence to be considered

(c). We, in light of the facts and circumstances, are constrained to reject the credibility and admissibility, of the Panchanama following the Hon'ble

Apex Court' ratified decision by the Principle Bench of the Tribunal, New Delhi in the case of M/s Kuber Tobacco Products Ltd. v/s CCE, Delhi [2013(290)ELT545].

15(a). As regards , ld Advocates contention challenging the very recovery of resumed **private records viz Note pads, Writing Pads and Register** , we find from the **narration in the Panchanama** dated 07/08.01.2016 of search proceedings, do not substantiate recovery of any private records but **'invoices & other records relating to the Appellants, without mentioning** the exact place where such records, if any , were found located and from where their recovery was effected, the identity of the officers who allegedly claimed to have found such records, the fact of recovery in presence of witnesses and/ or the authorized signatory of the Appellant, the description of documents and their contents.

16(b). We have however gone through the relied upon private records ie Note pads, Writing Pads and Registers and notice that contrary to the claim of Revenue the relied upon documents do not bear the names of either of the Appellants and there is no other indication in these records to connect the documents to the Appellants .

16(b)(i). We notice that the **Note Pads** do not contain the details of receipt of Raw-materials , manufacturing of Zinc Ingots and clearance thereof ; that each page of these Note Pads indicate some names and dates with some figures scribbled thereon ; that there is no signature, name or designation of the scribe of the documents , that the Note pads used nomenclature namly **Tanki , Barik, Gamti, Solder, Mota Tanki, Kali Peetal, Saff Peetal, Aluminium, and not Zinc Ingots** .

16(b)(ii). The relied upon Writing pads are found to contain daily receipt and expenses and not the manufacture and sales of any item much less the Zinc Ingots as claimed by the Revenue. The Register only contained daily receipt and expenses and not the sales of Zinc Ingots as claimed by the department. We therefore hold that the details contained in the said private records do not pertain to the Zinc Ingots, as alleged.

16(b)(iii). We find that the resumed Consignment Challans Books for sale of Zinc Scrap, **bear the names of the Appellants**. We however notice that the Consignment sales made under the Consignment Challans, represented authorized sales of Zinc Scrap and such sales are exempted from sales tax under section 6(A) CST Act. We further find that under the said Consigment Challans, the consignment sales are made through two different traders namely M/s Shri Ram Overseas Delhi and M/s Jay Shree Metal Corporation, Jamnagar (Guj.) for further sales. That the sale proceed of these Consignments are received by the Appellants through RTGS, which are duly accounted for, as confirmed by the Chartered Accountant of the Appellant based on the books of accounts. These Consignment Challans do not in any case reveal either **manufacture of Zinc Ingots** or clandestine removal thereof by the Appellants.

16(c). We together with ld Advocate and DR have further perused the Panchanama, the most crucial and key document of the proceeding having primacy over deposition and statements of various persons namely S/Shri Ramesh Chandra Tewari (representative of SKJ), Sandeep Maheswari (representative of Rishabh), Santosh Jhawar (Proprietor of SKJ). We found that it had by way of referring to disclosure by Shri Sandeep Maheswari described the manufactured brands of Ingots as RJ, PJ and LM. We , in light of the panchanama narration, had also gone through the statements of the said persons and found that even the statements also described that the Ingots manufactured in the factory were of RJ, PJ and LM brands. We also notice that the Panchanama of search and physical verification of the stocks do not disclose detection of Moulds of variable capacity and of brands other than the RJ, PJ and LM, not even of Star brand. Thus we are of the firm view that the Zinc Ingots described by any other nomenclature and brands other than RJ, PJ and LM were not manufacture of the Appellant.

16(d). We further find that the above named records lack corroboration by any tangible evidence. That the entries in resumed private records, not bearing name of factory and description of goods , enquiry at the buyers end to establish the co-relation between these records and the manufacture and reflected sale transactions, receipt of sale consideration to prove the event of manufacture, not sufficient to establish charges of clandestine manufacture and clearances thereof.

16(e). We , on perusal of the **Table – 2 of Show Cause Notice itself f**urther find that the Revenue itself had **serious doubts about the veracity of contents of the Note / Writing Pads and Register as expressed in note appended to the said Table-2.**

16 (f). We also observe that the result of the cross-examination of alleged buyers and also their written communications duly supported by the entries in their books of accounts do not corroborate transactions **found recorded in the incriminating note/writing pad** . Therefore the said revelation also discredits the authenticity of these note/writing pads etc .

16(g). We are also unable to reconcile as to how Shri Santosh Jhawer , who is stationed at Calcutta could , in his statement, decipher the contents of Note Pads and Writing Pads allegedly maintained at Hathras . We therefore agree with the ld Advocate that the deciphering of records as shown in the statement was made as per the dictates and under pressure of the officers . This had led to his instantaneous retraction of the statement, alleging the same to be non-voluntary and not based on the true facts, intimating that he was forced to admit that all the resumed incriminating records belonged to either of the Appellants and that in all the resumed documents wherever "Bareek Silli, Silli, Majak Silli, Gamti, , Electro" is written, these are only **Zinc Ingots** manufactured and cleared from his factory. We therefore are of considered view that in view of retraction, statement of Shri Santosh Kumar Jhawar is not admissible as credible evidence.

16(h). We strangely discover that the Revenue collected **<u>no material to prove the authenticity of the resumed records and</u> the scribe of these alleged private records were neither identified nor examined,** despite the settled law, that to establish evidentiary value of any resumed document, the author of the incriminating documents has to be confronted with the document to ascertain the contents thereof. Reliance is placed on the ruling of Hon'ble Supreme Court in the case of Bareilly Electricity Supply v. Workmen, 1971 (2) SCC 617 that

" when a document is produced in a Court or Tribunal, "mere production of the document does not amount to proof of it or the truth of the entries therein. The writer must be produced or his affidavit in respect thereof be filed and an opportunity accorded to the opposite party who challenges this fact to assess the probative value of the contents of the document."

16(i). **We are in agreement with the** ld. Advocate that production/admission of private documents has no meaning and it is necessary to establish their probative value as held by the Hon'ble Supreme Court in the case of Bareilly Electricity Supply v. Workmen, (supra) holding that mere production of document does not amount to proof. This position of settled law had been reiiterated in the case of Life Insurance Corporation of India & Anr v. Rampal Singh Besin, (2010) 4 **SCC** 491. That the Revenue have however failed to produce any evidence to establish maintenance and linkage of these documents with the Appellants.

16(j). We, in light of the aforesaid deliberations and findings have no option other than to reject the evidence value of the said private records, resumed from the premises of the SKJ and linkage of the said private records to the Appellants.

17(a). As regards the lone sheet of **computer printout titled "ZINC UNDER LEDGER : MAMA JI CALCUTTA 12.03.13 TO 25.05.13" the same was** resumed from the residence of Shri Anil Malik, Director of M/s Cartoon Sanitation Pvt. Ltd., Mathura. These are relied upon to establish manufacture and clandestine clearance of Zinc Ingots , based on deposition of Shri Anil Malik on the details recorded therein. We on hearing both sides and perusal of document, hold that the print out is devoid of even rudimentary details to connect it to the Appellant. The Print out lacked specific description of goods , name and identity of the supplier of the goods , nature of transactions i.e. whether pertaining to receipt of sums, trading, clearance, sales and the description of goods transacted, mode of transportation of goods, payment details of sale proceed .There is no identification of the author of the document and source documents which had gone into assimilation and generating of the print out data . The purpose of acquiring the goods and the mode of subsequent disposal , the names and addresses of the subsequent buyers, mode of transportation to their destination with bilty nos, mode and receipt of sale proceeds from them and most importantly the reasons of non reflections of the said transactions in books of accounts of M/s Cartoon Sanitation, Mathura.

17(b). We further notice that Shri Anil Malik was pulled out of cross-examination , after examination in chief. However at the same time his confirmation to earlier deposition was obtained unilaterally through examination in chief by the Adjudicator, that too without interrogating him on the details recorded in the computer print out.

17(c). We also observe that Shri Anil Malik despite his self implicating deposition, of abetment in evasion of duty by SKJ had not been proceeded against and not made a party to the Show Cause Notice. Besides, the clear proposal of issuing separate demand of Rs 1.64 Crores for evasion of duty based on material collected during the investigation of the subject case , to

M/s Cartoon Sanitation Pvt. Ltd., Mathura, as mentioned in the subject Show Cause Notice, had been shelved without any reason.

17(d). We find from the settled law cited by the ld Advocate, Hon'ble High Court (P & H) in the case of Jindal Drugs Pvt. Ltd. vs. UOI – 2016 (340) ELT 67 (P&H), dealing with the evidentiary value of examination in chief, inter-alia held that

i. Even if makers of statement is examined in chief by Department, cross-examination of witness must be allowed/offered.

ii. Statements recorded behind back of assessee cannot be relied upon in adjudication proceedings, without allowing assessee an opportunity to test evidence by cross-examining makers of said statements

iii. If the procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses,

iv. the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof

17(e). The Revenue, in our view, by withdrawing midway Shri Anil Malik from cross examination, have in no uncertain terms opted to give up its witness, and his statement becomes inadmissible as evidence.

17(f). We also discover from the Ld Advocate's submissions that Under Section 36A of the Central Excise Act 1944, the truth of contents of the subject print out cannot be presumed , as M/s Cartoon Sanitation Pvt. Ltd., Mathura or Shri Anil Malik, Director from whose custody or control the print out has been seized, have not proceeded against severally or jointly with the Appellants . Therefore the resumed print out have been unlawfully relied as evidence against the Appellants, particularly when there is no independent corroboration**.**

17(g). The ld DR , did not dispute the provisions of Section 36A but without specifying, claimed that there were other corroborations to substantiate authenticity of the print out. We however observe that there is total lack of corroboration and even the Books of accounts do not support the print out leave aside their linkage with the Appellants .

18(a). Coming to evidentiary value and reliance on the **retracted statements of S/Shri Santosh Jhawer dated 15.01.2016 (Proprietor of SKJ), Ramesh Chandra Tiwari and Sandeep Maheshwari** representatives of the Appellant-SKJ and Appellant-Rishabh, both dated 08.01.2016, in the context of sustaining the charge of manufacture. It is observed that Shri Santosh Jhawer in his statement was interalia asked to " Mention the names of the brands of Zinc Ingots which were being manufactured in factory " Shri Santosh Jhawer, deposed that " RJ,PJ,LM brands of Zinc Ingots are being manufactured in his factory". Regarding commencement of production it was stated that Appellant-SKJ commenced production of Zinc Ingots w.e.f 02.01.2016 . However contrary to the said facts, the Adjudicator had made astute inference from his deposition, to project and hold that Zinc Ingots were being manufactured since inception. We find that the statement of Shri Santosh Jhawer stood retracted on specified depositions duly supported with reasons, through affidavit dated 16.01.2016 (on the very next day).

18(b). We find that S/Shri Ramesh Chandra Tiwari and Sandeep Maheshwari had also retracted their statements, assigning specific reasons , through respective affidavits forwarded to the Commissioner Central Excise Agra under the cover of separate letters both dated 08.01.2016 . The receipt of retraction letters are acknowledged but receipt of enclosed affidavits have been disputed by the Adjudicator. We discern that , in any case ,the retraction letters along with the affidavits were admittedly before the Adjudicator at the time of Adjudication of the case . Thus irrespective of the date of filing of retraction the judicial evaluation of their respective statements in light of the contents of the retraction affidavits were called for to decide over voluntary and truthful nature of their statements , as per settled law by a series of decisions like the honorable Apex Court decisions in the case of Parle Beverages Pvt. Ltd.v/s Collector of Central Excise, Bombay [1998 (98) E.L.T. 585 (S.C.)], which still holds the field inter-alia laying down that

> Evidence - Delay - Affidavit not to be brushed aside solely on the grounds of delay - Affidavit with invoices filed after a lapse of 2 years - Tribunal cannot refuse to consider affidavit and invoices - Delay may be a factor with some relevance as to the probative value of the statement made in the affidavit, but it cannot be totally brushed aside without going into the genuineness of the invoices - In case of doubt Tribunal could have called the Deponent for cross-examination or allowed the cross-examination by the Department.

18(c). We also discover that the Adjudicator did not record findings on the decisions cited by the Appellants, on the admissibility of statement recorded under Section 14 . On the contrary, relying on a suitable part of observation of Hon’ble Tribunal in the case of CCE, Mumbai-V Vs. Nippon Zip

Industry Pvt. Ltd. [2009 (236) ELT 554 (Tri. Mumbai)] the facts of which are distinguishable, the Adjudicator held that statement under Section 14 of Central Excise Act, 1944 is reliable as evidence. He overlooked the substantial portion of the judgement holding that such confessional statements are acceptable only if *is found to be voluntary, and if retracted, court is required to examine whether it was obtained by threat, duress or promise and whether the confession is truthful,* as held in decision of Hon'ble Delhi High Court Delhi in the case of S.N. Ojha Vs. Commissioner of Customs 2016 (331) E.L.T. 33 (Del.)

"21.----------- ***<u>the broad principle that statements made have to be voluntary and not under threat, coercion, would nevertheless apply</u>-------------***

18(d). We find that the observations of the Adjudicator are inconsistent with the retraction letters and respective retraction Affidavits of Shri Ramesh Tiwari and Shri Sandeep Maheshwari in as much as that these persons had brought on records, as to how they were subjected to application of pressure, to extract their statement by the officers .We further rely on the affidavits that the Appellants also made specific request for recording of statement before some independent officer . However we do not find any evidence of issuance of Summons to the said representatives of the Appellants except a Summons dated 12.01.2016, that too for their appearance on the same date at Agra, which belies the findings of the Adjudicator that S/Shri Ramesh Chandra Tiwari and Sandeep Maheshwari representatives of the Appellant did not turn up despite various Summons.

18(e). It is further contended by the ld Advocate that the retracted statements of S/Shri Santosh Jhawer (Proprietor of SKJ), Ramesh Chandra Tiwari and Sandeep Maheshwari representatives of the Appellant-SKJ and Appellant-Rishabh, are not admissible in evidence in absence of independent reliable evidence to corroborate the same, as held by Honorable Delhi High Court and upheld by the by the Apex Court [2015 (321) E.L.T A210] in the case of Shakti Zarda Factory (I) Ltd [2015 (321) E.L.T438] ,Saakeen Alloys Pvt. Ltd. [2014 (308) E.L.T.655] of honorable Gujrat High Court which was upheld by the Apex Court [2015 (319) E.L.T A117],Jindal Drugs Pvt. Ltd. vs. UOI – 2016 (340) ELT 67 (P&H) ,CCE, Ahmedabad vs. Rekhaben S. Shah – 2005 (180) ELT 48 (Tri. Mumbai) .

18(f). We, in view of the aforesaid findings, do not find substance in the observations that the retraction(s) were invalid, and hold that the retracted statements are inadmissible as credible evidence.

18(g). We had also examined the decisions of this Tribunal in the case of Centurion Laboratories v/s C.C.E., Vadodara - 2013 (293) ELT 689 (Tri. - Ahmd.) and Hon'ble High Court of Gujrat, in the case of C.C.E. v/s Omkar Textile Mills Pvt. Ltd- 2010 (259) ELT 687 (Guj.) and agree with the contention of the ld Advocate that even if the statements are presumed to be valid, mere statements of S/Shri Ramesh Chandra Tewari and Sandeep Maheswari and Shri Santosh Kumar Jhawer are not sufficient to establish a case of clandestine removal of goods.

19. Coming to the next evidence, we have carefully perused the **Photographs of search operation**. We agree with the observations of the Adjudicator that Photographs of search operation show manufacturing of

Ingots on 07.01.2016, but do not subscribe to the view that the Appellants were engaged in the manufacturing ingots in the past , for which direct and positive documentary evidences of manufacture are needed . The Adjudicator's findings that both the Appellants were undertaking manufacture from the same premises relying on the photographs is totally delusive in the absence of any indication/clue what so ever about the conduct of operation by both the units in the photographs .

19(a). As regards the reliance on the **Statements of 9 buyers of Appellants** whose names are claimed to appear on such Note Pads, Registers, etc., we notice that the Adjudicator had himself in para-53.8 of the impugned Order observed that "Out of these, 10 persons responded and 8 persons appeared for cross-examination. One person, on behalf of his two firms, submitted written submissions and expressed his inability to attend cross-examination due to his old age and illness. All these persons, except Shri Anil Malik, Director of M/s Cartoon Sanitation Pvt. Ltd., stated during cross-examination/ written submissions that they have purchased only Zinc Scrap from Appellants.

19(b). We also observe that the written confirmation of the interrogated buyers followed by the outcome of their Cross-examination, corroborates that they transacted with the Appellants in Zinc Scrap only and also reaffirming their earlier communication , clearly stand by the contention of the Appellants. We further notice that the sale invoices and corresponding transport documents , ledger accounts received from a large number of other buyers in connection with annual reconciliation of accounts showing that the goods sold prior to 2.01.2016 by the Appellant were always Zinc Scrap, had not been challenged by the Revenue, nor found untrue.

In our opinion the said facts on records demolish the Revenue's contention of manufacture and clearance of Ingots by the Appellants, prior to 02-01-2016.

20(a). As regards to reliance on **Seizure of allegedly unaccounted excisable goods** (Zinc and Aluminium Ingot) on the day of search as evidence of manufacture of Zinc Ingots, we find that the same do not establish manufacturing in past , particularly when neither the Revenue nor the Adjudicator had brought out any direct / tangible evidence to establish manufacture of Zinc Ingots in past .

20(b). We observe from caption of Table A to the panchanama that the search team based on the activities and corresponding records maintained and produced by the Appellant-SKJ, accepted that production activities were being undertaken by them in their premises and held that the ownership of the stocks of finished goods vested in them. This fact is also forthcoming from the provisional release of the seized goods to the Appellant-SKJ. We further discover that only the Appellant -SKJ are asked to show cause against the proposed confiscation of the seized stocks.

20(c). We also observe from Table A to the panchanama that the Zinc Ingots which are clearly described as of imported origin were also seized and confiscated. Similarly the negligible quantity of Aluminum Ingots, bearing **'Star'** brand and segregated from imported scrap ,were treated as domestic produce and also seized and confiscated. We have heard the contentions of both sides on the findings of confiscation and notice that the

Appellant-SKJ possessed moulds of only RJ,PJ and LM brands capable of manufacturing Ingots of around 9Kgs each and thus agree with the ld Advocate that the seized/ confiscated Aluminum Ingots bearing 'Star' brand as described in impugned Order and weighing differently (avg 2.7 Kgs/ piece) are not produce of the Appellant-SKJ. Thus not only the Imported Zinc Ingots but the Aluminum Ingots were also those retrieved from the Imported Scrap consignments by the Appellants. Consequently the seizure and confiscation of these goods is not justified under the Central Excise Law, by any stretch of imagination.

20(d). We further find that by virtue of Nil value of clearance of the manufactured Zinc Ingots during the year 2015-16 (upto 02-01-2016) the Appellant-SKJ was neither obliged to take registration nor was liable to pay duty vide Notification No-8/2003-C.Ex dated 1.03.2003 and the seizure of own manufactured goods based on their liability and confiscation on the grounds that the said quantity attracted Central Excise duty was also not called for . The Adjudicator had also arbitrarily and unlawfully ordered appropriating the involuntary deposit of Rs 10 lakhs towards duty, without assigning any reason . We find from the decision of this Tribunal in the case of Gujarat Agrochem Ltd. v/s C.C.E., Surat[2012(280)ELT 435(Tri. Ahmd)] and Dodsal Pvt. Ltd. v/s CCE – 2006(193) ELT 518 , that debit of duty and statements at time of visit of Revenue officers is not sufficient for holding against the party. We , in light of the aforesaid findings set aside the confiscation of all the finished goods and appropriation of deposit of Rs10 lakhs towards duty, and order for refund.

21(a). Based on the findings on the relied evidence by the Revenue we find that the impugned order had failed to bring out any concrete , corroborative , reliable and independent evidence even distantly establishing production of finished goods (ingots), which is required to establish clandestine removal . Evidences of clandestine removal like transportation of goods ,transit seizure , seizure/ at the buyers end of clandestinely removed finished goods consignments, receipt of Sale proceeds, to substantiate allegations of the clandestine manufacture and removal, as laid down by this Tribunal in the case of Arya Fibres Pvt. Ltd Versus Commissioner of C. Ex., Ahmedabad-II [2014 (311) E.L.T. 529 (Tri. - Ahmd.)] elaborating as to how the clandestine manufacture and clearance of goods has to be established by Revenue.

21(b). We further notice that the Adjudicator did not give findings on various contra documentary evidences for the period prior to 02.01.2016 in the nature of Tax Invoices showing description of goods as Zinc Scrap/ Zinc, Transport bilties showing transportation of Zinc Scrap/ Zinc ,Receipts as sales proceeds of Zinc Scrap/ Zinc ,Confirmation of accounts of buyers against receipt of Zinc Scrap,Balance sheets showing sale of Zinc Scrap/ Zinc and S.T Returns/ I.T Returns and respective Assessment orders recognising trading of Zinc Scrap/ Zinc.

21(c). The ld Advocate contends that the charge of clandestine manufacture of Ingots made against the Appellants stand demolished by the contrary views of the other wing of the same Revenue authorities, namely the Customs House, Calcutta , who had been accepting the activities of trading of scrap by the Appellants, and continued to allow refunds of SAD on the invoices of sales of Scrap .

22. In nutshell , the relied upon documents of the Revenue do not establish charges of manufacture of Zinc Ingots by the Appellants during the disputed period in the Show Cause Notice, that too from the alleged common premises of the Appellants and clandestine removal thereof..

21(a). We also observe that the Appellants are not required to prove the negative, and had furnished sufficient evidences to counter the bald allegations . The Revenue had however arbitrarily and whimsically declared the contra documentary evidences produced by the Appellants as fabricated

22(b). We find from the Bills /Challans and payment documents of Pollution control Equipment , machinery / equipments required for the manufacture of Ingots , chemicals for regular maintenance of the production machinery/ equipments , chemicals used in the production and inputs used for firing of Furnaces were all purchased by Appellant-SKJ, **during the period between July 2015 to Dec 2015. We further find that the** Agreements with labour organizer for segregation / sorting of Scrap and later for production of Zinc Ingots were also submitted by the Appellant-SKJ in support of commencement of the production activities from 02.01.2016 . In light of these evidences we do not subscribe to the Adjudicator’s action to arbitrarily declare these documents as fabricated, without making any enquiry to verify the authenticity of documentary evidences and passing a reasoned order.

22(c). We are of the considered view that **it is** beyond human credence to judge the age of the machines from their still photographs and CDs, particularly the age of the furnaces which are installed under ground with only mouth exposed for charging and discharging **.** We therefore disagree with the findings in the impugned order that Furnaces were appearing old from still photographs and CDs (video), particularly when the Panchanama do not subscribe these facts .

22(d). We have no reservations in holding that without establishing availability of manufacturing machinery, the charge of production of Ingots does not survive. The Revenue had failed to disprove the claim of acquiring the manufacturing for machinery by the Appellant-SKJ at the end of Dec.2015. Therefore, the Revenues claim of engagement of the Appellants in the manufacturing prior to Jan2016, is unacceptable and set aside.

23 (a). As regards the allegation and findings on use of common premises by both the Appellants , the ld Advocate had pleaded that the Revenue **could not bring on record any material** evidence what so ever, to hold that the Appellants were not independent entities and undertaking manufacturing from the same common premises Plot No.629-630, Ruheri , Aligarh Road , Hathras . However they tried to substantiate the charges by relying on the alleged resumption of records of the Appellant-Rishabh also from the premises of Appellant-SKJ , non appearance of Smt Rashmi Jhawer (Proprietor of Appellant-Rishabh) despite repeated summons as the basis of the said findings. statement of Shri Sandeep Maheswari, that all the dealings and day to day affair of Appellant-Rishabh were being looked after by Shri Santosh Kumar Jhawar, and Shri Jhawer's admission in his statement dated 15.01.2016 .

23(b). We have perused and considered the evidences relied by the Revenue and heard both the sides. It is evident that the records of the Appellant-Rishabh were picked up or resumed from their own premises located near Cannara Bank at Circular Road, Hathras without panchnama. We notice that the said claim of Appellant-Rishabh is duly supported by the letters of Smt Sandhya Maheswari and Shri Sandeep Maheshwari (Authorized representative of Appellant-Rishabh) both dated 8.01.2016 , intimating the facts to the Commissioner Central Excise, Agra . We do not feel that any further evidence was required to substantiate the claim .That if at all any further evidence is needed by the Revenue, the same could have been gathered by acceding to the Appellant's request for testimony of Smt Sandhya Maheswari, along with the officers who were associated in the search or by acceding to Shri Sandeep Maheshwari's request of recording his statement before some other officer. We also take notice that the departmental officers were withheld from testimony , after having permitted their cross-examination. Further we do not find any evidence of issuance or service of summons to Shri Sandeep Maheshwari, except the summon dated 12.01.2016 for tendering statement the same day, that too at Agra. We therefore do not have any hesitation to hold that the officers picked up the records of the Appellant-Rishabh from their office located near Canara Bank, Circular Road, Hathras, and shown as resumed from Appellant-SKJ's premises.

23(c). Further in so for as the linkage of the private records like Note Pads , Writing Pads and Register and the Computer print out with Appellant-Rishabh is concerned , we find the observations of the Adjudicator are totally contrary to the admitted position in Para 6 and Para 18 respectively of the Show Cause Notice, which ruled out relevance of these documents with the Appellant-Rishabh .

23(d). It is evident from caption of **Table A to the panchanama** that the Revenue had exclusively connected the stocks of finished goods to the Appellant-SKJ, which is further borne out from the facts of giving provisional release of seized finished goods to the Appellant-SKJ. We further discover that only **the Appellant -SKJ** are asked to show cause against the proposed confiscation of the seized stocks. We therefore observe that the Revenue in that sense did not claim use of premises and manufacture of Ingots by Appellant- Rishabh also.

23(e). We observe that the fact of Smt Rashmi Jhawer's organizing and handling business activities from Calcutta is unambiguously clarified by Shri Sandeep Maheshwari in his statement recorded on the spot, on the day of search on 08.01.2016. While specifying his own responsibilities in the activities of maintenance of the records of the Appellant-Rishabh, at Hathras. We do not find any evidence on record to support the Revenue's claim of issue and /or service of any of the five summons to Smt. Rashmi Jhawar and thus her avoidance to tender evidence . We are astonished to note the findings of the Adjudicator to hold her, under the guise of the said non-compliance of summons , as dummy proprietor of Appellant-Rishabh and her husband Shri Santosh Kumar Jhawar, Prop of Appellant-SKJ as the main functionary and owner of the Appellant-Rishabh . We thus feel that on the said basis, applying the statement of Shri Santosh Kumar Jhawar dated 15.06.2016 to the activities of the Appellant-Rishabh also, that too by denying his cross-examination, is arbitrary and untenable in the eyes of law.

(f). We also notice that the Appellants individually held separate registrations with different statutory authorities; that they individually complied with the requirements of these statutory authorities like Customs, Income Tax and Sales Tax, DGFT, etc. We also find that the Revenue had failed to challenge the contra evidences, coroborating existence of independent storage go-downs and business premises of the Appellant-Rishabh located near Canara Bank at Circular Road Hathras, separated by as long a distance as about 5 Km from the Appellant-SKJ premises at Ruheri. We have perused the documents evidencing possession/ title over the premises located near Canara Bank at Circular Road Hathras, to buttress receipt, discharge, storage of the imported scrap consignments of the Appellant- Rishabh, after transportation from Calcutta Port, in their own premises and further sale there from. We have also seen the copies of the transport Bilties/GR's evidencing transportation of the imported Zinc Scrap of the Appellant-Rishabh from Sick Lane Yard of Calcutta to their go-down/ yard located at Circular Road, Hathras and the corresponding freight payment, vouchers for these transportation, freight payment, confirmations issued by the concerned transporters evidencing delivery up to the godown yard of the Appellant at Circular Road, Hathras, and set of sample documents pertaining to disposal/ delivery of Zinc Scrap, from the Circular Road Godown of the Appellant-Rishabh to various buyers.

23(g). We further observe that the Adjudicator had denied cross–examination of Shri Santosh Jhawer , on the grounds of being co-accused and also at the same time relied on his statement recorded behind the back of the Appellant-Rashmi Jhawer , implicating Smt. Rashmi Jhawar. We also realize that as per the settled law by the Apex Court, the statement of co-accused is a evidence but the statement of so claimed co-accused Shri Santosh Jhawer have been heavily relied against the Appellant-Rishabh, disregarding and by passing other direct evidences, is contrary to the settled law.

23(h). We also observe that the settled law on corroboration, that only those evidences which are completely credible can alone be used as corroborative evidence and used to give validity or credence to evidence, which is deficient or suspect or incredible, had not been followed. The Panchanama having legal backing normally holds the field to lawfully establish the credibility of other deficient / suspect evidence, but in the impugned order the credibility of Panchanama itself is legally untenable and factually misleading, drawn without association of the Pancha witnesses, had been established through sets of other incredible and suspect evidence like Note Pads, Writing Pads, Register and a sheet of computer printout of some sales transaction , author of which is not identified and entries disowned by 8 of the 9 interrogated named buyers , retracted statements of S/Shri Ramesh Chandra Tiwari and Sandeep Maheswari and Santosh Kumar Jhawer ,Proprietor of the Appellant , the statements of the cross-examined Buyers.

23(i). Based on the aforesaid facts we are convinced that the Appellants were operating and conducting their business from their respective premises and did not indulge in the manufacture of Zinc Ingots during the disputed period in the Show Cause Notice.

24. We further find that the Adjudicator despite upholding the charges of manufacturing by the Appellants, did not give findings on the issue of availability of Credit of the Additional duty of Customs paid on the imported Scrap. We find that confirmation of liability to duty, on clearances of Scrap consignments by treating them as the consignments of Zinc Ingots, automatically make the Appellants eligible to the credit of the Additional duty of Customs paid on the imported Scrap.

25(a). The ld Advocate submitted that contrary to the statutory provisions stipulating that the duty is chargeable on the value of actually cleared quantity, the Revenue in the absence of documents, not even for the name sake, evidencing clandestine manufacture / removal / clearance of Zinc Ingots raised and confirmed demand arbitrarily on presumed value derived by misconstruing the Balance Sheets, to suit their allegations.

25(b). We find that the nature of the commodity viz Zinc Scrap and the corresponding data of the statutory Balance Sheets had been arbitrarily transformed into Zinc Ingots, for imaginary quantification and confirmation of demand in the impugned Order. We observe that even the demand is solely based on the actual Balance Sheet, is not sustainable, unless the same is supported by sufficient and corroborative evidence. The impugned Order confirming artificially quantified demand is therefore inconsistent with the law and not tenable.

26. In the result, the appeals are allowed and the impugned order confiscating seized goods and confirming demand of duties and imposition of penalties is set aside with consequential relief.

(Order pronounced in the open court on-09.04.2019)

(Anil G. Shakkarwar)
Member (Technical)

(Anil Choudhary)
Member (Judicial)

Rekha