

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, ALLAHABAD**

REGIONAL BENCH : COURT NO.I

Excise Appeal No.70689 of 2016

(Arising out of Order-in-Original No.ALD/EXCUS/000/MP(Dem-88/13) 26 of 2016 dated 4 May 2016 passed by Commissioner, Central Excise & Service Tax, Allahabad.)

M/s. Kishore Zarda Factory

(D-51/199, Suraj Kund,
Varanasi (U.P.))

...Appellant

VERSUS

Commr. of Central Excise, Customs & Service Tax, Allahabad

.....Respondent

(38, M.G.Marg, Civil Lines,
Allahabad-211001.)

WITH

(i) Excise Appeal No.70742 of 2016(Ramesh Chandra Khandelwal); (ii) Excise Appeal No.70743 of 2016(Chandra Kishore, Partner); (iii) Excise Appeal No.70744 of 2016 (Uma Shankar Prasad); (iv) Excise Appeal No.70784 of 2016 (Commissioner of Central Excise, Customs & Service Tax, Allahabad)

(Arising out of Order-in-Original No.ALD/EXCUS/000/MP(Dem-88/13) 26 of 2016 dated 4 May 2016 passed by Commissioner, Central Excise & Service Tax, Allahabad.)

APPEARANCE

S/Shri Abhinav Mehrotra, Abhisek Panday, Jitendra Yadav, Advocates for the Appellant (s)

Shri Gyanendra Kumar Tripathi, Authorized Representative for the Respondent

CORAM: HON'BLE MRS. ARCHANA WADHWA, MEMBER(JUDICIAL)

HON'BLE SHRI ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 71447-71451/2019

DATE OF HEARING : 26 June 2019
DATE OF DECISION : 31 July 2019

MRS. ARCHANA WADHWA :

All the appeals are being disposed of by a common order as they arise out of the same impugned order passed by Commissioner vide which he has confirmed duty of Central Excise to the extent of around Rs.5.54 Crores against M/s.Kishore Zarda Factory along with confirmation of interest and imposition of penalty of identical amount under Section 11AC of the Central Excise Act, 1944. In addition penalty of Rs.5.00 Lakhs stands imposed on Shri Chandra Kishore, Partner of M/s.Kishore Zarda Factory and of Rs.2.00 Lakhs each on Shri Ramesh Chandra Khandelwar, Authorized Representative and Shri Uma Shankar Prasad, Proprietor of M/s.J.P. & Sons. Further, as the Adjudicating authority has dropped the demand of Rs.61,20,408/-, which was based upon procurement of raw material from M/s.Niranjan Tobacco Company, on the ground that the same stands merged with the confirmed demand based upon the records of M/s.Niranjan Tobacco and others. Revenue has also filed appeal against the said part of the order.

2. As per facts on record, M/s.Kishore Zarda Factory is engaged in the manufacture of "Halchal" brand Zarda falling chapter 24 of the first Schedule to the Central Excise Tariff Act, 1985. Their factory was visited by the Central Excise officers on 21 September 2011, who conducted various checks and verifications. Certain records were resumed by the visiting officers under the Panchnama dated 21 September 2011. However, no variation, either in the stock of raw material or final product was detected.

3. As it was gathered that the appellants were selling their final product "Zarda" by railways, a team of the officers of DGCEI visited the inward godown of parcel office, railway station, Sealdah and found 40 cartons bearing a mark "Red-50" & "Blue 50" and opined that the said consignments were containing Zarda transported from Varanasi to Sealdah. The name of the consignor and consignee was mentioned as

Raju in the RRs. Nobody came forward to claim the ownership of the said goods and by entertaining a belief that the said goods have been cleared from the factory of M/s.Kishore Zarda, they were seized as unclaimed under Panchnama dated 21 September 2011. On the subsequent date i.e. 22 September 2011, the godown of the said railway station was again visited by the Central Excise officers and 3(three) more consignments of similar identification marking were found lying there. Shri Samir Kumar Mondal, Chief Commercial Clerk informed the officers that the said two consignments have been received from Varanasi against the RRs. As the details of the consignor or consignee could not be ascertained, the same were again detained under Panchnama dated 22 September 2011.

4. Subsequently on 2 November 2011, the officers again visited the Inward Parcel Office, Sealdah railway station, Kolkata and opened and verified the contents of the 105 (one hundred and five) detained cartons in the presence of Shri Priyadarshan Barua, Authorized Representative of M/s.Kishore Zarda Factory. It was found that the same was containing "Halchal" brand Zarda and the name of the manufacturer was printed on the tin containers as M/s.Kishore Zarda Factory, Varanasi. As Shri Priyadarshan Barua could not produce any invoice/bill in respect of the said consignments and the same were accordingly seized. Statement of Shri Priyadarshan Barua was recorded on 2 November 2011 admitting that he was working as the clerk looking after the issuance of invoice and the clearance of Zarda in the factory of M/s.Kishore Zarda Factory and the seized goods from Sealdah Railway station has been manufactured in their factory at Varanasi and removed from there without cover of invoices.

5. Subsequently the business premises of one M/s.Khandelwal Surti House, Kanpur was also put to search in the backdrop of information that the appellant was clearing their final product without payment of duty to the said M/s.Khandelwal Surti House. 11(eleven) cartons containing "Halchal" brand of Zarda were found from their premises. As

Shri Khandelwal, Authorized Representative could not produce any purchase bill/invoice, the goods totally valued at Rs.52,800/- were put under seizure. Shri Khandelwal in his statement dated 1 October 2011 deposed that he was engaged in trading of "Halchal" Zarda manufactured by M/s.Kishore Zarda Factory, Varanasi as also Sweet Superi and Ratna Zarda etc.; the goods being received by him were cleared from the factory of M/s.Kishore Zarda Factory with as well as without cover of any documents; that all the purchases made by him are not covered by any bills and wherever bills are issued, the details are noted in the private note pad; that payments for goods received under cover of Bill are made vide cheques and whenever the goods are received without invoices, consideration is paid by cash. Scrutiny of the records maintained by M/s.Khandelwal Surti House led the Revenue to belief that he has received goods involving duty of around Rs.8.19 Lakhs from M/s.Kishore Zarda without payment of duty.

6. In the above backdrop, the further investigations were conducted by the Revenue and the statements of Shri Chandra Kishore, partner of M/s.Kishore Zarda was recorded on various dates. In his statement, Shri Chandra Kishore disclosed the names of the booking agents as also various transporters through whom their final product was being transported. He also disclosed the names of the suppliers of various inputs like raw Zarda, Glycerin and other chemicals viz. Benzyl Burate, Methyl Phenyl Acetate compounds, fragrances and dibby and cartons. Further the details of their customers were also disclosed. He also further deposed that some of the customers takes the delivery of the Zarda at the factory gate itself and the rest of the customers of Uttar Pradesh gets Zarda through transportation and the freight is borne by him. Zarda is sent to Dimapur, Aizawal through railways and freight is borne by his factory; Zarda sent through railways is through one Shri Sanjay Guru, whom they pay Rs.100/- per carton which includes expenses for loading, transportation and unloading etc.. It was further

deposed that Shri Sanjay Guru used to send Zarda through Railway through one Shri Banwari Chaurasia, a railway booking agent.

7. As a result of disclosures made by Shri Chandra Kishore, further searches were conducted at the business premises of transporters and various incriminating documents were recovered from the premises of such transporters. Further searches were also conducted at various general stores or the retailers and the statements of their representatives were also recorded, which are incriminating.

8. During the further course of investigations, Revenue also contacted Shri Banwari Chawrasia, railway booking agent and Shri Brinda Chawrasia and recorded their statements. The searches were also conducted at the premises of the raw tobacco suppliers like M/s.Niranjana Tobacco Co., Varanasi and based upon the statements of their various representatives and the records maintained by them, it was alleged that the appellants have been procuring unaccounted raw tobacco from the said suppliers which has been used in the manufacture of their final product cleared from their factory without payment of duty.

9. Based upon the result of the investigations, proceedings were initiated against M/s.Kishore Zarda Factory as also against other noticees alleging clandestine manufacture and removal of the final product Zarda. It is seen that a show cause notice dated 15 March 2012 was issued to M/s.Kishore Zarda Factory as also other noticees proposing to confiscate the goods seized from the railway's Sealdah Station as also from the premises of M/s.Khandelwal Surti House and to confirm the demand of duty of Rs.81,96,400/- on the allegation that M/s.Kishore Zarda Factory had cleared the said goods without payment of duty. Notice also proposed imposition of penalties upon various persons. The said show cause notice was adjudicated by the original adjudicating authority confirming the demand, imposing penalties and confiscating the seized goods with an option to appellant to redeem the same. The said order of the original adjudicating authority was

challenged by the appellants before Commissioner(Appeals), who vide his Order-in-Appeal No.28,29,30/CE/Alld./2014 dated 31 March 2014 set aside the order of the original adjudicating authority by observing that the onus to prove that the goods found at Sealdah Railway Station were booked by M/s.Kishore Zarda Factory is required to be discharged with affirmative evidence, which the Revenue has failed to do so. The reliance by the Revenue upon the statements of various persons including Shri Priyadarshan Barua and Shri Chandra Kishore, Partner was not appreciated by Commissioner(Appeals) by observing that though the statements recorded during investigation is vital piece of evidence, but as per the established law, in the case of allegation of clandestine manufacture and removal of the goods, the burden lies heavily upon the department to prove the same with positive evidences. The statements are required to be compared with the rest of the records, which has not been done by the Revenue. He further observed that over-emphasis has been given to the statements recorded during the investigation, without any verification etc.. He also observed that during the visit of DGCEI at the factory of the appellant, nothing incriminating was recovered so as to lead to the conclusion that the appellants were engaged in clandestine clearance of Zarda. The show cause notice is unspecific, insufficient and not disclosing any evidence regarding procurement of raw material, suppression of production and clandestine clearance of appellant. As such by referring to the various precedent decisions, he set aside the order of the original adjudicating authority.

It is seen that the said Order-in-Appeal No.28,29,30/CE/Alld/2014 dated 31 March 2014 does not stand challenged by the Revenue and as such has attained finality.

10. Apart from issuing the above show cause notice relatable to the seizure portion, arising out of the same set of facts and investigations the present show cause notice dated 13 September 2013 was also issued to the appellant raising demands in respect of past clearances on

the allegations of clandestine removal of the appellant's final products, which in turn are based upon the disclosures made by the various persons in their statements as also the documents recovered from such third parties. It is seen that demand of around Rs.61.00 Lakhs was proposed to be confirmed against the appellants based upon the unaccounted purchase of Zarda from M/s.Niranjan Tobacco Company read with the statement of Shri Ankur Patel and Shri Ramesh Bhai Patel of said M/s.Niranjan Tobacco Company and the documents recovered from the premises of M/s.Niranjan Tobacco Company. However the said demand stands dropped by the Adjudicating authority on the ground that the same stands merged with the confirmed demand based upon the records of said raw material supplier. Revenue is in appeal against the said dropping of demand.

10.1 Further the demand of around Rs.5.14 Crores was proposed to be confirmed based upon the documents recovered from the Railway booking clerk Shri Banwari Chawrasia and his brother Shri Birender Chawrasia and read with the statements of the said persons as also Shri Sanjay Trivedi alias Sanjay Guru. Demands of around Rs.11.00 Lakhs was sought to be confirmed based upon the records received from premises of M/s.Khandelwal Surti House read with the statements of Shri Ramesh Chandra Khandelwal. Further demand of Rs.27.00 Lakhs (approx.) was sought to be recovered based upon the records maintained at the transporter's end Shree Shakti Carrier, Guwahati, read with the statements of their representative along with the scrutiny of records maintained by the said transporter and the statements of various authorized representatives of retail stock.

The said show cause notice culminated into an order impugned before us passed by the Commissioner confirming the demands as proposed in the notice as also imposing penalties, detailed in the preceding paragraphs.

11. After hearing both sides duly represented by Shri Abhinav Mehrotra, learned Advocate along with Shri Abhisek Panday, learned Advocate and Shri Jitendra Yadav, learned Advocate for the appellants and Shri

Gyanendra Kumar Tripathi, learned Authorized Representative for the Revenue, we note that the appellants' factory premises were put to search on 21 September and the visiting officers undertook the stock verification of various raw materials as also final product. All the raw materials, packing materials, perfumery compounds were verified and found to be tallying with the records as maintained by the appellant in their books of accounts. Further no shortage or excess or any other variation was noticed by the visiting officers, as recorded in the Panchnama itself. No incriminating material was found by the visiting officers from the factory of the appellant.

12. The entire case of the Revenue is based upon the third party records and the statements of their representatives recorded by the officers during the course of investigations. The appellants have strongly contested that all the statements recorded by the officers are stereotyped and have been obtained under duress and by applying force and coercion. The records maintained by said third party cannot be adopted for making allegations of clandestine removal against the appellants, in the absence of any evidence on the record so as to establish the clandestine manufacture and removal against the assessee. The appellants have also contested that they specifically asked for the cross-examination of the deponents of various statements relied upon by the Revenue so as to test the veracity of the same which request of the appellant stand denied by the adjudicating authority on flimsy ground. It is seen that though the adjudicating authority has re-produced all the case law referred to by the appellants in support of their contention of cross-examination of the various deponents, but the adjudicating authority observed that the cross-examination should be allowed when the department's case is based on statements alone and there is total absence of supporting corroborative evidences. He further observed that though in the present show cause notice the department's case is undeniably built on statements of 12 witnesses, but a large number of documents have also been recovered from the said deponents which were being maintained by them in the ordinary course of their business. As such by referring to the said statements as also to the entries made in the records maintained by such third parties, he after denying the request for cross-examination, concluded against them.

13. We find that in an identical case of M/s.Sugandhi Snuff King the same adjudicating authority had denied the cross-examination of various deponents

by adopting the same reasoning. While disposing of the appeals of M/s.Sugandhi Snuff King the Tribunal vide its Final Order No.71268-71273/2019 dated 4 July 2019 observed as under:-

"18. We really fail to understand the above reasoning of the adjudicating authority. On one hand, learned Commissioner is accepting that the Revenue's case is based upon the statements of the witnesses and the cross-examination, as per the settled law, should generally be allowed. On the other hand he is disallowing the cross-examination by referring to Supreme Court's decision which is only to the effect that such request should be considered in the light of the facts and circumstances of the each case. The adjudicating authority has not gone further and dealt with the cross-examination request by discussing as to how the said request is not proper, in the facts and circumstances of the case. If the adjudicating authority is not intending to allow the cross-examination, the statements have to be kept out of consideration. He has never deliberated upon the fact as to how the cross-examination is not justified in the facts and circumstances of the present case. The only reasoning adopted by him for such denial is that the statements stand further corroborated with the documentary evidences recovered from various persons. However, it has to be kept in mind that these documentary evidences, to which he is referring to are also the documents obtained from the said deponents of the statements and the cross-examination requirement was only to test the veracity of the said documents. In these circumstances we are of the view that the denial of the appellant's request for cross-examination would lead to a situation of non-consideration of the statements in question.

A specific reference in this regard can be made to the Hon'ble Allahabad High Court's decision in the case of Parmarth Iron Pvt.Ltd. [2010 (260) ELT 514 (All.)], apart from various other decisions referred to by the appellant and re-produced in the preceding paragraphs.

In fact we note that not only cross-examination, but the examination in chief is also required to be done by the adjudicating authority as held by the Hon'ble Punjab & Haryana High Court in the case of *Jindal Drugs Pvt.Ltd. v. UOI* [2016 (340) E.L.T. 67 (P & H)] and *Ambica International v. UOI* [2016-TIOL-1238-H.C.-P & H-CX.] Having not done that the provisions of section 9D do not stand followed resulting in unsustainability of the adjudication order. Surprisingly the adjudicating authority has distinguished the decision of Hon'ble Allahabad High Court in the case of *Parmarth Iron Pvt.OLtd.* by observing that in that case the cross-examination was sought before show cause notice was issued whereas in the present case the appellant have sought the cross-examination of witnesses after the show cause notice stand issued and as such the ratio of the Hon'ble High Court decision is not applicable. Similarly he has referred to each and every decision relied upon by the appellant and have distinguished the same on the flimsy grounds that the facts in those cases were different than the facts in the present case, inasmuch as, in the present case, the statements were recorded under section 14 and are very clear and unambiguous statements. It may be noted that all the statements are always recorded under section 14 of the Central Excise Act and it is for the assessee to request or not to request the cross-examination so as to test the veracity of the said statements. The adjudicating authority cannot accept the statements on the ground that the same are clear statements and no purpose would be served by allowing the cross-examination. Surprisingly the adjudicating authority has also referred to the jurisdictional Allahabad High Court decision in the case of *Govind Mills Ltd.* [2013 (294) ELT 369(HC-All.)] and has observed that since in that case there was only one statement relied upon by the Revenue, the Hon'ble High Court held in favour of the assessee.

We do not appreciate the above artificial differentiation drawn by the adjudicating authority for the purpose of refusing to allow the cross-examination. A reading of the one liner

differentiation in the order leads us to believe that the adjudicating authority was in a hurry to confirm the demands without observing the principles of natural justice Having held that denial of cross-examination has led to violation of principles of natural justice and in such a scenario the statements have to be kept out of consideration, we proceed to decide the other evidences relied upon by the adjudicating authority to arrive at the findings of clandestine removal."

By following the said precedent decision of the Tribunal, wherein the entire case law stands discussed, we are of the view that the statements have to be kept out of the consideration and cannot take place of admissible evidences. Reference can also be made to another decision of the jurisdictional High Court of Allahabad in the case of Commissioner of Central Excise, Lucknow v. M/s.Shyam Traders reported as Manu/UP/0488/2016 wherein by following the precedent decisions of Allahabad High Court and Apex Court, the position of cross-examination of deponents of statements was again clarified.

14. If the said statements are not considered as admissible evidences, nothing remains with the Revenue to hold against the manufacturing appellant. The entries made in the documents recovered from the said third parties stand explained by the statements only and if the said statements are not to be considered as admissible evidence, the books of accounts maintained by such parties are also required to be kept out of consideration. In fact in the same decision of M/s.Sugandhi Snuff King, the Tribunal has, in detail, considered the evidentiary value of the records maintained by such third parties by observing as under:-

" 20. As regards the demand confirmed by the lower authorities, we note that the same is primarily based upon the documents recovered from third parties read with the statements of the representatives of said third parties. Revenue has referred to the documents recovered from M/s.Radhey Agency, M/s.Senior Box Factory, M/s.Mohit Traders,

M/s.Poorwanchal Transport Company and railway parcel booking authorities, Varanasi as also on the various railway booking agents and all the shop owners who were dealing with Gutkha and Zarda manufactured by the Appellant. It is the Revenue's case that the entries made in their books of accounts relate to the clandestine clearances of Zarda from the factory of M/s.Sugandhi. Such reading of the entries is based upon the statements of the representatives of the agents, traders, booking office etc.. As we have already held that the statements, by itself cannot be held to be the conclusive proof of establishing the clandestine activities, especially when the deponents have not been offered for cross-examination, we find no merits in the above stand of the Revenue.

Otherwise also it is well settled law that the third party documents cannot be relied upon for concluding against the assessee unless the same are fully corroborated by sufficient positive and legal evidence. The entries made in the third party records are not conclusive and are primarily based upon the understanding of the person who has made those records. The same stands relatable to M/s.Sugandhi based upon the statements of owners of those records without even identifying and examining the scribe of those entries. Having held that statements are not admissible, the entries are also required to be ignored. As such we find that in the absence of any evidence of actual manufacture of the goods or clearance of the same, the confirmation of demand based upon third parties documents cannot be upheld.

21.

22. At this stage we may refer to certain precedent decisions on the issue of the findings of the clandestine removal based upon the statements of various deponents, who have not been allowed cross-examination read with the entries made in the third party documents recovered from the premises of the said third parties. The Hon'ble Supreme Court in the case of Andaman Timber Industries v. Commissioner of C.Ex., Kolkata-

II reported as MANU/SC/1250/2015, while dealing with the cross-examination of the witnesses observed that not allowing the assessee the cross-examination of witnesses is a serious flaw which makes the order nullity inasmuch as the same amounts to violation of principles of natural justice because of which the assessee was adversely effected. The Hon'ble Supreme Court further observed that when the assessee disputed the correctness of the statements and wanted to cross-examine and such opportunity was not given, the rejection of this plea is totally untenable. It is not for the adjudicating authority to have guess work as to for what purposes the appellant wanted to cross-examine. It was not for the adjudicating authority to pre-suppose as to what could be the subject matter of the cross-examination. By observing so, the order impugned before the Hon'ble Supreme Court was set aside.

Similarly in the case of M/s.Modern Polythene v. Commissioner of Trade Tax, U.P., Lucknow the Hon'ble Supreme Court observed that when the taxing authority choose to levy tax or conclude that payment of tax has been evaded on the basis of statements of the individuals, the assessee must necessarily be granted an opportunity to cross-examine. Such adverse material can neither be introduced, nor form the foundation for the imposition of additional tax without an opportunity being afforded to the assessee to challenge the statements in cross-examination. Accordingly the order impugned before the Hon'ble Supreme Court was set aside.

Similarly the Hon'ble Allahabad High Court in the case of Commissioner of Central Excise v. Parmarth Iron Pvt.Ltd. reported as MANU/UP/2113/2010 by referring to various precedent decisions held that if the Revenue chooses not to examine any witness in adjudication, their statements cannot be considered as evidence. If the Revenue chooses to rely on the statements, then in that event the persons, whose statements

are relied upon have to be made available for cross-examination for the evidence or statements to be considered.

23. In fact it is not only the cross-examination of the witnesses which is required in terms of the provisions of section 9D of the Central Excise Act, but the examination-in-chief of the witnesses is also required to be done as held by the Hon'ble Punjab & Haryana High Court in the case of Ambica International v. Union of India. The Hon'ble High Court held that the provisions of section 9D of the Central Excise Act are required to be scrupulously followed in adjudication proceedings as the same is done in proceedings relating to prosecution. The evidentiary value of the statement, in so far as proving the truth contents thereof is concerned, is completely lost unless and until the case falls within the parameters of section 9D and otherwise it has to be held that adjudicating authority has relied on irrelevant material. 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 so that the reliance by the Commissioner on said statement has to be regarded as misguided and the statements have to be eschewed from consideration as they would not be relevant for providing the truth of the content thereof. To the same effect is the decision of the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd. [2016(340) E.L.T. 67 (P & H)]."

15. In fact we also note that the adjudication proceedings relating to the seizure portion of the entire case, emanating from the same set of facts and circumstances was dealt with by Commissioner(Appeals) and was held in favour of the assessee. The said order stands accepted by the Revenue and was not appealed against. The Commissioner(Appeals) held in favour of the assessee on the ground that the statements which have not been tested on the tool of cross-examination and in the absence of any other material, the charges of clandestine removal cannot be upheld against the appellant. The

present proceedings are also based upon the same evidence and the statements collected by the Revenue during the course of investigations and the Revenue having accepted the earlier order of Commissioner(Appeals), cannot now, in the present proceeding contend to the contrary.

16. As we have already observed the Revenue's entire case is based upon the statements of various persons, who in turn are relatable to entries made in their records and who have not been offered for cross-examination or examination in chief by the adjudicating authority, the said evidences have to be kept out of consideration and if that is done nothing survives in the Revenue's case.

17. It is well settled that the findings of clandestine removal are required to be upheld on the basis of positive, tangible and affirmative evidences and the same cannot be made on the basis of flimsy grounds leading to doubts. The Hon'ble Allahabad High Court in the case of Continental Cements Company v. Union of India [2014 (309) E.L.T. 411(All.)] observed that clinching evidence of purchase of raw materials, consumption of electricity, sale of final products, clandestine removal and transportation, realization of sale proceeds, mode and flow back of funds are required to be established before the findings of clandestine removal can be upheld. It is a serious charge and required to be proved beyond doubt by the Revenue and cannot be upheld merely on the basis of statements which are based on memories.

Though there are number of decisions laying down the legal principle of the evidences required to be adduced by the Revenue, to be beyond doubt, reference can be made to the Tribunal's decision in the case of Chandan Tobacco v. Commissioner of Central Excise, Vapi [2014 (311) ELT 593 (Tri.-Ahmd.)] as also in the case of Aum Aluminium Pvt.Ltd. v. Commissioner of Central Excise, Vadodara [2014 (311) ELT 354 (Tri.-Ahmd.)], laying down that the legally recognized evidences for establishing the case of clandestine clearance are as under:-

"(i) *Clandestine manufacturer;*

- (ii) Clandestine/disproportionate/unaccounted purchase, receipt and consumption of raw material and packing material required for manufacturing the alleged quantity of final product clandestinely removed from factory;*
- (iii) freight payment for any such movement;*
- (iv) unauthorized payment for procuring unaccounted raw material and packing material ;*
- (v) disproportionate power consumption, capacity utilization and labour employment; and*
- (vi) recovery of unaccounted sales proceeds in substantial cash from factory or office premises or anywhere else in direct control of assessee, backed by any confirmation, oral or written, from a person giving such cash against goods removed in clandestine manner without payment of duty from the factory."*

18. The said principles stand followed by the Tribunal in number of cases. Reference can be made to M/s.S.R. Ingots Pvt.Ltd. v. Commissioner of Central Excise (CESTAT), New Delhi – Final Order No.50750-50751/2018 dated 23 February 2018, Commissioner vs. Kurle Pan Products Pvt.Ltd., Final Order dated 17 January 2019 reported as MANU/CM/0013/2019. In fact, the list is unending and suffice it to say that it is well settled that onus to prove clandestine removal lies heavily on the Revenue and is required to be discharged by sufficient evidences. Further the Hon'ble Allahabad High Court in the case of Commissioner of Customs and Central Excise v. Auto Gollon Industries Pvt.Ltd. [MANU/UP/0003/2018] observed that allegations of clandestine removal are serious allegations and are required to be established beyond doubt by production of sufficient and positive evidence. The doubts, however strong cannot be converted into evidence so as to confirm the demand. There is no enquiry as regards the buyers so as to establish their identity, no enquiry as regards procurement of raw materials required for manufacture of final product, no enquiry as regards the transportation of goods or as regards the receipt of consideration of the said clandestinely removed final product.

The Court also observed that the shortage of one of the raw materials cannot lead to inevitable conclusion of clandestine manufacture is well settled.

Reference can also be made to the Hon'ble Delhi High Court's decision in the case of Felvel International v. Commissioner of Central Excise reported as MANU/DE/2747/2015. The decision of the Hon'ble High Court is against the majority decision of the Tribunal. Originally there was difference of opinion between two Members as regards the findings of clandestine removal of the goods. The third Member, hearing the difference of opinion, agreed with Member(Technical) and held against the assessee. The said majority decision was appealed against before Hon'ble Delhi High Court. While disposing of the appeal, the Hon'ble High Court set aside the majority decision and adopted the minority decision as the correct decision. It was observed that the allegation of clandestine removal made on the basis of entries in the ledger account cannot be upheld inasmuch as there was no direct evidence of manufacture of such huge quantities of Air-conditioners in the assessee's factory. In the absence of any evidence of procuring excess raw material required for production of such a huge number of Air-conditioners and in the absence of any statement of employees and in the absence of any identification of the buyers, the entire case of the Revenue was held to be having been made on the basis of doubts and presumptions. After taking into consideration the entire precedent decisions, the Hon'ble High Court observed that there is no abatement made by the department to substantiate the allegation of manufacture of Air-conditioners inasmuch as no evidence has been produced to show that the basic raw material required for manufacturing was procured by the appellant. The ratio of the said decision of the Hon'ble High Court is fully applicable to the facts of the present case.

19. In the present case, as already observed the Revenue's entire case is based upon statements which in turn are as regards explanation of various entries in the records maintained by such deponent. In case

of clandestine removal, the goods are first required to be manufactured for which purpose a manufacturer needs lot of raw materials. There is no evidence of procurement of excess raw materials. Admittedly the manufacture of Zarda requires a number of raw materials, the main being raw Zarda. Apart from that Glycerin and other chemicals like Benzyl Burate, Methyl Phenyl Acetate compounds, fragrances and packing materials in dibbies. Apart from alleging the procurement of excess raw tobacco, M/s.Niranjan Tobacco Company, which is also based upon the records maintained by the said raw material saler, Revenue has not made out any efforts to identify the supply of the other materials required for manufacture of such a huge quantity of Zarda. There is neither any allegation to the effect of unaccounted procurement of other raw materials. We really fail to understand as to how the appellant could have manufactured such huge quantity of Zarda without procurement of the said raw material. Further, no investigations stand made from the persons associated with the actual manufacture or the labourers appointed by the appellant so as to establish that such excess Zarda was manufactured by them. Further no incriminating documents stand recovered from the appellants' factory or possession.

19.1 We also note that at the time of search of the appellant's factory, no variation in the stock of the raw material or final product was detected by the visiting officers. If the said assessee was indulging in such large scale clandestine activities, there is bound to be excess raw materials and final products in the appellant's factory. Further no incriminating documents were also recovered from their premises. To uphold the findings of clandestine removal, which are in the nature of quasi-criminal proceedings, on the basis of the third party records, which we have already discussed and in the absence of any incriminating documents recovered from the assessee's factory or any variation in the stock, neither justifiable nor warranted. Admittedly the clearance of the final product has to be preceded with the manufacture

of the same product. Revenue having failed to discharge its onus as regards the manufacture of such a huge quantity of Zarda by the appellant, cannot allege clearance of the same. As such we find no merits in the Revenue's stand.

Not only that the Revenue has not made any efforts during the course of investigations to identify the buyers to whom the said goods have been sold. To raise such a huge demand of duty, based solely on the statements, explaining the records maintained by such third parties, without identifying the buyers to whom the goods have been sold and without producing any evidence as regards the mode of realization of the consideration of such clandestinely removed goods, we are of the view that the allegations and findings of clandestine removal cannot be upheld against the assessee.

20. In view of the foregoing we find that the impugned orders are unsustainable in so far the same relates to confirmation of demand against M/s.Kishore Zarda Factory or imposition of penalties upon them as also upon various other persons. Accordingly the same is set aside and appeals are allowed with consequential relief to the appellants.

21. Inasmuch as the impugned order confirming demands of duties and imposing penalties upon various appellants stands set aside, the Revenue's appeal against that part of the order vide which a part of the demand has been dropped by the Adjudicating authority has become infructuous. The same is accordingly rejected.

(Order pronounced in the open court on 31/07/2019.)

SD/
(ARCHANA WADHWA)
MEMBER (JUDICIAL)

SD/
(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)