CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

Excise Appeal No.70029 of 2020

(Arising out of Order in Appeal No.MRT-EXCUS-000-APPL-MRT-189-192-2018-19, dated-30/09/2019 passed by Commissioner (Appeals) CGST & Central Excise, Meerut)

Commissioner, CGST & Central Excise, Meerut-I,

.....Appellant

(CCS Universtrity Meerut-I)

VERSUS

Chaudhary Ingots Private Limited **....Respondent**

(Village Vehlna, Meerut Road,
Muzaffarnagar, U.P. 251001)

APPEARANCE:

Absent on call for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

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

FINAL ORDER NO.-70806/2025

DATE OF HEARING : 13.10.2025
DATE OF DECISION : 13.10.2025

SANJIV SRIVASTAVA:

This appeal filed by the Revenue is directed against the Order-In-Appeal No. MRT-EXCUS-000-APPL-MRT-189-192-2018-19, dated-30/09/2019 passed by Commissioner (Appeals) CGST & Central Excise, Meerut. By the impugned order Commissioner (Appeals) has set aside the Order-In-Original No.11/ADC/MRT/2018 dated 19.06.2018 and allowed the appeal of the present Respondent.

1.2 By the Order-In-Original No.11/ADC/MRT/2018 dated 19.06.2018 following has been held:-

ORDER

1. I confirm the demand of Central Excise duty amounting to Rs. 36,46,881/- (Rupees Thirty Six Lakhs Forty Six Thousand Eight Hundred Eighty One) payable on clandestine removal of finished goods without payment of duty, under the Section 11A (4) of the Central Excise Act, 1944 alongwith interest under Section 11AA of Central Excise Act, 1944

2. 1 confirm the demand of Cenvat Credit amounting to Rs 55,34,264/- (Rupees Fifty Five Lacs Thirty Four Thousand Two Hundred Sixty Four) involved on the Raw Material clandestinely removed, alongwith interest, under Rule 14 of Cenvat credit Rule, 2004 read with the Section 11A & 11AA of the Central Excise Act, 1944

3. I impose a penalty of Rs. 36,46,881/- (Rupees Thirty Six Lakhs Forty Six Thousand Eight Hundred Eighty One) upon the party under Rule 25 of the Central-Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 for contravention of the various provisions of the Act/ rules, discussed supra, in clandestine removal of finished goods.

4. 1 impose a penalty of Rs. 55,34,264/- (Rupees Fifty Five Lacs Thirty Four Thousand Two Hundred Sixty Four only) upon the party under Rule 15 of Cenvat Credit Rule, 2004 read with Section 11AC of the Central Excise Act, 1944 for contravention of the provisions of the rules, discussed supra, in clandestine removal of Raw Materials/inputs.

5. I also impose a penalty of Rs. 3,00,000/- each on the three Directors namely Sh. Narender Singh Panwar, Shri, Ashok Sharma, Shri Yatendra Singh Panwar, under Rule 26 of the Central Excise Rules, 2002.

2.1 The Respondent is engaged in the manufacture of M.S. Ingots and Runner & Riser falling under chapter 72 of the Schedule to the Central Excise Tariff Act, 1985. Their main raw materials were M.S. Scrap, Sponge Iron, Pig Iron and Alloys for manufacture of finished goods viz. M.S. Ingots. They were also availing.. CENVAT credit on inputs/capital goods under the provisions of Cenvat Credit Rules, 2004.

2.2 Acting on intelligence the Respondent was indulging in the evasion of Central Excise duty by way of suppression of production of actual quantity of finished goods and stock raw material and clandestinely clearing the same without payment of Central Excise duty as applicable. The premises of the Respondent was visited for necessary enquiry on 31.07.2015 and the entire proceedings recorded on the spot in the Panchnama of the same date. As a result on physical verification of the stock of finished goods and raw material following was observed:-

S.No.	Description of goods	Quantity physically verified on 31.07.2015 (In MT)
1	M.S. Ingots	NIL
2	Runner & Riser	NIL

S. No.	Description of goods	Quantity physically verified on 31.07.2015 (In MT)
1	Pig Iron	97
2.	Sponge Iron	01
3.	Scrap	48
4.	Alloys	NIL
	Total	146.00

2.3 Certain records/Registers were also resumed from the premises of the Respondent and following was observed:-

Sr. No.	Item (Description)	Qty. (in MT)	Date up to which stock maintained/recorded
1	M.S. Ingots (Finished Good)	2137.700	30.06.2015
2	Runner & Riser (Finished Good)	27.927	30.06.2015
3	Imported Raw Material (Input)	403.495	31.03.2015
4	Duty Paid Raw Material (Input)	1183.855	31.03.2015
5	Non Duty Paid Raw Material (Input)	64.95	01.07.2015

2.4 As there was difference in the stock as indicated in the records and the stock physically verified, further investigations were undertaken and the statement of various persons were recorded.

2.5 After examination of the records and completion of inquiry it was observed that:-

- The Respondent have clandestinely cleared 1215.62 MT of M S Ingots and by product Runner & Riser without payment of Central Excise duty involving Rs.36,46,881/-

which resulted in shortage of finished goods as observed at the time of visit of the premises.

- They cleared 1234.577 MT of raw material involving CENVAT Credit of Rs.55,34,263/- inclusive of CESS clandestinely without paying appropriate Central Excise Duty.
- As the Appellant failed to provide any explanation with regards to the above shortages noted it was alleged suppression of fact with intent to evade payment of Central Excise duty

2.6 A Show Cause Notice dated was issued to the Appellant asking them to show cause as to why:-

(1) Central Excise duty amounting to Rs. 36,46,881/- (Rupees Thirty Six Lakhs Forty Six Thousand Eight Hundred Eighty One) leviable on account of shortage of finished goods cleared clandestinely should not be demanded/recovered from them under the Section 11A (4) of the Central Excise Act, 1944.

(ii) Cenvat Credit amounting to Rs 55,34,264/- (Rupees Fifty Five Lacs Thirty Four Thousand Two Hundred Sixty Four) involved on the Raw Material cleared clandestinely should not be demanded/recovered under Rule 14 of Cenvat credit Rule, 2004 read with the Section 11A (4) of the Central Excise Act, 1944.

(iii) Interest on the duty and Cenvat credit demanded in para (i) & (ii) above should not be demanded/recovered under Section 11AA of Central Excise Act, 1944 and Rule 14 of Cenvat Credit Rules, 2004.

(iv) Penalty should not be imposed on them under Rule 25(1)(a) & (b) of the Central Excise Rules, 2002 read with Section 11AC(1) (c) of the Central Excise Act, 1944 for contravention of the provisions of the rules as pointed out herein above for clandestine removal of finished goods.

(v) Penalty should not be imposed on them under Rule 15 of Cenvat Credit Rule, 2004 read with Section 11AC of the

Central Excise Act, 1944 for contravention of the provisions of the rules as pointed out herein above for clandestine removal of Raw Materials/inputs.

2.7 The Show Cause Notice has been adjudicated as per the Order-In-Original.

2.8 Aggrieved Respondent filed appeal before the Commissioner (Appeals) which has been allowed as per the impugned order.

2.9 Aggrieved Revenue have filed this appeal stating following grounds:-

"1. The Panchnama dated 31.07.2015 (Copy enclosed as Annexure-A) shows that the officers of Central Excise visited the factory premises of M/s. Chaudhary Ingots Private Limited, Village Vehlana, Meerut Road Industrial Estate, Muzaffarnagar (U.P.) on 31.7.2015 and conducted physical verification of the stock of finished goods as well as Inputs/ Raw materials lying in the factory premises in the presence of Shri Anil Baliyan, Security supervisor of the factory, Shri Sanjeev Arora, (deputed by Sri Narender Pawar, Director to represent the respondent) and independent witnesses. The physical verification of the stock of finished goods i.e. M.S. ingots and raw materials was conducted as per the method suggested by and to the satisfaction of Shri Sanjeev Arora. The entire proceedings were recorded in the Panchnama dated 31.07.2015 drawn on the spot before two independent witnesses & Shri Sanjeev Arora. Therefore, acceptance of the respondent's plea that panchas were from Meerut & hence, not independent, by the appellate authority is totally incorrect. The respondent had never raised this plea at any time during enquiry/ adjudication proceedings. Had his representative objected during stock-taking itself, other witnesses could have been called to witness the entire proceedings.

2. The claim of the respondent that stock was lying in the backyard of the factory, has no substance in the absence of *any credible evidence presented by them. While witnessing the entire proceedings of the stock taking, neither Sri Sanjeev Arora, Respondent's representative, nor the security supervisor of the factory said anything about the stock lying in the backyard of the factory. Had this been pointed out at the time of stock taking, the same could have been duly accounted for by the officers. As the officers took round of the factory along with independent witnesses and Sri Sanjeev Arora, they found stock of materials lying as recorded in the panchnama. The entire exercise of physical verification of the goods was done to the satisfaction of Shri Sanjeev Arora, Respondent's representative who also signed the Panchnama in token of his satisfaction & agreement Thus, the appellate authority has erred in holding that shortage was never admitted by the appellant or his representative.*

3. The Respondents did not comply with multiple summons issued to them at regular intervals and did not co-operate in investigation of the case involving huge shortage in the stock of Finished Goods and Raw Materials found during physical stock taking by the Officers of Central Excise, Meerut on 31.07.2015. The respondent was asked to produce records/purchase bills of 2014-15 and 2015-16 in respect of raw materials on which Cenvat Credit was availed and in respect of non duty paid raw-materials but they did not respond to any of the Summons issued to them which shows that they deliberately did not join the investigation.

4. As regards stock of finished goods and raw materials shown to have been cleared in ER-1 Returns of October 2015 & November 2015, the Respondents neither produced any invoices etc. for clearance of the same nor provided any evidence of duty payment. The returns for the above two months show that the respondent has considered substantially lower value of the goods to minimize duty liability as detailed below:-

S. N	**Item**	**Clearance (Quantity in MT, Rate per MT in Rs**							
		June, 2015		July, 2015		Oct., 2015		Nov., 2015	
		Quantity	Rate	Quantity	Rate	Quantity	Rate	Quantity	Rate

1	**M.S.Ingot**	100.02	29000	950.00	24000	413. 85	16999. 79	773. 86	16999. 89
2	**Runner Riser**	0	0	0	0	22. 31	13996. 86	5.62	14000. 00

Note: There were no clearance of the finished goods in Aug & Sept, 2015.

Thus respondent reduced the value of Finished goods to the extent of about 35-40% in their ER-1 returns filed for the month of October, 2015 & November, 2015 in December, 2015. They did not produce copy of the invoices issued for such clearances. In fact, for runners & risers, value per MT is even less than the rate of scrap. Also, there was no evidence on record to suggest that the duty as assessed by the respondent has been paid by them in cash and/or adjusted against Cenvat credit.

5. On perusal of Monthly ER-1 Returns filed by the Respondent for the months from July, 2015 to December, 2015, certain anomalies were found to the effect that O.B. of M.S. Ingots has been shown as 2137700 Kg in the ER-1 for the month of July, 2015. After showing clearance of 950000 kg of M.S.Ingot during the month, C.B. of July, 2015 becomes 1187700 Kg. In August, 2015, there is no production and sale, The O.B. in the ER-1 for the month of September, 2015 should have been 1187700 Kg. but it has been taken as 2137700 Kg. of M.S.Ingot. Again in the ER-1 Return for October, 2015, the O.B. of M.S.Ingot has been shown as 1187.7 MT.

6. The respondent has shown clearance of inputs as such in October, 2015 & November 2015 for the quantity of 653.68 M.T. & 753.15 M.T. respectively supposedly on payment of duty but without satisfying the provisions of Rule 3(5) of Cenvat Credit Rules, 2004 as they failed to produce corresponding purchase & sale invoice before the department.

Rule 3(5) of CCR, 2004 is reproduced below:- "When inputs or capital goods, on which Cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, *shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9."*

7. It is quite evident that the claim of the Respondents to have cleared the finished goods/raw material found short on 31.7.2015, during the months of October & November, 2015 is an afterthought and without any basis. The said claim is without any evidence available on record to suggest that they have correctly assessed the goods and discharged Central Excise duty liability. Reliance is placed on the decision of Hon'ble Apex Court in Civil Appeal Nos. 11411-11413 of 2011 filed by Ramachandra Rexins (P) Ltd. against CESTAT Final Order Nos. 555-557/2011, dated 6-9-2011 as reported in 2013 (295) E.L.T. 116 (Tri.-Bang.) holding that clandestine removal need not be proved with mathematical precision and observed as under:-

> *"Tribunal further held that in a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by Department with mathematical precision. A person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In quasi-judicial proceedings, in such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt.--"*

8. The Appellate Authority has erred by not taking into consideration the above facts and grounds as mentioned above which clearly show that the Respondents had clandestinely cleared the finished goods and raw material without payment of duty which they are liable to pay to the

Govt. Exchequer as per the applicable provisions of the Central Excise Act, 1944 and Cenvat credit Rule, 2004.

3.1 As the matter has been listed on earlier occasions on 08.11.2024 and following order was recorded:-

"When the matter was called none appears on behalf of the Respondent nor any prayer for adjournment has been received, even notices for hearing were sent to the appellant's registered address i.e. 'Village Vehina, Meerut Road, Muzaffarnagar, UP-251001' but the same have been returned back by the Postal Authorities with the remarks "फर्म समाप्त हो चुकी है". In the interest of justice one more opportunity is being given.

2. Registry is directed to issue a copy of today's Daily Order to the Learned Authorised Representative appearing for the appellant-revenue, for service the same through the concerned Commissionerate to the Respondent, so that they can cause appearance on the next date of hearing. List on 14/01/2025."

3.2 None have appeared on behalf of the Respondent. Rule 21 of CESTAT Procedure Rules,1982 provides as follows-

"21. Hearing of appeals ex parte. —

Where on the day fixed for the hearing of the appeal or on any other day to which the hearing is adjourned the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte."

3.3 In view of the above, matter has been taken up for consideration *ex-parte* after hearing Shri Santosh Kumar, Authorized Representative who reiterates the grounds taken in the appeal.

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

4.2 Commissioner (Appeals) in the impugned order has held as under:-

> *"6.1 I further find that the SCN makes a very general allegation that physical stock taking of finished goods/inputs was conducted and was compared with stocks depicted in statutory monthly returns (July 2015) which revealed the alleged shortage of the inputs and the finished goods. No other documentary or any other evidence has been adduced which can lead to the conclusion of the alleged shortage and clandestine removal of the goods. No statement of any concerned person was recorded. Regarding the determination of alleged shortage, no method of verification / weighment of stock was mentioned in the Panchnama dated 31.07.2015. I further find that the shortage was never admitted by the appellant or his representative. In the absence of any corroborative evidence of the clandestine removal, the allegation of clandestine removal is not sustainable. Accordingly, the confirmation of demand of duty, based on the assumption of the clandestine removal, is not sustainable. In the case of CCE, Lucknow Versus Sigma Castings Limited (2012 (282) ELT 414 (Tribunal-Delhi)), the Hon'ble Principal Bench of the CESTAT have held as under. -*
>
> *7. I find that apart from the shortages, which are also contested by the assessee, inasmuch as there was no proper stock taking, there is no evidence showing the manufacture of the goods and their clearances without payment of duty. The clandestine removal being a positive act, the burden of proving the same is on the Revenue and cannot be discharged on the basis of conjectures and assumptions.......... The statement of the respondent's authorized representative, has nowhere accepted that such shortages are on account of clandestine removal."*
>
> *6.2 Moreover, I find that appellant had cleared the quantities as were recorded/shown in balance in his stock which was the same as were recorded as found short on*

physical verification. The goods were duty accounted for and were cleared, under the cover of invoices, in the subsequent months of October and November 2015 and the ER-1 returns were duly filed much before the issuance of the show cause notice on 26.07.2017. It is, therefore, evident that the entire duty liability stood self-assessed and admitted in the ER-1 returns for the months of October and November 2015 much before the issuance of the show cause notice. The fact regarding self-assessment of duty and declared in the returns were neither verified before the show cause notice was issued nor the adjudicating authority has taken pains to ascertain the same though the same was submitted before the adjudicating authority as is mentioned in para 18.4 of the impugned order. I find that there is no dispute that the appellant had self-assessed and admitted/ declared his entire duty liability in the ER-1 returns filed by him for the months of October and November 2015. Under the circumstances, in terms of the provisions of Section 11A (16) of the Act (effective from 14.05.2015) the provisions of the Section 11A of the Act were not applicable, and issuing a show cause notice for the demand of duty under the said Section 11A in respect of the duty liability already admitted/declared in the periodic returns was legally not permissible. The show cause notice dated 26.07.2017 was, therefore, bad in law. The subsequent proceedings vide impugned order in respect of a legally impermissible show cause notice are, therefore, not sustainable. The impugned order, therefore, suffers from serious legal infirmity and is liable to be set aside. The Board vide Circular No. 1053/2/2017-CX dated 10.03.2017-has also clarified that Section 11A (16) provides that provisions of Section 11A shall not apply for duty short paid or not paid which is self-assessed and declared in the periodic returns.

4.3 It has been constantly held that the demand could not have been made alleging clandestine clearance on the basis of the shortages detected during the visit of the officers to the premises of the Respondent, by eye estimation or otherwise, when physical verification of the stock has not been done by actual weighment. For alleging clandestine clearance much more substantial evidences is required to be established the same. In the present case we do not find any investigation been done to unearth further evidences to allege clandestine clearances. Commissioner (Appeals) has in his order relied upon the decision of the Delhi Bench in the case of CCE, Lucknow V/s Sigma Castings Ltd. [2012 (282) ELT 414 (Tri.-Delhi). Similar view has been taken by the Tribunal in the case of Surya Wires Pvt. Ltd. V/s Commissioner, Customs, Central Excise & Service Tax, Raipur reported at 2021 (376) E.L.T.550(Tri.-Del.) following has been held:-

> ***"11.*** *I further observe that there is no evidence of procurement of raw-material and consumption thereof. No single payment detail of clandestine sale has been discussed. Nor there is any evidence of any excessive power consumption which is otherwise required for the alleged large scale production. Nor there is any record of recruitment of workers or staff required for alleged massive production with no payment of record of salary and wages to such workers. No document in the form of receipts of any cash or kind on account of clandestine clearance and sale of goods has been seized from the parties. No evidences of removal of excisable goods or procurement of raw materials and its consumption are on record. I rely on the decision of Hon'ble Apex Court in the case of Continental Foundation Joint Venture v. CCE, Chandigarh-I - 2007 (216) E.L.T. 177, while hearing about decision of Allahabad High Court cited as Continental Cement Co. v. Union of India reported as 2014 (309) E.L.T. 411 (Allahabad), has laid down the criteria of investigation to prove the allegation of clandestine sale in following words :*
>
> *Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found*

that with regard to alleged removals, the department has not investigated the following aspects :

(i) To find out the excess production details.

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

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

13. *Finally, I observe that demand has been confirmed invoking the extended period of limitation alleging suppression of facts on part of the appellant but it is an admitted fact that monthly E.R. Returns have regularly been filed by the appellant. It becomes clear that all the relevant facts were in knowledge of the Department authorities since beginning. Except omission to file the declaration about job work from Sona Wires in terms of Notification No. 214/86-C.E., dated 25-3-1986 there is no other allegation which may amount as suppression. Law has been settled that every omission cannot be suppression. Hon'ble Apex Court in the case of CCE, Mumbai-IV v. Damnet Chemicals Pvt. Ltd. reported in 2007 (216) E.L.T. 3 (S.C.) has held as follows :-*

18. In the circumstances, we find it difficult to hold that there has been conscious or deliberate withholding of information by the assessee. There has been no willful misstatement much less any deliberate and willful suppression of facts. It is settled law that in order to invoke the proviso to Section 11A(1) a mere misstatement could not be enough. The requirement in law is that such misstatement or suppression of facts must be willful. We do not propose to burden this judgment with various authoritative pronouncements except to refer the judgment of this Court in Anand Nishikawa Co. Ltd. v. CCE [2005 (188) E.L.T. 149 (S.C)] wherein this Court held :

"We find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression."

(emphasis supplied)

14. *In another decision of Pahwa Chemicals Pvt. Ltd. v. CCE, Delhi reported in 2005 (189) E.L.T. 257. Hon'ble Supreme Court has held that mere failure to declare does not amount to misdeclaration or willful suppression. There has to be some positive act on part of the assessee to establish either willful mis-declaration or willful suppression. The failure of the appellant to provide all the relevant documents justifying the late filing of the declaration about job work cannot burden them with the fact of willful suppression specially, when all necessary details were provided at the first available opportunity of filing reply to the show cause notice. The Department, in view of the above observation, is not entitled to invoke the extended period of limitation. The entire demand being beyond the normal period is not sustainable.*

4.4 In the case of Super Smelters Ltd. V/s Commissioner of Customs, Central Excise & Service Tax, Durgapur reported 2020 (371) E.L.T. 751 (Tri. Kolkata) following has been held:-

"18. *It is evident from the panchnama dated 30-3-2011 that the shortage was detected on the basis of eye estimation and also on average weight without physical weighment. The department failed to gather any of documents from the factory of the appellant or elsewhere. Further, the loose documents which were recovered from the residence of Shri Ravi Bhushan Lal were not put to test for ascertaining to the authorship of these documents. Moreover, these documents could not be proved with the corroborative evidences. The investigating authority failed to elucidate the system adopted for the preparation of the relied upon documents which were allegedly based on these* *documents. The details contained on the loose sheets and third party documents are actually not comprehensible and, therefore, cannot be accepted as admissible piece of evidence. Moreover, none of the 12 persons on whose statement reliance was placed by the department were cross-examined. In C.C.E. v. Kuber Tobacco Product Ltd. [2016 (339) E.L.T. A-130] the Hon'ble Delhi High Court has held that without any corroborative evidence, loose papers, documents cannot be a sufficient to prove charges of clandestine removal. The Hon'ble Delhi High Court in case of C.C.Ex. v. Vishnu & Co. Pvt. Ltd. [2015-TIOL-2792-HC-DEL-CX = 2016 (332) E.L.T. 793 (Del.)] has also held that merely on the basis of statement made by the third party including transporter, agents and employees are not sufficient to prove the charges of clandestine removal in absence of independent corroborative evidence. The Hon'ble P & H High Court in case of M/s. G-Tech Industries Ltd. v. Union of India [2016 (339) E.L.T. 209 P&H] has held that Section 9D of the Act has to be construed strictly, as mandatory and not merely directory. We have seen that the learned Commissioner denied the request of cross-examination on the ground that it would further complicate the issue. We have also considered the following judgements cited by the appellant :-*

(i) M/s. Sakeen Alloys Pvt. Ltd. v. C.C.Ex. 2013 (296) E.L.T. 392 (Tri.) which was upheld by the Gujarat High Court [2014 (308) E.L.T. 655 (Guj.) and subsequently by the Supreme Court reported at [2015 (319) E.L.T. A-117 (S.C.)].

(ii) M/s. R.A. Casting Pvt. Ltd. v. C.C. Ex, 2009 (237) E.L.T. 674 (Trib). This judgement was firstly upheld by the Allahabad High Court reported at [2011 (269) E.L.T. 337 (All) and thereafterby the Supreme Court reported at [2011 (269) E.L.T. A-108] (iii) M/s. Triveni Engineering & Industries Ltd. v. C.C.Ex. 2016 (334) E.L.T. 595 (All).

19. *Relying on these judgments, we hold that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, employment of extra labour, seizure of cash, transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for clandestinely manufacture of finished goods, manufactured of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, amount received by the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. All these material evidence are missing in the present case and the evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal.*

20. *The shortage which was detected by the officers is based on average weight method basis and, therefore, mere admission by the Directors, who deposited the duty for the shortage, is not enough to proof that the goods were clandestinely cleared from the appellant factory. We have also considered the judgment cited by the appellant in case of C. C. Ex., Lucknow v. M/s. Sigma Castings reported at 2012 (282) E.L.T. 414 (Tri.-Del.), M/s. Micro Forge (I) Pvt. Ltd. v. C. C. Ex., Rajkot reported in 2004 (169) E.L.T. 251 (Trib.- Mumbai), C.C.Ex. Indore v. M/s. Kapil Steel Ltd. 2006 (204) E.L.T. 411 (Tri.-Del.), C.C.Ex., Lucknow v. M/s. Kundan Casting (P) Ltd. reported at 2008 (227) E.L.T. 465*

(Trib.-Del.), M/s. RHL Profiles v. C.C.Ex., Kanpur reported at 2013 (290) E.L.T. 247 (Trib.-Del.). In view of the findings contained in these judgments we hold that the shortage was detected on average basis is not sustainable and, therefore, we set aside the demand."

4.5 We also observe that the order in original, records the submissions of the respondent in reply to show cause notice and findings in respect of the shortages as follow:

"18.1 That factory was lying closed since January, 2015. During visit of Central Excise officers on 31.07.2015, no responsible person (directors) of the factory were available present in the factory. The stock verification was done in presence of witnesses who were not independent person of locality and they were of Meerut as per Panchnama datcd 31.07.2015.

18.2. That officers had not properly checked all the stocks lying scattered in the factory, they have only seen the stocks lying in open area near the entry gate, they have not verified the stocks lying at the back yard of the factory. In-spite of refusal by security person and Sh. Sanjeev Arora to sign they were compelled to sign the Panchnama. It was requested both the persons be called for cross-examination to arrive at true factual position. Shri Sanjeev Arora also stated to the above effect but no heed paid by officers. In such a situation, it could not be said that stock verification was properly donc by the officers om 31.07.2015, therefore there was no justitication to raise demand under the SCN dated 26.07.2017.

18.3 That in the Show Cause Notice allegation is that summons were issued to the Directors Shri Narendra Singh Panwar, Ashok Sharma & Yatendra Singh Panwar. It was submitted, due to recession in steel industry the factory was lying closed since Jan.2015 and the Directors were not *at Muzaffarnagar, therefore the summons could not be attended.*

18.4 That the stocks of finished goods as well as raw material lying in factory (closing balance of July 2015) were subsequently cleared in Oct.2015 and Nov.2015 and shown in records & ER- 1 returns. In support of it, copy of ER-1 return for the month of Oct.2015 & Nov.2015 was attached herewith which shows the balances of stock and clearance thereof as under:

ER-1 return for Oct.2015

Item	Opening Balance (in MT)	Clearances (in MT)	Closing Balance (in MT)	Value (in Rs.)	Duty (in Rs.)
Finished goods					
M.S. Ingots	1187.7	413.85	773.85	7035365	879135
Runner & Riser	27.93	22.31	5.62	312270	39220
Raw materials					
Sponge, Scrap	1388.83	635.68	753.15	8262757	1034474

ER-1 return for Nov.2015

Item	Opening Balance (in MT)	Clearances (in MT)	Closing Balance (in MT)	Value (in Rs.)	Duty (in Rs.)
Finished goods					
M.S. Ingots	773.85	773.85	0	13155535	1646162
Runner & Riser	5.62	5.62	0	78680	9835
Raw materials					
Sponge, Scrap	753.15	753.15	0	9693793	1213323

The assessee submitted that it was evident from the above, the balances of stocks of finished goods & raw materials (cenvatable) as per books of accounts were cleared on invoices on payment of duty and no stocks remained on which duty had not been shown at the time of clearances, therefore the demand show cause notice raising the demand of duty by treating it as clandestine removal was bad in law and liable to be set-aside. In above situation, there was no contravention of provisions of Rule 4(1), 6, 8(1), 10(1) &11(1) of Central Excise Rules,2002 as well as of Rule 3 & 4 of Cenvat Credit Rules.2004.

18.5 That the perusal of the Panchanama dated 31.07.2015. nowhere showed how the stock verification was done, there was no weighment sheet prepared and *attached with the Panchnama, therefore the stock verification could not be called as carried-out on actual weighment basis. It appeared the stock verification had been done by estimation by seeing only the front area of the factory and not the back yard of the factory where majority of raw material and finished goods were lying. Further, the Panchnama revealed that the officers visited the factory at 12:00 hours on 31.07.2015 and completed / concluded their stock verification and preparation of documents by 18:00 hours. This showed within six hours all the formalities of stock verification, verifying: the books of accounts and preparation of Panchnama etc. were completed which is not possible within span of six hours. This also proved that stock verification was not done correctly, it was on estimation only. In this reference, case laws were referred to by assessee in support of their defence.*

18.6 That Show Cause Notice is time barred issued beyond normal period of limitation of one year. Reference was made to case law in support.

18.7 That in view of submission made there was no shortage of goods (finished goods and raw material,) thus there was no contravention of rule 25 of Central Excise Rules or Rule 15 of Cenvat Credit Rules and no penalty was imposable and proceedings be dropped. Party also stated they would make final submission in he matter after cross examination of persons mentioned above.

19. ……..

20. Other noticees Shri Narender Singh Panwar and Shri Ashok Sharma vide letters received on 18.4.18 stated that they were looking after procurement of raw material and liaison with the Bank and not day to day affairs of the factory. They stated that they had already given reply they had made clearances on invoices in October, 201 5and November 2015, thus proceedings be dropped. Reference *was made to case laws as in reply of Shri Yatinder Singh Pawar.*

Discussion & findings :-

21. Having given sufficient opportunities for personal hearings which party has failed lo avail I proceed to adjudicate the case on allegations made in show cause notice. I have carefully gone through the case file, evidences available on records and defence replies as received on 18.04.18 I find following points needs to be determined-

(i) *Whether demand of Central Excise duty Rs.36,46,881/- on finished goods allegedly cleared clandestinely is required to be recovered alongwith interest.*

(ii) *Whether demand of Cenvat Credit Rs.55,34,264/- on raw material allegedly cleared clandestinely is required to be recovered alongwith interest.*

(iii) *Whether penalties are required to be imposed on noticees.*

22 At the outset on perusal of panchnama dated 31.07.2015 I find that a team of preventive officers visited the unit on 31.7.2015 which was lying closed. During the visit, the officers took a round of the factory premises and conducted physical verification of the stock of finished goods as well as Input/ Raw material lying in the factory premises in the presence of Shri Anil Baliyan, the Security supervisor of the factory, Shri Sanjeev Arora, the representative of the assessee and the two independent witnesses and proceedings was recorded in Panchnama dated 31.07.2015. I reproduce the relevant extract of panchnama as follows : -

---The officers then took a round of the factory and it was noticed that no manufacturing activities were being undertaken. The Guard Shri Main Pal and Shri Anil Baliyan told the officers that the production activities in the factory

has been lying closed since last six months. In the yard some stock of raw materials such as scrap, pig iron, sponge iron was lying.

On being asked by the officers Shri Anil Baliyan, Security Supervisor opened the office room where Central Excise records were kept. The officers tried to contact the owner of the factory through security guards but fail: Meanwhile, another person came in the factory and introduced himself as Sanjeev Arora and told the officers that Shri Nurender Pawar Director of the company has sent him to represent during the proceedings to be conducted by the officers. He also informed that Shri Yatender Singh Pawar, Shri Narender Pawar and Shri Ashok Sharma, all Directors of the company was out of station. He further informed that this company is lying closed since January, 2015. In the office, the officers found only daily stock register of finished goods for the year 2015-16 filled upto 30.06.2015 and two registers for mported/indigenous raw materials filled upto 31.03.2015 in the factory. Thereafter, the officers conducted physical verification of stock of finished goods i.e. M.S,. ingots and raw materials as per the method suggested by Shri Sanieev Arora. The details are as under :-

1.	*M.S, Ingots (Finished goods)*	*Nil*
2.	*Runner & Riser (Finished goods)*	*Nil*
3.	*Pig Iron (Raw material)*	*97 MT*
4.	*Sponge Iron (Raw material)*	*01 MT*
5.	*Scrap (Raw Material)*	*48 MT*
	TOTAL	*146 MT*

On perusal of daily stock account of the finished goods maintained upto 30.06.2015, it was observed thal there was stock of M.S Ingots and Runner Risers weighing 2137.700 MT and 27.927 M T respectively. Similarly, as per raw material account for imported/indigenous raw material *written up to 31.03.2015, there was stock of imported/indigenous raw material weighing 403.495 MT and 1183.855 MT respectively. Some of the records were resumed as per Annexure-A of this panchnama.*

The proceedings were conducted in a peaceful manner and no harm was cause to any person or property of the party by the officers. The officers took nothing except records mentioned in Annexure-A. The proceedings were started as 12.00 hrs. and concluded at 18.00 hrs. on the same day.----."'

In view of the panchnama drawn I find that:-

(i) There is no reason to suspect that panchas from Meerut were not independent I find no substance in the pleas of the party in this regard.

(ii) Claim of the party that stock were lying in backyard of the factory without any credible evidence presented by them, has no substance in view of above panachnama signed by the party's representative. Since officers took round alongwith party's representative and independent witnesses and found stock of material lying as recorded in panchnama.

(iii) Claim of the party that physical verification of stock of raw material as carried out cannot be done during the duration of proceedings, as no weighment slip is attached is based on surmises and afterthought without any evidences when at no stage of investigation same was contested. On perusal of Panchnama I find physical verification of goods (raw material) has been done to the satisfaction of the party's representative. I find that the officers tried to contact the owner of the factory but failed and physical verification was done to the satisfaction of Shri Sanjeev Arora party's representative as sent by Shri Narender Singh Pawar one of the Directors. Thus I find no

> *reason to doubt on manner of physical verification carried out by the officers. Stock of finished goods was physically verified to be Nil.*
>
> *23 In view of above, on comparison of the stock physically verified and those recorded in book balance of the shown in ER-1 Return of finished goods and ER-6 returns of raw material for the month of July`2015, I find that there was shortage of finished goods M.S. Ingot 11.87.70MT & Runners and Risers 27.927 MT , Total 1215.627 MT. Similarly there was shortage of 1234.577 MT in the stock of raw materials as given in tables in Para-6 supra*.

4.6 From perusal of the above as recorded in the order in original, it is evident that factory of the respondent was not working since January 2015 and admitted fact is that no production activities were undertaken by the respondent since then. At the time of visit as per the panchanama and finding recorded in the order in original (para 23) that there was shortage of 1215.627 MT (1187.70 MT (M S Ingots) + 27.927 MT (Runners & Risers)) of the Finished goods and 1234.577 MT of stock of raw material. Respondent had claimed before the adjudicating authority claimed that this stock was available in the factory premises and was subsequently cleared on payment of duty in the month of October and November 2015. These clearances have been reflected in the ER-1 return of the respondent as recorded in the tables in para 18.4. The fact this quantity has been cleared by the respondent in months of October and November 2015 is also recorded in show cause notice and the appeal filed by the revenue. It is also not in dispute that all the production activities in factory were closed since January 2015. Thus if the contention of the revenue, in respect of shortages was to accepted then also the duty demand needs to be adjusted against the payment of duty made by the appellant in the month of October and November 2015. The entire proceedings initiated by the show cause notice, would only amount the demanding the duty twice in respect of the same goods. To establish that the panchnama proceedings failed to take note of certain stocks lying in the backyard of the factory, respondent has asked for cross examination, which has been denied without according any reason. Thus once the factum of payment of duty in respect of the same goods alleged to be found short at the time of visit is established by way of clearances reflect in the ER-1 for the month of October and November 2015, we do not find any merits in this appeal filed by the revenue.

4.7 We also observe that the purpose of the review is to determine the legality and propriety of the order, and should not be to take magnifying glass and find some error in the order of the Appellate Authority for filing of the appeal. The function of the reviewing authority is to determine whether the Appellate/Adjudicating Authority had fairly considered all the evidences on record in light of the existing law/decision to determine legality/propriety of the order. In case of Sony Polymers Pvt. Ltd [2017 (357) E.L.T. 286 (Tri. - Mumbai)] Mumbai Bench observed as follows:

> ***9.****We find that none of the grounds of appeal are legally tenable or logically appealing. Review under Section 35B of Central Excise Act, 1944 is a power conferred upon high authorities to call for, scrutinize and direct appeal against orders that do not appear to be legal and proper. Impliedly, all orders are to be subject to such ascertainment but, in practice, appeals are filed only against orders that have been decided by the first appellate authority against Revenue. Recourse to the jurisdiction of the Tribunal is, thereby, thrust upon an assessee whose contentions have been upheld by Commissioner (Appeals) which is a senior position in the tax hierarchy. Hence, the conferment of powers of review upon an equally senior level whose wisdom is presumed to be doubled by sheer force of numbers. Half-hearted review or abdication of the power in favour of levels deemed to be incompetent on account of experience and maturity is gross contravention of the responsibility that accompanies*

conferment of power. For Revenue, such appeals do not cause incremental burden but they do impose additional costs on the assessee even when the matter has been decided in their favour. This power to appeal is, therefore, to be exercised with appropriate sagacity and consideration. Hectoring by us may not be visited with appropriate course correction. That consummation can be achieved only by the supervisory authorities. We do hope that the Central Board of Excise & Customs does take note of dereliction of responsibility on the part of its senior functionaries in the discharge of their statutory duties that load such burden on the assessee.

5.1 Appeal filed by revenue is dismissed.

(Operative part of the order pronounced in open court)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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