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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 15/02/2018

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70327-70331/2018-EX[DB] dated 12/02/2018

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/4052/2012	**Som Aromatics** B-71,sector-64 NOIDA UTTAR PRADESH
2	E/4053/2012	**Nissar Hussain** C/o M/s Som Aromatics B-71, Sector-64 NODIA UTTAR PRADESH
3	E/4054/2012	**V K Bansal Manager** C/o. M/s Som Aromatics B-71, Sector-64 NOIDA UTTAR PRADESH
4	E/4055/2012	**Atul Kumar Agarwal** C/o. M/s Som Aromatics B-71, Sector-64 NOIDA UTTAR PRADESH
5	E/55092/2013	**Commissioner CUSTOMS Central EXCISE and SERVICE TAX-Noida** C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH 201307

Name and Address of Respondent

	Name and Address of Respondent
6	C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307
7	Som Aromatics A-54.sector-64,, NOIDA ,U.P
8	C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307
9	C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA, UTTAR PRADESH-201307

10 C.C. & C.E. & S.T.-Noida
C-56/42...SECTOR 62,
NOIDA,
UTTAR PRADESH-201307

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Other Appellants and Respondents as per Annexure

Copy To

11 Advocate(s) / Consultant(s):

**Dr. Seema Jain & Abhishek Srivastava (Advocates) C/O
S. Jaina & Associates
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NEW DELHI,
DELHI**

12 Bar Association, CESTAT, Allahabad

13 Director Publications, Customs, Excise. I.P. Estate, Delhi

14 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

15 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

16 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

17 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

18 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

19 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

20 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

21 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

22 C.D.R. 23 Office Copy 24 Second Folder Copy 25 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

E/4052/2012, E/4053/2012, E/4054/2012, E/4055/2012
AND
E/55092/2013 EX(DB)

Arising out of O/O No.28/Commissioner/Noida/2012-13 dated 28.09.2012 passed by Commissioner, Customs & Central Excise, Noida.

M/s. Som Aromatics, Nissar Hussain, V.K. Bansal (Manager), Atul Kumar Agarwal, Commissioner, Customs & Central Excise, Noida

...APPELLANT(S)

VERSUS

Commissioner, Customs & Central Excise, Noida, Som Aromatics

RESPONDENT (S)

APPEARANCE

Dr.Seema Jain (Advocate) & Shri Abhishek Srivastava (Advocate) for the Appellant (s) AND Shri Rejeev Ranjan (Jt.Commr.)(AR) & Shri Pawan Kumar Singh (Supdt.)(AR) for the Revenue

Shri Rejeev Ranjan (Jt.Commr.)(AR) & Shri Pawan Kumar Singh (Supdt.)(AR) for the Revenue AND Dr.Seema Jain (Advocate) & Shri Abhishek Srivastava (Advocate) for the Respondent (s)

CORAM:

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

DATE OF HEARING : 18.01.2018
DATE OF DECISION : 14/02/2018

FINAL ORDER NO......70327-70331/2018

Per Shri ANIL G. SHAKKARWAR:

The above-stated 5(five) appeals are arising out of common impugned order-in-original No. 28/Commissioner/Noida/2012-13 dated 28.09.2012 passed by Commissioner, Customs & Central Excise, Noida. Therefore, they are taken together for decision.

2. Briefly stated facts of the case are that M/s.Som Aromatics were engaged in the manufacture of Pan Masala containing Tobacco commonly known as Gutkha under the brand name 'Dilbagh'. The goods manufactured were classifiable under Tariff Item No.24039990. The factory premises of M/s.Som Aromatics was inspected by officers of Central Excise on 27.08.2007. Officers physically verified the stock of finished goods as well as raw materials and also work in progress. Officers found some loose slips. It appeared to the officers of Central Excise department that said loose slips indicated clearances of 820 bags of Dilbagh Gutkha. It also appeared to them that said goods were removed without payment of duty. Further officers also collected gate passes issued by Shri V.K.Bansal, Authorized Signatory. The gate passes recovered from factory premises during the said search by the officers were bearing No.146 dated 13.08.2007 to 157 dated 24.08.2007. On 27.08.2007, statements of various persons were recorded such as Shri Vinod Kr. Bansal, Manager and Authorized Signatory, Shri Atul Kr. Agarwal, partner of the firm. Simultaneously searches were also conducted at a few premises such as M/s.Bimal Kr. & Bros., Moradabad. Statement of Shri Bimal Kr., partner of M/s.Bimal Kr. & Bros. was recorded on 27.08.2007. On 27.09.2007 statement of Shri Nissar Hussain, Partner of M/s.Som Aromatics was recorded. On 29.10.2007 statement of Shri Suresh Chandra Sharma, Proprietor of M/s.Sharma Filling Station, Ghaziabad was recorded. On 30.10.2007, search was carried out in the office of M/s.Top Fuel, Ghaziabad and ledger and a few Bill Books were recovered. Statement of Shri Hari Mohan Mathur, Manager of M/s.Som Aromatics and that of Shri Atul Srivastava, Manager (Admn.) were recorded on 05.11.2007. On the basis of statements and above stated evidences in the form of loose sheets, gate passes and ledger and Bill books recovered from fuel suppliers a show cause notice dated

21.01.2008 was issued to M/s.Som Aromatics and other 3(three) appellants stated above. In para 7.1 of the said show cause notice it has been stated as follows.

"7.1 On the basis of above verification of diesel consumption required to run the DG Set installed in the factory and taking into account the per hour consumption of HSD as 26.25 liters per hour in respect of two D.G. Sets of 380 KVA, which are of higher KVA rating vis-à-vis single D.G Set of 275 KVA (ostensibly kept and installed for use as stand by arrangement), the consequential quantum of production of finished goods for period December, 2006 to August, 2007 have been arrived at as per details shown in annexure 'A' to this notice."

Further it has been stated in para 7.2 as follows:-

7.2 Shri Nissar Hussain, the partner of the firm in his statement dated 27.09.07 has stated that 66 packing machines were installed during October and November' 2006. He has further confirmed in his subsequent statement dated 14.11.07 (RUD-18) that entire machines installed at different times in factory was operational in one shift of nine hours. Taking the above disclosure of Sh. Nissar Hussain as true and correct admission of the facts, the consequential manufacturing of goods during the period from October'06 to November'2006 is arrived at as per details shown in Annexure-'B' to this notice.

For the sake of ready reference Annexure 'A' & 'B' are as follows:-

Annexure-"A"

DETAILS OF PRODUCTION BY UTILISING UNACCOUNTED HSD (FUEL)

S.No	Month/Year	No. of operational pouch filling machine	Total unaccounted procurement of HSD (ltrs)	Per hrs. consumption of HSD (ltrs)	Total hrs. of running	Per machine per hrs. production	Total production	Ass. Value	Duty	E.Cess	Total Duty
1	2	3	4	5	6	7	8 (3 x 6 x 7)	9	10	11	12
1	Dec'06	81	9800	26.25	256	4800	100659200	50340600	33230736	996922.08	34227658.08
2	Jan/07	81	12000	26.25	457	4800	177681600	88840800	58634028	1759047.84	60393075.84
3	Feb/07	81	12000	26.25	457	4800	177681600	88840800	58634028	1759047.84	60393075.84
4	Mar'07	81	9000	26.25	343	4800	133358400	66679200	44008272	1320248.16	45328520.16
5	Apr'07	81	8400	26.25	320	4800	124416000	62208000	41057280	1231718.4	42288998.4
6	May/07	81	11500	26.25	438	4800	170294400	85147200	56197152	1685914.56	57883066.56
7	Jun'07	81	8400	26.25	320	4800	124416000	62208000	41057280	1231718.4	42288998.4
8	Jul'07	81	14000	26.25	533	4800	207230400	103615200	68386032	2051580.96	70437612.96
9	Aug'07	81	15000	26.25	571	4800	222004800	111002400	73261584	2197847.52	75459431.52
	TOTAL	729	97100		3698	43200	1437782400	718891200	474468192	14234045.8	488702237.8

Total duty payable 488702238
Duty already paid (to be appropriated) 6162517

66

Annexure-"B"

Details of Production during October-2006 & November-2006

Sl.No.	Month	No. of machines installed	Hrs.x days of operation	Per machine/per hrs. production	Total Production	Ass. Value	Duty	Cess	Total
1	Oct-06	66	08x21	4800	53222400	26611200	17563392	526901	18090293
2	Nov-06	66	08x25	4800	63360000	31680000	20908800	627264	21536064
		Total		9600	116582400	58291200	38472192	1154165	39626357

Less duty paid as per ER-1 return 684240

Duty short paid 38942117.

For SOM AROMATICS

Partner

3. On the basis of said Annexures M/s.Som Aromatics were called upon to show cause aso to why Central Excise duty amounting to Rs.52,76,44,354/- for the period from October 2006 to August 2007 should not be recovered under the provisions of proviso ~~of~~ to section 11A of Central Excise Acty, 1944. There was proposal in the said show cause notice for imposition of personal penalty under Rule 26 of Central Excise Rules, 2002 on Shri Atul Kr. Agarwal, Shri Nissar Hussain and Shri V.K.Bansal. Through Order-in-Original No.13/2009 dated 30.03.2009 Commissioner confirmed the demand. Appeal was preferred before this Tribunal. This Tribunal vide Final Order No.198-201/2010 Ex. dated 07.04.2010 remanded the matter to Commissioner to allow cross-examination of Shri Sharma of M/s.Sharma Filling Station and to decide about cross-examination ~~and~~

other witnesses in accordance with the provisions of law and relevancy of their statements. On 13.12.2011 cross-examination of Shri Hari Mohan Mathur, Shri Atul Srivastava, Shri Suresh Ch. Sharma of M/s.Sharma Filling Station was conducted. Further on 28.09.2012 impugned order was passed. Ld.original authority has held that the investigation in the case did not substantiate any corroborative evidence to show that raw materials were procured for the quantity of goods alleged to have been clandestinely removed in respect of which said demand was raised. He has further recorded that Revenue relied upon the diary resumed from M/s.Montage Enterprises, Noida, in which an amount of Rs.18,30,000/- has been shown to be reflected against the name of Shri Nissar Hussain. However, Revenue did not carry out any investigation at the premises of M/s.Montage Enterprises. Further ld.original authority has recorded that the contents of the said show cause notice dated 21.01.2008 nowhere revealed that the investigation was made in respect of locations in the factory premises where M/s.Som Aromatics stored the raw materials and the space occupied by M/s.Som Aromatics was sufficient for storage of such huge quantities of raw materials. He has also recorded that neither the documents in the form of private records, nor deficiency during the stock challenges was noticed by the officers to the effect that M/s. Som Aromatics had purchased the raw materials in excess of recorded balances. Therefore, he has come to the conclusion that the investigation did not reveal illicit procurement of raw materials, transporation of said raw materials to the factory premises, storage and storage related documents at the factory premises in respect of such unrecorded procured raw material and payment details in cash or otherwise for such raw materials. He has further recorded that neither the excess raw materials nor the excess finished goods were found in the store of the factory of M/s.Som Aromatics at the time of checking. Reliance was placed on the decision of this Tribunal in the case of Vira Badran v. CCE, Chennai reported at 2005 (182) ELT 389 (Tri.-Chennai). He has held that the said show cause notice dated 21.01.2008 was presumptive. He has further held that there was no evidence of clandestine removal of finished goods by transporting the same and sale of the same and realization of sale proceeds. He has further held that there was no evidence of sufficient manpower available with M/s.Som Aromatics to run 81 machines simultaneously resulting in clandestine manufacture of alleged quantity of goods. In view of the said observations he passed order which is reproduced below:-

ORDER

1. I confirm the Central Excise duty amounting to Rs.61,63,517/- (Rs.48,13,400/- and Rs.13,50,117/-) (Rs.Sixty One Lakhs Sixty Three Thousand Five Hundred Seventeen only) against M/s.Som Aromatics, Noida. Since the said duty has already been deposited by M/s.Som Aromatics, Noida vide challan No's 655536 dated 27.08.07 for Rs.20,00,000/-, 655037 dated 31.08.07 for Rs.28,13,400/- and 655084 dated 17.10.07 for Rs.13,50,117/-, I order to appropriate the same against the said demand of Rs.61,63,517/- confirmed against M/s.Som Aromatics, Noida;
2. I order to drop the demand amounting to Rs.52,14,80,837/- initiated against M/s.Som Aromatics, Noida vide show cause notice issued under C.No.CE(9)CP/76/07/192-195 dated 21.01.2008;

3. I impose a penalty of Rs.61,63,517/- (Rs.Sixty One Lakhs Sixty Three Thousand Five Hundred Seventeen only) on M/s.Som Aromatics, Noida under Rule 25 of the Central Excise Rules, 2002 read with Section 11 AC of the Central Excise Act, 1944 for contravention of provisions of Central Excise Act, 1944 and rules made there-under;
4. I impose penalty of Rs.10,00,000/- (Rs. Ten Lakhs only) on Sh.Atul Agarwal, under the provisions of Rule 26 of the Central Excise Rules, 2002 for contravention of Central Excise Act, 1944 and rules made there-under;
5. I Impose penalty of Rs.10,00,000/- (Rs.Ten Lakhs only) on Sh.V.K.Bansal under the provisions of Rule 26 of the Central Excise Rules, 2002 for contravention of Central Excise Act, 1944 and rules made there-under.
6. I impose penalty of Rs.10,00,000/- (Rs.Ten Lakhs only) on Sh. Nissar Hussain under the provisions of Rule 26 of the Central Excise Rules, 2002 for contravention of Central Excise Act, 1944 and rules made there-under.

4. Aggrieved by the order dropping the demand amounting ot Rs.52,14,80,837/- Revenue has preferred appeal before this Tribunal, which is bearing No.E/55092/2013. Aggrieved by confirmation of demand of Rs.61,63,517/- and imposition of penalties M/s.Som Aromatics, Shri Atul Agarwal, Shri V.K.Bansal and Shri Nissar Hussain have filed present appeals.

5. The grounds of appeal filed by Revenue are as follows:-

(i) The case of the department was already established on the basis of the statements and records. However, if the adjudicating authority were to give opportunity of cross examination to the appellant he has not given any reason why such opportunity was also not given to the Department. This appears to be so in the light of para 10 of Hon'ble CESTAT's Final Order No.198-201/2010 EX(DB) dated 07.04.2010 that "it will be in the fairness of the things for both the parties to allow the appellants to cross examine Shri Sharma." It is evident that the Hon'ble CESTAT had held to be "in the fairness of the things for both the parties" to "cross examine SHRI Sharma."

(ii) During the course of search it was found that three DG sets were found installed in the factory premises out of which two DG sets were of 380 KVA while the third was of 275 KVA capacity. On inquiry it was revealed that the unit had a domestic Electricity connection and the manufacturing in the factory ran on the DG sets only and that fuel for the DG sets was purchased from Sharma Filling Station, Vijay Nagar, Ghaziabad and Top Fuel, Hapur Mor, Ghaziabad.

(iii) Follow up action at the end of Sharma Filling Station was taken and Shri Suresh Chandra Sharma, Proprietor in his statement dated 29.10.2007 provided the ledger detailing the purchases made by Som Aromatics, Noida from them. He also stated that Som Aromatics was one of the parties to whom HSD was supplied by them on credit and the payment was received through one Shri Srivastava normally in cash and sometimes through cheque. Scrutiny of the fuel account maintained by Som Aromatics revealed that out of the 99800 Lts of HSD purchased by them they had accounted for only 2700 Lts. While 97100 Lts was not accounted for.

(iv) During the course of statement dated 05.11.2007 Shri Srivastava, Manager Administration was shown the entries relating to Sharma Filling Station and he admitted all the entries in the ledger from January 2007 onwards i.e. 31 out of 33 entries accounting for almost the whole of the HSD purchased.

(v) The adjudicating authority has committed a manifest error on the question of the nature of evidence required for determination of duty liability and evasion of duty in the present case of Gutkha under the misconception that he had to decide the question of evidence on the basis of an unsubstantiated statement made during cross examination which neither mentions the name of Som Aromatics nor can it be accepted against specific documentary record and his earlier statement made 4 years ago. The case was already established on the basis of statements made earlier and the records. Even after cross examination the position remained the same. The affidavits and retraction of a general nature cannot be accepted.

He thus, wrongly accepted the belated and retracted plea put forth by Shri Sharma of Sharma Filling Station during the course of cross examination made after over 4 years that the sale of the entire quantity of diesel was shown in the accounts in the name of 2-3 persons only at the end of the day because it was not possible for him to show it in the name of all the small customers. Documentary evidence cannot be rebutted by a general oral statement when the existence and preparation of the document has been admitted by the same person in the course of sale of HSD to M/s.Som Aromatics who were admittedly their customer.

(vi) Based on the belated retraction and afterthought the adjudicating authority did not accept all the above facts put forward by the department and accepted the retracted statement of Shri Sharma despite the fact he had earlier stated categorically that Som Aromatics was one of the few parties who purchased HSD in bulk on credit and which was substantiated and corroborated by the Ledger. It was a grossly belated retraction against his own categorical records. Further, nowhere has Shri Sharma stated that the entries in his ledger folio in respect of M/s.Som Aromatics were false. There is no denial during cross examination that the entries in the Ledger folio in respect of M/s.som Aromatics were incorrect. Al he has stated is that he was engaged in the business of selling petrol, diesel and mobile oil and a number of customers came to his petrol pump to purchase the diesel in small quantity i.e. in drums and cans etc. He further stated that the sale of the entire quantity of diesel was shown in his accounts in the name of 2-3 persons only at the end of the day because it was not possible for him to show it in the name of all the small customers and he could not say about the places where the diesel was taken by M/s.Som Aromatics after purchasing from his petrol pump. Generally, the diesel was supplied to M/s.Som Aromatics in drums and sometimes by tanker. The payment was usually made by M/s.Som Aromatics immediately after purchase of diesel in cash or sometimes on credit basis through cheques whereas, he had earlier stated he is supplying

HSD/Petrol on credit to few parties and M/s.Som Aromatics, Noida is among one of them and he confirmed that the details of account as appearing on ledger page No.7 and 8 as those belonging to M/s.Som Aromatics, Noida. Thus merely saying during cross examination that instead of booking the sales in the name of small buyers the sale was shown against Som Aromatics does not hold ground that is an afterthought and has no evidentiary value as it is contrary to the written record of the same person. In common trade practice in case of sale of goods on credit the quantity and value of the goods have a sizeable bearing on the transaction because payments are made accordingly and it is not viable to carry out business if the style resorted to by Shri Sharma during cross examination is accepted. A person cannot deny that the entry of sale in the name of one person was meant to be for sale to unspecified other persons, without any basis at all. As per the Indian Evidence Act, presumption is that business has taken place in the usual course. Thus the presumption is that goods/HSD was sold to the party in whose name it was mentioned in the record. Particularly when it is not denied that sale had been on earlier occasion been made to this party (Som Aromatics) who had seen that entry and had admitted them. Further, rebuttal of presumption under Section 114 (g) of the Indian Evidence Act cannot be arbitrary but has to be proved in accordance with the illustrations given therein. The retraction statement made by Mr.Sharma does not meet the requirement of rebuttal and thereby cannot be taken on record as having evidentiary value. As per law of the Section 114(g) of the Indian Evidence Act, the adjudicating authority ought to have ignored the belated and bare statement of Mr.Sharma, which was bereft of any basis.

(vii) In order to quantify the production of Gutkha vis a vis procurement and average consumption of HSD the factory premises of the party was visited by the officers of Central Excise and the consumption of diesel required to run the DG set of 380 KVA was verified in the presence of Shri V.K.Bansal, Manager and two independent witnesses and the per hour consumption was found to be 26.25 Lts. Per Hr. The proceedings were duly recorded under panchnama dated 31.10.2007. Similarly the consumption of HSD in

275 KVA DG set was verified on 02.11.2007 and was found to be 39.34 Ltrs. Per Hr. The fact was also recorded in the panchnama bearing the signatures of all the three parties namely the officers, the Manager of the party and the independent witnesses indicating therein that the verification was done to the complete satisfaction of the party as well as the witnesses. The adjudicating authority has ignored the consumption of HSD physically verified in presence of witnesses and party at that point of time, nor has adduced any credible reasons for ignoring the same while accepting the consumption as brought out in the affidavits filed by the party wherein they had taken an oath that the consumption of 380 KVA D.G. Set was taken as 26.25 Litres per hour by the officers while it was measured 78 litres per hour at that time.

(viii) A diary had been resumed from M/s.Montage Enterprises, C20, 21 & 22, Sector 57, Noida, (manufacturer of flexible packaging material i.e., printed laminate in rolls and pouch form) wherein an amount of Rs.18,30,000/- was reflected against the name of Sh.Nissar Hussain, one of the Partners of M/s.Som Aromatics, Noida. On being confronted during the course of recording of his statement dated 14.11.2007 he confirmed/admitted that the amount reflected that the amount related to the purchase of laminates from M/s.Montage Enterprises, Noida. Further this purchase was not reflected in their books/accounts indicating that the same was used for clandestine manufacture and clearance of goods in as much as there was no use of these laminates besides packing of the finished goods. This fact also finds force from the fact that during the course of search loose slips relating to clandestine removal of Gutkha, without payment of duty were recovered and M/s.Som Aromatics, on their own also deposited Rs.20 Lakhs and Rs.28.13 Lakhs towards duty liability and also on a later date indicating thereby that they were under no pressure or threat. The Hon'ble Supreme Court in the case of CC Madras Vs. D.Bhoormull-1983 (13) ELT 1546 (SC) has held that : "the department would be deemed to have discharged its burden if it adduces only so much evidence circumstantial or direct as is sufficient to raise a presumption in its favour with regard to the existence of the fact sought to be proved". However, the adjudicating authority failed to take cognizance of the contents of the diary relating to M/s.Som Aromatics and put them aside.

(ix) Further, the judgements cited by the adjudicating authority in favour of the party are not relevant because in the instant case a huge quantity of clandestine removal has been proved beyond doubt and the party had deposited the applicable Central Excise duty on the said manufactured and clandestinely cleared goods.

(x) In this connection it is very much relevant to mention that Hon'ble Tribunal in their F.No.198-201/10-Ex. Dated 07.04.2010 while remanding the matter to the Commissioner (which resulted into the impugned Order) have observed at para 9 as under-

> "Undoubtedly, the analysis of the evidence of the record disclose that apart from the statement of the Shri Shama and the ledger book, there are also other materials which are sought to be analysed to arrive at the finding of the liability for payment of duty quantified under the impugned order."

6. Heard Shri Rajeev Ranjan (Joint commissioner)(AR) AND Shri Pawan Kumar Singh (Supdt.)(AR) on behalf of the Revenue, who has presented the said grounds as scripted above. He has also submitted that the period of show cause notice is prior to the issue of Notification under section 3A of Central Excise Act, 1944 notifying Gutkha as notified goods.

7. Heard Dr.Seema Jain (Advocate) and Shri Abhishek Srivastava (Advocate) on behalf of other appellants. They brought our attention to the said Annexure 'A' and Annexure 'B' to the show cause notice through which the quantification of demand was arrived at. They have submitted that the entire show cause notice is based on the presumption that for running of one DG set for one hour total high

speed diesel required in litres was 26.25. Further each machine per hour produces 4800 pouches of Gutkha. Further there was another presumption that the appellant was running 81 machines continuously. Further on the basis of inadmissible evidence, the quantity of high speed diesel allegedly consumed by the appellant for various months was stated in column 4 of the said Annexure 'A'. On the basis of presumption of per hour consumption of HSD total hours for which 81 machines would have run was calculated and presuming that each machine produced 4800 pouches per hour, the running hours and the number of machines and factor 4800 was multiplied to arrive at presumed total production per month for the period from December 2006 to August 2007 and for such presumed production duty payable by the appellant was calculated at Rs.48,87,02,238/-. Similarly for the month of October and November 2006 it was presumed that 66 (sixty six) machines were working in the factory and each machine was giving 4,800 pouches per hour and on that basis demand of Rs.3,89,42,117/- was arrived at. The said two demands put together were demanded through the said show cause notice. They further submitted that Revenue arrived at the presumption of manufacture of 4,800 pouches per hour per machine on the basis of reply by Shri Nissar Hussain for one of the questions asked to him for recording his statement on 27.09.2007 and the question was of general nature. He was asked as to how many pouches one packing machine packs per hour to which he has replied that each machine is capable of packing 4,500 to 4,800 per hour. She has submitted that the question was not how many pouches they manufacture by using each machine in every hour, whereas the question was in general nature to know the capacity of each machine and that did not mean that all the machines were continuously running and producing 4,800 per hour and production took place and it was clandestinely removed. She has further submitted that consumption of Diesel @ 26.25 per litre per hour presumed by Revenue for calculation of said demand in the said Annexure 'A' was contrary to the technical literature which indicated that 79.5 litre of high speed diesel is required to run the generator per hour. She further submitted that the presumption that 81 (eighty one) machines were working all throughout was also not correct because Shri Atul Agarwal, partner in his statement informed that generally 25 to 30 machines used to work at a time. She has further submitted that statement is on record which indicates that for running two machines, three workers are required. Statement is also on record which states that at any point of time around 30 workers were working which indicates that around twenty machines were working and no more than 20 machines could be working at any point of time. Further to run 80 machines 120 labourers were required and Revenue has not brought any evidence to show deployment of 120 labourers. She further submitted that there were no documents of transportation in respect of such huge quantity of HSD to the premises of M/s.Som Aromatics and that there was no evidence of payment of freight for transportation of HSD. Proprietor of M/s.Sharma Filling Station, in his cross-examination on 13.12.2011 stated that entire sale of diesel was shown in the account of 2 or 3 persons at the end of the day because it is not possible to show it in the name of all customers. She further submitted that the ledger of fuel stations and Bill books were never made available to the appellants and partner of M/s.Som Aromatics was never confronted with the so called evidence of sale of such huge quantity of HSD of fuel station to M/s. Som Aromatics and therefore evidence on the basis of which such huge quantity of HSD presumed to have been used by M/s.Som Aromatics as reflected in Annexure 'A' is a third party evidence and therefore the same is not admissible in view of the provisions of Evidence Act as held by Hon'ble Delhi High Court in the case of L.K. Advani vs. Central Bureau of Investigation as reported at 1997 (41) DRJ 274. Further there was no evidence or investigation for removal of such large quantity of finished goods and no evidence of receipt of such large sale proceeds in cash. Therefore she has submitted that the entire show cause notice is presumptive in nature and presumptions were in respect of number of pouches manufactured by one machine per hour, the number of hours the machines were running etc..

8. In respect of her submissions on the departmental appeal she has submitted as follows:-

1. Sh. Sharma of Sharma Filling station does not claim to be author of the ledger at any stage. The handwriting of Sh.Sharma and the handwriting in the ledger is different. The author of the ledger not identified and brought on record. Statement of Sh Sharma in respect of the ledger which he has not written cannot be taken on face value

has to be subjected to cross examination which was allowed by Tribunal. In cross examination, Sh Sharma explained that the the entire sale of diesel was shown in the account of 2-3 persons at the end of the day because it is not possible to show it in the name of all customers. This is the common practice of all petrol pump stations and the explanation was accepted by the Commissioner.

2. The heading in the ledger "DIAL BAGH SOM" is not in the writing in which the entries have been made in the ledger which also casts a doubt that the entire entries in the ledger pertained to M/s.Som. The ledger may be an account of transactions of various parties. Also statement refers to Som Aromatics as the party whereas ledger is titled Dial Bagh Som which is again suspicious.

3. M/s.Sharma Filling station was visited on 29.10.2007. The resumed ledger maintained by Sharma Filling station shows sale till 16.10.2007.

- The Ledger of M/s.Som shows purchase of 3000 litres of HSD on 22.10.2007 vide bill dated 22.10.2007. The said bill was not entered in the Ledger of Sharma filling station which questions the entries in the ledger.

4. The Ledger was never shown to Sh Atul Agarwal, partner, who was the person placing order for HSD.

5. The ledger was not shown to Nissar Hussain who was partner.

6. The ledger was shown only to Sh shrivastava, Manager (Admn) who neither ordered the HSD, nor had any knowledge of the consumption of HSD.

7. The other grounds on which the Commissioner dropped the demand have not been contested.

8. Diary of M/s.Montage Enterprises, Noida without statement of any person from M/s.Montage Enterpries, Noida explaining the entries is only an assumption that lamination was purchased clandestinely.

9. In respect of grounds of appeal on the basis of para 9 of Final Order of this Tribunal dated 30.03.2009 she has submitted that Revenue has quoted only part of the said para. Subsequent to the sentences quoted by Revenue subsequent sentence contains as follows:

> However, the fact remains that the allegation against the appellant regarding the clandestine manufacture and removal of the product is essentially based on the working of the factory for part hours during the relevant period and the capacity of the factory to manufacture the quantity of product during such work. The factory could not have worked in the absence of proper supply of the diesel and it is the case of the department that the diesel was supplied by Sharma Filling Station. Undisputedly Shri Sharma was not made available for cross-examination. In other words there was no fair opportunity given to M/s.Som Aromatics to verify the genuineness about the ledger Book and genuineness of the allegations made by Shri Sharma.

She has submitted that above are the observations of Hon'ble Tribunal in the same paragraph. She has further submitted that for confirmation of demand the ld.original authority has relied on the same evidences which he has discarded for dropping of the demand and therefore, confirmation of demand is contradictory to the findings. She has submitted that the demand to the exact amount is confirmed by the original authority which matches the amount which was deposited by M/s.Som Aromatics on 17.10.2017. Further the confirmed amount is part and parcel of the demand arrived at on the basis of said annexure 'A' and 'B'. The said quantification in said Annexure 'A' and 'B' are presumptive therefore demand confirmed by the original authority needs to be set aside and appeal filed by Revenue may be dismissed. She has further submitted that the original authority has not conducted any examination in chief in respect of the statements relied upon for confirmation of said demand and it was held by Hon'ble High Court of Punjab & Haryana in the case of M/s.Ambika International v. Union of India and Another reported at 2016-TIOL-1238-HC-P&H-CX that the statements recorded under section 14 of Central Excise Act, 1944 do not have any evidentiary value if the adjudicating authority does not carry out examination in chief in respect of the said statements. Similar view was also held by Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd. v. Union of India reported at 2016 (340) ELT 67 (P & H).

10. We have carefully gone through the case records and submissions made before us. We are in full agreement with the ld.Counsel for M/s.Som Aromatics that the said Annexure 'A' which quantified the demand was based on various presumptions including the quantity of HSD required for running for one hour, the number of pouches that can be manufactured per hour from each machine and that 81 machines were running all throughout. Further the evidence of consumption of HSD was based on the record collected by Revenue

from fuel stations and the same record was not confronted before the partner of the appellant M/s.Som Aromatics and therefore the said evidence became third party evidence in view of the pronouncement of the Hon'ble High Court of Delhi in the said case of L.K. Advani (supra), and therefore, such third party evidence is not admissible. It was held in para 97 of the said ruling as follows:-

> "97. In the present case there is no evidence against the petitioners except the diaries, note books and the loose sheet with regard to the alleged payments (vide Mr Nos.68/91, 72/91 and 73/91). The said evidence is of such a nature which cannot be converted into a legal evidence against the petitioners, in view of my above discussion.

10. We are, therefore, in agreement with the ld.Counsel for M/s.Som Aromatics that the entire show cause notice is presumptive. Revenue could not establish manufacture of 116582400 pouches of Gutkha during the period from October, 2006 to November, 2006 and Revenue could not establish manufacture of 1437782400 pouches of Gutkha for the period from December, 2006 to August, 2007 alleged in the said show cause notice. Central Excise duty is on manufacture. Unless manufacture is established Central Excise duty cannot be demanded. In the present case the burden to prove that above stated quantity of pouches were manufactured by M/s.Som Aromatics was on Revenue. We hold that Revenue could not establish manufacture of above stated quantities of pouches of Gutkha during above stated period. We therefore, hold that the said show cause notice dated 21.01.2008 is presumptive in nature. Therefore, we hold that the appeal filed by the Revenue has no merits. We also find that the confirmation of demand

by the original authority and imposition of penalties by original authority through impugned order are not sustainable because the amount confirmed through the said Order-in-Original is part and parcel of the said demand raised through the said show cause notice which is presumptive in nature. We therefore dismiss Appeal No.E/55092/2013-EX(DB) and allow remaining appeals bearing No.E-4052-4055/2012-EX(DB).

(Pronounced in the court on 12/02/2018)

Sd/-	Sd/-
ASHOK JINDAL	**ANIL G. SHAKKARWAR**
(MEMBER JUDICIAL)	**(MEMBER TECHNICAL)**

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