CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

E/742/2008-DB

[Arising out of Order-in-Original No. 5/2008 dated 04/07/2008 passed by Commissioner of Central Excise & Customs, Cochin]

M/s. K.K.PLASTICS
1/2437 INDUSTRIAL DEVELOPMENT AREA,
ERUMATHALA P.O. ALUVA

Appellant(s)

Versus

C.C.,C.E.& S.T-COCHIN-CCE
C R BUILDING,
I S PRESS ROAD, ERNAKULAM,
COCHIN,
KERALA
682018

Respondent(s)

Appearance:

Mr. Arshad Hidayatullay & Mr. P.Nagendran, Advocate
NAGENDRAN AND NAGENDRAN
SREEPATHAM KRISHNASWAMY ROAD,
COCHIN -682035

For the Appellant

Mr. S.Chandramohan, Commissioner, AR

For the Respondent

Date of Hearing: 07/12/2018
Date of Decision:17/01/2019

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No.20054/2019

Per : P. ANJANI KUMAR

This is a case of alleged clandestine removal. Officers of DGCEI inspected the premises of the appellants, i.e. M/s K.K. Plastics, and have conducted an investigation. On the completion of investigation a Show Cause Notices dated **20.7,2006** and **1.3.2007** alleging clandestine removal etc. of plastic molded chairs by the appellant is alleged. Commissioner of Central Excise has upheld the SCN vide order 5/2008 dated 4.7.2008 and confirmed duty demanded, confiscated goods seized and imposed penalties on the company and persons involved therein. Hence, this appeal.

2. Ld. Counsel for the appellants submitted that to establish Clandestine Removal the burden is on the department to establish that there was clandestine manufacture because without manufacture no duty can be levied; there must be cogent, solid direct evidence of clandestine removal without payment of duty; Cases of Clandestine Removal are quasi criminal and hence the burden is more heavily on the revenue; in a case of Clandestine Removal there can be no presumption or assumption on any aspect here it is the price of the chairs.

2.1. Ld. Counsel submitted that if the search and seizure is tainted or illegal then the entire case of relied upon documents in the Mahazar falls flat on its face; the only witness who has testified about the recovery of the pen drive is one Pradeep Kumar. His evidence on cross examination is patently contradictory for the following.

(i). He says that he was present in the factory but cannot state whether he went to the office room.

(ii). He states that the pen drive was recovered from a dustbin but did not see the pen drive being seized. He further adds on hearsay that somebody told him that the pen drive was taken from the dustbin. The revenue alleges that it was seized from a drawer at the office. But the witness does not know whether it was taken from the drawer.

(iv). He cannot remember whether he was carrying a pen drive or the name of the pen drive.

It is significant that the address given by him as his residence is actually the address of Mr. Santhakumar who was an officer of the Excise who was present when the search was carried out. He also states that the said Santhakumar was one of the persons who conducted the raid and had asked him to come to appellant's factory to be present as a witness at the time of the raid. It is relevant to note that Santhakumar asked the witness to travel from Trichur to the factory a distance of 40-50 km when the search party could have picked up anybody else as a witness like the second witness.

2.2. The appellants have always maintained that they were doing job works previously for another company and the parting with them was not amicable and the entire search was done at the instigation of that company is active connivance with some officers of the Central Excise Department. The witness Pradeep Kumar gives his address in the Mahazar as Sindhu Nivas, Nettusserry, Thrissur. He admits in cross-examination that it is the addresses of Mr. Santhakumar and not his address. He states that Shri Santhakumar was part of the raid team and was present at the search. However, N.P. Grampurohit, Intelligence Officer, DGCEI categorically states that Mr. Shanthakumar was not part of the search party. Mahazar witness states that Mr. Shanthakumar had asked him to come to the appellant's factory as he was required to be a witness. The witness then travels on a Motorcycle for 40 km to be present at the search at the appellant factory. The witness Mr. Pradeep Kumar also admits that he was talking to the said Mr. Shanthakumar and another Inspector on that day of the witness's cross examination. It is here pertinent to state that Mr. Shanthakumar had by then been transferred to Mangalore and hence the only conclusion that can be deduced for his presence at Cochin is that he was there to coach the witness.

2.3. Ld. Counsel further submitted that there were discrepancies in the statement given by the Mahazar witness Shri pradeep kumar. The witness is not a chance witness but as admitted by him he was asked to travel more than 40 km to be present at the appellant's factory for the search. He has asked to do so by his neighbor Shri Shanthakumar, a Central Excise Officer. In the Mahazar he falsely states his residential address to be Sindhu Nivas, Nettusserry, Thrissur which he he admits in cross examination to be the address of Mr. Shanthakumar.

2.4. The alleged seizure of the pen drive is stated to have been effected from a drawer in the office of the appellant. Shri S.A. Hariprakash SIO, DGCEI, confirms that the pen drive was seized from the drawer as stated in the Mahazar. The Mahazar witness Shri Pradeep Kumar in his cross examinations stated that he was there and from some dustbin the pen drive was ceased" (in answer to Question 21). In answer to the next question he stated that he did not see the pen drive being seized but somebody told that the pen drive was taken from the dustbin. Towards a specific question as to whether the pen drive was taken from the drawer he stated that he did not know. He also stated that he did not know whether the print out were taken from the factory or from the pen drive; he did not know whether the print outs were made into the file. This is in contrast to the answer of Shri N.P. Gramaprohihit who stated that print outs were taken by the search officers in the presence of the two Mahazar witnesses and two employees of the company. The witness further could not recall the brand name of the pen drive and also states he was unaware whether any computers were seized. Shri Mr. S.A.

Hariprakash stated that the statement in the Mahazar was typed by one of the Officers as narrated by the witness. In answer to question 48 the witness instead stated that he did not know who prepared the statements, the statements was prepared and then read over to him. In answer to the next question he categorically stated that the statements were prepared not as per his direction but the Inspector prepared. The Mahazar was prepared in English but on being asked whether the witness could read English he stated he could read. Three words from the Mahazar were put to the witness to ascertain their meaning and he replied that 'Moulding' meant 'covering', Provisions" meant 'job' and he did not know the meaning of 'incriminating'.

2.5. Ld. Counsel submitted that more interesting was the case of the other Mahazar witness. The department was unable to bring the said Shri Rajib Dan as he first was said to have moved to Calcutta. M/s. K.K. Plastics on their own initiative made enquiries and furnished the correct address of the Shri Rajib Das in Calcutta. However, the department for reasons known only to them or may be seeing how the case was faring after the deposition of Mr. Pradeep Kumar, which had already done extensive damage to the case refused to produce the Mahazar witness. Adverse inference ought to be drawn from the inability of the department to produce the Mahazar witness. The Mahazar is also signed by Mr. Gorakh Bist who is the Machine Operator of M/s. K.K. Plastics. He stated before the Commissioner that he had studied only up to 7th standard and that he knew only Hindi and Nepali; he was asked to sign some papers.

2.5.1. From the forgoing it is clear that the seizure of the pen drive cannot be established for reason that no witness has seen the pen drive being seized. One witness claimed it was seized from the dustbin. Mr. Gorakh Bist was also not present when the pen drive was said to be found and the Mahazar says that the pen drive was secreted inside a draw. Shri N. P. Gram Purohit would also say that Shri Gorakh Bist was present when print outs were taken. This has been denied by Mr. Gorakh Bist.

2.6. Ld. Counsel for the appellants submitted that the entire SCN is based on the evidence contained in the said 'pen Drive'. The recovery of the same and the truthfulness of the Mahazar is suspect in view of the above. Clandestine removal being a serious charge the department needed to establish the same with cogent evidence on procurement of raw material, manufacture, clearance, transportation, receipt of sale proceeds etc. The department has not discharged the burden and therefore, the Show Cause Notice falls flat and the OIO is liable to be set aside.

3. The Ld. Commissioner, AR for the respondents gave an elaborate submission on the applicability of evidence quoting ratio of various judgements, in favour of the respondents, on the point of applicability of evidence, non-vitiation of proceedings where witnesses were pre-arranged or where witnesses could not totally recount the Mahazar proceedings or where witness's version during cross –examination was slightly in variance with Mahazar proceedings et. He submitted that

(i). the appellants are only pleading that they are innocent without adducing any evidence; the appellant has only questioned the validity of Search and Seizure on flimsy ground; The case is built up not only on the 'Pen Drive". Three CPU- Hard Disks seized, Production Slips, Other Records in KKP etc, statements were recorded from the concerned, corroborate the conclusions.

(ii). Appellants dis-own the Pen Drive and its Printout thereof; they are not able to explain most of the entries found in their private records and that they have no explanation for the corroborative statements of their Dealers & Drivers. The Ownership of the "Pen Drive" and "Printout" thereof are established with concrete documentary evidences with mutually supported corroborated statements.

(iii). 3 CPU-Hard Disks seized are not questioned by the appellant. Hence the Printouts of the data in the Hard Disks are used to cocreate other data of the appellant despite the destruction of Actual Price Documents by the appellant. Other Private records recovered and seized in residential/factory premises of the appellant, sister units & dealers which are used to link the unaccounted transactions of the appellant.

(iii). Unaccounted Chairs and Stools are also seized in three units viz. KK Plastics, Beverly Agencies, Green fair Marketing.

(iv). Managing Partner Sri KK Ibrahim also admitted the offence on 24.01.2006 who has retracted his statements as per legal advice later without any proof of threat or duress.

(v). Almost 12 Dealers/Distributers through their statements confirmed impugned illegal Sales Pattern of KK Plastics. Most of the Dealers/Distributers confirmed in their statements that they paid extra cash over and above the Sale Price shown in the Bills to the Drivers who delivered the goods. The Drivers of KK Plastics also confirmed that they receive the CASH from the dealers when they delivered the goods.

(vi). Shri Afsal, son of KK Ibrahim who is one of the partners of the firm KK Plastics admitted that their Drivers used to handover Cash to him in the absence of his father. This admission corroborated the facts that the dealers/distributers paid cash for the extra value.

(vii). The data retrieved by GEQD, Hyderabad from the Pen Drive and Hard Disks also used to co-relate and confirm most of the entries found in other Private records of KK Plastics.

(viii). The Destruction/Surrender of documents titled “Estimate” also proved through the confessional Statements of Sri KK Ibrahim which was corroborated by various Dealers in their statements.

(ix). Seizure of "Unaccounted Branded Chairs and Stools" along with Records in KKP, Beverly Agencies & Green fair Marketing supplement the evidence.

3.1. Ld. Commissioner AR has submitted that even though, in the QUASI-JUDICIAL Proceedings, the contravention of Central Excise Act and Rules not required to be proved with mathematical precision, in the instant issue, the clandestine transactions of the appellant have been proved with legally convincing evidences. By taking into account of the entire facts and circumstances, the Adjudicating Authority has confirmed the SCNs which are legal and proper. As the appellant is making attempt to hide the “entire Pumpkin” in a handful of rice in a plate, the vague Appeal preferred by the appellant is liable for dismissal. The Hon’ble Bench may dismiss the Appeal restoring the order of the Original Adjudicating Authority.

3.2. Ld. Commissioner AR has submitted his replies to the claims of the appellants as below.

3.2.1. Contention: Witness was not residing in the given residential address and was arranged by one Shri Shanthakumar

Rebuttal: No Enmity between Shanthakumar & M/s KKP and between the Witness and M/s KKP was alleged. Further there is no legal bar that Witness should reside in his permanent Native Address.

3.2.2. Contention: witness was unable to say whether the Office was visible from outside the factory

Rebuttal: Irrelevant.

3.2.3. Contention: he did not see any women employees

Rebuttal: Incorrect. In response to Q.18 of Cross Examination; he replied that there was one woman employee.

3.2.4. Contention: witness could not read the word "Narrated"; could not read the News Paper and that he gave wrong answers for three "words" found in the Mahazar.

Rebuttal: if the Witness is Capable to understand & perceive the facts of Search and Seizure and able to narrate the same, there is no bar for him to be a Witness.

3.3.5. Contention: he did not see the Pen Drive being seized somebody told that the Pen Drive was taken from the Dustbin.

Rebuttal: When three or four officers are making search in the premises including Toilet, it is impracticable for the Panch Witness to follow the Officer like his shadow. If any Tiny Objects like Pin, Needle, Nail, etc is found and taken, the Witness cannot be faulted that he has not seen the recovery of Pin inside the premises. None will expect that each and every item detected is to be announced /inform openly in front of Witness. Because each officer in the search team may search different locations in the same premises and find different items. Further it is not known whether the Pen Drive is an empty one or it contains some irrelevant data or relevant data at the beginning. After taking Printout of the content only CEO will come to know the Pen Drive is having "Evidential Data". Under the background the credibility of the Witnesses should not be discarded.

3.2.6. Contention: The Statements were not prepared as per witness's directions. The Inspector only prepared the Statements.

Rebuttal: After the Search & seizure, Mahazar is to be prepared as per Law(CrPc & C.Ex). It cannot be prepared by anybody's directions. Only after preparation, Witnesses will attest the Mahazar after understanding the contents thereof. If they don't understand the content, or if any doubt is there, the Witnesses can refuse to attest it.

3.2.7. Contention: He is not the local resident but he is coming from 50 km away from the Searched premises.

Rebuttal: There is no legal bar for a Witness who is away from the Search Locality. Sections 100(4) & (5) of Cr. P. C are only guidelines.

Ld. Commissioner AR submitted that in the case of P. V Pzltan Mailah **reported in 2005 CR1 LJ 918,** Hon'ble supreme Court held that

"*The* ***evidence obtained under illegal search could still be admitted in*** *evidence provided there is no express statutory violation or violation of the constitutional provisions. For example, if certain specific enactments are made and the search or seizure is to be effected in accordance with the provisions of such enactment, the authorities shall comply with such provisions.* ***The general*** *provisions* ***given in the Criminal Procedure Code are to be treated as guidelines*** *and if* ***at all there is any minor violation, still the court can*** *accept the evidence and the courts have got discretionary power to either accept it or reject it. In the instant case, we do not think that the court has* ***violated any such provision merely because the witness was not from the same locality and his evidence cannot be rejected."***

3.2.8. Contention: Shri Gram Purohit, who prepared the Mahazar, would state that at the time of Search, the officers went looking for two witnesses and they were found outside the factory premises. This is in direct contrast to the statement of Mr. Pradeep Kumar who would state that he was asked by Shri

Shanthakumar to be a Witness to the raid.

Rebuttal: No contradiction has been found. Even for the sake of argument, it is accepted that Shri Shathakuamr asked Sri Pradeep Kumar to be a Witness, none can rule out the possibility that Shri Shanthakumar might have also asked Sri Pradeep Kumar to stand outside the factory premises till the Search Officers found & requested him to be a witness. Accordingly, Sri Pradeep Kumar might have been brought from outside the factory. So question of contradiction does not arise at all. However, Contradiction relating to witnesses from "outside factory" or "inside factory" will not discredit the recovery and seizure of the impugned "Pen Drive". Moreover, Witness cannot be discarded on the grounds that discrepancies are found in the Deposition of Witness. He submitted that, **the Hon'ble Supreme Court in the case of Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat on 24 May, 1983 [1983 AIR 753]** laid down **SEVEN GOLDEN PRINCIPLES** for **appreciating evidence of the Witness as** and held **that** We do not consider it appropriate or permissible to enter upon a reappraisal or re-appreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. **Over much importance cannot be attached to minor discrepancies. Discrepancies which do not go to the**

root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factors" echoes in favour of the version narrated by the witnesses. "The Hon'ble Supreme Court **in the case of State of Rajasthan V Smt Kalki** 191 *SCC(2)* 752, in para 6 held that

"in the depositions of witnesses there are always some normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time*, due to mental disposition such as shock of horror at the time of occurrence, and the like."*

The **Supreme Court** in the case of **Modan Singh v. State of Rajasthan, AIR 1978 SC 1511: (1978 Cri LJ 1531) in para 9**, held that

"*it is found that the witness who have been examined for attesting the seizure have not supported the prosecution version. On behalf of the defence it was submitted that the seizure witnesses were not men of status in the village and their supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo.* ***If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witness do not support the prosecution version."***

3.2.9. Contention: Non-Availability of Cross Examination of another Mahazar Witness Sri Rajib Dan is a fatal to the seizure

Rebuttal: The Original Authority in **para 94.31** of Order in Original clearly stated that non availability of Sri Rajib Dan do not make the mahazar invalid. In this regard, it is further submitted that **Sri Rajib Dan is only a Panch** Witness. **He has not witnessed any crime committed by the appellant. He has only observed the scene of Search operation and to** ensure that search is conducted peacefully in an orderly manner without causing any damage to the person or property etc and attest the Mahazar. Moreover, the Managing Partner Sri KK Ibrahim confessed that the used the Pen Drive in their factory. The retraction of statement letter sent by him also is not having any substance or poof. Under the background, the question of Cross examination of Panch Witness is not required at all.

As per **Section 100(5) of CrPc, 1973,** it is not imperative that the **Search Witness** should be called for their evidence. Further, the Hon'ble Supreme Court **in the case of Surjeet Sing Chhabra V UOl in** 1497(9) ELI 646 (SC) ruled that It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross examination by the petitioner. The Supreme Court in the case of Modan Singh v. **State of Rajasthan, AIR 1978 SC 1511** held that

it the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witness does not support the prosecution version."

By applying the ratio of the above referred judgements of Hon'ble Supreme Court and Section 100(5) of CrPc,1973, the non-availability of one Search Witness Sri Rajib Dan will not vitiate the Search and admissibility of Seized material evidence. The plea of the Appellant is liable rejection in Toto on this count.

3.2.10. Contention: Sri Gorakh Bist, Supervisor & Machine Operator did not witness the Seizure of Pen Drive. He studied only 7th std and he knows only Hindi and Nepali and he stated that he was asked to sign some papers.

Rebuttal: Original Adjudicating Authority in Para *94.32* noticed that he (Sri Gorakh Bist) has written in his own hand in the bottom portion of the said Mahazar that "Received copy with necessary A.B. and seized goods as above" and affixed his signature below that. Therefore, he knew a little English. He had not so far made any independent retraction, allegation or complaint regarding Search or Seizure. He is still continuing in their factory as the Machine Operator. Hence his statement made during cross examination is "after thought" to benefit his employer. The Adjudicating Authority in **para 94.35** recorded that **Smt Aswathy, Office** Assistant of M/s K. K. Plastics was also present in the factory at the time of search and recovery of Pen Drive and Printouts were taken by the officers with the help of Smt Aswathy. This fact was clearly recorded in the Mahazar dated 24.1.2006. This fact was **not retracted** or **denied** by her or sought to be disproved **by way** of **cross examination.**

3.2.11. Contention: The Ownership of the "ZION" Brand - "Pen Drive" of 256 MB is not established and there are contradictions in the statements of Sri Afsal regarding Usage of Pen Drive:

Rebuttal: The "**Pen Drive"** seized is branded as **"ZION"** having the capacity of **256MB. Sri.K.I.Afsal,** the son of K.K. Ibrahim, Managing Partner of M/s K.K. Plastics also confirmed by his own hand writing as a reply to Q.5 & 6 in his **statement dated 15.5.2006** that he got one **"Pen Drive"** through Sri Aijee George for study purpose in April or May 2005. The **brand name**

of the Pen Drive is **starting with the letter "Z".** It was **256MB.** Both versions of the Sri Afsal clearly **established that the Ownership of the Pen Drive lies with Sri Afsal.** This fact of ownership was corroborated by **Sri Aiju George, Hardware Engineer,** who has deposed in his Statement dated 28.4.2006 that he had been attending computer related works in M/s K. K, Plastics, Karothukuzhy Plastics and residence of Sri Ibrahim and he had supplied one **256 Mb-ZION —brand Pen Drive,** by purchasing from Skynet Computers, Perumbavoor, as required by him.

3.2.12. Contention: Sri Afsal stated on 155.2006, that he has lost the Pen Drive, whereas during the course of Cross Examination, he stated that he has handed over the Pen Drive to his friends. The Pen Drive owned by Sri Afsal was used for his Study purpose?

Rebuttal: If the **Pen Drive** is **handed over to his friends, on what basis, Sri Afsal stated that the Pen Drive is lost when the CEOs asked him to produce the Pen Drive.** This contradictory stands itself clearly proved that Sri Afsal had *"ma/a fide"* intention to mislead the investigating and adjudicating authorities. He only tried to create a scene that the subject Pen Drive was not used in their Firm, as the CEOs detected offence case against their Firms with the concrete evidence of "Pen Drive" and other records seized in their premises. The Statements of Sri Aiju George, Sri Jinson Thomas and Sri S.K. Benidle who have attended Computer System related job to M/s K. K. Plastics proved beyond doubt that the impugned Pen Drive had been used in M/s K. K. Plastics to maintain their unaccounted transactions. Sri **Aiju George, Hardware Engineer,** in his Statement dated 28.4.2006 deposed that he had been attending computer related works in M/s K. K. Plastics, Karothukuzhy Plastics and residence of Sri Ibrahim. As required by Sri Afsal, he had supplied one **256 Mb-ZION —brand Pen Drive,** by purchasing from Skynet **Computers, Perumbavoor and installed the "Pen Drive" at their factory.** Further, he deposed that he personally gone to the place and he himself installed the software in that computer and he received **Rs.2100/-** towards the **cost of Pen Drive and installation and service charges.** Sri Aiju George only stated during the course of Cross Examination that he had not seen the Pen Drive being used in M/s K. K. Plastics during his visit to that factory. **In this regard, it is to submit that "Pen Drive" is not a device inbuilt in the Computer system permanently. It can be attached in and detached from the Computer/Laptop as per the convenient of the user.** Hence, the "pen Drive" not seen by Sri Aiju George during his visit to the factory will not establish that the impugned "Pen Drive" was never used by M/s K. K. Plastics **Sri Jinson Thomas,** in his Statement dated 26.4.2006 deposed that he was **involved in the Development of Accounting Software by name "FAST"** while working along with Sri Benidle and Sri Dony in the firm viz Aldous Glare **Trade and Exports and that "FAST" SOFTWARE was supplied to many customers including M/s K. K. Plastics** They had quit the firm, but continued to provide software support for accounting purpose to M/s K. K. Plastics on the programme "FAST" supplied by Aldous, that the "FAST" is an accounting system, for accounting and inventory; that the **"FAST" Software could be used in external devices like CD, Pen Drive** etc. He also knew that M/s **K. K. Plastics were using the "FAST" software in their Pen Drive.** He also **confirmed that the impugned Print Outs (except few pages) having taken by FAST software. Sri S. K. Benilde,** in his statement dated 26.6.2006 has confirmed his involvement in the development of "FAST" software for Financial Accounting and Inventory; that software was supplied to Sri K. K. Ibrahim of M/s K. K. Plastics and that he knew that Sri Jinson/Dony were providing support of "FAST" software to many customers including Sri K.K.Ibrahim. It is pertinent to note here that **Sri Aiju George, Sri.Jinson Thomas and Sri. S. K. Benilde have not retracted their statements. Further, they have not made any contradictions to their statements during the course of Cross Examination" also**

3.3. The Ld. Commissioner AR submitted that the GEQD, Hyderabad, after conducting due forensic analysis, sent **Supplementary Report dated 11.7.2006** *(Marked as* Annexure C-56) confirming that the files and folders available in the suspected Digital Storage Media marked Q4 (Seized Pen Drive) is also available in the suspected Digital evidence storage media marked as Qi & Q3 (-Seized Hard Disks of KK Plastics).

3.3.1. The Computer Hard Disks seized were **not disowned** by the Appellant. Hence they are the owners of the files and folders available in the Hard Disks. The Adjudicating Authority in **para 94.36 (page SI No: 182)** of the 010 made his detailed findings of the **Statement of Sri. K. K. Ibrahim,** the Managing **Partner of M/s K. K. Plastics. In his statement dated 24.1.2006, he had admitted that the incriminating documents, Computer Hard Disc, Pen Drive and unaccounted Plastics Chairs and Stools, Print Outs listed out in the Annexures to the Mahazar dated 24.1.2006 were recovered and seized** from the factory premises of M/s K.

K. Plastics. He also admitted that they maintained the accounts of actual sales made by M/s K. K. Plastics in their computer **system and such details were stored in the Pen Drive recovered from** their premises. The statement given on 24.1.2006 was **retracted vide letter dated 25.1.2006** which was delivered through Special Messenger to DGCEI, Kochi in the evening of 27.1.2006 is liable to be rejected in as much as Sri K. K. Ibrahim, in his **subsequent statements dated 20.2.2006 and 3.5.2006, both written by** his **own hand had admitted that the retractions were made only as per legal advice.**

3.3.2. No prudent man will believe that the Pen Drive containing Purchase of various Raw Materials, Purchase of Chemicals, Sales, Cash Book details, Purchase Orders, Expenses etc with minute details with dates, specifying the names of the suppliers, Dealers etc pertaining to the Appellant is not belonging to them. Most of the entries in the data are mutually corroborated with each other; many are corroborated by the statements of the Dealers. From the foregoing submissions, by taking into account of the **statements of** Sri **Aiju George, SriJinson Thomas and Sri S. K. Benilde and admission of ownership of the Pen Drive by Sri K. K. Ibrahim and Sri Afsal,** and the **Forensic Analysis**

Supplementary report of GEQD, Hyderabad, it is clearly established with clinching evidences that the "ZION -BRAN D-256mb Pen Drive" seized under Mahazar on 24.1.2006 has been purchased and used in the factory premises of M/s K. K. Plastics to maintain their accounts.

3.3. On the issue of legal position on the **"admissibility of evidence"** on the "Materials obtained" by Search & Seizure, the Ld. Commissioner AR relied upon the following.

(i). The **Hon'ble High Court of Bombay in the case Kekoo J. Maneckji vs Union of India (UOI) on 12 April, 1979 reported in (1980) 82 BOMLR** 109 while appreciating the evidence, held as follows.

*13. In **Kuruma v. The Queen [1955] A.C. 197 the Privy Council** laid down that if the evidence is admissible, the Court is not concerned how it was obtained. The Privy Council has observed as follows (p. 203):*

*In their Lordships' opinion the last to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the **Court is not concerned with how the evidence was obtained.** While this proposition may not have been stated in so many words in any English case there are decisions which support it, and in their Lordships' opinion it is plainly right in principle.*

*These observations of the Privy Council were quoted with approval by the Supreme Court in **Pooran Mal v. Director of Inspection [1974 AIR 348]**. After quoting the above observations of the Privy Council, the Supreme Court has observed as follows (p. 366):*

...It would thus be seen that in India, as in English, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence

obtained as a result of illegal search or seizure is not liable to be shut out.

14. That was a case dealing with a challenge that a search and seizure were in contravention of the provisions of Section 132 of the Income-tax Act and the Supreme Court held that even assuming that the search and seizure were in contravention of the provisions of Section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the Income-tax authorities against the person from whose custody it was seized and, therefore, no writ of Prohibition in restraint of such use could be granted.

15. In an earlier decision in ***Magraj Patodia vs R. K. Birla And Ors*** *on 10 September, 1970 [1971 AIR 1295], dealing with a document procured by illegal means, the Supreme Court has held that the fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved.*

He submitted that by applying the ratio of the above referred Judgements of Hon’ble Supreme Courts, in the instant case also, the “evidence of Pen Drive” should not be discarded by accepting the claim of the appellant that the evidence of “Pen Drive” was seized/obtained/procured by illegal means. Consequently, the “Print out” taken from the data stored in the “Pen Drive” also can be relied on legally to support the charges.

3.4. On the issue of Legal Position on Evidentiary Value of the Retracted Confession statement Sri K. K. Ibrahim, he submitted that Managing Partner of M/s K. K. Plastics has given a confession Statement on 24.1.2006 by admitting the Offence by explaining the "modus Operandi" in detail for effecting his unaccounted secret sales transactions by suppressing value with the help of Computer System and Pen Drive seized before

Central Excise officers. But, the statement given on 24.1.2006 was **retracted** vide letter dated 25.1.2006 which was delivered through Special Messenger to DGCEI, Kochi in the evening of 27.1.2006. The reason adduced for the Retraction was that he *had studied only up to* [10th] *standard and he was not fluent in English; Realizing my limitation with regard to English, the raid party compelled his son Mr Afsal K.I to write his statement in English; he submitted that various averments in the said Statement were made by him and written down by son under the compulsion of the Officer; he was compelled to affix signature on the statement; the great stress and tension created by your Officers is reflected in the signature in the statement which greatly differs from his usual signature".*

3.4.1. Ld. Commissioner AR submitted that the ratio of the following three rulings pronounced by Hon'ble Supreme Court need to be taken into account.

(i). The ***Hon'ble Supreme Court in the case of Percy Rustomji Basta V State of Maharashtra 1983(13) ELT 1443(SC)*** *held in para 24 as follows:*

The mere fact that the customs officer who recorded the statement ***explained the provisions of Section 193 of the Indian Penal Code*** *and informed the appellant that he was bound to tell the truth and that he was liable to be prosecuted if he made a false statement, cannot be treated to be a threat and Section 24 of the Evidence Act has no application." [para 24]*

(ii). Further, the Hon'ble Supreme Court, in the case of K.I.Pavunny V AC 1997(90) ELT 241(SC) while observing that the ***"white Collar crimes are committed under absolute secrecy****, dealt with various case laws in appreciating "retraction of confession statement" especially in para 20, it is held that "***Burden is on the accused to prove*** *that the statement of obtained by threat, duress or promise………..If the accused is able to prove*

the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc the ***burden would be on the prosecution to prove*** *that the confession was made by the accused voluntarily."*

(iii). Hon'ble Supreme Court relating to the Clandestine Removal Case of CCE V Kalvert Foods India P Ltd 2011(270) ELT 643(SC), held *in para 18 that it is ruled that* ***the statements were recorded by the Central Excise Officers and they were not Police Officers. Therefore, such statements made by the Managing Director of the Company and Other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation****. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon."*

3.4.2. Ld Commissioner, AR submitted that the reasons put forth for the retraction of the statement by Sri K. K. Ibrahim is merely used the terms "written down under compulsion of your officers" in a mechanical manner. His son Mr Afsal has done B. Tech Degree Course in Electrical & Electronic Engineering. He is also one of the partners of the firm M/s K. K. Plastics. Whatever deposed regarding the Offence was written by his son in his own handwriting. Further, Central Excise Officers are not Police Officers. In order to get true picture behind the offense, the Officers only informed that the statement will be used as evidence in the Judicial/Quasi-judicial proceedings. This cannot be treated as "threat"/"Compulsion" as per the above referred decision of Apex Court. Moreover, even though Sri K. K. Ibrahim is not fluent in English, his son Sri Afsal K I has done B. Tech Degree Course in Electrical Electronics Engineer, who is one of the partners of M/s K. K. Plastics also accompanied with him at the time of recording statement. In fact, whatever narrated on the Offence by Sri K. K. Ibrahim was recorded in English by his son in English on his own hand writing. His son knows English, and he is one of the Partners, he also knows about their business. Under the circumstances, the Central Excise Officers cannot play any mischief against him in getting Statement in English from Sri K. K. Ibrahim through his son. Sri K. K. Ibrahim on **20.2.2006** stated that the retraction letter has been withdrawn after consulting an advocate. Again on **03.5.2006**, Sri K. K. Ibrahim stated that he got legal advice to retract the statement. Thus, these statements clearly revealed that **Sri Ibrahim is compelled only by his Advocate** to send Retraction letter. Further, in his statement dated 20.2.2006, for Question No:15 regarding file containing the Sheets of Estimates, Sri KK Ibrahim stated that he does not understand what those **"ESTIMATES**" are. But Estimate No: 000445 dated 22.01.2006 [Annex-C2] was seized from his residence. Another Estimate NO: 000292 dated 13.10.2005 [Annex-C3] was seized from his Dealer M/s Green fair Marketing. These Estimates were reflecting in the Estimates retrieved from Pen Drive by Computer Forensic Division, GEQD, Hyderabad. These Documentary evidences proved credibility of Sri KK Ibrahim. In this background, in the instant case, the retraction has been made in usual mechanical manner, by alleging that the appellants were compelled and forced to write on the papers as per the choice of the officers. The Appellant have not put forth any material evidence to prove that the impugned confession was obtained by Compulsion, threat or duress. Thus, Sri KK Ibrahim had failed to discharge his burden to prove that the statement was obtained by compulsion duress, threat etc as ruled by the Apex Court as referred above.

3.4.3. Ld Commissioner, AR further submitted that in the absence of any proof for the threats/force/coercion, mere sending of one retraction letter, will not, itself, turn the statements into involuntary and incorrect statements, **especially when plethora of minute details**, **which would be in the personal knowledge of the deponents only, had been disclosed in the statements**. Taking into account of the totality of the facts, and legal position on retracting statement, it is established that the reasons put forth by Sri K. K. Ibrahim for retraction is an "after thought attempt" to get away from the penal consequences. Hence the retraction is liable to be ignored as baseless in the absence any specific threat or compulsion and proof thereof. In this background the "confession statement " dated 24.1.2006 given by KK Ibrahim before Central Excise officers is legally admissible as evidence with the support of the following case laws.

(i). Kollatra Abbas Haji V GOI 1984 (15) ELT 129(Ker- HC)

"The expression `document' would include the statements made by the accused. Section 139 leaves no doubt that a court shall presume, unless the contrary is proved that the signature of the maker and every other part of the document is genuine. This principle equally applies to proceedings before quasi-judicial authority. Therefore, like the courts it is open to the quasi-judicial authority in proceedings of this kind to draw a statutory presumption and conclude in the absence of evidence to the contrary, that every word contained in the statement and the signature appearing on the face of it are those of the maker. In view of this, the Customs authorities were entitled to rely upon every word in the statements, signed by the witnesses, notwithstanding their attempt to retract therefrom, especially when there was no evidence of threat."

In the instant case, by applying the ratio of the judgement, the Quasi-judicial authority can draw the statutory presumption under Section 36A and 36B of Central Excise Act,1944.

(ii). Bhana Khalpa Bhai Patel 1997 (96) ELT 211(SC)

An attempt was made to contest the admissibility of the said statements in evidence. It is well settled that statements recorded under Section 108 of the Customs Act are admissible in evidence vide ***Ramesh Chandra v. State of West Bengal, AIR 1970 S.C. 940 and K.I. Pavunny v. Assistant Collector (H.Q.), Central Excise Collectorate, Cochin, 1997 (90) E.L.T. 241 (S.C.)"****.*

Hence, in the instant case also, Statements recorded under Section 14 of Central Excise Act, 1944, when found to be voluntary and not vitiated in any manner, admissible in evidence"

(iii). Jethmal V UOI 1999(110) ELT 379 (SC)

"Before us a faint argument was made that the statements of the two Mohammads or Ghulam Rasool were inadmissible in evidence as having been made before a police officer. In our view there is no substance in this point because the statements were recorded by a Customs Officer duly investigating into a case where allegations were made about the smuggling of gold. At that stage no criminal case had been started against them in respect of such smuggling and it is difficult to see how such statements can be said to be inadmissible in evidence. The question as to admissibility of the statements made to Customs Officers is now settled by decisions of this Court, e.g. Ramesh Chandra Mehta v. State of West Bengal - Cr. A. No. 27 of 1967, decided on 18-10-1968 and Hira H. Advani, etc. v. State of Maharashtra - 1969 (2) SCC 662."

In the instant case, the statement was not recorded before Police officer. Central Excise Officers are not police officers. Hence the Statement recorded by CEO are admissible evidence.

(iv).Hazari Singh V UOI 1999 (110) ELT 406(SC)

This later statement is clearly admissible in evidence because it was made to a Customs Officer and it is not alleged that the police were present at that *time. Confessional statements made to the Customs Officer have been held by this Court not to come within the inhibition of Sections 24 and 25 of the Indian Evidence Act because Customs Officers are not police officers within the meaning of those provisions, vide Asstt. Collector of Customs v. Vallabhadas, (1965) 3 SCR 854 and R.C. Mehta v. State of West Bengal, (1969) 2 SCR 461.*

(v). Amrik Singh Saluja V UOI 2016(331) ELT 57(Del-HC)

It is held by the Hon'ble High Court of Delhi, that the statements shall have to be corroborated by other independent evidences. ***Statements of applicants contains <u>such details which is impossible to have been fabricated by departmental officials</u>.*** *Nothing credible brought on records to conclude that statement was obtained under threat, duress or any form of coercion and applicant did not make it voluntarily.*

(vi). Balbir Singh V State of Punjab AIR 1957 SC 216 -SC

The Hon'ble ***Supreme Court, in para 18 of the decision,*** *held that It is necessary to emphasize here that the* ***rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated****, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made, (see <u>Hem Raj v. State of Ajmer</u>)* ***. If the rule required that each and every circumstance mentioned in the confessional statement must be separately and independently corroborated, then the rule would be meaningless*** *inasmuch as the independent evidence itself would afford sufficient basis for conviction and it would be unnecessary to call the confession in aid.*

3.5. Ld Commissioner, AR submitted with regard to the a**ppreciation of Other Evidences that the officers** have seized not only the impugned **Zion Branded Pen Drive,** but also seized **3 CPU-Hard Disks(factory and Residence), Other Private** records found in the factory of KK Plastics & Sister Concerns, Residential premises of Partners of the Units, Beverly Agencies & Green Fair Marketing in addition to un accounted Plastic Moulded Chairs and stools found in M/s K. K. Plastics and Beverly Agencies and Green Fair

Marketing. The Appellant has not disputed the recovery and seizure of Three Hard Disks and other Private records sized as referred above. Instead, they only pointed out few discrepancies in the entries found on their Private Records with the entries reflected in the Printouts. These private documents & the Print outs are discussed by the Original Adjudicating Authority in detail in the **OIO Para 94.42** to 94.79.

3.5.1. The Appellant claimed that **there are discrepancies in almost 5 of the entries in the returned Hard Disks.** Hence, the Print Outs taken from the Hard Disks should not be relied upon. GEQD, Hyderabad is a Government Organization. There is no motive for them to manipulate the entries in the Hard Disks of the Appellant. In case of any tampering of Hard Disks, the Appellant could have got confirmed the same by cross examining the officers of GEQD to confirm the tampering. But the appellant failed to do so. Hence, the claim of tampering of Hard Disk is only false allegation against the Experts without any basis. Further, even, if any material is placed against the Appellant, he can very well disprove the charges with the supportive documents instead of pointing out trivial errors or picking up some discrepancies or inconsistencies in the investigation here and there. Once the Seized Hard Disks are returned, the Department will not have anything to deal with them. In order to create doubt and complicate the litigation the appellant is making false allegation.

3.6. Ld. Commissioner, AR submitted that the appellants have not maintained proper records. Every Manufacturer of Excisable goods shall maintain **proper "Daily Stock Account"** containing the details like **manufacture, removal, opening stock, closing stock and description of excisable goods** etc as required under **Rule 10** of **Central Excise Rules. The Appellant, who has got Central Excise Registration No: AAEFK8846LXM001,** have failed to do so with *mala fide intention* to evade statutory levies. The Manufacturer have to maintain statutory records prescribed by different taxing authorities. If not prescribed, they have to properly maintain their own Private records. But, the appellant **maintained manipulated** records. In the **010, para 57.39** the **Comparison of Stock** recorded **Register No: 2** and Stock entries found in **Note Book No: 15** for each day of **December 2005** clearly proved their manipulated records. This fact has been verified and confirmed by the Commissioner in **para 94.59 & 94.60 in the 010.**

3.7. Ld. Commissioner, AR submitted that the appellants s**uppressed the Production. 0I0, at para 57.39,**

the production slips available in File No. 1 and 9 seized om KK Plastics(Annexures C-33 of SCN.2) was compared with the production accounted in **Register No.2** and huge variation noticed in the furnished Table. This fact has been confirmed by the Commissioner in para 94.61(page 186) of the 0I0. He further submitted that the appellants suppressed the value of goods cleared. Sri KK Ibrahim in his confessional statement dated 24.1.2006, explained the modus operandi adopted by him that they were showing Sale Price of the Chair as Rs.70/- per Chair, whereas Sales were actually sold by them around Rs.150/-per Chair, allowing separately a discount of Rs.10/- per chair. The amount over and above invoice value were collected in cash only and not accounted in their books of accounts. **All the 12 Dealers/Distributers/Buyers (Para 94.81 of 0I0) have admitted that the Sale Value of Rs.70/- per chair shown in the Sales Invoice was not actual rate and they had actually paid Rs.135/- Rs.140** per Chair as per the Estimate Slips and had actually paid the **extra value was** given in cash to the Driver of the company vehicle in which goods are delivered. None have retracted on their own at the earliest opportunity. During the course of **Cross examination Sri Pradeep Kumar, Sri K. V. Bhaskaran, Shri Bashith etc have stood by their own statements.** Few others contradicted versions referring "recycled plastics" etc are rejected as "after thought" to help KK Plastics. The Commissioner established the Contravention by narrating the details in **Paras 94.80 to 94.89** in detail.

3.8. Ld. Commissioner, AR submitted that the appellants removed goods on i**mproper Sale Invoices.** As per Rule **11** of Central Excise Rules, **no excisable goods shall be removed from a factory except under an invoice signed by the owner** of the factory or his authorized agent; Each invoice shall be **serially numbered** and shall contain name of the consignee, description, classification, time and date of removal, mode of transport, vehicle registration number, rate of duty, quantity and value of the goods etc. The Appellants have not issued proper Invoices for the consignments removed from their factory. They have manipulated the Invoices also. This has been dealt by the Commissioner in para 57.37 and in para 94.58. **(Annexures C-27 to** C- The Appellant prepared two Parallel Documents for the same consignments. For **example, Credit Bill No.18 dt 24.4.2005[C271 and Tax Invoice No.18 dt** 24.4.2005[C281 are prepared for the same consignments. The tax Invoice was having the heading "CREDIT". Further usually, INVOICE is to be Pre-authenticated to avoid mis-use. Whereas, in the instant case, Credit Bill is Pre-Authenticated. Though both the documents are prepared on the same day, both are signed by different person for the reasons known to them.

3.8.1. Further, it is submitted that the Appellant have maintained improper documents with false figures to evade statutory levies. For an example, they have collected **KVAT @ 12.50% in Credit Bill No: 23 dated 6.5.2005[C29]** and **Tax Invoice** No: 23 dated 6.5.2005 1C301 pertaining to their dealer M/s Green fair Marketing. Whereas they used to pay KVAT only 4% to the Department as claimed by the Appellant in Para 0 of the Memorandum of Appeal. For the same month raised subsequently i.e., **Credit Bill No. 27 dated 10.05.2005** they have collected KVAT @4%. This concrete evidence clearly established that the appellants were manipulating records.

3.8.2. The Employees Smt Aswathy, Smt. Sunitha of KK Plastics and most of the dealers have confirmed the fact of getting orders over phone. Even, almost all the Dealers also confirmed this fact. Sri KK Ibrahim also admitted and corroborated this fact. The Commissioner in the **0I0 (Paras 94.47, 94.48 94.49 & 94.50)** dealt with the placing of orders and supply thereof by verifying the matching of entries in the Pen

Drive Estimates and documents seized from the dealers (Note Book: 8 seized from Beverly Agencies & Order Book No.12 seized from the factory), and other Billing particulars, Sales Register Data of the Pen Drive.

3.8.3. Ld. Commissioner, AR submitted that the appellants were **Destroying /Not Keeping of the Documentary Evidences of Estimates. Shri** KK Ibrahim admitted and explained the "modus operandi of this offense, he, *inter al/a,* stated in his statement dated 24.1.2006 as "the goods are dispatched from the factory directly to the dealers/distributers; at the time of dispatch of goods from the factory we are generating a Slip containing the details of goods dispatched and the actual sale value of the **goods; such Slips are generated by using the Computer and the Slips are** having the **heading "Estimate";** the files seized by contain many such Estimates prepared by them in respect of sale of goods by M/s K. K. Plastics; at the time of dispatch of goods from the factory they are also generating Invoices but the same were mostly taken back and destroyed after delivery of the goods to the Customers; in such cases the transactions are not accounted in books; for their reference, they were entering the details of the actual Sales made in the Pen Drive seized. The other Dealers/Distributers/Buyers corroborated the above referred statement of Sri K. K. Ibrahim. The Computer Forensic Division, GEQD, Hyderabad sent 50 such ESTIMATES stored in the Pen Drive. Out of which One Estimate was recovered from the Managing Partner Sri KK Ibrahim and another ESTIMATE was recovered from Sri Saheersha of Green fair Marketing. The Commissioner dealt this Estimates in the 0I0 (para 94.42).

3.9. Ld. Commissioner, AR submitted, with respect to Costing /Manufacture out of "Virgin Plastics" or "Recycled Waste Plastics" and "Expert Opinion" that Excise Duty is to be levied for the Assessable Value (Actual Sale Price) of the goods. In the instant case, Actual Sale Price is Admitted by the Managing Partner with corroborative Statements of Dealers/Distributer/Buyers and other records. Further, the "actual Sales turnovers" for the impugned period has been stored in the Pen Drive and most of the entries are mutually matching with other private records of the appellants. The Managing partner also admitted the impugned Sales Turnover. The Dealers also corroborated most of the transactions. In this background, Costing of the Chairs is immaterial to the demand of duty. For an example even if the total cost of making a "Bamboo Flute" Rs.50/- and the manufacturer sold the "Bamboo Flute" © Rs. 500/-, excise duty is to be levied for the Sale Price of Rs.500/- irrespective of the cost. Even, there is no need to go into the issue whether the impugned chairs are manufactured out of Virgin Plastics or Re-cycled Waste Plastics. Also there is no need to verify aspect of "cost of chair inside Kerala" or "Outside Kerala" etc. Hence the Expert Opinion obtained from Dr. Thomas Kurian by the appellant is irrelevant to the instant issue which is liable to be ignored.

3.10. Ld Commissioner, AR submitted regarding the **Sale proceeds for Estimates that** Most of the Dealers/ Distributers/Buyers and few Drivers have confirmed the fact of collection of extra value of the sale proceeds Drivers. **Sri** Afsal **Statement dated 15.5.2006** additionally corroborated this fact. Shri K.K. Ibrahim vide his **statement 10.7.2006** admitted that the sale Proceeds are collecting through his Drivers.

3.11. With regarding to appellants request to verify their Sales Tax Returns to confirm the fact in respect of Bill No:8 and Bill No:11, Ld Commissioner, AR submitted that the Appellant has maintained improper documents with false figures in order to evade statutory levies. Accordingly, the appellant have paid the statutory levy of Sales Tax for lesser Values accounted, on the basis of concerned undervalued documents. Whereas for their reference, they are storing the actual data in the Electronic Devices viz Computer & Pen Drive. It is evident that the Appellant has accounted 4% KVAT to the Government Authorities whereas actually they collected illegally KVAT © 12.5% from many Dealers which is stored in their Computer. This is clearly proved with documentary evidences of their own **CREDT BILL No:23 dated 6^{5}2005(Marked as C29) and TAX Invoice No: 23 dated** 652005(Marked as **C30)** in which for the for the 800 Quantity of Chairs valued as Rs.56000/- and collected Rs.7000/- in the name of KVAT @ 12.5% from their Dealer M/s Green fair Marketing. Whereas for the Credit Bill No: 27 dated 21.05.2005 the Appellant collected KVAT © 4% only. Further, when entries of huge volume of transaction pertaining to Sales, Purchases of various Raw Materials accounted in private records and accounted in Digital media are co-related along with various statements recorded from various persons that also in the absence of the "destructed documents", it is natural to commit few trivial errors and discrepancies. But that cannot erase the entire offense of clandestine transactions.

3.12. Ld Commissioner, AR submitted, with regard to the claim that the statements of dealers were recorded under **"Threat",** that the Commissioner dealt properly in the 0I0 that these Statements are not retracted on their own at the earliest opportunity available which are nothing but after thought versions to help KK Plastics. In the Statements recorded, all the above five dealers have been revealed crucial minute details known to them & the appellants, and most of information are reflecting in the documents seized. They never made any complaint of threat or retraction of statement. Further, retraction cannot be made with false allegation alone. It should be supported by proper proof. For the arguments sake, assuming that statements are recorded as dictated by the officers, how the **minute details on the private transactions are revealed** and how **the hard copy of incriminating documents (Credit Bills) have been obtained** from them. Moreover, it is not possible to believe that statements were obtained by using "threat" from so many dealers having different personalities located in different places. The submissions made against the "retraction of Letter dated 25.1.2006 of Sri K. K. Ibrahim" in the beginning of this written submissions along with the legal may also be taken into account and the impugned "threat" uttered subsequently without any substance by the above referred 5 dealers may be ignored. He reiterated that the ratio of judgements cited above, are squarely applicable in the instant case, and accordingly the plea of the Appellant is to be rejected. Both the Original Adjudicating

Authorities and CESTAT are Quasi-judicial Bodies. Hence in such proceedings, "standard of Proof" plays a prime role. As per the settled legal position, "Convincing probability" is sufficient to fix liability on the tax evaders. Even then in the instant case, sufficient electronic and documentary evidences have been collected to prove the contravention of Clandestine Manufacture, Clandestine Clearance and Suppression of Value.

Hon'ble CESTAT(LB) in the case of Gopal Industries Ltd 2007(7) STR (TR-LB) also held in **para 18.1** that:

"Nature of particulars contained in the Private Records clearly go to show their intrinsic authenticity about the clandestine production and removal of the excisable goods by the appellants who had obtained the excise Registration for the manufacture of such goods in the firm name. When the production and removal of excisable goods in a clandestine manner is established by such documentary evidence and the oral evidence of the Managing partner and the supervisor, it cannot be said that the Commissioner committed any error in holding that the appellant has manufactured and cleared tin containers in a clandestine manner. The quantum of liability which is worked out, has not been disputed before us. We find ourselves in complete agreement with the reasoning and findings of the learned Commissioner in holding that the charge of clandestine removal of tin containers by the appellants was established beyond doubt. No further corroboration is required in view of the clinching nature of the oral and documentary evidence establishing clandestine production and removal of tin container by the appellants".

4. Heard both sides and perused the records of the case. It is seen that the counsel for appellants has vehemently contested the manner in which evidence was collected, statements were recorded and the admissibility of such evidence and statements. The appellants main contentions were that (i). One of the witnesses Shri Pradeep Kumar was brought by an officer Shri Shanta Kumar from a distance of 50 km. He was not a witness who was from the locality and picked on the spot. The address given by Shri Pradeep Kumar was that of Shri Shanta Kumar. The other witness Shri Rajib Dan was not produced for cross-examination.

(ii) Shri Shanta Kumar has caused investigation at the instigation of the company for which M/s. K.K. Plastic were doing job work earlier. Shri Shanta Kumar was part of raid team and was presented the search . However, Shri N.P. Grampurohit, Intelligence Officer of DGCEI categorically states that he was not part of the team. The witness, Shri Pradeep Kumar, not only gave the address of Shri Shanta Kumar as his own address but he was in constant touch on telephone with Shri Shanta Kumar on the day of cross-examination.

(iii) There were discrepancies in the version of Shri Pradeep Kumar about the recovery of pen drive from the factory. During the cross-examination, he stated that he was there during the search and the pen drive was taken from some dustbin; he also said that he did not see the seizure of pen drive but was told by someone that it was seized from dustbin; he did not know whether the print outs taken were made into his file. This is in contradiction of what was stated in the Mahazar that the pen drive was seized from one of the drawers of an employee of the company and print outs thereof were taken in the presence of Mahazar witnesses.

(iv) Shri Gorakh Bisht who signed the Mahazar stated during cross-examination that he studied only up to 7th standard and that he knows only Hindi and Nepali; he was asked to sign some papers.

(v) Though clandestine removal was alleged, clandestine manufacture was not established. No cogent, solid and concrete evidence of clandestine removal has been established.

(vi) If the search and seizure is tainted or illegal then the entire case relied upon documents in the Mahazar falls flat on his face. The appellants relied upon the following cases among others:

(i) ***Continental Cement Company Vs. UOI, 2014 (309) ELT 411 (All.).***

(ii) ***Kuber Tobacco Products Pvt. Ltd. Vs. Commr., 2015 (317) ELT A4159 (SC).***

(iii) ***Pan Parag India Ltd. Vs. CCE, Kanpur, 2013 (291) E.L.T. 81 (Tri. - Del.)***

And submitted that clinching evidence is required of purchase of raw material, use f extra electricity, sale of final products, clandestine removal, transportation, payment, realization of sale proceeds, made and flow back of fund.

5. We find that Ld. Commissioner AR has rebutted the argument of the appellants point wise citing a catena of judgments to support his contentions. Whereas the appellant's arguments were on the issue of correctness of the Mahazar, dependability of Mahazar witnesses and maintainability of evidence, Commissioner has dealt elaborately on each of the issues raised in the SCN and OIO. He has established as seen above by citing relevant cases the following:

(i) Evidence obtained under illegal search could still be admitted in evidence and merely because the witness was not from the same locality, his evidence cannot be rejected.

(ii) Much importance cannot be attached to minor discrepancies which do not go to the root of the matter and shake the basic version of the witness. There may be discrepancies due to the normal errors of observation, memory due to lapse of time. If the evidence of the Investigating Officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witness does not support the prosecution version.

(iii) The recovery of pen drive is corroborative by other evidences and the print outs given by GEQD, Hyderabad from the hard disks of computers maintained in the factory. The officers have seized not only the impugned Zion brand pen drive but also seized three CPU-Hard Disk from factory and residence

(iv) Burden is on the accused to prove that the statement is obtained by threat, duress or promise.

(v) The non-maintenance of proper records has been corroborated by the private note books seized.

(vi) Suppression of production was corroborated by the production slips.

(vii) Suppression of value is corroborated by the statements of dealers/distributors/buyers who paid the amounts as per the estimate slips though the invoices reflected lesser value.

(viii) The employees, Smt. Aswathy and Smt. Sunita have given statements confirming giving orders on phone. Shri K.K. Ibrahim himself admitted slips showing actual sale value of the goods are generated by using computers and after dispatch were taken back and destroyed.

(viii) Dealers/distributors/buyers and a few drivers have confirmed collection of sale proceeds of the extra value.

6. We find that the Ld. Commissioner AR has driven home his argument well. We find that the Department could prove to a reasonable extent that the appellants have indulged themselves in clandestine removal. We find that the same issues have been elaborately discussed in the OIO giving reference to various evidences like documents recovered and statements recorded. We find that the appellant's contention with regards to the manner of search and seizure may be relevant in a criminal proceeding but not certainly in quasi-judicial proceedings. The Revenue for understandable reasons cannot prove everything with an arithmetical precision. What is required is to prove the allegation with reasonable amount of evidence which could logically be extended to the entire activity. The seizure of estimates from the residence of Shri K.K. Ibrahim and from the dealers like M/s. Greenfair go to prove that the arguments of the appellant on the pen drive are not substantiated. We find that Hon'ble Supreme Court has observed in the case of CC Vs. Bhoormall (supra) that:

"But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application. ***One of them is that the prosecution or the <u>Department is not required to prove its case with mathematical precision to a demonstrable degree</u>; for, in all human affairs absolute certainty is a***

myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". *El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible.* ***<u>All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue</u>. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to <u>the probabilities of the case</u>.***

6.1. We also find that Hon'ble Supreme Court in the case of *Ramachandra Rexins Pvt. Ltd.* v. *Commissioner - 2014 (302) E.L.T. A61 (S.C.)] held that:*

"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.' In case of clandestine removal, benefit of Cenvat/Modvat claim cannot be considered in absence of duty-paying documents".

7. The appellants have contended that the Department has not proved with cogent evidence that they have manufactured the goods which are alleged to have been clandestinely removed. On going through the records, we find that among the date contained in the seized pen drive, there were estimates, sales register (month-wise), purchased register of chemicals, purchased register of RP and cash book etc. Evidences were available about the purchase of chemicals from M/s. Plastic Industries, Mumbai and M/s. Pinks Enterprises, Allwaye etc. It has been established that the appellants have been purchasing RP (recycled plastic) from their sister concerns, Karothukuzhy Plastics and Karothukuzy Plastic Industries and others like A to Z Traders and Marketing etc. The same was confirmed by Smt. Aswathy, Office Assistant of the appellants. The Commissioner has given a clear finding of clandestine manufacture as evidence from production slips, purchase of raw materials, power consumption and has also gone in to the costing of raw materials showing suppression of value. In view of the same, we find that it is incorrect to say that the Department has not established clandestine manufacture. It cannot be expected that all evidence will be contained in the records seized as the records are likely to be destroyed in all probability particularly in the case of clandestine manufacture and removal. Seizure of "Periyar" brand of plastic chairs and stools from M/s. Green Fair Marketing on 16.01.2006 is one of the clear evidences for clandestine manufacture and clearance. Therefore, in view of the facts of the case and the case laws cited above, we find that Department has established clandestine manufacture to a reasonable extent. Further, as discussed above, sale and recovery of additional consideration has been clearly established from the evidence gathered from the print outs taken from the pen drive, statements of company officials and statements of drivers, dealers etc. Therefore, the appellant's contention is not acceptable.

8. In view of the above, the impugned order is upheld and the appeal is rejected.

(Order was pronounced and dictated in Open Court on **17/01/2019**)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

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