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

Appeal(s) Involved:

E/2111, 2620 TO 2625/2011-DB

[Arising out of OIA No. 56 to 62-2010 dated 16/07/2010 passed by CCE,C&ST(Appeals), Cochin]

C.C.,C.E.& S.T-CALICUT
CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE,
KERALA
673001

Appellant(s)

Versus

PRINCE ALLOYS PVT LTD & OTHERS
PLOT NO.II/14 A, VILAYOOR PANCHAYAT, NEAR 110 KV KSEB SUBSTATION, MANNENGODE POST, KOPPAM, PATTAMBI, PALAKKAD 679 307

Shri T.K. Abdul Karim, CMD

Shri Ahmed Faizal Sha, Director

Shri C.K. Abdurahiman, GM

M/s. Bee Path Casting Pvt. Ltd.
VII/715, G&H, NIDA, Kanjikode,
Palakkad.

M/s. Prince TMT Steels Ltd.
No.34, Kinfra wise Park,
Kanjikode, Palakkad – 678 621.

Shri Anub Sha, Director

Respondent(s)

Appearance:

Shri K. Murali, Superintendent(AR) — For the Appellant

Shri M.S. Nagaraja, Advocate
T. RAJESWARA SASTRY & — For the Respondent

ASSOCIATES.

Date of Hearing: 27/03/2019
Date of Decision:14/05/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20414 to 20420 /2019

Per : S.S GARG

These seven appeals filed by the Revenue are directed against the common impugned order dt. 16/07/2010 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has allowed the appeals of the assessee and set aside the Order-in-Original. Since there is a common impugned order disposing of all the 7 appeals against the company and its various functionaries on whom the penalties have been imposed, all the 7 appeals are being disposed of by this common order. The details of appeals are as under:-

Sl. No.	Appellant name	Amount of duty demand / confirmed	Penalty imposed u/s 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002	Penalty imposed under Rule 26 of Central Excise Rules, 2002
1	M/s.Prince Alloys (P) Ltd.	Rs.49,05,222/-	Rs.49,05,222/-	--
2	Shri T.K. Abdul Karim	--	--	Rs.1 lakh
3	Shri Ahmed Faizal Sha	--	--	Rs.50,000/-
4	Shri C.K. Abdurahiman	--	---	Rs.50,000/-
5	M/s. Bee Path Casting Pvt. Ltd.	--	--	Rs.10,000/-
6	Shri Anub Sha	--	--	Rs.50,000/-
7	M/s. Prince TMT Steels Ltd.	--	--	Rs.10,000/-

2.1. Briefly the facts of the present case are that the respondents M/s. Prince Alloys (P) Ltd., Palakkad (main respondent)are manufacturers of MS ingots, M/s. Prince TMT Steels Ltd. are the manufacturers of TMT bars / rods and M/s. Bee Path Casting Pvt. Ltd. are manufacturers of CTD bars and MS Rods. The Preventive Unit, Calicut conducted a search of the common office and factory premises of M/s. Prince Alloys Pvt. Ltd. and their sister concern M/s. Prince Rollings (P) Ltd. and seized several documents. Some incriminating private documents evidencing receipt of unaccounted MS scrap, unaccounted production of ingots and clearance of MS ingots without payment of excise duty by the said unit was also recovered. Statements of Shri C.K. Abdurahiman, General Manager and Shri Sibiraj, Chemist of the main respondent were recorded under Section 14 of the Central Excise Act, 1944 (the Act, for short). On perusal of the documents seized from the premises of the main respondent, it was found that most of the clearance of MS ingots were effected to M/s. Prince TMT steels Pvt. Ltd., their sister unit and M/s. Beepath Castings Pvt. Ltd. Follow up search was conducted in the office and factory premises of M/s. Prince TMT Steels Pvt. Ltd. On verification of the raw materials viz. MS ingots, it was found that 46 nos. of MS ingots weighting 4.544 MT was in excess. The excess quantities of MS ingots were seized. Follow up search was also conducted at the office and factory premises of M/s. Beepath Castings Pvt. Ltd. Statements of functionaries of the main respondent M/s. Prince Alloys, M/s. Bee Path Castings and M/s. Prince Rollings were recorded. Follow up search was conducted in the premises of scrap dealers M/s. Parvathy Steels and M/s. Karakkad Iron Traders and statements were recorded. Investigations were also conducted to ascertain the capacity of furnaces supplied and installed in the factories by M/s. Inductotherm (India) Pvt. Ltd., Ahmedabad. Statements were recorded from the employees of M/s. Inductotherm (India) Pvt. Ltd.

2.2. On the basis of documents seized, statements recorded and investigation conducted, show-cause notice No.3/2007 dt. 08/01/2007 was issued to demand Central Excise duty amounting to Rs.49,05,222/- with interest. Show-cause notice also proposed penalties under Section 11AC of the Act and Rules 25 and 27 of the Central Excise Rules, 2002. After following the due process, the Additional Commissioner of Central Excise, Calicut vide Order-in-Original dt. 30/11/2009 confirmed demand with interest and imposed equal penalty under Section 11AC on the main respondent. He also imposed penalties on other respondents, as shown in the above table. Aggrieved by the said order, respondents filed appeals before the Commissioner(Appeals) who vide the impugned order allowed the appeals of the respondents and set aside the Order-in-original issued by the Additional Commissioner, Calicut by holding that the charges of unaccounted production and clearance of 1720.674 MT of MS ingots without payment of duty has not been proved. Thereafter, the Committee of Commissioners examined the records and the order passed by the Comissioner(Appeals) and there was no consensus among the members of the Committee and the matter was referred to the Chief Commissioner who directed that the appeal be filed before the Tribunal. Hence the Revenue filed the present appeals.

3. Heard both sides and perused records.

4.1. Learned AR appearing for the Revenue has submitted that the impugned order passed by the Commissioner(Appeals) setting aside the Order-in-Original is not sustainable in law as the same has been passed without properly appreciating the documentary evidences on record and without appreciating the law and the binding judicial precedent. He further submitted that the Revenue has filed the present appeals against the impugned order mainly on the following grounds:-

a. Note Books allegedly maintained by Shri Anbu, Cashier pertaining to payments made to the production contractor, maintenance contractor and maintenance supervisor and note books allegedly maintained by one of the Chemists and seized under Mahazar dt. 12/07/2006.
b. Retracted statements of Shri V.R. Sibiraj, one of the Chemists, and Shri Anbu, Cashier, Shri C.K. Abdurrahiman, GM and Shri Ahmed Faizal Sha, Director who retracted their statements before the Investigating authorities as recorded in the show-cause notice itself. The witnesses have retracted their subsequent statements as well which fact is recorded by the Commissioner(Appeals) in the impugned order.
c. Payments made to the production contractor Shri Bhagwat Singh, as per the entries in the note book maintained by Shri Anbu, Cashier.
d. Capacity of furnace installed in 2005-06 by M/s. Industotherm India (P) Ltd. being 8 MT and not 6 MT as claimed and the allegation based on the statement of Shri Sriram P Vaidya, Production Manager (Melting) of M/s. Inductotherm India (P) Ltd. and drawings sent by the manufacturer.
e. Alleged excess consumption of electricity as evidenced by wide variation.

4.2. He further submitted that the respondent's contention of revenue neutrality before the first appellate authority cannot be accepted. He also submitted that the quantity of 4.544 MT of MS ingots seized from the sister concern viz. M/s. Prince TMT steels Pvt. Ltd. was confiscated by the Commissioner vide Order-in-original No.13/2009-CE dt. 12/05/2009. Non-duty paid goods will always have an edge over duty paid goods in the competitive market due to availability of such goods at a lower price. He also submitted that in the case of M/s. Beepath Castings Pvt. Ltd., they have paid voluntarily excise duty on CTD bars and MS rods manufactured and cleared using MS ingots clandestinely removed from the respondent's factory. Demand against M/s. Beepath Castings Pvt. Ltd. was confirmed by Order-in-original No.32/2009-CE dt. 13/10/2009 passed by the Deputy Commissioner, Palakkad. He also submitted that sufficient evidences were brought out in the show-cause notice to prove that there was unaccounted production and clandestine removal of MS ingots but the said evidence on record was not properly appreciated by the First Appellate Authority. He further submitted that retraction of statements not valid because the statements were retracted as an after-thought and lacks credibility. Further the retraction of any statement made under Section 14 of the Central Excise Act should invariably be addressed to the officer before whom statements were made which was not done in this case. In support of this, he relied upon the decision in the case of Zaki Ishrati Vs. CCE, Kanpur [2010(255) ELT 545 (Tri. Del.) and this decision was affirmed by the High Court which is reported in 2013(291) ELT 161(All.). He also relied upon the following decisions:-

i. CCE, Coimbatore Vs. Acufil Machines [2004(177) ELT 326 (Tri. Chennai)]
ii. Surjeet Singh Chhabra Vs. UOI [1997(89) ELT 646 (SC)]
iii. Naresh J. Sukhawani Vs. UOI [1996(83) ELT 258 (SC)]

4.3. He also submitted that the Department has recorded the statements of the employees who were related to production and clearance and also recovered private records which can be considered to arrive at a finding of clandestine removal. He further submitted that clandestine removal can only be proved by circumstantial evidence and it is not possible to establish every link in chain without any break. He also submitted that the Revenue has also relied upon the statements of the dealers to prove the clandestine removal. He also submitted that the details are recorded in the mahazar and its annexures and the same have not been challenged and therefore the same can be taken as sufficient evidence. it is his further submission that on analyzing the evidences available on record relating to purchase of unaccounted scrap, the Department found that the respondents used to purchase against cash payment without bill and was not accounting the same. The seized purchase slips, statement of the Accountant and the scrap dealer proves the same. The learned AR also submitted that the Department has also considered the electricity consumption to arrive at the clandestine clearances. For various submissions, the learned AR has relied upon the following case laws:-

i. CCE, indore Vs. Pithampur Alloys Castings Ltd. [2014(314) ELT 113 (Tri. Del.)
ii. Gulabchand Silk Mills Pvt. Ltd. Vs. CCE, Hyderabad [2005(184) ELT 263 (Tri. Bang.)]
iii. Somani Iron and Steels Ltd. Vs. CESTAT [2011(270) ELT 189 (All. HC)]
iv. KP Polycolor India Ltd. Vs. CCE, Haldiar [2013(290) ELT 81 (Tri. Ko.)]
v. Surjeet Sing Chhabra Vs. UOI [1997(89) ELT 646 (SC)]

5.1. On the other hand the learned counsel for the respondents defended the impugned order and submitted that impugned order is well reasoned order wherein the Commissioner(Appeals) has considered each and every evidence and has also considered the case laws and has rightly set aside the Order-in-Original. The learned counsel for the respondents has made the following submissions under various heads:-

i. Cross-examination of the witness was not permitted by the adjudicating authority. with regard to this submission, the respondent/assessee in reply to the show-cause notice specifically submitted that the show-cause notice has relied on the retracted statements of Shri c.K. Abdurahiman, GM, Shri V.R. Sibiraj, Chemist and Shri Anub Sha. The respondents sought the cross-examination of the various witnesses whose statements were recorded by the Revenue but the same was not permitted and their statements recorded were relied upon without cross-examination. Statements of witnesses, not permitted to cross-examine, cannot be relied upon. For this submission, he relied upon the following decisions:-

i. Andaman Timber Industries Vs. CCE, Kolkata [2015(324) ELT 641 (SC)]
ii. CCE, Delhi Vs. Balaji Perfumes [2017(358) ELT 87 (Del.)]
iii. Golden Steel Corporation Ltd. Vs. CCE, Kolkata [2017(347) ELT 570 (Tri.)]
iv. Paras Laminates (P) Ltd. Vs. CCE, Jaipur [2005(180) ELT 73 (Tri.)]

ii. He also submitted that this fact of denial of cross-examination has been recorded by the Commissioner(Appeals) vide the impugned order that the statements were retracted immediately and even the subsequent statements were also retracted. He also submitted that it is a settled legal position that the charge of clandestine manufacture and removal of goods without payment of duty cannot be established based on the uncorroborated statement of a person. This has been held in the case of CCE&C, Surat Vs. Suresh Synthetics [2016(332) ELT 385 (SC)] . He also submitted that it is a settled proposition of law that retracted statements cannot be relied upon without corroboration of independent evidence. for this submission, he relied upon the following decisions:-

a) Vinod Solanki Vs. UOI [2008(233) ELT 157 (SC)]
b) KI Pavunny Vs. Asst. Collector of CE, Cochin [1997(90) ELT 241 (SC)]
c) Pascoal Dias Vs. ACC(P), Goa [2003(157) ELT 132 (Bom.)]

iii. He also submitted that para 3 of the show-cause notice refers to physical stock verification of MS ingots and raw materials in the factory on 12/07/2006 and there was no discrepancy in stock of the goods whatsoever. Learned counsel also pointed out the flaws in the investigation and submitted that the investigation authorities have not recorded the statement of Shri Arumugam, Chief Chemist to establish the authorship of the diary and prove their contents as to whether the recordings in the note books represent the actual production and clearance of MS ingots. The said notebooks which contained the basis for the demand of excise duty had not been proved as to its authorship, contents and the basis. Further the Department itself has not relied on the said note books allegedly written by the Chemist containing the details of MS ingots alleged to have been manufactured and removed to M/s. Prince TMT Steels Pvt. Ltd. and M/s. Beepath Castings while initiating subsequent proceedings against both the alleged recipients of the said goods. Further the Department has not relied on the note books maintained by Shri Anbu, Cashier in the subsequent proceedings initiated against Shri Bhagwat Singh, Production Contractor in the case of M/s. Prince Alloys (P) Ltd. and also against the Production Contractor in respect of Prince Rollings (P) Ltd. He also submitted that it is well settled position in law that the evidence produced by Revenue in the form of note books or diaries recovered from the premises and which have not been proved by the authors of such diaries or of uncertain authors cannot form the basis for the charge of clandestine manufacture and removal of MS ingots. He relied upon the following decisions:-

a) CCE, Chandigarh Vs. Arsh Castings Pvt. Ltd. [2006(195)ELT 302 (T)]
b) Gurpreet Rubber Industries Vs. CCE [1996(82) ELT 347 (T)]
c) Ruby Chlorates (P) Ltd. Vs. CCE [2006(204) ELT 607 (T)]

5.2. Regarding the procurement of raw materials, the appellant in reply to the show-cause notice had submitted that they had imported and also indigenously procured MS scrap and Sponge Iron totally amounting to 6260.610 MTs during the period from January 2006 to July 2006 as recorded in their books. Further the physical stock verification on 12/07/2006 did not find any excess or shortage of MS scrap and this fact has been accepted in para 128 of the Order-in-Original wherein it is recorded that there was no discrepancy in the physical stock of goods as on 12/07/2006. Regarding the capacity of the furnace as per the Department, the capacity of induction furnace was 8 MT instead of 6 MT. This allegation regarding the capacity of the furnace was also against the sister concern M/s. Prince Rollings (P) Ltd., which has also procured the furnace simultaneously in 2005-06. This fact was considered by the Tribunal in the case of M/s. Prince Rollings (P) Ltd. and has examined this issue in its order dt. 05.10.2018 wherein the Tribunal has concluded that there is no report of any action taken by the jurisdictional Central Excise authorities against M/s. Inductotherm (India) Pvt. Ltd. for suppression of capacity and thus understandably the value of the furnace cleared by them and in the absence of any proof, one cannot conclude simply on the basis of drawings attached to the invoice. Further regarding the electricity consumption, the Revenue has not carried out any tests or trail in the factory of the assessee to determine the average electricity consumption for manufacture of one MT of MS ingots. This issue has also been examined by this Tribunal in the case of Prince Rollings (P) Ltd. in its Final Order dt. 05/10/2018 in para 4.8 and after examining the orders of the Kerala VAT Tribunal and the Hon'ble High Court of Kerala, the Tribunal has rejected the contentions of the Revenue. Further the counsel submitted that the CCE, Calicut, based on the same investigation, statements, witnesses and documents had issued show-cause notice to M/s.Prince Rolling (P) Ltd. alleging unaccounted production and clearance of 2014.185 MT of MS ingots to M/s. Prince TMT Steels (P) Ltd., sister concern and M/s. Bee Path Castings (P) Ltd. The show-cause notice also proposed to confiscate 4.544 MT of MS ingots found in excess in the factory of M/s. Prince TMT Steels (P) Ltd. and to impose penalties on the Chairman and Directors of the two companies. The Commissioner confirmed the proposed demand of duty vide Order-in-Original dt. 25/05/2009 with penalties and confiscation of the excess goods as proposed. Penalties were also imposed on the Chairman and Directors. The said order was appealed against in Appeal No.E/811 to 816/2009 before the CESTAT, Bangalore. After hearing both sides, the Tribunal passed Final Ordder No.21543-21548/2018 dt. 05/10/2018 setting aside the impugned order and allowing the appeals filed by M/s. Prince TMT Steels Pvt. Ltd., M/s. Prince Rollings (P) Ltd., Shri Anub Sha, Shri C.K. Abdurahiman, Shri Ahmed Faizal Sha and Shri T.K. Abdul Karim.

6.1. After considering the submission of both sides and perusal of the material on record, we find that on the basis of the same investigation and the statements of the witnesses and the documents recovered from the premises of the respondents, show-cause notices were also issued to M/s. Prince Rollings (P) Ltd. alleging unaccounted production and clearance of 2014.185 MT of MS ingots to M/s. Prince TMT Steels (P) Ltd. which is a sister concern and M/s. Bee Path Castings (P) Ltd.. The Commissioner confirmed the proposed demand of duty vide Order-in-Original No.13/2009 dt. 25/05/2009 with penalties and confiscation of the excess goods and also imposed penalties on the Chairman and Directors and other officers of the assessee. On appeal before the Tribunal, the Tribunal after analyzing the entire evidences on record passed a detailed Final Order No.21543-21548/2018 dt. 05/10/2018 and set aside the impugned order by allowing the appeals filed by M/s. Prince TMT Steels (P) Ltd., M/s. Prince Rollings (P) Ltd. and other co-noticees on merits. Penalties were dropped. Further we we find that the present proceedings are based on the same facts, statements and documents recovered during investigation. Therefore it is pertinent to reproduce the findings of the Tribunal which is based on the same evidence as relied upon by the

Revenue in the present appeals.

4. Heard both sides and perused the records of the case. The brief issues which require consideration in the present case are:

(i) Whether the allegation of clandestine manufacture and removal of steel ingots by the appellants is sustainable? Whether the Department relied on uncorroboratedstatements and documents whose ownership was not established?

(ii) Whether seizure and confiscation of 4.544 MT of MS ingots in the factory of M/s. Prince TMT Steels Pvt. Ltd. is maintainable?

4.1 We find that the impugned order has mainly relied upon the following:

(i) 3 Note books/pads allegedly maintained by Shri V.R. Sibiraj, Chemist and 4 Note books maintained by Shri Anbu,Cashier.
(ii) Statements of various persons of the company and truck drivers.
(iii) Electricity consumption.
(iv) Alleged suppression of capacity of the furnace

4.2 Coming to the note books maintained by the Chemist, it was alleged that they are relate to date-wise production of figures of MS ingots in different heats by M/s. PRPL and M/s. PAPL. It was alleged that Shri C.K. Abdurahiman, General Manager PRPL has accepted the same. On a comparison of the above records with statutory RG-1 figures, the officers concluded that there was unaccounted production of 2014.185 MT of ingots. The Commissioner has given a finding that Shri Sibiraj, Chemist and Shri C.K. Abdurahiman, General Manager have accepted the maintenance of records. The Commissioner also found that the above production is corroborated by the note books/pads which evidence payments to production contractor and the fact that the appellants have not accounted for 152.690 MT of MS scrap received (as against 170.150 MT) during 5.7.2006 to 11.07.2006 as per the vehement slips seized from the appellants. The cash book also indicated a payment of Rs. 31,17,504 including that of 95.840 MTs scrap purchased for PAPL also. The learned Commissioner found that Shri Anbu, Cashier in his statement dated 28.03.2006 has stated that the entries made in red ink relate to uIILLounted clearance of MS ingots using separate parallei invoices. Unaccounted clearances were mostly to M/s. Prince TMT Steels. We find that Shri C.K. Abdurahiman, GeneralManager, Shri Anub Sha, Director, Prince TMT, Shri Sibiraj, Chemist have retracted their statements and have confirmed their retraction during the cross examination before Commissioner. Shri Sibiraj in fact has stated that he had not, maintained the note books as seen by him on 12.07.2006 and that he thought Mr. Aurmugam was writing the same. But he was not sure. Vide letter dated 17.12.2008 they have replied to the Commissioner that the production slips did not contain the number of ingots manufactured. The mention of the same as quantity in numbers in Annexure II to the show-cause notice was erroneous and was not based on *records; the officers have not questioned Shri Aurmugam; the Chemist are not concerned with the quantity of goods produced except for test reports in the lab. The appellants contended that reliance on retracted statement without independent corroboration of materials is not correct in law. Moreover as there was no discrepancy found either in the raw material, stock or finished goods stock, the allegation of unaccounted purchase of scrap, clandestine manufacture and removal would not sustain. Recovery of unused invoices do not call for any adverse inference. We find that the appellants had made valid points. However, though the learned Commissioner has mentioned the above in the brief facts but has not given any findings countering the same.*

4.3 Moreover, we find that there are certain inherent discrepancies in the approach of the Revenue in the instant case. The impugned order has found in no uncertain terms that most of the unaccounted clearance was made to their sister concerns i.e. M/s. TMT Steels Pvt. Ltd. and M/s. Bee Path Castings Pvt Ltd. The appellants have brought to our notice that a show-cause notice 18/2007 dated 23.05.2007 to M/s. BPCPL was issued alleging that M/s. PRPL had removed 140 ingots weighing 11.260 MT under invoice No. 409 on 11.07.2006 and that M/s. PAPL have cleared 275 Nos. of MS Ingots weighing 11.030 MT under invoice No. 362 on 11.07.2006. It is not understood as to how 275 Ingots and 140 Ingots would weigh approximately the same whereas in the mahazar dated 13.07.2006 drawn at M/s. PTSPL average weight of Ingot was taken to be 98 kg.

4.4. Show-cause notice No. 43/2007 dated 6.12.2007 issued to M/s. PTSPL alleges that M/s. PRPL have cleared 265.178 MT of MS Ingots to M/s. PTSPL. The confirmation of this show-cause notice has been set aside by Commissioner (Appeals) vide Order No.52-55/2010 dated 13.07.2010.

4.5. A combined look that all the show-cause notices issued to M/s. PRPL, PTSPL and BPCPL shows that the Department has taken the figures differently for different show-cause notices. While the impugned order alleges that M/s. PRPL I].acle cleared 2014.185 MT of MS Ingots to their sister concerns M/s. PTSPL and M/s. BPCPL, the quantity for which those sister concerns were asked to show-cause, though at a later date, comes to about only 276 MT. It is not understood as to what happened to the balance quantity of 1740 MT. Even if it is felt that most clandestine clearances were to their sister concerns, by no stretch of imagination 276 MT cannot constitute most of 2014. 185 MT. It is very pertinent to note that neither the impugned order nor the show-cause notice mentions any other party/person, not even one, to whom the appellants have allegedly cleared MS Ingots clandestinely. The appellants have alleged that the Department is not sure of the evidence, in the form of note books/pads it has collected, so much as it seeks to rely on the same in the case against the appellants while discarding the same in respect of show-cause notice issued to their sister concerns. We find that the stand of the Department was not uniform. Two different show-cause notices based on same set of records and evidences, proceeded on different quantities. Such an approach casts doubton the maintainability of such evidence. It gives an impression that (as also alleged by the appellants) the Department itself was not convinced about the evidentiary value of the private *records seized during investigation. A serious charge such as clandestine removal cannot be based on records which the department itself was not convinced of. It needs to be corroborated by confirming a series of steps in production and clearance.*

4.6 The impugned order relies on a register maintained by the cashier allegedly containing the payments made to the Production Contractor Shri Aftab and Maintenance Contractor. As per the records allegedly maintained by Shri Anbu, Cashier the production and the payments to the contractors was found to be as follows and as discussed in para 128/142 of the Order-in-Original.

Month	*Production*	*Payment to production contractor (@175/MT)*	*Payment to Management contractors (@42/MT)*
March 2006	*1588*	*2,77,900*	*1,32,762 (66696 on account of M/s. PAPL)*
April 2006	*1115*	*1,95,125*	*46,830*
May 2006	*1176*	*2,05,800*	*--*

M/s. PRPL and the amounts shown to have been received by him were quite different from above and as under:

Month	***Amount***
April 2006	*50,000*
May 2006	*78,000*
June 2006	*79,000*
July 2006	*60,000*

The adjudicating authority has dropped the proceedings. Here also it is evident that the Department is not relying on the same set of records in two different proceedings thereby putting a question mark on the evidentiary value of the documents.

4.7. We find that Shri C.K. Abdurahiman, General Manager, Shri Anub Sha, Director, Prince TMT, Shri Sibiraj, Chemist and Sh. Anbu, Cashier have retracted their statements. They were again called for statements and their statements were recorded confirming the original statements. However, during the cross examination they have again retracted the statements, In fact issues raised and were not answered or attended. Shri Sibiraj, Chemist claimed that he did not maintain those records but one Arumugham may have maintained. No efforts seem to have been made to find out if such Person existed. No findings contradicting the claim were also given in the impugned order on cross-examination. We find that Ld. Commissioner has not given any findings on *the cross-examination. Appellant's submission with regard to contradiction between the statement of P.K. Moideen Koya and Shri Anoof, Sales manager of M/s BCPL the OIO simply mentions that the statement of sales manager was relied upon. Ld. Commissioner concluded saying that the retraction of statements has no relevance as the statements were corroborated by the documents and records. We do not find any such corroboration. In fact as mentioned above, the records were not relied upon by the department itself in the proceedings against M/s PTSPL, M/s BCPL and Shri Aftab, the production Contractor. Therefore, the corroboration with respect to one of the two facts i.e. production is to be held not corroborated. As stated earlier, clandestine removal is a serious charge and requires to be proved at least to the level of preponderance of probability. Only records which came for consideration pertain to production. It was not proved as to who was the author of the records. Clandestine procurement of Raw material was alleged on the basis of statements. No discrepancy was found in the raw material, finished goods stock in the premises of the appellants. It is not a case of pre-announced audit of the unit by authorities. It was a surprise visit/raid by the preventive unit. If the appellants were engaged in clandestine procurement of raw materials and clandestine manufacture, as alleged some discrepancy would have been found either in the raw material or in the finished goods stock. The only discrepancy that was found by the officers was in case of M/s PTSPL where an excess stock of 4.544 MT of MS Ingots. That shortage too was on the basis of an estimate. Looking at the Ingots (690.08OMT) lying in the premises discrepancy comes to around 0.65%, which is much less than the variation that occurs in such products. When such low variation is found on approximation and not actual weighment, excess cannot be alleged.*

4.8 The impugned order considers electricity consumption as an additional evidence for the clandestine manufacture and clearance by the appellants. The learned Commissioner finds that the average power consumption from March to June 2006 between accounted/unaccounted production works out to 988.652 and 697.132 respectively. A variation of 290 units is on account of unrecorded production. The Commissioner relied upon a statement of Shri Ahmed Fazal Sha that the average power consumption was around 700 to 750 units. Ld. Counsel for the appellants submitted that the Commercial Taxes Department has issued a demand notice alleging that 800 units were required for 1 MT of ingot. The Appellate Tribunal of VAT directed the officers to determine power consumption practically. On a direction given by Kerala High Court in Writ Petition C. No. 2371/13(V) concluded on the basis of study got conducted that 1103.64 units were required for 1MT ingot. Accordingly, the adjudicating authority has dropped the proceedings. In view of the above, evidentiary value of electricity consumption, appears not strong.

4.9. The impugned order alleges that the appellants have suppressed the capacity of the plant to be 6 MT whereas it was actually of 8 MT. Though the invoice mentioned the furnace to be 6 MT, it is evidenced by the drawings supplied by M/s. Inductotherm (India) Pvt. Ltd that the furnace was of 8 MT. The appellants submitted that the invoice No.3618/21.10.2005 issued by Inductotherm (India) Pvt. Ltd was for 6 MT only. The furnace was of 6 MT only but with lining as applicable to 8 MT furnace. Heat registers maintained by them prove that the capacity was 6 MT only. The appellants contended that they were not provided with a copy of this statement of Shri Srirarn P. Vaidya, *Product Manager of M/s. Inductotherm (India) Pvt Ltd though it was relied upon in the SCN as per Sl. No.42 of the Annexure III to theshow-cause notice. We find that the department has not produced any other evidence than the alleged drawings attached to the invoice. It was not confirmed as to whether the payment was made by the appellants for 6 MT furnace or 8MT furnace. No trial run was conducted in the presence of experts to ascertain the actual capacity of the furnace. No report of any action taken by the jurisdictional Central Excise authorities on M/s Inductotherm (India) Pvt Ltd for suppression of capacity and thus understandably the value of the furnace cleared by them. In the absence of any other concrete proof, one cannot conclude simply on the basis of drawings attached to the invoice.*

4.10. As stated above, clandestine removal is a serious charge and for alleging the same the department has to meticulously prove the purchase of main Raw material and other inputs; manufacture of final goods; clandestine removal of the same; transportation; receipt of the same in the customer's premises and the financial transactions. We find that Tribunal in ***the case of Mahesh Silk Mills vs CCE,. Mumbal: 2014 (304) E.L.T. 703 (TrL-Ahmd.)*** *held that:*

> *"8. Similarly, in the matter of Nova Petrochemicals Vs CCE, Ahmedabad-J1, this Tribunal in its Final Order Nos. A.[1]11207-1121912013, dated 26-9-2013 this bench has held as under in Para 40:*
>
> *"After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenues which mainly are the following:*
> *(i). There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
>
> *(ii). Evidence in support thereof should be of.*
>
> *(a) Raw materials, in excess of that contained as per the statutory records;*
>
> *(b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty.*
>
> *(c) Discovery of suchfinished goods outside the factory*
>
> *(d) Instances of sales of such goods to identified parties.*
>
> *(e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*
>
> *(f) Use of electricity for in excess of what is necessary*

for manufacture of goods otherwise manufactured and validity cleared on payment of duty

(g) Statements of buyers with some details of illicit manufacture and clearance;

(h) Proof of actual transportation of goods, cleared without payment of duty

(i) Links between the document recovered during the search and activities being carried on in the factory of production; etc

9. In view of the above legal position and facts available on record, we are constrained to reiterate that evidence of only one diary cannot be made the basis of establishing clandestine manufacture and removal of the fabrics. It has been repeatedly held by the Courts that clandestine manufacture and clearance cannot be readily inferred from few documents and statements unless the allegations are also corroborated and established on evidences, relatable to or linked with actual manufacturing operations. As far as the present demand is concerned, there is no such evidence forthcoming in the records before us to suggest clandestine manufacture and clearance by the appellants. Mere reliance on note books/diaries or statements cannot be considered as enough evidence for clandestine manufacture and clearances. Accordingly, duty demand Rs.30, 18,378/- is not sustainable against the appellant Mahesh Silk Mills, and the same is set aside. Consequently, neither any penalty is imposable upon Mahesh Silk Mills nor their land, plant nor machinery is liable to confiscation under Rule 173Q of the Central Excise Rules, 1944. Appeals filed by the appellants are allowed by setting aside the Order-in-Original dated 5-3-1999."

4.11. We find that in the instance case, the evidence whatever was heavily loaded towards only one aspect of the above. That is unaccounted production based on the records alleged to have been maintained by Shri Sibiraj, Chemist and Shri Anbu, Cashier and statements of some persons. Shri Sibiraj, Chemist claimed that he did not maintain those records but one Shri Armugham may have maintained. All the statements were retracted twice once during the investigation and once during the cross examination. Production was estimated on the basis of certain numbers, mentioned in the slips which were taken to be number of ingots, with average weight of an Ingot. It was alleged that the appellants have manufactured and cleared about 2014 MT of MS ingots and have cleared the same mostly to their sister concerns M/s PTSPL and M/s BCPL. Though the SCN alleges that most of the goods are cleared clandestinely to their sister concerns, the findings in 010 start by alleging that entire product was sold to their sister concerns. Names of other firms to which the appellants may be alleged to have cleared the goods are not forthcoming. It is interesting to see that not even one more unit than sister concerns are found during investigation or mentioned in the SCN and findings. The only discussion was about unaccounted *purchase of 167 MT of scrap for the period 5-7-2006 to 11-7-2006. The appellants contended that since they have not availed the Cenvat credit they have not accounted for the same. Moreover, they have submitted that during the period January - July 2006 they have imported/indigenously procured about 6,473 MT of scrap. The impugned order did not take these submissions in to account. Purchase of any other raw material was not established. Electricity consumption was not established as discussed above. Statements of the drivers indicated that they have transported goods to their sister concerns and that they were given papers in an envelope which they showed to officers of whenever it was checked. Therefore, it cannot be alleged that all clearances were clandestine. Clearances to units other than sister concerns, if any, were not established. There was no investigation or record or findings in the impugned order about financial transactions. Under these conditions, allegation of clandestine removal only on the basis of production, allegedly evidenced by the records said to have been maintained by Chemist showing production and the records said to have been maintained by Cashier showing payments to production contractor cannot be relied upon. As a matter of fact, Revenue did not rely on these records while issuing SCNs to their sister concerns i.e. M/s PTSPL and M/s BCPL. Whereas the sister concerns M/s PTSPL and M/s BCPL were alleged to have received about 166 MT and 11 MT of MS ingots from the appellants respectively. Therefore, private records alleged to evidence production were not relied upon by the department themselves. Even these SCNs though confirmed by lower authorities were set aside by Commissioner Appeals. The department is said to have withdrawn the appeals on litigation policy. Therefore, the order passed by Commissioner (A) has attained finality. Similarly, it was alleged that as per records maintained by the cashier, the production contractor Shri Aftab was paid huge money during the impugned period, the SCN issued to him for recovery of service tax mentioned small and altogether different figures. The SCNwas also dropped by lower authority. No appeal appears to have been filed on the same. As the department itself did not find these records reliable, the only conclusion that can be drawn is that these records are not reliable. We find that the Ld. AR argued on the basis of certain case law that the department need not prove clandestine clearances with mathematical precision. Though, We accept the same in principle, as per the discussion above the allegation was mainly on the production; the authenticity of the records not being proved; statements being retracted during investigation and cross examination; findings on the basis of records not being corroborated by other parameters; transportation not being clearly established and financial trail not being investigated we find that the ratio of case laws submitted by Ld AR is not applicable as facts are distinguishable. We find that in terms of the ratio of the case mentioned above at para 4,10, we find that the recordings in private diaries have not been corroborated by other evidence, rather it was controverted in proceedings against other parties, in view of the discussion above.*

4.12. The edifice of the allegation in the show cause notice was sought to he built mainly on four pillars. (i). Productionrecords alleged to have been maintained by Shri Sibiraj, Chemist (ii).Production records alleged to have been maintained by Shri Anbu Cashier about payments to production contractor (iii). Consumption of electricity and (iv). Capacity of furnace. All other aspects were either not investigated or investigated perfunctorily. Out of these four, first two were negated by the department itselfwhile issuing SCNs to the sister concerns *i.e. M/s TSPL, M/s BCPL and Shri Aftab. We also find that as per discussion above, they are not otherwise corroborated. The third one was nullified by the sample run conducted by VAT department on the directions of Hon'ble High Court of Kerala. The fourth one was not investigated to thoroughly establish as discussed above. In view of the above, we are inclined to accept the submissions of the appellants on the facts of the case and go by the case law submitted by them.*

6.2. Further we find that it is well settled legal position that the allegation of manufacture and clandestine removal of goods without payment of duty being a serious charge, the burden of proof is on the Revenue. The charge must be proved by producing cogent / positive material evidence of procuring raw materials, manufacture of goods, removal of goods from the factory, receipt of the goods by the buyer and receipt of consideration etc. These requirements have been held in the following cases.

i. Commissioner Vs. Bihariji Manufacture Co. Pvt. Ltd. [2015(323) ELT 106 (Del.)]; [2015(323) ELT A 023(SC)]
ii. Mahesh Silk Mills Vs. CCE, Mumbai [2014(304) ELT 703 (Tri. Ahmd.)]
iii. Continental Cement Company Vs. UOI [2014(309) ELT 411 (All.)]
iv. CCE Vs. Motabhai Iron & Steel Industries [2015(316) ELT 374 (Guj.)]
v. CCE Vs. Swati Polyester [2015(321) ELT 423 (Guj.)]

7. The Learned Commissioner, in the impugned order has given clear findings, inter alia, as follows.

(i). A Show Cause Notice No. 130/2009- ST dated 04.12,2009 was issued to Shri Bhagwat Singh by the same lower authority for demanding Service Tax on "Manpower Recruitments Agency" services rendered by him. As per the above notice, Shri Bhagwat Singh has given a statement before the Superintendent of Central Excise, Ottappalam Range, that he gets a remuneration of Rs. 150/- per M.T. of production of M.S. Ingots. The above Notice dated 04.12.2009 proposed to demand service, tax on amounts received by the service provider. As per the notice Shri Bhagwat Singh received Rs. 98,000/- for the month of May 2006, Rs. 81,000/- for June 2006 and Rs. 1, 44,000/- for the full month of July

2006. As per the impugned Order, the Production Contractor is paid Rs. 175/- per M.T. of M.S. Ingots produced. In such a case, the production figures are to be 560 MT 'and 463 M.T. for May 2006 and June 2006 respectively, whereas, as per the impugned order,the figures are 1142 M.T. for May 2006 and 1139 for June 2006.On perusal of the impugned order, it is evident that the contents of the note pads/note books were revealed through the statements of the witnesses. As statements were retracted, the documents were not proved and cannot be relied upon. I find that there are no concrete corroborative evidences to substantiate the reliance placed in the impugned order on the retracted statements and consequential authentication.

(ii). It was alleged that the appellants have adopted a modus operandi of purchasing M.S. Scrap without bill against cash payment and without accounting for the same used in the production of MS. Ingots and cleared the M.S. Ingots so manufactured without payment of Central Excise duty. However, one scrap dealer submitted an affidavit, stating that he has not sold scrap without proper bills. Two dealers retracted their statements. Moreover, the lower authority has not arrived at the total quantity of unaccounted scrap purchased. I find that no evidence is produced to show that the contractor was paid separately for bundling of scrap.

(iii). I find that the capacity of the installed furnace is a question of fact. The matter could have been resolved by the competent Technician/Engineer by appropriate technical /scientific measurements. Neither the Department nor the appellants cared to adopt this method. In the absence of any conclusive evidence the capacity of the furnace remains uncertain.

(iv). It is quite evident that many of the above factors affecting power consumption from factory to factory are relevant in the same factory also and can significantly affect production over a period of time. As such the finding wide variation of consumption in electricity confirms the allegation of unaccounted production and clearance is wrong.

(v). None of the parallel invoices were recovered or seized. Impugned order records that lorry drivers have stated that they used to carry ingots without bills from the factory. The appellants contended that both lorry drivers stated that they were transporting goods with bills only. I find that there is no mention of transportation of M.S. Ingots without bills in the statements of the lorry

drivers as concluded in the impugned order.

8. We find that the Learned Commissioner has given careful consideration to the facts of the case and has given reasoned findings which are similar to the case, based on same set of facts and investigation, decided by this bench as discussed above. Therefore, we find that no sufficient cause has been made out by the Revenue so as to necessitate the interference of this bench in the impugned order.

9. In view of our discussion above, we are of the considered opinion that there is no infirmity in the impugned order warranting interference. Consequently, we uphold the impugned order by dismissing all the appeals of the Revenue.

(Order was pronounced
in Open Court on **14/05/2019**)

S.S GARG
JUDICIAL MEMBER

P. ANJANI KUMAR
TECHNICAL MEMBER

Raja...