

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]**

**Cross Application Nos.: E/CO/18,19/2011,
Application No.: E/Misc[WD]/41604/2018
Appeal Nos.: E/199-207, 209 & 210/2011**

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/199/2011	M/s. Agni Steels Pvt. Ltd., Ingur, Erode	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
2.	E/200/2011	Shri. R. Krishnamurthy, Managing Director of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
3.	E/201/2011	Shri. M. Chinnasami, Chairman of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
4.	E/202/2011	Shri. K. Thangavelu, Executive Director of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
5.	E/203/2011	M/s. Sree Sakthi Steels, Karur	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
6.	E/204/2011	M/s. Agni Steels Pvt. Ltd., Ingur, Erode	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
7.	E/205/2011	Shri. R. Krishnamurthy, Managing Director of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
8.	E/206/2011	Shri. K. Thangavelu, Executive Director of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
9.	E/207/2011	Shri. M. Chinnasami, Chairman of M/s. Agni Steels P. Ltd.	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate
10.	E/209/2011 E/CO/18/2011	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate	M/s. Agni Steels Pvt. Ltd., Ingur, Erode
11.	E/210/2011 E/CO/19/2011 E/Misc[WD]/41604/2018	The Commissioner of G.S.T. & Central Excise, Salem Commissionerate	M/s. Agni Steels Pvt. Ltd., Ingur, Erode
Arising out of Order-in-Original No. 02/2011 (Commissioner) (Denova) dated 07.01.2011 passed by the Commissioner of Customs & Central Excise, Salem			

Appearance:-

Shri. S. Venkatachalam, Advocate
for the Appellant

Shri. A. Cletus, ADC (AR)
for the Respondent

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing: 02.01.2019

Date of Pronouncement: 31.01.2019

Final Order Nos. 40203-40213 / 2019

Per Bench :

The Show Cause Notices came to be adjudicated by the Commissioner vide Order-in-Original No. 15/2007 dated 12.12.2007 against which, an appeal was filed before this forum and this Bench, vide Final Order Nos. 55-60/2009 dated 12.01.2009 set aside the Order-in-Original with a direction to pass a *de novo* Order after considering the pleas of the assessee and after hearing them. Vide Order-in-Original No. 02/2011 dated 07.01.2011, the Commissioner has passed the impugned Order wherein, the duty liability has been reduced/determined at Rs. 1,92,88,482/- apart from applicable interest under Section 11AB of the Central Excise Act, 1944 and various penalties. Aggrieved, the assessee has come in appeal before this forum. Being dissatisfied with the findings of the Commissioner who has reduced the duty demand from Rs. 12,84,81,532/- to Rs.

1,92,88,482/-, the Department has also filed the appeals and since both the above appeals emanate from a common Order, all the appeals are taken up together for the sake of convenience and are disposed of by this common order.

2. Heard Shri. S. Venkatachalam Ld. Advocate appearing on behalf of the appellant and Shri. A. Cletus, Ld. ADC (AR) appearing on behalf of the Revenue.

3.1 The contentions of the Ld. Advocate for the assessee can be summarized as below :

- (i) The Revenue has mainly relied on the chits, small notebooks, fax message, etc., recovered from third parties;
- (ii) The Revenue has relied on the uncorroborated statements of various persons who were not subjected to cross-examination and who have later on retracted;
- (iii) The so-called evidences relied upon by the Revenue have no evidentiary value to sustain the allegation of unaccounted receipt of scrap, suppression of production and unaccounted clearance by sale;
- (iv) The alleged excess production (of 36182.875 MT) of CTD Bars and Rods and by-products could never have been

manufactured by the assessee since the same is beyond the capacity of their machinery;

(v) The capacity of the machinery in the assessee's factory was also inspected by the Deputy Director of National Institute of Secondary Steel Technology, Mandi, Gobindgarh, whose report also favoured the assessee;

(vi) The electricity consumption is also not disputed by the State Government. Nor is there any allegation or any contravention with regard to suppression of usage/consumption of electricity;

(vii) There is absolutely no evidence alleged or placed on record by the Revenue to establish the production of the alleged quantity of CTD Bars and Rods. There is also no supporting evidence by the Revenue for the alleged manufacture of 36182.875 MT of rolled products which require 41117 MT of MS Ingots which in turn requires about 45685 MT of scrap. To manufacture the alleged quantity of rolled products, electricity to an extent of 1,08,54,863 units of power is required and to manufacture 41117 MT of MS Ingots in excess, about 4,30,08,382 units of power is required in excess which cumulatively require about 5,38,63,245 units of

electricity in excess, which the Department has not established. Neither has the assessee consumed such a huge quantity of electricity nor has the State Electricity Board charged the assessee for the above after alleging suppression;

(viii) The pendrive printouts did not reflect the day-to-day activities of the assessee, especially in the light of the allegations of the Revenue with regard to the productions beyond the assessee's capacity;

(ix) The alleged computer printout is also not in conformity with the provisions of Section 36B of the Central Excise Act, 1944, since admittedly, the printout reflected only the contents of the pendrive allegedly seized by the Revenue and not that of the computer, etc.

3.2 Further, Ld. Advocate *inter alia* contended that most of the witnesses during their cross-examination have revealed contrary to the statements given by them in the first instance; that most of the dealers also admitted that they did not maintain their accounts properly; that even after raising bills in the name of one party they would divert the scrap load to some other party regularly; that one of the dealers had even subsequently issued a revised bill after noticing such mistakes; that for the above reasons, the dealers'

statements *per se* lead to nowhere since the same are full of controversies with their own accounts not being maintained properly; that during the search, the Revenue has taken stock only on eye estimation; that even the alleged production of CTD Bars with the electricity consumption would not tally; that the capacity of the furnace was 5 MTs whereas the allegation in the document alleged to have been seized shows production of 8.313 tonnes/7.929 tonnes per heat; that the assessee was in receipt of an objection raised by CERA for the years 2004-05 to 2006-07 wherein the assessee was alleged to have manufactured 6474 MTs of MS Ingots for three years which only points out, if considered for argument's sake, that the assessee could have produced 5826 MTs which on an average works out to a duty of Rs. 1.48 crores, etc.

4.1 *Per contra*, Ld. AR Shri. A. Cletus appearing on behalf of the Revenue supported the findings in the impugned Order. He also contended that the Show Cause Notice had also brought out the *modus operandi* of the assessee who was not recording the purchases nor had the assessee maintained proper accounts.

4.2 He *inter alia* pointed out that even the finished final products which were cleared, were not recorded, obviously to evade duty;

that even the statements of various persons recorded during the search supported the contention of clandestine removal by the assessee; that the recordings in chits, small notebooks, pendrive printout, etc., also corroborated the *modus operandi* of the assessee as to the clandestine removal of finished products, etc. He thus prayed that the original demand be restored.

5. We have considered the rival contentions, perused the documents placed on record and also gone through the case law referred to during the course of hearing.

6. We note from the records that the Revenue through its Commissioner has filed an application seeking withdrawal of Appeal No. E/210/2011 filed by the Revenue against the Order of the Commissioner-adjudicating authority. The same is taken on record and accordingly, the Revenue Appeal in Appeal No. E/210/2011 is dismissed as withdrawn. Consequently, the Miscellaneous Application No. E/Misc/41604/2018 filed by the Revenue is allowed.

7. The Revenue has preferred the appeal on the ground of the action of the adjudicating authority sustaining the addition based solely on the electricity consumption and this could also lead to a possibility that except the electricity consumption, the Revenue

seems to have accepted the other findings. This effectively points out the acceptance of the other findings of the adjudicating authority who has meticulously sieved the evidences gathered during search/investigation and thought it wiser to deduce/work out the clandestine removal on the basis of electricity consumption.

8.1 In the impugned Order, the adjudicating authority refers to the procurement of raw materials like MS Scrap, Ingots, Sponge Iron, Coal and Furnace Oil allegedly by unaccounted means to prove suppression of production and reaches a conclusion at paragraph 36.00 at page 32 of his Order as under :

“While it is so, both P. Senthilkumar and Sri. K. Thangavelu, Executive Director in their statements confirmed the authenticity of the entries made in the documents. In view of this contradictory evidence, it is inconclusive that these documents indicate suppression of production, though they are probably indicative.”

8.2 With regard to the alleged production of bars and by-products for the month of August 2006, he refers to the statement of Works Manager and Executive Director and then concludes at paragraph 36.03 at page 33 as under :

“The Executive Director in his statement (B-57) dated 06.04.2007 however confirmed that the average production could be in the range of 3600 MT per month. While the evidence is strong on both sides, it is difficult to draw any conclusion about the quantum of suppression of production thought here are indications to this effect.”

What is surprising from the above is the non-reference to mode of transportation of raw materials to the appellant's factory premises and non-examination of the driver(s) of such transport vehicles.

9. The next step considered by the Commissioner is the unaccounted clearance for which the evidences he has considered are weighment slips, internal corroborating documents, documents seized from the dealers, chits and again, weighment slips. In paragraph 37.03 at page 34 of his Order although the adjudicating authority records the objection of the assessee as to the absence of any enquiry of the lorry drivers or even the customers, the same is not deliberated upon nor do we find any discussion on the gate passes being issued either for delivery of raw materials or for transportation of the finished products outside.

10. After analysing, as indicated above, in a nutshell the adjudicating authority records in paragraph 41.03 at page 38 while quantifying, as under :

"41.03 ...

While it is true that the argument made by the assessee has substance, it can be with equal justification held that in a surreptitious activity like this, perfect matching of the records at different places is not expected."

11. Further, he also accepts the plea that it was impossible for the assessee to have manufactured and cleared the quantity of clandestine removal alleged in the Notice and as a via media refers to the removals from September 2005 to September 2006 and while admitting that the opening balance and closing balance were not known, held that the proposition as to the suppression of alleged production could not have been made even on the basis of entries in the DMR or scrap suppliers' documents would hold good.

12.1 The Commissioner in the impugned Order has arrived at the impugned demand and while doing so, has thought it fit to analyse the whole case from three different angles/methods and for this, both the parties have no disputes. The methods are :

- a. Quantification on the basis of dealers' documents and arrive at 951.254 MTs being removed clandestinely;
- b. Production capacity of the assessee's machinery which alleges clandestine removal of 3239.418 MTs; and
- c. Calculating the production on the basis of electricity consumption by which 4377.379 MTs is worked out to have been clandestinely removed.

12.2 The Commissioner rejects the first method on the ground that the dealers might not have maintained proper accounts; even the second method is not accepted by him for the reason that due to paucity of time, the certificate of Government Accredited Institution could not have been verified. Hence, the Commissioner resorts to the third method wherein he also takes judicial note of the report on production and sale by a Professor of IIT, Kanpur. We also note that with regard to the credibility of the report of a Professor of IIT, Kanpur as to the electricity consumption *vis-à-vis* the production, the Hon'ble High Court of Jharkhand have thrown out the same palpably on the ground that manufacture or production cannot be deduced sitting in a glass chamber. The cases decided by the Hon'ble High Court of Jharkhand are : 1) *M/s. Nanak Ispat P Ltd. Vs. Union of India through the Commissioner of Central Excise & Service Tax, Jamshedpur & Ors in W.P. (T) No. 7408 of 2012 dated 11.01.2017* and 2) *M/s. Stan Commodities Pvt. Ltd. Vs. Commissioner of Central Excise & Ors. in W.P. (T) no. 1208 of 2015 dated 21.11.2017*. The relevant paragraphs of the decision in the case of *M/s. Nanak Ispat P Ltd (supra)* are as under :

“21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the

manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date . There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. In the following case laws, it has been held that the consumption of the electricity alone is not sufficient to determine the production;

- (i) Pure Enterprises (P) Ltd. v. CCE, Rajkot 1999 (111) E.L.T. 407 (Tri.)*
- (ii) Kapadia Dyeing Bleaching and Finishing Works v. CCE, Surat 2000 (124) E.L.T. 821 (Tri.)*
- (iii) A. Arti Leathers (P) Ltd. v. CCE and C, Ahmedabad 2001 (136) E.L.T. 1255 (Tri.Mum.)*
- (iv) Parshuram Cement Ltd. v. CCE, Lucknow 2003(160)E.L.T. 213 (TriDel.)*
- (v) Mukesh Dye Works v. CCE, Mumbai VI 2006 (196) E.L.T. 237 (tri.Mum.)*
- (vi) Hans Castings Pvt. Ltd.v. CCE, Kanpur 1998 (102) E.L.T. 139*
- (vii) M/s. Padmanabh Dyeing and Finishing Works v. CCE, Vadodara 1997 (90) E.L.T. 343 (T)*
- (viii) M/s. Madhu Products v. CCE, Hyderabad 1999 (111)E.L.T. 197 (T). 22.1 For want of evidence relating to the above points, clandestine removal cannot be sustained merely on the basis of the technical opinion report of Mr. Batra. In this connection, the following case laws are relied:*
 - (i) Emmtex Synthetics Ltd. v. Commissioner of Central Excise, New Delhi reported in 2003 (151) E.L.T. 170 (Tri.Del.);*
 - (ii) Commr. of Central Excise, Chennai v. Dhanavilas (Madras) Snuff Co. reported in 2003 (153) E..T. 437 (Tri.Chennai);*
 - (iii) Commissioner of Central Excise, Madurai v. Madras Suspensions Ltd. reported in 2003 (156) E.L.T. 807 (Tri. Chennai);*
 - (iv) Commissioner of Central Excise, Coimbatore v. Sangamitra Cotton Mills (P) Ltd. reported in 2004 (163) E.L.T. 472 (Tri Chennai);*
 - (v) Commissioner of Central Excise Coimbatore v. Velavan Spinning Mills reported in 2004 (167) E.L.T. 91 (Tri.Chennai);*
 - (vi) M. Veerabadhran and others v. Commissioner of Central Excise, Chennai III reported in 2005 (182) E.L.T. 389(T)= 2005 (98) ECC 790 (T).*

23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the

lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

24. The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what is alleged with positive and concrete evidence. In the absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained. (emphasis supplied)

(x) The aforesaid decision has been upheld by the Division Bench of Allahabad High Court in a decision reported in 2010(1) taxman.com 342 (Allahabad) and SLP preferred against the said decision has also been dismissed by the Hon'ble Supreme Court."

12.3 Further, in arriving at the disputed demand the adjudicating authority/Commissioner has only considered the Iron content of the raw material (Order-in-Original) for the entire period and that too the highest Iron content rather than the average Iron content of the raw materials.

13. The grave misconduct alleged in this case is clandestine removal and hence, the burden is always on the Revenue to establish the same, if not with mathematical precision, but, at least beyond reasonable doubts. Persons whose statements are recorded have retracted and such retractions find place in the record. On a perusal of the statements, even they are not leading us anywhere since no one has spoken as to him witnessing any event : even the Mahazar is not beyond suspicion. In this context, Ld. Advocate's

argument deserves merit when he says that the seizure of pendrive was from the personnel and that the same was not attached to any computer; that nowhere in the panchanama/Mahazar do we find the make of pendrives. Hence, the allegation of clandestine removal is not made out beyond doubts.

14.1 Section 36B of the Central Excise Act which plays a crucial role requires the Revenue to comply with its requirements when it comes to the admissibility of evidences in the form of micro-films, facsimile copies of documents and computer printouts. The relevant portion of Section 36B *ibid* is reproduced below :

“SECTION [36B. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. — (1) Notwithstanding anything contained in any other law for the time being in force, —

(a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a “computer print out”), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

14.2 On a careful analysis of the basic requirement of Section 36B, what it requires as evidence is a document, may be a micro-film or facsimile or a statement contained in a document and included in a printed material produced by a computer. Therefore, it clearly has the effect of excluding any other thing other than a document, that is to say, it excludes any material or thing other than documents. We are therefore constrained to hold that the pendrive(s) not being a document should also get excluded from the provisions of Section 36B(1).

14.3 Sub-Section (2) of Section 36B speaks about a computer printout produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities carried on regularly over that period by the person having lawful control over the use of computer. Here in this case, we do not find either in the statements of any persons or by means of any independent investigation by the Revenue as to who was actually having lawful control over the use of the computer. This assumes importance especially when the case of the assessee is that the pendrive seized was a standalone pendrive, not attached or inserted in the computer. As a natural corollary, the printout obtained from the pendrive is not the one covered by Sub-

Section (2) as the Revenue has nowhere established that the alleged printout was a result of regular supply in the ordinary course of the appellant's business. Strangely, the Revenue relies on such printouts, running over one thousand pages, but even then the same is not foolproof since undisputedly, the requirements of Section 36B (4) are not at all complied with. Sub-Section (4) (*supra*) requires a certificate if a statement is sought to be relied or used as evidence and no such exercise is done by the Revenue. In this regard, we may very usefully refer to a recent Order of the Delhi Bench of the CESTAT in the case of *M/s. Popular Paints and Chemicals & Ors. Vs. Commissioner of Central Excise and Customs, Raipur in Final Order Nos. 52716-52718/2018 dated 06.08.2018* wherein, the Ld. Bench after analysing the requirements of Section 36B *vis-à-vis* the computer printouts and after relying on the decision of the Hon'ble Supreme Court in the case of *Anwar P.V. Vs. P.K. Basheer reported in MANU/S/0834/2014*, has held as under :

"14.1. In our considered view the computer printouts in the facts at hand do not fulfill the mandatory provisions of Section 36B-(2) & (4) of the Central Excise Act, in so far as there are serious irregularities about the manner of sealing of the computers as pointed out hereinabove and one computer not sealed at all. The provisions of Section 36B(4) have also not been fully complied with. The Ld. Counsel has strongly relied upon the law laid down on the admissibility of electronics records by the Supreme Court in the case of Anwar P.V. Vs. P.K. Basheer reported in MANU/S/0834/2014 wherein in paragraphs 13 to 17 it has been held as under:-

“13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*
- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;*
- (b) The certificate must describe the manner in which the electronic record was produced;*
- (c) The certificate must furnish the particulars of the device involved in the production of that record;*
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and*
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

16. *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

17. *Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.*

18. *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.”*

15.2. *Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act. It has been clearly laid down in para 15 of this judgment that all the safeguards as prescribed in Section 65B (2) & (4), to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are pari materia.”*

15. From an overall analysis of the investigation, the requirements of Section 36B as also the finding in the above case, we find that it is manifest on the Investigating Officers to comply with the safeguards mandated under Section 36B of the Central Excise Act, 1944 and this is critical since, admittedly, the computer printouts were produced in the office of the DGCEI behind the back of the appellants and the

appellants were nowhere in the picture during the alleged retrieval of the deleted contents of the pendrive without there being the same panchas who are alleged to be present when the alleged seizure Mahazar was drawn. We have come across umpteen number of cases wherein the courts have discorded the computer printouts, but the much worse situation here is that the alleged printouts were not from any computer but from standalone pendrive(s) fed into computer(s) in the office of the DGCEI which is palpably incorrect and susceptible to innumerable doubts. This view also stands supported by another Order of this very Bench of the Tribunal in the case of *M/s. Indroyal Furniture Co. Pvt. Ltd. Vs. Commissioner of G.S.T. & Central Excise, Tirunelveli vide Final Order Nos. 40059-40060/2019 dated 14.01.2019* [in which one of us Hon'ble Member (Technical) is a party] and also another decision of this very Bench in the case of *M/s. Shri Amman Steel & Allied Industries & Ors. Vs. C.C.E., Trichy & Ors. Vide Final Order Nos. 40533-40537/2018 dated 26.02.2018* [in which one of us Hon'ble Member (Technical) is a party]. In the case of *M/s. Shri Amman Steel & Allied Industries (supra)* this Bench was considering the evidence revealed from computer floppies and has held as under :

“13. One of the points agitated before the Tribunal by the appellants was that the evidence recovered from the computer floppies cannot be relied upon for the reason that the department had used unauthenticated software for opening the files. In the ROM filed by the assessee, the said point was sought to be clarified by the assessee and the Tribunal in the Miscellaneous Order on ROM application held as under:-

"As regards the appellant's submission that the Tribunal had not considered the vital point raised by the petitioner regarding usage of unauthenticated software, we find that we have not allowed the revenue in our Final Order to put to use any files opened with unauthenticated software in the remand proceedings ordered. This application is rejected."

14. Thus, as seen from above, the Tribunal had clarified that Revenue has no right to use any files opened with unauthenticated software in the remand proceedings. In the denovo proceedings, the Commissioner has therefore excluded the evidence obtained from the filed opened with unauthenticated software. As seen above, in the impugned order it is discussed in detail the reason for dropping duty demand of Rs.7,60,79,469/-. Therefore, we do not find any merit in the appeal filed by the department in E/401/2009 requesting to interfere with the dropping of the said demand of duty."

16. In view of our discussions hereinabove, we are of the considered opinion that the Revenue has miserably failed to prove clandestine removal and therefore, the impugned demands cannot sustain. The Revenue has requested for withdrawal of Appeal No. E/210/2011; the same is therefore treated as dismissed as withdrawn.

17. For the above reasons, the assessee's appeals are allowed and the Revenue's appeals are dismissed. The Cross Objections filed by the assessee are only supporting and the same are disposed of.

(Pronounced in open court on 31.01.2019)

(P Dinesha)
Member (Judicial)
Sdd

(Madhu Mohan Damodhar)
Member (Technical)