IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

EXCISE APPEAL No.40812 OF 2013

(Arising out of Order-in-Original No.12/2012 (C.Ex) dated 31.12.2012 by Commissioner of Central Excise, No.1, Foulks Compound, Anai Road, Salem 636 001.)

M/s. Hi Tech Mineral Industries Covai Pvt. Ltd. .... Appellant
Chellapillaikuttai Post,
Omalur Road,
Salem 636 304.

Versus

The Commissioner of GST & Central Excise, ...Respondent
Salem GST Commissionerate
No.1, Foulks Compound, Anai Road,
Salem 636 636 001.

AND

EXCISE APPEAL No.40813 OF 2013

(Arising out of Order-in-Original No.12/2012 (C.Ex) dated 31.12.2012 by Commissioner of Central Excise, No.1, Foulks Compound, Anai Road, Salem 636 001.)

Mr. P. Ganesh, ... Appellant
Commercial Director,
Hi Tech Mineral Industries Covai Pvt. Ltd.
Chellapillaikuttai Post, Omalur Road,
Salem 636 304.

Versus

The Commissioner of GST & Central Excise, ...Respondent
Salem GST Commissionerate
No.1, Foulks Compound, Anai Road,
Salem 636 636 001.

APPEARANCE :

None (Sl.No.1-written submissions)
Mr. S. Durairaj, Advocate (Sl.No.2)
For the Appellant

Mr. Rudra Pratap Singh, Additional Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 21.09.2023
DATE OF DECISION :02.01.2024

FINAL ORDER No.40002-40003/2024

ORDER : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the main appellant M/s.Hi-Tech Minerals (Covai) Pvt. Ltd. (M/s.Hi-Tech, for short) was registered with the Central Excise Commissionerate and was engaged in the manufacture and clearance of Sponge Iron and M.S Ingots/Billets falling under Chapter Heading 72 & 76 respectively of the CETA 1985. The second appellant Shri P. Ganesh is the Commercial Director of the company.

2. On intelligence gathered that M/s.Hi-Tech was indulging in evasion of Central Excise duty by suppression of production of sponge iron and MS ingots/billets and clandestine removal of the same, the officers of Directorate General of Central Excise

Intelligence (DGCEI) conducted simultaneous search operations at the factory at Salem and Head office at Coimbatore on 15.03.2008. The search operations resulted in recovery of various incriminating documents as well as Central Processing Units (CPUs) of computers which were seized under mahazar dt.15.03.2008 drawn at the respective premises. The seized documents *prima facie* appeared to indicate large scale evasion of Central Excise duty by M/s.Hi-Tech.

3. During the search conducted at the factory premises on 15.03.2008, the officers *inter alia* found one computer containing the Hard Disk of Seagate model bearing S/N: 9RX4MWAD, 160GB, ST 3160215AS. The 'Recycle Bin' of the said computer contained a file titled 'Scrap'. On restoring the said file and browsing the said file 'Scrap', the officers noticed that the same contained *inter alia* the details of unaccounted transactions relating to sale of sponge iron and MS ingots / billets. Shri P.S.B. Kamath, Office Manager and Sri K.M. Ramesh, Accounts Assistant of M/s.Hi-Tech who were present during the search operation informed the officers that the said computer was used for recording of the transactions of the company for a considerable period of time. Sri P.S.B.Kamath informed that the computer was used by him for recording the transactions and that no repairs had been carried out on the computer. Sri K.M. Ramesh took a print out of the file titled "Scarp" containing 293 sheets serially numbered from 1 to 293. The said printouts were filed in a 'Made-up file' seized under Sl.No,1 of annexure to mahazar dt. 15.03.2008.

4. Apart from the above documents seized from the factory premises statements were recorded. Statement of Sri K.M. Ramesh, Accounts Assistant was also recorded on the same date. It was deposed by him that he has been working as Accounts Assistant in M/s.Hi-Tech since 2004. He is looking after the affairs of the company as per the directions of Managing Director and Commercial Director. He is looking after all works related to Central Excise, apart from maintaining records of production and clearance as per the directions of the Managing Director and the Commercial Director. The data contained in the printouts of the made-up file seized from the factory pertaining to the transactions of the company have been entered by him as per the directions of the Managing Director and Commercial Director. The details of the entries in the file was explained by Sri K.M. Ramesh.

5. Search was conducted at the office premises of M/s.Hi Tech on 15.3.2008 and the following documents were seized :

"(i) One file titled "Kamalalaya Transports Statements" under Sl.no. 27 of Annexure to Mahazar dated 15.03.2008. This file contains details of trips performed by the trucks mainly for transporting Iron ore from Karnataka to Hitech factory for the period from 1.4.2007 to 31.12.2007. The trucks belong to Hitech, its Directors and their relatives.

(ii) Two paper board files titled "Coal & Coal Inward Statements" under Sl.no. 3 of Annexure to Mahazar dated 15.03.2008. These files contain the details of receipt of coal which are accounted in the books of accounts of Hitech.

(iii) Five box files titled "Mineral Purchase" under Sl.no. 1 of Annexure to Mahazar dated 15.03.2008. These files contain the accounted purchase by Hitech of raw materials like iron ore, coal, scrap and pig iron.

(iv) Three Box files titled "Coal" under Sl.no. 2 of Annexure to Mahazar dated 15.03.2008. These files contain interalia details of coal received by Hitech from various coal suppliers, the proximate analysis of the coal received to verify the quality, correspondences with the suppliers of coal and production of sponge iron by Hitech for a few days.

(v) One box file titled "Sponge Iron Sales" under SI.no. 8 of Annexure Mahazar dated 15.03.2008, This file contains interalia details of correspondences with various customers of Hitech for sale of sponge iron, quality problems faced and production of sponge iron for certain periods.

(vi) Six paper board files titled "Iron Ore" under Sl.no.9 of Annexure to Mahazar dated 15.03.2008. These files contain the details of receipt of iron ore which are accounted in the books of accounts by Hitech.

(vii) Made up file under Sl.no.30 of Annexure to Mahazar dated 15.03.2008. This file inter alia contains correspondences with various buyers of sponge iron, MS ingots / billets from Hitech, certain transactions with a buyer for supply of MS ingots / billets and payments received / due from him and end cuttings received from the said buyers.

(viii) An assembled computer system bearing serial No.55274 653914802423092.

(ix) On a request from Hitech, the Hard Disk ('SEAGATE BARRACUDA 7200.7 80 GBytes Model ST 3800 11A, S/N 5JVVSXPS, P/N 9W2003-399) from the CPU bearing serial No.55274 6539148024 23092 that was seized from the office of HITECH vide Mahazar dt. 15.03.2008 was removed and the CPU tower was released to Shri J.Prem Kumar of Hitech under acknowledgement. The above mentioned hard disk was seized again vide Mahazar dt. 25.03.08."

(x) Perusal of the seized documents from the factory and office of Hitech indicated that they were indulging in evasion of Central Excise duty by suppression of production of Sponge iron and MS Ingots/Billets and clandestine removal of the same, simultaneous search operations were conducted at the buyers of MS Billets / Ingots from Hitech.

6. The hard disk seized from the factory premises of M/s.Hi-Tech on 15.3.2008 was sent to Government Examiner of Questioned Documents, Directorate of Forensic Science, Hyderabad (GEQD) for analysis. Vide letter dt. 04.07.2008, a report was furnished along with the soft copy of the relevant file in a CD/R. Perusal of the data in the above CD indicated interalia that a file titled "Worksheet in Scrap" available in Q9 of the above said CD contained the very same data as figuring in the print out taken on 15.03.2008 at the factory of M/s.Hi-Tech. The said 'Worksheet in Scrap' file contained data in 14 MS Excel Sheets. The same data are also available in the made up file seized from the factory premises of M/s.Hi-Tech under mahazar dt. 15.03.2008.

7. Investigation was conducted by the Department at the buyers' end also. On the basis of documents seized from the factory and the office of M/s.Hi-Tech, simultaneous search operations were conducted at the factory premises of the buyers viz. M/s.Tulsyan NEC Ltd., Coimbatore. M/s.Cheran Steel Rolling

Mills, Coimbatore, M/s.S.B. Steel Industries, Coimbatore, M/s.Paavai Alloys & Steels (P) Ltd., Namakkal, M/s.Sri Vigneswara Steels (P) Ltd., Sankari, Salem. M/s. Sri Vinayaga Alloys (P) Ltd., Salem. Statements of persons associated with these buyers were also recorded.

8. Investigation was conducted at the transporters' end. Search was conducted at the premises of M/s.Sekar Brothers, Salem on 19.03.2008. Search was conducted at the premises of M/s.S.P.S Transporters, Salem also. Statements of the proprietors of these transporters were also recorded.

9. Scrutiny of documents seized from the office premises of M/s.Hi-Tech on 15.03.2008 and the data contained in the printouts seized from the factory premises indicated that M/s.Hi Tech had purchased raw material viz. Iron Ore and Coal without accounting. Hence the investigation was conducted at the premises of suppliers of raw materials. On perusal of the made-up file, it showed that certain details regarding receipt of coal from various parties under 17 Railway Receipts along with quantity invoice / receipts were recorded under the title "wagon details (coal)" for the period from April 2007 to January 2008 with the remark "A" or "W" against each of the 17 entries. On verification of the receipts of coal with the details available in the form of mineral purchase file, it was found that there were receipts of coal as mentioned in the Sheet No.219 with the remark "A" which alone were found to be accounted by M/s.Hi- Tech.

10. Investigation was conducted with the coal suppliers and statements were recorded. Search was conducted at the premises of M/s.S.P Coal Resources (P) Ltd., Chennai on 08.02.2011 and the statement of Mr. N. Jagadesh, Manager (Operations) of the said firm was also recorded.

11. Search operation and investigations were conducted with regard to Iron ore supplier viz. M/s.Clariya Marketing Services (P) Ltd. Hospet and M/s.Sri Vinayaga Minerals, Tumkur. The statement of Sri K. Rajkumar, Proprietor of M/s.Clariya Marketing Services Pvt. Ltd. and Sri D.M. Shanker, Proprietor of Sri Vinayaga Minerals, Tumkur was recorded. So also, statement of Sri R. Kamath Naik, Proprietor of M/s.Kamath Minerals, Hospet was recorded. The Department also recorded statements from Directors and other officers of M/s.Hi-Tech. The statement of Sri P. Ganesh, Commercial Director (second appellant herein) was recorded on 25.05.2010 and on other dates. The statement of Sri R. Prabakaran, General Manager (Administration) of M/s.Hi-Tech as well as Sri N. Senniappan, Production Manager was recorded.

12. From the evidences, it appeared that M/s.Hi-Tech has procured unaccounted raw materials such as coal and iron ore and manufactured sponge iron, iron billets which were clandestinely cleared without payment of Excise duty. The Department also noticed that M/s.Hi Tech had indulged in theft of energy during the period 12.01.2008 to 09.03.2008 and a case was registered

against them by Tamil Nadu Electricity Board, Salem. The department was of the view that the allegation of the theft of energy by TNEB on the main appellant appeared to lend credence to the fact that M/s.Hi- Tech had used the excess energy for unaccounted production of finished product. Show cause notice dt. 27.04.2011 was issued to the appellant for the period 01.04.2006 to 15.03.2008 alleging clandestine removal of goods without payment of duty and proposing to demand Central Excise duty along with interest and for imposing penalties. The SCN proposed separate penalties on Sri P. Venkittapathy, Managing Director of M/s.Hi-Tech and Sri P. Ganesh, Commercial Director of M/s.Hi-Tech. After due process of law, the original authority confirmed the duty demand along with interest and imposed penalties. Personal penalty of Rs.50 lakhs was imposed on Sri P. Ganesh, Commercial Director under Rule 26 of Central Excise Rules, 2002. Aggrieved by such order, the appellants are now before the Tribunal.

13. It requires to be stated that the Managing Director of the company Mr. Venkittapathy passed away on 31.08.2012 and the appeal is filed by his Son, Sri V. Ranjit Chandar before the Tribunal. It is also brought to our notice that insolvency proceedings were initiated against the company and that by an order dt. 23.03.2015 passed in C.P. No.385 of 2014, the Hon'ble High Court has ordered for winding up of M/s. Hi-Tech Minerals Industries (Covai) Pvt. Ltd. and appointed Official Liquidator attached to the High Court. The Tribunal vide its Final Order Nos.41388-41389/2017 dt. 02.08.2017 had earlier dismissed the appeals for non-appearance on the part

of the Official Liquidator as well as the Appellant, Sri P. Ganesh. The appellant thereafter approached the Hon'ble High Court and vide Tribunal's Interim Order Nos.40049-40050/2019 dt. 22.03.2019 these appeals were restored to the files of the Tribunal.

14. When the matter was listed for final hearing, the Official Liquidator filed a report on 29.05.2023 as to the status of the proceedings in regard to the winding up of the company. It is stated in this report that in compliance of the order of winding up passed on 23.03.2015 the Official Liquidator took possession of available assets of the company in Provisional Liquidation in the presence of the Petitioner-Creditor and the representatives of the Ex-Directors. Further, the Indian Overseas Bank took possession of the property of the company in liquidation on 20.05.2014 under SARFAESI Act. As the company's assets have been taken possession by Indian Overseas Bank under the SARFAESI Act and no assets have been taken by official liquidator, the Official Liquidator is not in a position to proceed further with the matter pending before CESTAT. It was submitted by Official Liquidator that the Bench may decide the case on merits and pass suitable orders as it deem fit and proper in the circumstances of the case. Thus, no arguments on merits of the case have been advanced on behalf of the main appellant M/s.Hi-Tech .

15. The Learned Counsel Sri S. Durairaj appeared and argued on behalf of the appellant Sri P. Ganesh on whom personal penalty has been imposed. The counsel made following submissions :

15.1 The appellant, Sri P. Ganesh is an employee with the designation of Commercial Director of the Company with a nominal share holding of around 1 %. He was a salaried employee. He resigned with effect from 18.09.2023**.** The separate appeal [E/40813/2013-DB] has been filed by not only relying on the grounds of the appeal filed by Company but also among other grounds against the imposition of penalty of Rs.50 lakhs under Rule 26 of the Central Excise Rules, 2002.

15.2 The offence alleged against the Company in para 20 and 21 of the SCN is clandestine purchases, production and removal of goods by evading the duty. In para 23.2 of the SCN, it is alleged that Sri P. Venkittapathy, Managing Director, was the person at the helm of affairs of Hitech and has masterminded the entire gamut of nefarious activities involving the unaccounted procurement of raw materials, suppression of production, and clandestine clearance of finished goods with an intent to evade payment of excise duty along with financial management. In para 23.3 of the SCN, it is alleged that Shri P. Ganesh, who was looking after the day to day affairs of the unit, has executed the unaccounted procurement of raw materials, suppression of production, and clandestine clearance of finished goods with an intent to evade payment of duty [Rs.13.11 crores] along with financial management.

15.3 It is argued by the Ld. Counsel that there is no allegation in the SCN that the goods are liable for confiscation and the appellant is also not aware of confiscation of goods. There is no allegation in the SCN that the Appellant has made some personal gains out of the alleged activities.

15.4 Adjudicating Authority confirmed the demand of Rs.13.11 crores on the Company and imposed equal penalty of Rs.13.11 crores on the company. A penalty of Rs.50 lakhs was imposed on the Appellant under Rule 26.

15.5 Under Rule 26, a penalty not exceeding the duty on such goods or two thousand rupees, whichever greater can be imposed. The power is discretionary and not absolute. It is submitted that such power is not to be exercised arbitrarily. The imposition of such huge penalty of Rs.50 lakhs is without reasonable explanation and not on the basis of the prescribed rules, procedure and law. It is not founded on reasons and facts.

15.6 The Ld. Counsel argued that the impugned order is passed without following the principles of natural justice and also without considering the statutory provisions of Sections 9D, 36A and 36B of the Central Excise Act, 1944. SCN was received on 02.05.2011. Repeated requests were made by appellants to return the not relied upon documents to defend the case on 19.05.2011, 14.06.2011, 29.07.2011, 17.09.2012, 24.09.2012, 29.09.2012 and 09.10.2012. The documents were not returned as per Rule 24A of Central Excise Rules, 2002. Such requests were not even adverted to by the adjudicating authority. Repeated requests were made for the imaged version of the hard disks [B-3, B-13 and B-18] and for copies of relied upon documents [B-7, B-8, B-11, B-17, B-33 and B-34 of the SCN]. The Company on 29.09.2012 requested to provide the imaged version and submitted to bear expenses as well as equipments and man power. Such request was not adverted to by the adjudicating authority. Copies of documents were not provided to the Company and the appellant. Further, Company sought for cross examination of the witnesses. Cross examination and personal hearing were fixed on 26.11.2012 and 12.12.2012. Company applied to adjourn the hearing & cross examination since necessary copies of not relied upon records were not returned. The entire copies of relied upon documents were not provided, and, imaged version of the hard disks and pen drives were not provided to the appellants. However, the adjudicating authority passed the order without considering the appellant's request. Thus impugned order has been passed in violation of principles of natural justice as documents necessary to put up the defence were not supplied, cross examination was denied, and effective hearings were not granted.

15.7 The duty demand has been confirmed on the basis of documents, which were seized from third parties. The third parties are not co-noticees to the impugned proceedings. Therefore, the presumption under Sections 36A is not available to the adjudicating authority. Reliance is placed on para 5.2 of the decision of CESTAT in the case of *Reynolds Petro Chem Ltd Vs CCE* – 2023 (68) GSTL 292 (Trib. Ahmd). The entire quantification is done on the basis of computer print outs without following the mandatory procedure under Section 36B. Therefore, such printout outs cannot be relied. Reliance is placed on para 11 of the CESTAT's decision in the case of *UP Bone Mills (P) Ltd Vs CGST* – 2022 (382) ELT 713 (Tri. Del). Further, Depositions of various persons under Section 14 were relied without following the procedure prescribed in Section 9D i.e. examination in chief and cross examination of witnesses. The decision rendered by the High Court of Punjab and Haryana in the case of *Jindal Drugs (P) Ltd Vs UOI* – 2016 (340) ELT 67 (P&H) emphasizes the requirement to comply with the procedure under Rule 9D.

15.8. The role of the Appellant Sri P. Ganesh has been determined arbitrarily by the adjudicating authority without any basis. In para 23.2 of the SCN, though it is alleged that Sri P. Venkittapathy, Managing Director was the person at the helm of affairs of Hitech, who has masterminded the entire gamut of nefarious activities, in the said para of the SCN, it is never alleged that the appellant is at the helm of affairs. However, the adjudicating authority in para 56.02 of the impugned order has given a finding that the appellant is also at the helm of affairs, which is contrary to the facts alleged in the SCN.

15.9. Penalty imposed by invoking Rule 26 is without jurisdiction. Under Rule-26, the condition precedent is that the person has dealt with any excisable goods, which such person knows or has reason to believe to be liable to confiscation. In the present case, there is no allegation or findings that the goods are liable for confiscation and the appellant is also not aware of any order of confiscation passed. Therefore, Rule 26 is not applicable.

Reliance is placed on paras 9 and 10 of the decision of the Hon'ble Karnataka High Court in the case of *CCE Vs Vijaya Steels (P) Ltd*. – 2012 (282) ELT 215 (Kar) and also on para 11 of CESTAT's decision in the case of *Air Carrying Corporation Pvt. Ltd. vs Commissioner* — 2008 (229) E.L.T. 80 (Tribunal).

15.10. It is submitted that Shri P. Ganesh was not managing the affairs and he has not masterminded the alleged activities. As a salaried employee, his role was only to assist the Managing Director and to obey his instructions. It is also pertinent to mention that there is no allegation in the SCN that Shri P. Ganesh has made personal gains out of these alleged activities. Further, he is not having any control over the production activities since he is only in the Office at Coimbatore and not at the factory @ Salem. Under such circumstances, no penalty can be imposed under Rule 26. Reliance is placed on para 23 of the decision of CESTAT in the case of *Tejas Network India Ltd Vs CCE* – 2014 (302) ELT 80 and on para 8 of the decision of CESTAT in the case of *Liladhar T.Khusiliani Vs CC* – 2015 (330) ELT 705. Ld. counsel prayed that the appeals may be allowed.

16. Before we proceed to state the submissions made on behalf of the Department, it would be beneficial to note the Interim Order No.40005-40006/2023 dt. 06.07.2023 passed by the Bench. On such date, the learned counsel appearing for the appellant Sri P. Ganesh brought to notice that the company has gone into liquidation and no one is representing the company. It was also submitted that the relied upon documents have not been supplied

and the non-relied upon documents have not been returned to the appellant in terms of Rule 24A of Central Excise Rules, 2002. Further that though the appellant had requested for imaged version of the hard disk, the same was not supplied. Letter dt. 09.10.2012 was referred to by the learned counsel to argue that the documents necessary to prepare the defence had never been supplied.

17. The Bench then enquired the department as to whether they would be able to supply the documents so as to consider whether there was a chance to remand the matter. The Department submitted that all the relied upon documents were given to the appellant on 02.05.2011 along with SCN and the non-relied upon documents were returned to the appellant on 17.11.2014. As per DGCEI letter dt. 03.10.2012 the same soft copy of data containing the hard disk was also supplied to the appellant on 02.05.2011. Since the appellant is insisting for imaged version of the hard disk they are ready to provide the same. Letters dt. 06.07.2023, 08.08.2023 & 30.08.2023 were filed by the Ld. A.R in this regard. Letter dt. 08.08.2023 reads as under :

"F.No.E/40812/2013-C (AR)-CESTAT Date : 08/08/2023

URGENT / COURT MATTER

To

The Additional Director General,
DGGI Coimbatore Zonal Unit,
155-1, Lakshmanan Street,
Behind Ukkadam Bus Stand, Ukkadam,
Coimbatore – 641001.

Sir,

Sub: Appeal filed by M/s. Hi-Tech Mineral Industries Covai Pvt Ltd and Shri.P. Ganesh, Commercial Director -Appeal Nos. E/408 12 & 40813 of 2013 -Reg.

Please refer to this office letter dated 06.07.2023, on the above subject and your reply vide F.No.DGGI/INV/CM/65/2023-Gr F-O/oADG/1064 dated 27.07.2023.

2. It is evident from your letter dated 27.07.2023 and its enclosures that all relied upon documents were received by the appellant on 02.05.2011 and the non-relied upon documents were returned by the department on 17.11.2014. Further, as per DGGI letter dated 03.10.2012 (enclosed with the above reply), the soft copy of data contained in the hard disk was also supplied to the appellant on 02.05.2011.

3. However, since the appellant is insisting for imaged version of the hard discs seized, it is requested that kindly please inform this office that whether the said hard disk is still available in your good office and if answer is yes, then kindly please also inform that the required images could be created from the said hard discs or not.

4. Your reply in this regard may please be sent to this office immediately, as the matter is very instrumental with respect to large amount of revenue involved in the case concerned."

Letter dt. 30.08.2023 issued by Joint Director, DGCEI addressed to Additional Commissioner (A.R) CESTAT Chennai reads as under :

"Sub : Appeal filed by M/s.Hi-tech mineral Industries Covai Pvt. Ltd. and Shri P. Ganesh, Commercial Director – Appeal Nos. E/40812 & E/40813/2013 – Regarding.

Kind reference is invitd to letter bearing F.No.C/40812/2013-C(AR)-CESTAT dated 08.08.2023 and 18.08.2023 on the above subject, requesting this office to inform whether the imaged versions of the hard disks can be supplied to the appellant M/s.Hi-ech mineral Industries Covai Pvt. Ltd.

2. In this connection, it is informed that the Hard disks listed in Sl.No.3 and 13 of the list of the relied upon documents, sealed by the Officer of the government Examiner of Questioned Documents after imaging is available in this office. If the appellant wishes to obtain the same, he may approach this office and the imaging proceedings can be done and the imaged copy of the hard disks can be given to the appellant."

18. The Ld. A.R Shri Rudra Pratap Singh appeared and argued for the Department. It is submitted that all the documents have been supplied to the appellant and that appellants were given enough opportunity for hearing. The Department had conducted search operations at the factory and office premises of the appellant company and the documents in the nature of hard disk of the computers were seized. The printouts from the hard disks were taken which revealed clandestine production as well as clearance of goods. Investigation in the nature of searches were conducted regard to the buyers' end who have purchased the finished products from the appellant. Their records tallied with the details in the computer printouts. So also, investigation and search operations were conducted with regard to transporters and the accounts maintained by them tallied with the details in the computer printouts which corroborated the evidence contained in the hard disk. The Department has also conducted investigations from whom the appellant company has purchased raw materials as they mainly used coal and iron ore as raw materials. The evidence gathered showed that the appellants have procured raw materials which have been used in the manufacture of finished products which were cleared clandestinely. Added to this, the appellant has been penalised for using unauthorized electricity which also indicates that the appellant has used unaccounted power for manufacture of unaccounted finished products and clandestine clearance. Apart from the documents, the Department has also recorded statements of various persons whose statements

corroborated the documentary evidence seized from the appellant's factory as well as others. Ld. A.R prayed that the appeals may be dismissed.

19. Heard both sides.

20. At the outset, it requires to be noted that there has been no representation for the main appellant though the duty of Rs.13,11,35,087/- has been confirmed on the appellant and equal penalty imposed. The Ld. Counsel appearing for the appellant. Shri P. Ganesh has argued that there is complete violation of principles of natural justice as the appellants have not been supplied with complete relied upon documents. It is also stated that non-relied upon documents have not been returned to them. Further, though they requested for imaged version of the hard disk seized from their factory, the department has not provided the same. The records show that the show cause notice was issued on 27.04.2011 which was received by the appellant on 02.05.2011. On 19.5.2011 itself, the appellants have sent a letter to DGCEI requesting to return non-relied upon documents and also requesting for imaged version of the hard disk relied in the SCN. The letter reads as under :

"HT/DGCEI/2010-2011
19.05.2011

The Deputy Director,
Directorate General of Central Excise Intelligence,
Coimbatore Regional Unit,
53, 1st Main Road, Meena Estate,

Coimbatore – 641 028.
Sir,

Sub : Request for the return of not relied upon documents and computers.

Please refer to your visit to our factory on 15.03.2008. Consequent to that, you have seized many documents, computers and laptop. Now, a show cause notice has been issued to us vide F.No.INV/DGCEI/CHZU/8/2011 dated 27.04.2011. While verifying the same, it is found that most of the documents, computers and laptop are not relied upon in the show cause notice. Therefore, it is requested to return non-relied upon documents, computers and laptop, so as to enable us to reply to the show cause notice.

Further, on perusal of list of relied upon documents, it is found that two hard disks, one CD and a pen-drive are relied against Sl.nos: 3, 13 and 18. In this connection it is requested to provide the imaged version of these items so as to enable us to reply to the show cause notice."

21. On 14.06.2011 they have again sent a letter requesting for documents. The appellant has furnished copy of letters along with the proof of delivery (Speed post). On 29.07.2011 they have again sent a detailed letter to the Deputy Director, DGCEI and Commissioner, Salem. The appellant has produced the proof of delivery of this letter also. In the said letter, the appellant has given details of non-relied upon documents taken away by the department and have requested to return the same. So also, they have given the details of documents they need for preparing their defence. The said letter reads as under :

"2.0 We are yet to receive the copies of the relied upon documents and also the imaged version of the hard disks, as detailed below. It is requested to provide the same so as to enable us to reply to the show cause notice.

LIST OF RELIED UPON DOCUMENTS	
Description of Documents / Records	**Quantity**
Hard Disk of Seagate Model bearing S/N:9RX4MWAD, 160GB, ST 3160215AS – Sl.N:3 of list of relied upon documents	1
Paper board Files Coal & Coal Inward Statement (3 ½ to 3 2/2) – Sl.No: 7 of list of relied upon documents.	2
Box Files – Mineral Purchase – Period 01.04.2006 to 22.02.2007 (1 1/5 to 1 5/5) – Sl.No.8 of list of relied upon documents	5
Paper Board File – Iron Ore (9 1/6 to 9 6/6) – Sl.N: 11 of list of relied upon documents	6
Hard Disk (SEAGATE BARRACUDA 7200.7 80 Gbytes Model ST 3800 11A, S/N 5JVVSXPS, P/N 9W2003-399) seized from office of HITECH vide Mahazar dated 15.03.2008 – Sl.No: 13 of list of relied upon documents.	1
Invoice Files 2006-07, 2007-08 – Sl.No.17 of list of relied upon documents	23 Nos
Two Notes titled "Full Load Enquiry" – Sl.No:33 of list of relied upon documents.	Two
"Lorry Booking Note" – Sl.No:34 of list of relied upon documents	One

3.0 Further, we have also requested to return the not relied upon documents in view of Rule 24A of Central Excise Rules, 2002. So far, we have not received the same. Therefore, it is requested to return the documents as detailed below so as to enable us to reply to the show cause notice.

NON RELIED UPON DOCUMENTS	
Mahazar Dt: 15.03.2008 drawn at Office (B-2) Quantity	
Description of the Documents / Records	**Quantity**
Box File – Import Scrap Bill	1
Paper Board File – Scrap	1
Box File – Mineral Party's Statement	1
Box File – Mineral – Bank – Cbe	1
Paper Board File – SISCOL (10 1/2 to 10 2/2)	2
Paper Board File – Peekay Steels & Re-Rolling)	1
Paper Board File – Sumangala Steels	1
Paper Board File – SAR Ispat (P) Ltd.	1
Paper Board File – Hi-Tech Minerals TNEB	1
Paper Board File – Induction Furnace II	1
Paper Board File – Rajasthan Agency Bills	1
Paper Board File – Billets Sales	1
Paper Board File – Mineral Sales Tax Reply &	1

Disputes	
Paper Board File IOB/SBI Stock Statement	1
Paper Board File – Test Certificates (20 1/2 to 20 2/2)	2
Plastic file containing file list	1
Scribbling Pad (22 1/2 to 22 2/2)	2
Note Book (23 1/2 to 23 2/2)	2
M&A of Yuktha Wind Farm	1
Annual Reports Hi – Tech Minerals Industries Pvt. Ltd. (25 1/3 to 25 3/3) Period 2004-05 to 2006-07)	3
A Scribbling Book containing the Caption "Every Metal is Precious", of Shri J. Premkumar, Finance Manager, M/s.Hi-Tech Mineral Industries Covai (P) Ltd.	1
KA-0-AC 7071 Bills (bearing nos 32 & 33) (28 1/2 to 28 2/2)	2
Compact Discs sealed in paper cover	10 Nos

Mahazar Dt : 15.03.2008 drawn at Factory (B-1)	
Description of the Documents / Records	**Quantity**
Made up file containing complete printout sheets serially numbered from 01 to 293	1
Flat File Containing Computer Printouts of Sundry Debtors etc.	1
Flat File Containing lorry trip sheets with bill of expenses	1
Monthly matter 2007 book containing	1
Telephone Diary bearing	1
One HCL laptop computer	1

Summon Dated 15.03.2008	
Description of the Documents / Records	**Quantity**
General Ledger for the year 2005-06	6+4 Books
Iron Ore Rejects Bills 01.04.2005 to 31.03.2006	1
Purchase Order file	1
Steam Coal Register	2
Iron Ore Inward 2006-07	1
Iron Ore Inward Statement Box File	1
RG 23A Part 1 2007-08	1
RG 23A Part 1 2006-07	1
RG 23A Part 1 2005-06	1
RG1 Register 2004-05, 2005-06	2

Letter Dated 16.07.2008 (HM/DGCI/2008-09)	
Description of the Documents / Records	**Quantity**
Purchase Documents for the period 01.04.2007to 31.03.2008	11 Box Files

4.0 It is also respectfully submitted that, we have been directed to reply within 30 days from the date of receipt of show cause notice vide paragraph 28 of the show cause notice; but, we are unable to reply to the show cause notice since the copies of the above mentioned relied upon documents, imaged version of the hard disks and the not relied upon documents were not provided to us; therefore, it is requested that the date of receipt of the above documents may please be considered as the date of receipt of show cause notice for replying to show cause notice."

22. A letter again was sent by the counsel for the appellant to the Commissioner on 24.08.2012 requesting for the documents as mentioned in letters dt. 19.05.2011, 14.06.2011 and 29.07.2011. It is seen that even though the appellant has made so many requests there has not been any response from the side of the department either stating that the documents have already been supplied or informing that the documents / imaged version of hard disk etc. would be supplied to them very soon.

23. On 12.09.2012, the intimation was given to the appellant fixing the hearing date on 25.09.2012. It is to be noted that the appellant has been continuously writing to the Department to provide documents so to prepare their defence. They have not yet furnished any reply to the SCN as all documents from the factory had been taken into the custody of the Department.

24. Pursuant to the intimation of first hearing on 12.09.2012, the appellant sent another letter dt. 17.09.2012 to the Deputy Director, DGCEI and the Commissioner informing that they have not received the documents and requested to provide documents along with imaged version of hard disk so as to enable them to file reply to the SCN. The letter reads as under :

> "… …. …..6.0 In view of the above reasons, we are sending this letter wherein we have clearly explained the chronological events from the date of issue of show cause notice. It is also pertinent to mention here that we have not received any reply from you so far for our letter dated 29/7/2011. The entire facts of the issue are known to Mr. Suresh Rao, Senior Intelligence Officer.
>
> 7.0 Therefore, it is requested (i) to return the not relied upon documents and materials as listed in our letter dated 29.7.2011 as per Rule 24A of the Central Excise Rules,2002; (ii) to return the copies of relied upon documents as listed in our letter dated 29.7.2011 and also the imaged version of the hard disks.
>
> 8.0 An early action is solicited so as to enable to reply to the show cause notice and also to appear in person on 25.9.2012."

25. On 24.09.2012, for the first time, a reply was issued by the Dy. Director, DGCEI stating that all the documents including the soft copy of the data contained in the hard disk is already supplied to the appellant on 02.05.2011. As regards non-relied upon documents, it is informed that the appellant can obtain the same after getting prior appointment from the office. The said letter reads as under :

> " Please refer to your letter dated 17/09/2012 wherein you have stated that you have not received some of the relied upon documents.
>
> All the relied upon documents were given to you on 02.05.2011 including soft copy of the data contained in the hard disk. The receipt of the relied upon documents have been acknowledged by M/s.Hi-Tech Mineral Industries Covai Pvt. Limited, Omalur Road, Shri P. Ganesh, Director and Shri P. Venkittapathy, Managing Director.

As regards non-relied upon documents are concerned, you are requested to visit this office after getting prior appointment and obtain the same."

26. On the same date, the counsel for appellant issued a letter to the Commissioner, Salem to provide required documents to enable the counsel to file reply to SCN and also expressing their inability to appear for personal hearing on 25.09.2012 as they are not able to prepare the defence. The very next date, the appellant was issued an intimation letter informing the hearing date as 09.10.2012.

27. On 29.09.2012, the appellant replied to the Deputy Director, DGCEI and Commissioner, Salem requesting to provide documents and informing that they would be able to bring their xerox copier, computer printouts for imaging the hard disk and that they are ready to take copies on their own expenses. The said letter is issued by Sri P. Ganesh and in para 6 it is informed to the department that the Managing Director Sri P. Venkittapathy who was fully conversant with the entire issue demised on 31.08.2012. The relevant part of the letter reads as under :

"4.0 We have also requested to provide the imaged version of the hard disks for the purpose of analysing the entire data available in the hard disk so as to reply to the show cause notice. Since the entire allegation is based on the computer print outs alleged to be retrieved from the hard disk, imaged version of the hard disk is very much required for us to defend our case. You have stated that the soft copy of the data of the hard disk was provided in the form of CD. We cannot rely on that CD because the data conversation from the hard disk into the CD was not done in our presence through mahazar proceedings. Further, we have to ascertain whether the data in the Cd is from the data of the hard disk. Therefore, we will provide two new hard disks to you so that you can provide the imaged version of the hard disks. If you are able to do it with your own staff, it is well and good. Otherwise, if you are directing us to bring any computer experts, we would be doing it at our own expenses so that the imaging can be done in your presence.

> 5.0 An early date may be fixed to collect the not relied upon documents. It is also requested to inform the suitable date for taking photo copies of the relied upon documents and also to get the imaged version of the hard disks.
>
> 6.0 It is also further informed that, we have made our requests during May, 2011, June 2011 and July, 2011; a copy of the requests was also endorsed to the Commissioner of Central Excise each time; but we have neither received any reply from you nor received the documents; finally, you have asked us vide your letter dated 24/9/2012 to collect the non relied upon documents; the delay on your part have crippled us from making an effective reply to the show cause notice because the managing Director, Mr. Venkitapathy, who was fully conversant with the entire issue, has demised on 31/8/2012; if we have received proper replies for our letters dated 19.5.2011, 14.6.2011 and 29.7.2011, Mr. Venkitapathy, managing Director and also one of the notices, would have filed a fitting reply to the show cause notice; but, we missed an opportunity because of your delay in taking action for our letters; therefore, principles of natural justice have already been violated.
>
> 7.0 Therefore, it is requested to make necessary arrangements at the earliest (i) to provide the copies of relied upon documents (ii) to provide the imaged version of the hard disk and (iii) to return the non relied upon documents."

28. Thereupon the Deputy Director vide letter dt. 03.10.2012 informed the appellant that all relied upon documents are already supplied. Soft copy of the data of hard disk was given in CD and non-relied upon documents can be obtained after appointment. The relevant part of the letter reads as under :

> "Once again this office would like to place on record that all the relied upon documents were given to you on 02.05.2011 including soft copy of the data contained in the hard disk The receipt of the relied upon documents have been acknowledged by M/s.Hitech Mineral Industries Covai Pvt. Limited – Omalur Road, Shri P. Ganesh, Director and Shri P. Venkittapathy, Managing Director.
>
> As regards non-relied upon documents are concerned, you are requested to visit this office after getting prior appointment and obtain he same."

29. On 06.12.2012, the appellant again has issued a letter requesting for copies of documents. On 09.10.2012, the appellant

made a written statement before Commissioner during the hearing stating the importance and the necessity to get imaged version of the hard disk as well as other documents. The appellant Shri P. Ganesh attended hearing and also requested for cross examination. In the written submissions dt 09.10.2012, the appellant has stated that the hard disk and laptop computer which were seized from the factory on 15.03.2008 and documents not relied in the SCN are required for the purpose of reconciliation of the data relied in the SCN and also to prepare their defence, as also to cross examine some of the witnesses. Further, most of the financial documents of the appellants were recovered / handed over to the department during the course of investigation and that these are not made part of the relied upon documents. They have again requested to return such documents as per Rule 24A of Central Excise Rules, 2002. It is submitted in the letter that though department had given a CD and informed that data of three exhibits are transferred into the CD, the data in the CD is not complete as per SCN and not sufficient. They also requested for imaged version of hard disk to know the entire details.

30. As can be seen from the above correspondences, the appellants have been continuously requesting for the imaged version of the hard disk. During pendency of this appeal, the Bench had enquired whether the department would be able to provide imaged version of the hard disk, Ld. A.R replied that they are able to provide the same. However, the learned counsel for appellant submitted that getting the imaged version of the hard

disk at this fag end of the proceedings after such lapse of time would not be useful at all as the company is no more in existence and they have no data with them for the reconciliation of the files. It is to be noted that the appellant had requested for imaged version of the hard disk to analyse the details on which the demand has been quantified by the department. Even after repeated requests the department has not bothered to provide copies of such hard disk and documents.

31. It can be seen that the SCN was issued on 02.05.2011 and only after the appellants issued letters dt. 19.05.2011, 14.06.2011 and 29.07.2011 and 24.08.2011, the department has responded on 24.09.2012 to the appellant stating that the soft copy of the data in the hard disk has already been given in a CD and they can collect the non-relied upon documents after getting prior appointment. Only on 24.09.2012 i.e. after almost a year of continuous requests, the Department has obliged to respond to the appellant and that too in a evasive way stating that the data contained in the hard disk has already been supplied to them in the CD. The appellant in their written submissions filed at the time of hearing has stated that the documents are necessary for them to prepare the defence. The relevant part of the submissions reads as under :

> "2.2 Out of the relied upon documents, we have requested for the imaged version of the hard-disks at Sl. No: B-3, B-13 and B-18. The Department had given a CD and informed that the data of the three exhibits are transferred into the CD. In this connection, it is submitted, the date in the CD is not sufficient for us; and we require the imaged versions to verify the following :

- Details of files created, accessed and modified;
- How long the hard disk was in use before its seizure;
- Whether the hard disk was used for the period from April 2006 to March, 2008 regularly.
- Whether the hard disks have satisfied the conditions of Section 36B of the Central Excise Act, 1944.
- To prepare ourselves for the cross examination of the witnesses.

We have requested for the same vide our letters dated 19.5.2011, 14.6.2011, 29.7.2011 and 17.9.2012. After a period of more than year, the department had informed that a CD containing the data was given to us. But, out request was not considered even after our pleading that we would provide the necessary assistance by providing new hard disks for the purpose of imaging at our own expenses. Such imaging process will not tamper the original hard disk and it will take a maximum of two hours for imaging a hard disk. It is not known as to why such an opportunity was denied.

2.3 We have sought for the copies of the relied upon documents B-7, B-8, B-11, B-17, B-33 and B-34, which were not provided to us. We have made our requests to the DGCEI on 14/6/2011, 29/7/2011 and 17/9/2012, duly endorsing a copy to you also. We have received the reply from DGCEI only on 25/9/2012 stating that the copies of relied upon documents were given. If it is so, it is not known as to why the DGCEI has taken more than one year to inform this. However, we have pleaded vide our letter dated 29/9/2012 that we may be permitted to take photo copies at our own expenses with out men, machine and materials. The said letter was also endorsed to you. The said request was not considered. These documents, especially B-7, B-8, B-11 and B-17 are accounted transactions, which are very much required to reply to the show cause notice. Further, the documents at Sl.No:33 and 34 are transporters' documents, which are also very much required for us to prepare ourselves for the cross examination of the transporters. The photocopying work will take only one day with our assistance but we do not know as to why such an opportunity was denied.

… …

4.0 The entire case rests on the computer print outs (B-4) for the period from April 2006 to March 2008, containing pages from 1 to 293. These computer printouts are retrieved from the computer, having the hard disk number 9RX4MWAD, seized from the factory on 15.3.2008 (B-3). The said computer print outs cannot be relied upon because of the following reasons.

4.1 Conditions of Section 36B should be satisfied before relying on the computer printouts. In this case, the show cause notice is silent on this aspect, which proved that the conditions were not fulfilled. One of the conditions of Section 36B is that the computer should be used regularly over a period of time for which the print outs are available. In the instant case, the print outs are for the period from April, 2006 to March, 2008, which means that the computer should have been used since April, 2006.

> But, the said computer was purchased only on 18.2.2008 vide invoice number 37 dated 18/2/2008; it was installed on 24/2/2008; payments were made vide cheque No: 652029 dated 25.2.2008. Copy of the invoice 37 dated 18.2.2008, copy of the ledger accounts for the period from 1.4.2007 to 31.3.2008 and bank statements are enclosed herewith. This proved that the computer was in use only from 24/2/2008. In this connection, we wish to chief examine the authorised person of Softline Computers, 5, Thirunavukarasu Street, AVK Nagar, Opposite, New Bus Stand, Salem – 636 004."

32. The appellant has also requested for cross examination of several witnesses. None of the witnesses have been examined or cross examined and Rule 9D Central Excise Act, 1994 has not been complied. It has been held in the case of *Jindal Drugs Pvt. Ltd. Vs Union of India* - 2016 (340) ELT 67 (P&H) that the statements recorded during the investigation cannot be relied straightaway by the adjudicating officer and can be relied only if the statement is admitted as evidence in accordance with the procedure prescribed in clause (b) of Rule 9D of Central Excise Act, 1944.

33. It is brought out by evidence that after the SCN dt. 27.04.2011 was received by the appellants on 02.05.2011 along with some documents, including a CD, the appellant has immediately requested (on 19.5.2011) to furnish imaged version of the hard disk, and to return the non-relied documents which were taken by the department. The department has taken almost a year (24.09.2012) to respond to the repeated requests and to say that the non-relied documents can be collected from their office after prior appointment. In this letter, it is stated that all necessary data of hard disk is supplied in the form of CD. However, there is no response to their request for providing an imaged version of the

CD. It is only after the Bench enquired and directed vide interim order dt. 06.07.2023 that the department has replied stating that they are ready to furnish the imaged version of the CD. We do not understand why the department has taken so much time to respond to the requests made by appellant. They have written both to Deputy Director of DGCEI as well as Commissioner, Salem requesting to return / supply documents.

34. The non-relied documents taken away as per mahazar dt. 15.03.2008 is listed in letter dt. 29.07.2011 which has been reproduced above at para 21 of this order.

35. As per Rule 24A of the Central Excise Rules, 2002, the documents seized and taken into custody by the department has to be returned to the assessee. The Rule reads as under :

> “**RULE 24A. Return of records.** — The books of accounts or other documents, seized by the Central Excise Officer or produced by an assessee or any other person, which have not been relied on for the issue of notice under the Act or the rules made thereunder, shall be returned within thirty days of the issue of said notice or within thirty days from the date of expiry of the period for issue of said notice :
>
> **Provided** that the Commissioner of Central Excise may order for the retention of such books of accounts or documents, for reasons to be recorded in writing and the Central Excise Officer shall intimate to the assessee or such person about such retention.”

36. The Ld. Counsel appearing for the appellant has submitted that these documents which were ledger accounts, financial statements, invoices, bank related documents, financial statements were extremely necessary to reconcile the details of transactions mentioned in the SCN on the basis of which the demand of duty

has been raised. Needless to say that during investigations when majority of the documents are taken away, the assessee will be handicapped to prepare their defence. Rule 24A is a safeguard provided to an assessee to get the non-relied documents. This is necessary not only for preparing defence but also for continuing the business. It is the right of the party to get back the documents, and if the department intends to retain, the same has to be intimated to the assessee. We find that the strong inference that can be made due to delay on the part of the department to respond to the letters of the appellants is that the contention of the department that they have supplied entire data in CD and have returned all the non-relied documents is not believable. Even as per the letter of the department the non-relied documents have been returned only on 27.11.2014. The impugned order is passed on 31.12.2012. There is indeed violation of principles of natural justice due to non-supply of entire relied upon documents and not returning the non-relied documents so as to facilitate the assessee to prepare the defence.

37. It is also to be stated that after receiving the SCN on 02.05.2011, the Managing Director of the Company, who is alleged in SCN to be the man at the helm of affairs of the Company passed away on 31.08.2012. The death happened few days prior to the intimation (12.09.2012) informing first hearing date as 25.09.2012. The hearing date was then adjourned to 09.10.2012. The appellants filed their written submissions before theadjudicating authority on 09.10.2012. At the time of hearing in

which they again expressed their grievance of inability to properly defend the case due to non-return of documents. In such circumstances, even a remand after such long lapse of time would not serve any purpose.

38. The Ld. Counsel has argued that even after repeated requests the department did not provide the imaged version of the hard disk seized by them and thereafter sent by the department to the Government Examiner of Questioned Documents, Directorate of Forensic Science, Hyderabad (GEQD). It was submitted that as the Company has been liquidated, and Managing Director no more, the appellant is not in a position to reconcile and understand the data even if provided after such long lapse of time. This submission of the appellant is not without substance. Only after the Bench enquired whether the department would be able to provide the imaged version, the department has responded positively. We do not understand why the department did not heed to the request of the appellant, if they had no problem to provide the imaged version.

39. In the written submissions dt. 09.10.2012, the appellant (in para-2.2 already noticed above) has given the reasons why the appellant was insisting on getting an imaged version of the hard disk. It would help the appellant to know the details of the files created, accessed and modified. It would provide information as to how long the hard disk was in use before seizure.

39.1 At this juncture, the fact that department has failed to establish that Section 36B was complied while taking the printouts from the hard disk attains significance. It is brought out from evidence that the department has seized the hard disk and taken the print outs by themselves. These print outs were filed as 'Made-up file' with 293 pages. These print outs are the foundation for initiating the investigation. Only after taking the printouts the hard disk has been sent to the DGCEI. In the case of *U.P. Bone Mills (P) Ltd. Vs CGST, Dehradun* – 2022 (382) ELT 713 (Tri.-Delhi) it was held that on failure to follow the mandatory procedure prescribed under Section 36B of Central Excise Act, 1944, the electronic evidence cannot be accepted in evidence.

40. Besides, the evidence of the printouts from the hard disk, the other evidence relied by department are the documents seized from Third parties like the Buyers of finished products, Transporters of goods, Suppliers of raw materials etc. Some of these documents are again, pen driver and computer printouts. The department has recorded statements from persons who are running these establishments. But none of them have been examined by the adjudicating authority as required under Section 9D of Central Excise Act, 1944. The appellant has requested for cross examination and the same has not been complied. The Ld. Counsel for appellant has adverted to Rule 36A of Central Excise Act, 1944. As per this provision, the documents so seized can be used in evidence, if the person from whose custody it was seized is also a party to the proceedings. But none of these persons have been

made co-noticee to the proceedings. Therefore without examining these persons / witnesses in evidence under summons, third party statements or third party documents cannot be admitted in evidence.

41. In the case of *Reynolds Petro Chem Ltd. Vs CCE & ST, Surat-I* - 2023 (68) GSTL 292 (Tri.-Ahmd) similar issue was considered and the Tribunal held that the burden of proof to establish the allegations in the SCN is on the department. The seized from the premises of third parties cannot be used without corroboration, and that the presumption under Section 36A would not be applicable unless these persons from whose custody the documents have been seized are made parties to the proceedings. The relevant paras read as under :

> "**5.2** We find that in the present matter it is on record that during the search at the premises of the Appellants, no invoices/debit notes etc., raised to their customers were found. In the present matter, transactions records were called from the various customers of Appellant. The said alleged debit notes/invoices were provided by the customers to department. Further it is on record that during the search at the premises of M/s. Forward Resources Pvt. Ltd., department seized the records/documents containing Income tax TDS statements of Appellant. It is mandate of law that presumption of documents in certain cases under Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned. Section 36A the Central Excise Act, 1944 is reproduced below :-
>
> **Section 36A. - Presumption as to documents in certain cases.** - Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -
>
> (a) unless the contrary is proved by such person, presume -
>
> (i) the truth of the contents of such document;
>
> (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the

handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

In view of above Section 36A of Central Excise Act, 1944 it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized that the presumption under Section 36A is available. In the present case admittedly none of the alleged invoices/documents was produced by the Appellant or seized from the Appellant's premises or control. In view of the above, when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove that the source documents are related to the Appellants and that any taxable services under the source documents were actually provided by the Appellant. This burden has not at all been discharged in the present case. The department could not have simply accepted the customers' documents provided by them on its face value and the same needed strict corroboration which is completely absent in the present case."

42. In the case of *Jindal Drugs Pvt. Ltd. Vs Union of India – 2016 (340) ELT 67 (P&H)* the Hon'ble High Court emphasized the requirement to comply with Section 9D of Central Excise Act, 1944. Relevant para reads as under :

"**19.** Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

43. In the present case, the computer hard disk seized from the appellant’s factory is the basis for the investigation. The evidences placed on record cannot be relied or admitted in evidence due to non-compliance of mandatory provisions of law. In such circumstances, we have to hold that the confirmation of duty demand and the penalties imposed require to be set aside.

44. The Ld. Counsel appearing for appellant Shri P. Ganesh has stressed that a huge penalty of Rs.50 lakhs has been imposed on the appellant which is too high and without basis. Shri P. Ganesh is only a Commercial Director holding 1% of the share. In fact, he is an employee and has stated that the Managing Director, Shri P. Venkittapathy was giving instructions on day to day affairs. The department has not produced any evidence to show that Shri P. Ganesh has made any personal gain from the alleged clandestine clearances. He was a salaried person. Again, there is no proposal in the SCN to confiscate the goods. We do not find any evidence led by the department, to hold that the appellant has connived or actively involved in any of the allegations raised in the SCN. We find that the penalty imposed on the appellant is not justified. The same requires to be set aside.

45. In the result, the impugned order is set aside. The appeals are allowed with consequential reliefs, if any.

(Pronounced in court on 02.01.2024)

sd/-	sd/-
(VASA SESHAGIRI RAO)	**(SULEKHA BEEVI C.S.)**
Member (Technical)	Member (Judicial)

gs