

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III**

(1) EXCISE APPEAL No.40135 OF 2023

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

Naya Carnation Fireworks

... Appellant

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH

(2) EXCISE APPEAL No.40136 OF 2023

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

Sri Cornation Fireworks Pvt. Ltd.

... Appellant

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH

(3) EXCISE APPEAL No.40137 OF 2023

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

Bee Cee Fireworks Industries

... Appellant

No.7, Chairman A Shanmugam Road,
Sivakasi, Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH**(4) EXCISE APPEAL No.40138 OF 2023**

(Arising out of Order-in-Original No.MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

The Coronation Fireworks Factory**... Appellant**

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH**(5) EXCISE APPEAL No.40139 OF 2023**

(Arising out of Order-in-Original No.MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

K. Balaji**... Appellant**

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH**(6) EXCISE APPEAL No.40140 OF 2023**

(Arising out of Order-in-Original No.MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

K. Jeyakumar**... Appellant**

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise, ...Respondent

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH

(7) EXCISE APPEAL No.40141 OF 2023

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

K. Jeyasankar**... Appellant**

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise,**...Respondent**

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH**(8) EXCISE APPEAL No.40142 OF 2023**

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

A.R. Arumugarajan**... Appellant**

No.7, Chairman A Shanmugam Road,
Sivakasi,
Tamilnadu 626 123

Versus

The Commissioner of GST & Central Excise,**...Respondent**

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

WITH**(9) EXCISE APPEAL No.40143 OF 2023**

(Arising out of Order-in-Original No. MDU/CEX/COM/01 to 04/2023 dated 31.01.2023 passed by Commissioner of GST & Central Excise, Central Revenue Buildings, Bibikulam, Madurai - 625 002.)

B. Saravanan**... Appellant**

Proprietor,
Sv. P.N.S.N. Balasivaji & Co.,
85, Main Bazaar,
Virudhunagar-626 001.

Versus

The Commissioner of GST & Central Excise,**...Respondent**

Madurai Commissionerate
Central Revenue Buildings,
Bibikulam,
Madurai 625 002.

APPEARANCE :

Mr. S. Jaikumar & Mr. M. Karthikeyan, Advocates (Sl.No.1-7)
Mr. L. Gokulraj, Advocate (Sl.No.8)
Mr. N. Mariappan, Advocate (Sl.No.9)
For the Appellant

Ms. Anandalakshmi Ganeshram, Assistant Commissioner (A.R)
For the Respondent

CORAM :

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

FINAL ORDER Nos. 40303-40311 OF 2024

DATE OF HEARING: 12.12.2023

DATE OF DECISION:20.03.2024

Per Ms. Sulekha Beevi. C.S

The issues involved in all these appeals being the same and connected they were heard together and are disposed of by this common order.

1. The appellants are engaged in manufacture and clearance of fireworks falling under Chapter Heading 3604 of Central Excise Tariff Act 1985. For ease of reference the appellants are referred to as Coronation Group of Companies, (hereinafter also referred to as "CGC").

2. On intelligence received from the Directorate General of Goods & Service Tax Intelligence (DGGI), Chennai Zonal Unit, which was further developed by the officers of DGGI, Madurai Regional Unit, indicated that CGC indulged in evasion of Central Excise duty and GST on clearance of fireworks/crackers by receiving part of the consideration/sales proceeds in cash by various means including receiving commission through agents/conduits/local hawala brokers engaged by them. The amounts received in cash by CGC did not form

part of transaction/dutiable value in the bills/invoices issued by them, and therefore escaped excise duty.

3. Simultaneous search operations were conducted on 8.10.2020 at several premises connected to CGC including their head office premises at Sivakasi. The officers of the department recovered various incriminating documents, records, electronic gadgets and these were seized under Mahazar proceedings, on the reasonable belief that the same would be useful for further investigation.

4. An amount of Rs. 1,82,25,000/- was seized from the residential premises of Shri K. Jeyasankar, one of the partner/director of CGC. The amount was deposited in the Bank Account as a fixed deposit in the name of President of India. The data from the seized electronic gadgets were retrieved under Mahazar proceedings following the provisions under Section 36 B of Central Excise Act, 1944. These were stored in external hard-discs for further investigation and the seized electronic gadgets were sealed once again after retrieving the data from them in the presence of the owners of the electronic gadgets and independent witness. Statements were recorded from the key personnel of CGC, their employees, marketing executives, agents etc. The department recorded statements of Shri. B. Saravanan, Shri. B. Thirumani Selvan, Shri. Anandha Vel, Shri Hitesh Jain @ Shantilal, Shri. Vimal Kumar Jain, Shri. C. Malleswaran, Shri. S. Ramesh, Shri. S. Jeyakumar, Shri. C. Rajarathinam, Shri. C. Arunachalam, Shri. S.A. Perumal, Shri. Raghavendra Vuppula, Shri. A.R. Arumugarajan, Shri.S. Rathnagiri, Shri. Kanagavel, Shri K. Balaji and Shri. Jeyasankar.

5. The scrutiny of the details in the documents, and electronic gadgets and statements recorded from various persons revealed that:

- CGC cleared goods to various buyers on the discounted value than the MRP printed on the packs;
- The invoice value of such goods were much lesser than the MRP as well as actual transaction value;
- The buyer also had the leverage to sell the goods at much higher price than the actual transaction value in as much as the MRP printed was higher than the actual transaction value
- The actual transaction value was arrived at by the DGGI by adding the value declared in the invoice as reflected in the record / ledger maintained by key commission agent Shri Saravanan and the cash amount receivable / received as maintained in another ledger/record by Shri. Saravanan for the above sales.
- The periodical returns filed by CGC for Central Excise did not properly reflect the invoice value. The Income Tax Returns filed by CGC also did not properly reflect the cash amount received /receivable as maintained by Saravanan;

6. Shri. B. Saravanan had admitted the above modus operandi in his statements deposed before the officers, but later on retracted these statements. The investigation indicated that Shri. K. Jeyasankar, masterminded the entire practice of issuing undervalued invoices and clearing final products without issuance of invoices in collusion with others. Shri. K. Jeyasankar, was arrested and remanded to Judicial

custody on 17.02.2021, thereafter he was released on bail. The appellants made deposit of Rs.2.67 crores during investigation.

7. According to the department the modus operandi adopted by the appellants for evasion of Excise duty is as below: -

7.1 On receipt of orders from their dealers orally through mobile phones or by WhatsApp messages or in emails or through sales representatives, Shri. K. Jeyasankar will give instructions to their partner, Shri K. Jeyakumar, to raise invoices offering various discounts for different products. Such discounts on different products on different dealers will be decided by Shri K. Jeyasankar in consultation with his father Shri. P. Kanagavel. On raising the invoices, the same would be communicated and handed over to the dispatch team in their factory to arrange for packing the products as per invoice and for loading in the transport carrier for dispatch. Fireworks can be sold by the dealers at much higher rate than the value shown in the bills for the reason that the MRP printed on packing of the fireworks are much higher than the transaction value. Considering the benefit of the huge profit margin, the dealers were ready and agreed to give the amounts in cash which was over and above the value declared in their bills. The higher value was predominantly paid in cash. Also, CGC used to make some of the sales to some dealers without raising any invoices. The amounts with regard to such supplies without issuing bills was also received by CGC predominantly in cash. These cash amounts were collected through commission agents. Some of the commission agents engaged by Shri. K. Jeyasankar were Shri. B. Saravanan who had their offices at Virudhunagar and Mumbai, Shri. Hitesh Jain (Shantilal), Shri.

P. Vimal Kumar Jain and Shri. Jegathesan. The amounts to be collected from their different dealers were quantified periodically and informed to the agents.

7.2 Shri. K. Jeyasankar, used to give the information through voice calls or WhatsApp voice calls from the mobile number to the dealers. So, also Shri. K. Jeyasankar used to communicate a token or code, which was normally an Indian currency note number or image of currency note in different denominations obtained from commission agents which would be shared to the dealer from where commission agents have to collect the amounts in cash. This was to identify each other to verify the genuineness and correctness of the person. After collecting the amount in cash, commission agent as well as fireworks dealers used to confirm Shri K. Jeyasankar either over normal voice call or WhatsApp voice call through mobile. The commission agents handed over such amounts to Shri K. Jeyasankar or to the person communicated by Shri K. Jeyasankar. One of the persons as per the instruction of Shri K. Jeyasankar to whom the amount was handed over in cash was M/s Vijay Jewellery, Sivakasi. Normally all conversations would be carried out over normal voice calls or WhatsApp voice calls only to avoid any digital or physical evidence. Some times the conversations would be in SMS, WhatsApp messages.

7.3 On comparison of ER1 returns the value of the bills/invoices recovered from their billing software showed that the appellants have short declared the assessable value in their monthly returns. So also in their VAT returns and Profit and Loss statements.

7.4 Based on the above, show cause notices were issued to the appellants proposing to demand the short-paid excise duty along with interest and for imposing penalty. After due process of law, the original authority passed the impugned order against which the appellants have preferred these appeals. The operative portion of the impugned order reads as below:

33. ORDER

33.1 M/s The Coronation Fireworks Factory [SCN No.04/2021-C.Ex]

i) I confirm the demand of differential Central Excise duty of Rs.1,72,56,579/- (Rupees One crore Seventy Two Lakhs Fifty Six Thousands Five Hundred and Seventy Nine Only) [Rs.1,38,05,263/- in respect of Central Excise Registration Number AAFT5790QXMOO1 and 34,51,316/- in respect of Central Excise Registration Number AAFT5790 QXMoo3, (in proportion to their assessable value declared in the ER1 Returns) being central excise duty not paid by M/s The Coronation Fireworks Factory, collected/ received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared/supplied & lesser/suppressed transaction/taxable values reported in the invoices and value of the manufactured final products supplied/cleared/sold without issuance of invoices under Section 11A(4) of the Central Excise Act 1944;

ii) I confirm the demand of Rs. 10,138/- (Rs.Ten Thousand and One Hundred and thirty eight Only) being central excise duty not paid by M/s The Coronation fireworks Factory on suppressed / short declared in the ER1 Returns filed by them when compared with total value or the invoices issued by them during the period from August 2016 to June 2017 under " Section 11A(4) of the Central Excise Act 1944;

iii) I confirm demand of interest as applicable on the Central Excise duty amount mentioned at (i) & (ii) above under Section 11AA of the Central Excise Act 1944;

iv) I impose a penalty of Rs.1,72,66,717/- (Rupees One crore Seventy Two Lakhs Sixty Six Thousands Seven hundred and Seventeen Only), being central excise duty not paid by M/s The Coronation Fireworks Factory collected / received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared/supplied & lesser/suppressed transaction/ taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices / short declared in the ER1 Returns filed by them during the period from August 2016 to June 2017 under Section 11AC of the Central Excise Act 1944. with option to pay penalty equal to 25% of the penalty imposed if the entire amount of excise duty along with interest and reduced penalty is paid within 30 days from the date of receipt of this order;

v) I order to appropriate the voluntarily discharged amount of Rs. 1,42,26,800/- (Rupees One Crore Forty two Lakhs Twenty six thousands and eight hundreds only) already paid by M/s Coronation Fireworks Factory vide CIN No.20210220183621313056 dated 20.02.2021 against the confirmed demand at para No. 33.1 (i); and

vi) Since I have already imposed penalty under Section 11AC of Central Excise Act. 944. I consider that it is not required to impose penalty under Rule 26 & 27 of the Central Excise Rules, 2002 again for the same offence on the company, therefore I drop the penalty proposed under Rule 26 & 27 of the Central Excise Rules, 2002

33.2 M/s Sri Coronation Fireworks Private Limited [SCN N05/2021 C. Ex)

i) I confirm the demand of differential Central Excise duty of Rs.1,95,30,192/- (Rupees One Crores Ninety-Five Lakhs Thirty Thousands One Hundred and Ninety Two Only) being central excise duty not paid by M/s Sri Coronation Fireworks Private Limited, collected / received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared/supplied & lesser/suppressed transaction./taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11A(4) of the Central Excise Act 944;

ii) I drop the proceedings being central excise duty not paid by M/s Sri Coronation Fireworks Private limited on suppressed / short declared in the ER1 Returns filed by them when compared with total value of the invoices issued by them during the period from August 2016 to June 2017 under Section 11A(4) of the Central Excise Act 1944;

iii) I confirm demand of interest as applicable on the Central Excise duty amount mentioned at (i) above under Section 11AA of the Central Excise Act 1944;

iv) I impose a penalty of Rs.1,95,30,192/- (Rupees One Crores Ninety-Five Lakhs Thirty Thousands One Hundred and Ninety Two Only), being central excise duty not paid by M/s Sri Coronation Fireworks Private Limited, collected / received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared/supplied & lesser/suppressed transaction/ taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11AC of the Central Excise Act 1944, with an Option to ply penalty equal to 25% of the penalty imposed if the entire amount of excise duty along with interest and reduced penalty is paid within 30 days from the date of receipt of this order;

v) I order to appropriate the voluntarily discharged amount of Rs. 1,25,12,819/- (Rupees One Crore Twenty-Five Lakhs Twelve Thousand and eight hundred and Nineteen only) already paid by M/s Sri Coronation Fireworks Private Limited vide CIN no. 20210220135327238931 dated 20.02.2021 against the confirmed demand at para no.33.2 (i); and

vi) Since I have already imposed penalty under Section 11 AC of Central Excise Act, 1944. I consider that it is not required to impose penalty under Rule 26 & 27 of the Central Excise Rules, 2002 again for the same offence on the company, therefore I drop the penalty proposed under Rule 26 & 27 of the Central Excise Rules, 2002

33.3 M/s Naya Carnation Fireworks [SCN No. 06/2021-C.Ex]

i) I confirm the demand of differential Central Excise duty of Rs.25,90,015/- (Rupees Twenty Five Lakhs Ninety Thousand and Fifteen Only) being central excise duty not paid M/s Naya Carnation Fireworks, collected / received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared/supplied & lesser/suppressed transaction/ taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11A(4) of the Central Excise Act 1944;

ii) I confirm the demand of Rs.5,42,707/- (Rupees Five Lakhs Forty two Thousand and Seven Hundred and Seven Only), being central excise duty not paid by M/s Naya Carnation Fireworks on suppressed / short declared in the ER1 Returns filed by them when compared with total value of the invoices issued by them during the period from August 2016 to June 2017 as detailed in Para No.29.15 should not be treated as suppressed/short declared assessable values during the period under Section 11A(4) of the Central Excise Act 1944;

iii) I confirm demand of interest as applicable on the Central Excise duty amount mentioned at (i) and (ii) above under Section 11AA of the Central Excise Act 1944; and

iv) I impose a penalty of Rs.31,32,722/- (Rupees Thirty one Lakh Thirty two Thousand and Seven Hundred and Twenty two Only), being central excise duty not paid by M/s Naya Carnation Fireworks, collected / received in cash from the dealers/customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared / supplied & lesser / suppressed transaction / taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11AC of the Central Excise Act 1944. with an option to pay penalty equal to 25% of the penalty imposed if the entire amount of excise duty along with interest and reduced penalty is paid within 30 days from the date of receipt of this order; and

v) Since I have already imposed penalty under Section 11AC of Central Excise Act, 1944, I consider that it is not required to impose penalty under Rule 26 & 27 of the Central Excise Rules, 2002 again for the same offense on the company, therefore I drop the penalty proposed under Rule 26 & 27 of the Central Excise Rules, 2002

33.4 M/s Bee Cee Fireworks Industries [SCN No. 07/2021 -C. Ex.]

(i) I confirm the demand the differential Central Excise duty of Rs.43,62,229/- (Rupees Forty Three Lakhs Sixty Thousands two hundred and Twenty Nine Only) being central excise duty not paid by M/s. Bee Cee Fireworks Industries, collected / received in cash from the dealers/ customers towards differential value between the actual transaction/taxable value of the manufactured goods cleared / supplied & lesser / suppressed transaction / taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11A (4) of the Central Excise Act 1944;

(ii) I drop the proceedings being central excise duty not paid by M/s Bee Cee Fireworks Industries on suppressed / short declared in the ER1 Returns

filed by them when compared with total value or the invoices issued by them during the period from August 2016 to June 2017 under Section 11A(4) of the Central Excise Act 1944;

(iii) I confirm demand of interest as applicable on the Central Excise duty amount mentioned at (i) above under Section 11AA of the Central Excise Act 1944;

(iv) I impose a penalty Rs.43,62,229/- (Rupees Forty Three Lakhs Sixty Two Thousands Two Hundred and Twenty Nine Only), being central excise duty not paid by M/s Bee Cee Fireworks Industries, collected / received in cash from the dealers/customers towards differential value between the actual transaction / taxable value of the manufactured goods cleared / supplied & lesser / suppressed transaction / taxable values reported in the invoices and value of the manufactured final products supplied /cleared/sold without issuance of invoices under Section 11AC of the Central Excise Act 1944, with an option to pay penalty equal to 25% of the penalty imposed if the entire amount of excise duty along with interest and reduced penalty is paid within 30 days from the date of receipt of this order;

(v) I order to appropriate the voluntarily discharged amount of Rs 43,62,229/- (Rupees Forty-Three Lakhs Sixty-Two Thousand Two Hundred and Twenty Nine only) already paid by M/s Bee Cee Fireworks Industries, Sivakasi vide CIN No. 20201027112605304435 dated 27.10.2020 against the confirmed demand at para no. 33.4 (i); and

(vi) Since I have already imposed penalty under Section 11AC of Central Excise Act, 1994, I consider that it is not required to impose penalty under Rule 26 & 27 of the Central Excise Rules, 2002 again for the same offence on the company, therefore I drop the penalty proposed under Rule 26 & 27 of the Central Excise Rules, 2002;

34. Penalty for Key persons

34.1 (i) I impose penalty for Shri K. Jeyasarikar, Residence: No. 122, Velayutham Road, Sivakasi — 626123, of Rs.10,00,000/- (Rs. Ten Lakhs only) for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 26 of the Central Excise Rules, 2002.

(ii) I drop penalty for Shri K. Jeyasankar, Residence: No.122, Velayutham Road, Sivakasi 626123 for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 27 of the Central Excise Rules, 2002

34.2 (i) I impose penalty for Shri. K. Balaji, No.127-A/1, Velayutham Road, Sivakasi — 626123 Rs.10,00,000/- (Rs. Ten Lakhs only) for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 26 of the Central Excise Rules, 2002;

(ii) I drop penalty for Shri K. Balaji, No.127A/1, Velayutham Road, Sivakasi — 626123 for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 27 of the Central Excise Rules, 2002;

34.3 (i) I impose penalty for Shri K. Jeyakumar , Door No 474, Old No.133/2C, Thendral Nagar, Sivakasi — 626123 Rs.10,00,000/- (Rs. Ten Lakhs only) for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 26 of the Central Excise Rules, 2002;

(ii) I drop penalty for Shri K. Jeyakumar , Door No.474. Old No. 133/2C, Thendral Nagar, Sivakasi — 626123 for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 27 of the Central Excise Rules, 2002;

34.4 (i) I impose penalty for A.R. Arumugarajan, Employee of Coronation Group of Companies, NO.132-B, Palani Andavarpuram Colony, Ganagiri Road Temple, Sivakasi — 626123 of Rs.10,00,000/- (Rs. Ten Lakhs only) for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 26 of the Central Excise Rules, 2002;

(ii) I drop penalty for A.R. Arumugarajan, Employee of Coronation Group of Companies, No.132-B, Palani Andavarpuram Colony, Ganagiri Road Temple, Sivakasi — 626123 for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 27 of the Central Excise Rules, 2002

34.5 (i) I impose penalty for Shri B. Saravanan, Proprietor, M/s SVPNSN Balasivaji & Co 140 /1, Dr. Ambedkar Road, Virudhunagar — 626001 Rs.10,00,000/- (Rupees Ten Lakhs only) for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 26 of the Central Excise Rules, 2002;

(ii) I drop penalty for Shri B. Saravanan, Proprietor, M/s SVPNSN Balasivaji & C 140/1, Dr. Ambedkar Road, Virudhunagar — 626001 for the acts of commission and/or omission (as discussed in above paras), separately in terms of Rule 27 of the Central Excise Rules, 2002.

34.6 I drop penalty for Shri Hitesb Jain, 10C, Gopala Kothan Street, Madurai 625001 & Shri P. Vimal Kumar Jain, No. 138, North Avani Moola Street, Madurai- 625001 for there is no involvement of planning and executing in the current proceedings during the impugned period

35. The Show Cause Notice No 4,5,.6, & 7 /2021 C-Ex dated 03.09.2021 issued to M/s The Coronation Fireworks Factory, M/s Sri Coronation Fireworks Private Limited, M/s Naya Carnation Fireworks, and M/s Bee Cee Fireworks Industries of Sivakasi by the Additional Director General of GST Intelligence, Coimbatore stands disposed of, accordingly.

8. The Ld. Counsel Sr. S. Jaikumar appeared and argued for the appellant. It is submitted that the origin of these proceedings are based out of an investigation conducted against M/s. Standard fireworks Pvt Ltd, Sivakasi (hereinafter referred to as SFW) by the Directorate General of GST Intelligence (hereinafter referred to as DGGI), Chennai Zonal Init, Chennai during October 2017. The said investigation resulted in a Show Cause Notice against M/s. SFW. During the said investigation, the DGGI recovered few electronic evidences, namely a laptop and a pendrive allegedly from the premises of M/s.

SVPNSN Balashivaji & Co, (hereinafter referred to as Bala) Virdhunagar and Mumbai. Statements were recoded from Sri. B. Saravanan, proprietor of Bala and also from Shri B. Thirumani Selvan an employee of Bala.

8.1 Subsequently, during the adjudication proceeding of M/s. SFW, a cross examination of Shri B. Saravana and Shri B. Thirumani Selvan, was conducted wherein they had totally disowned the said electronic evidences (laptop/pen drive) and also the contents thereof.

8.2 In the above backdrop in 2020, the officers of DGGI Madurai conducted investigations against these four appellants namely The Coronation Fireworks Factory (hereinafter CFF), Sri Cornation Fireworks Pvt Ltd (hereinafter referred to as SCFPL), Bee Cee Fireworks Industries (hereinafter referred to as BCF), Naya Carnation Fireworks (NCF). Based on further investigations a Show Cause Notice was issued to all the four units which culminated into an Order In Original dated 31.01.2023 as tabulated hereunder. The period involved in these proceedings is between 01.08.2016 and 30.06.2017 (11 months) and the differential duty demanded on account of undervaluation is also tabulated hereunder

SL No.	Name of the appellant	SCN No. & Date	Differential Duty Demanded	
			Due to undervaluation	Due to difference between invoice and ER 1 return
1.	The Coronation Fireworks Factory	SCN No. 04/2021 CEX dated 03.09.2021	1,72,56,579	10,138

2.	Sri Cornation Fireworks Pvt Ltd	SCN No. 05/2021 CEX dated 03.09.2021	1,95,30,192	0
3.	Naya Cornation Fireworks	SCN No. 06/2021 CEX dated 03.09.2021	25,90,015	5,42,707
4.	Bee Cee Fireworks Industries	SCN No. 07/2021 CEX dated 03.09.2021	43,62,229	0
5.	Total		4,37,39,015	5,52,845

8.3 It is submitted that CGC are engaged in the manufacture of fireworks falling under chapter heading 3604 of the Central Excise Tariff and the said goods attracted Central Excise duty at the rate of 12.5% during the relevant period. The relevant shareholding pattern of all the 4 companies are tabulated hereunder for ready reference.

Serial No.	Name of the Unit	Constitution	Name of Partners/Directors S/Shri	% of shares
1.	The Coronation Fireworks Factory	Partnership	P Kanagavel (expired in 2021)	97
			K Jeyasankar	1
			K Balaji	1
			K Jeyakumar	1
2.	Sri Cornation Fireworks Pvt Ltd	Private Limited	P Kanagavel	40.7
			P Kanagavel (HUF)	14.3
			K Jeyasankar	15
			K Balaji	15
			K Jeyakumar	15
3.	Naya Carnation Fireworks	Partnership	K Jeyasankar	2
			K Balaji	49
			K Balaji (HUF)	49

4	Bee Cee Fireworks Industries	Partnership	K Jeyakumar	49
			K Jeyakumar (HUF)	50
			K Balaji	1

8.4 For ease of argument, the issues as framed by the Adjudicating authority (AA) in the impugned Order-in-Original (OIO) are referred to as below;

- Whether the evidences, including electronic evidences, recovered by the investigating officers during earlier proceedings for another company can be considered and relied as evidence in a subsequent investigation and proceedings initiated against the noticees namely CGC and others.
- whether the evidences more particularly the electronic evidences have complied with the provision of Section 36B of the Central Excise Act, 1944 (hereinafter referred to as “CEA”) to be considered as an evidence for the purpose of demand of Central Excise Duty under the CEA?
- Whether the quantification of demand as arrived in the Show Cause Notice vide para 7.1 to 7.17 adopting percentage of cash to invoice value is correct or the same needs to be arrived at only based on the evidences available on record?
- Whether demand of Central Excise Duty on CGC on the amounts collected in cash over & above the value is correct or not;
- Whether interest to be demanded; and

- Whether suppression clause is to be invoked and consequently penalty is imposable on the assessee and Co-Noticees.

8.5 It remains an undisputed fact and as observed by the adjudicating authority in his finding in para 29.9 of Order-In-Original that the genesis of the current proceedings is an offshoot of investigation in 2017 by the officers of DGGI. It also remains an undisputed fact that the entire evidences relied upon in the impugned proceedings is borne out of the 2 electronic evidences namely, the laptop and pendrive retrieved from Shri. B. Saravanan and is not only a third-party evidence but also recovered in a completely alien proceedings against another company namely M/s. SFW. Third party evidence which is totally alien to these proceedings cannot be relied upon against these appellants to hold them liable for demand of duty and that too in absence of any direct evidence. The AA has observed in para 29.9 that there is no legal bar to rely upon evidences recovered in case against another party. He further observed that the appellants have not substantiated their argument about this defence with any corresponding legal provision or judgement. The appellant in their reply dt. 23.11.2022 at para 14.4 had stated that the ratio of decision in the case of Shree Rolling Mill Versus Commissioner as reported in 2021 (377) E.L.T. 883 (Tri. – Del.) and Synergy Steels Limited Versus Commissioner 2020 (372) E.L.T. 883 (Tri. – Del.) have held that third party evidence is not admissible without corroboration. In this connection, the decisions of the CESTAT, Chennai as reported in 2018 (2) TMI 14 and 2017 (11) TMI 815 also support the defence put

forward by appellant that third-party evidences cannot be relied upon to hold liability against the appellants.

8.6 In respect of the view taken by AA as to compliance of Section 36B and evidentiary value of the electronic evidences, the AA has in para 29.10 of the impugned Order-in-Original given a complete go-by to the statutory requirements provided under section 36B of CEA which stipulates various conditions for admissibility of electronic evidence admissible in proceedings.

8.7 AA, in para 29.10 of the impugned OIO has observed that, as the said electronic evidences namely the laptop/pendrive were recovered in the earlier proceeding against M/s. SFW and the said proceeding against M/s. SFW had culminated by way of a settlement under the SVLDRS scheme, the same has to be considered as compliance to section 36B of CEA. The Ld. Counsel submitted that the above conclusion of the AA is not only patently illegal but also against the spirit of SVLDRS scheme as spelt out by the CBIC in their circular no 1071/4/2019-CX dated 27.08.2019 and also the related FAQ (Q 42) released by the department. The AA has not only ignored the legal provisions but has also disregarded all judicial pronouncements in this regard cited by the appellant in their reply.

8.8 It is also a curious observation of the AA in para 29.10 that "the **consistently inconsistent depositions** of B. Saravanan right through the proceedings has not only rendered his depositions as unstable and unreliable thus making his application under SVLDRS scheme as the only credible, stable and reliable act from his end and hence I have no hesitation in holding that the electronic evidence

resumed from B Sarvanan and relied upon in the current proceedings are credible in law”.

8.9 It is also worthwhile to mention that there is an apparent contradiction in para 29.10 & 29.11 of the impugned OIO wherein on one hand the AA holds that the electronic evidences relied upon in the current proceedings is only pendrive or a laptop and not mobile phones. On the other hand he has proceeded to conclude that Whatsapp chats can be used as evidence as they are virtual and verbal communications. While doing so, AA has totally misplaced his reliance in the case of Ambalal Sarabhai Enterprise Ltd Vs. KS Infraspac LLP Ltd & Anr. C.A. Nos. 9347 to 9349 of 2019 by ignoring the most important and relevant part of the dictum. In para 17 of the said judgement though rendered on a different context, the Hon’ble SC has observed that “the whatsapp messages which are virtual verbal communication are matter of evidence with regard to their meaning and its contents”. In this instant case, there is no effort whatsoever made by AA to prove the contents of the messages neither by evidence in chief or by cross examination. On the contrary, the appellants have dislodged the basic evidentiary value of the electronic evidence both by referring to the relevant statutory provisions, namely, Section 36B of Central Excise Act, 1944 and section 65B of the Indian Evidence Act, 1872 as well as by cross examination conducted before the AA thus making even the referred judgement to be in total favour of the appellant. In the above referred decision, the Hon’ble Apex court has held as under;

"17. The WhatsApp messages which are virtual verbal communications are matters of evidence with regard to their meaning and its contents to be proved during trial by evidence in chief and cross examination".

8.10 Notwithstanding the above, the contention of the appellant that the whatsapp messages which are vulnerable for manipulation are to be authenticated as per sections 36B of Central Excise Act and 65B of the Indian Evidence Act 1872 has been totally disregarded.

8.11 The appellants are left with awe and despair to comprehend as to how the ratio in the above judgement would be of any assistance to the department to hold that the electronic evidences are credible evidences in compliance with section 36B of CEA. Notwithstanding the above, it is very relevant and pertinent to mention that even the retrieved and relied upon documents are under cloud. The following communications for seeking the retrieved documents and its corresponding authenticity during the course of investigation are noteworthy in this regard:

a) Letter dated 03.01.2022 was issued by the authorised representative of the appellants wherein at para 3.3 (ii) a request was made for the proceedings documented while retrieving data of ledger from the laptop of Shri. B. Saravanan which is relied upon as RUD No. 38 of SCN. In response to the said letter the deputy director DGGI, Madurai vide reply dated 02.02.2022 at para 7 stated that the print outs referred as RUD 38 in the Show cause notice was retrieved by Government forensic laboratory.

b) Further another Letter dated 09.02.2022 issued by the authorised representatives of the appellants wherein at para 6.2 a request was made to provide documents relating to retrieval of data from the laptop at the Government Forensic Laboratory. No reply was received for this letter.

8.12 From the above, it can be seen that despite specific requests the department had not provided to the appellant the details as requested, making the relied upon documents (data from pendrive and laptop) under cloud and inadmissible in these proceedings.

8.13 Further, in para 29.12 and 29.13 of the impugned OIO, the AA has observed that there is excess cash transaction over and above the invoice value as per the statements of dealers. It is a surprising fact that, in the instant proceedings though there are around 200 dealers for CGC across various states of West Bengal, Andhra Pradesh, Delhi, Gujarat, Maharashtra, Madhya Pradesh, Kerala, Rajasthan, Punjab etc., only statements of two dealers have been recorded and relied (one from Andhra Pradesh and one from Tamil Nadu). It is also pertinent to mention that even in these 2 statements the dealer from Andhra Pradesh had deposed that he had started transactions with CGC only from 2018 and not during the period of dispute. It establishes that these statements cannot be the basis for quantification of duty.

8.14 Huge and intense reliance has been placed on few depositions given by Shri B Saravanan. The AA has on one hand observed that the depositions of Shri B Saravanan are "consistently inconsistent and unreliable right through the proceeding". On the other hand, accepts his so called 'consistently inconsistent depositions' to hold against the

appellants and thus has proceeded on a suit-to-the-glove convenience. The AA has comfortably ignored the cross examination of Shri B Saravanan conducted before him on 02.11.2022 where he had categorically stated that, his previous depositions during the cross examination dated 27.10.2019 before the Commissioner in the earlier proceeding against M/s. SFW is true and correct and also that all his other depositions given during the current investigation were given out of fear of arrest. It is submitted that, if at all the AA had any apprehension or doubts about the deposition of Shri. B. Saravanan during the cross examination proceeding, it was well open for the AA to have questioned/examined him in the same manner. By being mute during the proceeding, the AA has deemed to have accepted the depositions of Shri B Saravanan made during the cross examination conducted before himself and hence cannot discard or dismiss the same during adjudication.

8.15 Further the AA has also dismissed the various depositions made during cross examination by the witnesses giving flimsy reason that they have retracted after a lengthy passage of time. The denial of allegations by the witness during cross-examination cannot be considered as a retraction statement. In this context the AA has not only ignored the well settled legal position that such cross examination would be the first legitimate opportunity for the witnesses to come out in open and give fair deposition, but has not also taken cognisance of the very pertinent and relevant facts namely;

A) The entire proceedings were during the thick of pandemic,

- B) No copies of the statement were given till the Show Cause Notice was issued,
- C) There was an impending threat of arrest induced by the investigation supported by the arrest of Sri K Jeyshankar in the proceedings and,
- D) The untimely and unexpected demise of Sri Kanagavel the founder of CGC.

Ignoring all the above, the Commissioner just brushed aside the entire depositions obtained during cross-examination.

8.16 Last but not least, the SCN has proposed a novel method of determination of differential duty. Relying on the clouded electronic evidences allegedly retrieved from Sri B Saravanan during a proceeding in an erstwhile investigation, and which were neither legally retrieved nor corroborated with any of the dealers, and which corresponds to the states of Gujarat and Maharashtra alone, the department has arrived at a percentage of 192.63% over and above the invoice price considering the transactions in those two states. In other words, the department has considered the entire figures as appearing in these electronic evidences to correspond to the clearances effected by the appellants during the relevant period to the states of Gujarat and Maharashtra and has arrived at a percentage accordingly to quantify duty for entire clearances of disputed period. It is not known, how department has worked out 192.63%, to the entire transactions of CGC during the relevant period to arrive at differential duty. The quantification of duty is on methods impermissible both

legally and logically. Assuming without admitting even if there is an excess collection from a particular dealer, applying the ratio of Hon'ble Supreme Court in CERA Boards and Doors as reported in 2020 (373) E.L.T. 794 (S.C.), the same shall be applicable only to that particular dealer and not to everyone, leave alone the geography.

8.17 CGC was incorporated in the year 1974 by Late. Shri P. Kanagavel who founded Coronation Fireworks factory and later on in the years 1994, 1995 and 2003 Sri Coronation Fireworks Pvt. Ltd., Naya Carnation Fireworks and Bee Cee Fireworks Industries were founded, respectively. Right from inception till the demise in the year 2021, Shri. P. Kanagavel was incharge of the entire spectrum of activities of the entire group. This fact would be evidenced from the univocal depositions of all the witnesses who appeared for the cross examination before the Ld. Commissioner on 02.11.2022 and 09.11.2022. This is also otherwise evident by the holding of 97% of the shares of the mother company, namely The Coronation Fireworks Factory and 55% in Sri Cornation Fireworks Pvt. Ltd and other 3 Directors are having 15% of the shares. In other words, Shri. Kanagavel had been the sole in-charge of all the business activities of CGC starting from manufacturing, finances, sales and all other policy decisions of CGC till he was alive.

8.18 The appellants hold central excise registration separately. However, the demand is raised against two registration numbers only. All the four group companies have been issued SCNs. Again, the first para of the operative portion of the order, the AA has stated that the demand is confirmed for goods supplied without issuing invoices also.

However, in last part of para 29.13 it is observed that there are no clearances made by appellants without issuing invoices.

8.19 The appellants have not indulged in any undervaluation of goods. They have discharged excise duty and filed ER-1 returns. The entire case is made up by the department after the case against M/s. SFW Ltd ended up in opting for SVLDRS. It is prayed that the appeals may be allowed.

9. The Ld. AR Ms. Anandalakshmi Ganeshshram appeared and argued for the department. It is submitted that the data from the seized electronic gadgets were retrieved under mahazar proceedings following due procedures as per Section 36B of CE Act, 44 and relevant provisions of CGST Act, 2017 read with Indian Evidence Act, 1872 & Information Technology Act 2000 and were stored in the external hard discs for further investigation and seized electronic gadgets were sealed once again after retrieving the data from them in the presence of the owners of the electronic gadgets and independent witnesses.

9.1. The extract of Section 36 B of the Central Excise Act, 1944 is given below:

Section 36B in the Central Excise Act, 1944

36B. Admissibility of microfilms, facsimile copies of documents and computer printouts as documents and as evidence. —

(1) Notwithstanding anything contained in any other law for the time being in force,

(a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (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 printout"), **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.

(2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely: --

(a) the computer printout containing the statement was 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 regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, --

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

9.2. The Ld. AR submitted that the adjudicating authority has noted in the impugned order that Section 36B has been complied. So also cross examination of the persons as desired by the authorized

representatives of the appellants had been permitted by the AA of whose statements were relied upon in the SCNs.

9.3. It is submitted that the findings are so elaborate and supported with various statements given by the directors, employees of the company, the author of the electronic evidence and also have been corroborated by the statement of the dealers. Though inconsistent, when finally opposed with evidence, the directors as well as Shri B. Saravanan along with key employees have admitted the cash receipts over and above the invoice value.

9.4 It is submitted that though a feeble attempt has been made during the course of cross examination to deny their earlier admissions, the said retractions are after a lengthy passage of time. It has been time and again held by various courts including the Apex Court that belated retractions cannot be considered as a valid retraction.

9.5 In this connection reliance is placed on the judgement of the Hon'ble Supreme Court in the case of *Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh and Anr (2008) 15 SCC 49* as to the question of whether the confession statement can be relied upon to convict the accused in spite of subsequent retraction, The Hon'ble Court answered in affirmative and accordingly the retracted statements were relied upon. It was held that the retractions were made after almost a year and were only an afterthought and were not raised at the first available opportunity. This judgement is applicable to the present case.

9.6 In this connection reliance is also placed on the judgement of the Hon'ble Supreme Court in the case of *Telestar Travels Pvt. Ltd.,*

Vs. Special Directory of Enforcement [2013 (289) ELT 3 (SC)] in which it was held that if the statements are based on consideration of relevant facts and circumstances and found to be voluntary, they can be relied on irrespective of retraction and when subsequent retraction was mere afterthought to escape consequences of the violations committed. These judgements are squarely applicable to the present case.

9.7 It is submitted that it is clear that CGC, their directors/partners, employees and Sales Representatives colluded among themselves and also with their dealers and commission agents engaged by them and ensured that excisable firecrackers manufactured by their firms namely M/s The Coronation Fireworks Factory, M/s Sri Coronation Fireworks Private Ltd., M/s Naya Carnation Fireworks & M/s Bee Jee Fireworks Industries were cleared by them under the bills with lesser/suppressed transaction value issued by them at the time and place of their removal. They had put in place a well-oiled mechanism to make sure that amounts corresponding to the extent of the cash transactions as reflected in the various evidences including the electronic evidences correspond to the cash receipts received over and above the invoice value of the clearances made by the noticees towards the value of their final products. Thus, it is clear that the cash receipts mentioned in the various evidences including electronic evidences correspond to the under valuation of excisable goods manufactured and cleared by the noticees as it relates to the impugned period and to hold that the same has escaped the payment of Central Excise Duty. The fact that the firecrackers were undervalued by them & were cleared / removed by them without issuance of bills amounts to 'fraud' and was obviously

suppressed from the department. Needless to state that in the regime of self-assessment, greater onus is thrust on the assessee in determining their tax/duty liability as a part of voluntary compliance. However, in the instant case, CGC has deliberately violated the provisions in utter disregard to law while assessing their duty liabilities and appears to have evaded the duty.

9.8 It is submitted that it is clear that all this was done as a part of gross fraud with an intention to evade duty by contravening various provisions of the Central Excise Act, 1944 and the Rules made there under. Moreover, it is observed from the records that the entire issue came to surface because of the strenuous investigations carried out by the officers attached with the DGCEI office. But for their timely intervention and carrying out tactful extensive investigation, the whole issue of this much magnitude involving the part of all the parties with their clear intent to evade payment of duty would not come to light. It is prayed that the appeals filed by the parties may be dismissed and render justice.

10. Heard both sides.

11. On the basis of the submissions made by both sides, the issues arising for analysis and discussion are same as the issues framed by the adjudicating authority as stated in para 29.1 of the impugned order, and are reiterated as under:

- a. Whether the evidences, including electronic evidences, recovered by the investigating officers during earlier proceedings for another company can be considered and relied as evidence in

a subsequent investigation and proceedings initiated against the noticees namely CGC and others.

- b. whether the evidences more particularly the electronic evidences have complied with the provision of Section 36B of the Central Excise Act, 1944 (hereinafter referred to as "CEA") to be considered as an evidence for the purpose of demand of Central Excise Duty under the CEA?
- c. Whether the quantification of demand as arrived in the Show Cause Notice vide para 7.1 to 7.17 adopting percentage of cash to invoice value is correct or the same needs to be arrived at only based on the evidences available on record?
- d. Whether demand of Central Excise Duty on CGC on the amounts collected in cash over & above the value is correct or not;
- e. Whether interest to be demanded; and
- f. Whether suppression clause is to be invoked and consequently penalty is imposable on the assessee and Co-Noticees.

12. The first issue (a) being dependent on other issues, unless we first discuss issues (b), (c), and (d), we would not be able to answer issue (a). Hence, we proceed to analyse these issues first. The period involved is from August 2016 to June 2017. The Show Cause Notice is dated 03.09.2021 and has been issued invoking the extended period.

12.1 Some of the significant facts are as under:

(i) the main evidence relied for demand of duty are the data retrieved from electronic evidence in the nature of a pen drive and laptop.

(ii) This pen drive and laptop was not recovered in the investigation initiated in 2020 against the appellants or from the premises belonging to the appellant group companies.

(iii) This pendrive and laptop was recovered in 2017 in an earlier investigation initiated against M/s Standard Fire Works Ltd., conducted by officers of DGGI, Chennai Zonal Unit.

(iv) During the investigation conducted against M/s Standard Fire Works, Ltd., search was conducted by officers in 2017 in several premises including the premises of M/s SVPNSN Balashivaji & Co., at Virudhunagar and Mumbai. Shri. B. Saravanan is alleged to be the proprietor of M/s SVPNSN Balashivaji & Co. The pen drive and laptop was recovered as per Mahazar dated 26.10.2017 from the premises of M/s SVPNSN Balashivaji & Co.

(v) As per investigations conducted against M/s Standard Fireworks Ltd., a show cause notice dated 27.10.2018 was issued against M/s Standard Fireworks and others. Shri B. Saravanan was a co-noticee in the said Show Cause Notice. All the noticees of the said Show Cause Notice dated 27.10.2018 including M/s. Standard Fireworks Ltd., and Shri. B. Saravanan opted for SVLDR scheme and paid duty as per this Amnesty Scheme.

(vi) Subsequently, after a period of 3 years, the DGGI, Madurai Unit on the basis of the evidence contained in the very same pen drive

and lap top initiated investigation against the appellant group companies and search operations were conducted at various premises of appellant group companies on 08.10.2020.

(vii) Pursuant to such search operations, and recording of statements etc., the present Show Cause Notice dated 03.09.2021 has been issued in which Shri. B. Saravanan is again a co-noticee.

12.2 The Ld. Counsel for appellant has vehemently argued that the electronic evidence (pen drive & laptop) are not admissible in evidence. Firstly, for the reason that they were recovered in an earlier proceeding to which the appellant was not a party. Secondly, because the procedure contemplated under Section 36B has not been complied.

12.3 In para 29.9 and 29.10 the adjudicating authority has discussed these contentions of the appellant. Undisputedly, the pen drive and lap top were not recovered during the investigations initiated against the appellant. So also, it is admitted by department that the proceedings against M/s Standard Fireworks was closed after the issuance of Show Cause Notice (dt. 27.10.2018), as the main noticee M/s Standard Firework and co-noticee, Shri B. Saravanan and others had settled the matter under the SVLDR Scheme. The argument put forward by appellant that the evidence in the nature of pen drive and laptop collected in an earlier investigation cannot be used in the current proceeding has been brushed aside by the adjudicating authority by observing in the impugned order, that though the appellant contend that the evidence cannot be used in a subsequent proceeding, there is no legal bar and that appellants have not substantiated their contention

with relevant legal provision or judgements. The discussion of the adjudicating authority in this regard is as under:

Now coming to the question before me as to whether the evidences collected in an earlier proceeding against the another company could be relied upon as an evidence in any other/ subsequent proceeding against another company / person, I find that there is no legal bar against the same. Though the notices have brought out this in their defence, they have not substantiated the same with any corresponding legal provision or judgement to that extent. In absence of any such legal prohibition, I am of the considered view that the evidences collected by the investigation in an earlier proceeding against different company could be well used against the noticees, as long as the integrity 36B not followed of the evidence as well as the evidentiary value are not negotiated and hence I answer the question in affirmation.

12.4 We find the above view of adjudicating authority to be legally flawed. The pen drive and laptop were recovered as per Mahazar dt.26.10.2017 at 11.30 hrs. This mahazar was recorded at the premises of M/s SvPNSN Balasivaji & Co. The appellant Company (CGC) or their representative was not present during such proceedings. CGC had no occasion to know anything about such investigation, search or recovery of documents. The appellants were not co-noticee in the earlier proceedings.

12.5 The mahazar for search in the present proceeding is dated 08.10.2020. Though a laptop, 2 CPU, mobile phones etc., were recovered during the search conducted at the premises of appellant on 08.10.2020, none of these electronic evidences are relied for establishing the allegations against appellants. As per the impugned order the evidence relied are the pen drive, and laptop seized vide mahazar dt. 26.10.2017. A mahazar is a written document which serves as proof for material objects collected from the scene. It lays down certain procedures to be adopted for recovery of such objects. It is a proof that the officers have physically visited the scene and also

seen the objects recovered. A copy of the mahazar has to be served/supplied to the party who is affected. Correction or alteration in a mahazar is to be avoided or not allowed after completion. Thus a mahazar is the proof of the procedure undertaken during the search and seizure of the material objects. It is a document to ensure that there was no occasion for fabricating or tampering of evidence. Section 12F deals with the power of officers for search and seizure. Sub-section (2) of Section 12F provides that the provisions of the code of Criminal Procedure Code 1973 relating to search and seizure shall, so far as may be, apply to search and seizure under this Section.

12.6 On perusal of mahazar dt. 26.10.2017 of the earlier proceedings, the pen drive was seized and kept in a brown colour cover duly signed by Shri B Thirumani Selvan, Shri B. Saravanan and by the officers. The lap top seized was kept in a carton box duly sealed with paper seal containing the signature of Shri B Thirumani Selvan, Shri B Saravanan and the officers of the department. Some loose sheets as made up file 1 to made up file 6 and mobile phones of Shri B Saravanan and Shri Thrumani Selvan were also seized.

12.7 After such seizure and recording of statements in regard to investigation against M/s Standard Fire Works Ltd., a show cause notice was issued to M/s. SFW and others which was concluded or closed after the noticees there in opted for SVLDR Scheme. In such circumstances, we are left to guess that after the closure of that case, the department has opened these sealed evidences (one pen drive and lap top) again to view and retrieve the data. The evidence, gathered in a case loses relevance as to whether they are kept safe and sealed

when the case is concluded. We have no clue as to who was in custody of this evidence after the closure of the case against M/s Standard Fireworks Ltd. Further, copies of data in these electronic evidence would have been furnished to all noticees of the earlier proceedings, who may also be competitors in business.

12.8 The very same evidence is used to issue the present show cause notice. In the case of electronic evidence, the law prescribes certain conditions to be complied with at the time of recovery as well as retrieving data. This is because, it is easy to interfere with the data contained in electronic items. We are not able to understand how the data contained in electronic items, if kept sealed could be reused in a subsequent investigation without obtaining permission from a higher authority or a court. The mahazar dt. 26.10.2017 by which one pen drive and one laptop was seized is the main relied upon document (RUD at Sl.No.20 of the list of RUD). There is no evidence coming before us as to which officer had occasion to again open and view the data contained in the pen drive and lap top after 3 years. The details of how the data contained in the pen drive and laptop was retrieved for the purpose of adopting to present proceeding is missing.

12.9 Pursuant to search conducted in present proceedings at the place of business of CGC, at Sivakasi, on 08.10.2020, the officers, recovered two CPU along with hard disk and one lap top. More than 10 mobile phones used by the Director, accountant, employees like Arumugarajan, etc., were also seized. Search was conducted on same day at residential premises of Shri K Jeyasankar Shri K Jeyakumar, Shri K Balaji who are Partner / Director of CGC. Again, many mobile

phones were seized. The Whatsapp messages, and calls made from these mobile phones were retrieved. The documents dated 12.10.2020, 27.10.2020, 28.10.2020 and 11.11.2020 are mahazars recorded at office of DGGI, Madurai Unit for retrieval of data from these mobile phones, CPUs, laptops. The Mahazar dt. 12.10.2020, is significant as it is a mahazar recording the procedure for opening and retrieving data from mobile phones seized in earlier proceedings on 26.10.2017. The relevant part of this mahazar reads as under:

"Today, i.e, on 12.10.2020 at about 05.30 PM, we, the above mentined witnesses were called upon by the Senior Intelligence Officer and other officers attached to the Directorate General of Goods & Service Tax Intelligence, Madurai Regional Unit to witness the opening and retrieval of data proceedings including the whatsapp chats from electronic gadgets which were seized earlier under mahazar proceedings dated 26.10.2017 from the office premises of M/s. Sv.P.N.S.N. Balasivaji & Co., 140/1, Dr. Ambedkar Street, Virudhunagar – 626001 by the officers of DGGSTI, Chennai Zonal Unit, to which we have also agreed upon. The said officers further informed that on the reasonable belief that the aforesaid seized electronic gadgets (i.e. two numbers of Mobile Phones)"

Thereafter, the officers packed the aforesaid seized Mobile Phones carefully and sealed the same with adhesive tapes & paper sealed the cover. We, the witnesses, Shri. B. Saravanan and Shri R. Surreandar and the Senior Intelligence Officer have affixed our dated signature on the said paper seal. The officers informed that the all the aforesaid seized Mobile phones were again taken over into the custody of the officers. The Pen drive (Sandisk 64GB) used to store the above retrieved data was put into a separate package and covered the same with adhesive tapes paper sealed the cover. We, the witnesses, Shri B. Saravanan and Shri R. Surreandar and the Senior Intelligence Officer have affixed our dated signature on the said paper seal. The same was kept as "Master copy". Second Pen drive (Sandisk 64GB) with the retrieved data was kept as "Working Copy".

12.10 The above mahazar seems to have recorded the procedure adopted by department to retrieve the data/whatsapp messages contained in the mobile phones, which were seized in 2017. The procedure explained in the mahazar shows that one pen drive with retrieved data is kept as Master copy and another as working copy. It is not understood why these mobile phones which were seized during

the earlier proceedings were not opened and retrieved earlier. This apart, we do not understand whether the procedure of retrieval of data was already done in earlier proceeding and this is the retrieval for the second time. If not opened and examined earlier, why was it not done so in the earlier proceedings of 2017 is not explained by the department.

12.11 The procedure in the above mahazar poses a question before us as to whether there was master copy and working copy for the data retrieved from pen drive and laptop of 2017. As per para 29.10 of the impugned order the pen drive and laptop of 2017 is the main evidence for establishing undervaluation and evasion of excise duty. However, we do not find any mahazar recorded for retrieving the data from these electronic items during the investigations in 2020. It should be inferred that these items were opened, examined and the data already retrieved in 2017. The appellant has not been a party to such proceedings and has not been supplied with copy of such mahazar proceedings or the data retrieved at the earliest. In 2020, he has been supplied with copy of 2017 mahazar and copies of the retrieved data. If the procedure adopted by department as noted in mahazar dt.12.10.2020, is to keep one copy of the retrieved data as 'Master Copy' which is supposed to be sealed and kept in safe custody, there ought to be a mahazar recorded in the presence of independent witnesses and parties of present proceeding for opening the sealed Master Copy of pen drive and laptop. We are in the dark as to whether there was a master copy, who was in custody of it, who opened and examined it for second time etc. All these casts heavy shadow on the

evidentiary value of the pen drive and lap top seized in 2017 and used as evidence in this proceedings.

12.12 The appellant vide letter dated 03.01.2022 and 05.-01.2022 issued a preliminary reply to the show cause notice. In these letters the appellant requested permission to cross examine the mahazar witnesses who participated in imaging (retrieval of data) as well as cross examination of technical experts (R. Surendar, R.Karthick- Forensic experts). However, the request of appellant was denied as per letter of adjudicating authority dated 21.02.2022. This letter of adjudicating authority reads as under: -

"2. In this regard it is seen that totally 8 Mahazars were drawn and 16 witnesses were there. The witnesses have not given any statement against the notices/co-noticees. Therefore you are requested to give the reason for your request for cross examination of all witnesses to the Mahazars".

12.13 Again to the request of the appellant to supply the data retrieved from electronic items, the department has issued reply dated 02.02.2022 which reads as under:

"The printouts of contact details and images (Sl.Nos.54 & 55 in Annexure – A to the referred Show Cause Notice) referred in para 3.2(d) of your letter were taken from the electronic gadget which was retrieved by Government forensic laboratory".

The printouts of ledgers in the name of M/s. Sri Saravanan Traders and M/s Ganesh Traders (sl.no.12 in Annexure – A to the referred SCN) which has been mentioned in para 3.3(i) of your letter, were taken from the pen drive seized during the course of search at M/s SvPNSN Balasivaji & Co., 140/1, Dr. Ambedkar Street, Virudhunagar – 626001 under Mahazar dated 26.10.2017 (sl.no. 20 in Annexure – A to the referred SCN). All the pages of the printouts were authenticated by Shri. B. Saravanan, Proprietor of M/s.SvPNSN Balaji & Co., Virudhunagar. Extract of said ledger with the signature of Shri B. Saravanan for the period from 2014-15 to 2017-18 (upto October, 2017) were bound into 5 books for the purpose of investigation against Coronation Group of Companies. Shri. B. Saraavanan & others including partners/directors of Coronation Group of Companies have authenticated the data in the bound books by appending their dated signature on first & last 3 pages of the books.

12.14 The fact which emerges out of the above letter is that the data in the pen drive seized from M/s SVPNSN Balasivaji & Co., was retrieved at some point of time in earlier proceedings. As per SCN, Sl. No. 12 of RUD are printouts of ledgers contained in pendrive and laptop bound into 5 books. As per SCN, Sl. No. 13 is the extract of ledgers recovered from M/s. SvPNSN Balasivaji & Co. Sl.No.38 is the print out of ledger taken from laptop of Shri B.Saravanan seized in 2017. The other print outs are the whatsapp messages, SMS, contact details obtained from several mobile phones. While recording statements during this investigation, the officers have asked the partners/directors of CGC and B. Saravanan to affix their signatures in these bound books. We do not understand how such affixing of signature on bound books would make the data retrieved from electronic item to be admissible in evidence in para 13.4 of impugned order the excerpts from statement of Shri B. Saravanan would show how the department got his signature on these bound books. We are surprised. The affixing of signatures on the bound volume of books would not suffice compliance of Section 36B.

12.15 We will now examine the discussion of adjudicating authority as to the compliance of requirement of Section 36B of Central Excise Act. In para 29.3 of impugned order the adjudicating authority states as under:

"The data from the seized electronic gadgets were retrieved under mahazar proceedings following due procedures as per Section 36B of Central Excise Act, 1944 and relevant provisions of Central Goods & Services Act, 2017 read with Indian Evidence Act, 1872 & Information Technology Act, 2000 and were stored in the external hard discs for further investigation and seized electronic gadgets were sealed once again after retrieving the data

from them in the presence of the owners of the electronic gadgets and independent witnesses”.

12.16 The procedure to be followed by the investigating officer while collecting evidence in the nature of electronic gadgets is provided in Section 36B of the Central Excise Act 1944 has been already noticed in para 8.1. As per Section 36B a certificate has to be made to the effect that such computer / laptop / pen-drive during the material period was operating properly, was ordinarily being used in the course of business, being supplied with information etc. No such certificate is before us. Without complying Section 36B it is not possible to hold that the data retrieved from pen-drive and laptop (seized in 2017) is admissible in evidence. This is more important as this pen-drive and laptop are the only documents relied by AA for confirmation of demand of the duty. The relevant para of (29.10) of the impugned order is as under.

“So, I am constrained to discard the various attempts made by the notices namely M/s CGC and others to dispute the integrity of the electronic evidences and hold that the electronic evidences resumed from the pen drive and the laptop are in compliance with Section 36B of the CEA and thus are admissible evidence under the CEA. Further Shri B. Saravanan has been consistently inconsistent in his depositions, right through the proceeding, which only renders his depositions as unstable and unreliable thus making his application to SVLDRS scheme as the only credible, stable and reliable act from his end and hence I have no hesitation in bolding that the electronic evidences resumed from Shri B. Saravanan and relied upon in the current proceedings are credible in law. While concluding so, I have also taken cognizance of the defence put forth by the notices and Whatsapp messages cannot be held as evidence under the CEA. In this context it is relevant that the electronic evidences relied upon in the current proceeding is only a pen drive and a laptop and not mobile phone. Though there are few references to the Whatsapp messages, ultimately the quantification of demand is only based on the data retrieved from the pen drive/ laptop and not from the Whatsapp messages and hence accordingly I discard the said defence for want of relevance to the current proceeding”.

(emphasis supplied)

12.17 Though the adjudicating authority, states as above that the Whatsapp messages retrieved from the mobile phones seized in 2017 and 2020 are not taken into consideration for holding that appellants have indulged in undervaluation and evasion of excise duty, he has however attempted to place some sort of a certificate so as to comply Section 36B of Central Excise Act, 1944 for the retrieval of data from mobile phones. The certificate is stated to be, under Section 65 B of Indian Evidence Act, 1872. A sample of such certificate is as under:

_____ Left Blank _____

CERTIFICATE U/S 65B of THE INDIAN EVIDENCE ACT, 1872

I, K.JEYASANKAR state the following that I am a PARTNER/DIRECTOR (Designation) of M/S CORONATION FIREWORKS FACTORY, M/S CORONATION FIREWORKS(P)LIMITED, SIVAKASI (hereafter Referred to as firm /Company /LLP /AOP /Proprietary Firm) with office at NO.7A CHAIRMAN A.SHANMUGAM ROAD, SIVAKASI-626123.

I Certify that the data in the SAMSUNG MOBILE used by me was inventorized and Impound as "SANDISK 128 GB PENDRIVE" during the retrieval proceeding in the case of M/S CORONATION FIREWORKS FACTORY, M/S CORONATION FIREWORKS(P)LIMITED, SIVAKASI. The retrieval data stored in the following devices:-

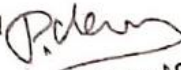
Main Copy Storage Devices		Working Copy Storage Devices	
Make :SANDISK	Model: 128 GB PENDRIVE	Make:SEAGATE	Model: SLIM
Sr.No: -		Sr.No: NABAFV96	

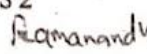
I certify that above data backup is a true and identical copy/reproduction of electronics record which was stored in the SAMSUNG MOBILE in ordinary course of activity of the IMAGING/WHATS APP DECRYPTION. I further state that the SAMSUNG MOBILE used and utilized by me was operating properly and there is no distortion in the accuracy of the content of the backup taken during the aforementioned proceedings.

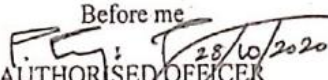
This certificate, therefore, is sufficient compliance of section 65B of the Indian evidence ACT, 1872.

28/10/2020
K.JEYASANKAR

IN PRESENCE OF

WITNESS 1 
28/10/2020

WITNESS 2

28/10/2020

Before me

AUTHORISED OFFICER

12.18 Though some kind of certificate is produced for retrieval of data from mobile phones, there is no certificate at all for compliance of

Section 36B for retrieval of data from the pen drive and laptop seized in 2017. At the cost of repetition, we say that we are in the dark as to how and when the data in these electronic items were retrieved, after the closing of the case against M/s Standard Fireworks Ltd. The Hon'ble Apex Court in the case of Anvar P.V. Vs P.K. Basheer 2017 (352) ELT 416 (S.C) considered the admissibility of electronic evidence and held that unless accompanied by certificate the print outs from computer and electronic items are not admissible in evidence. The relevant para of the judgement reads as under: -

"14. 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.

15. 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.

16. 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.

17. 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.

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu* case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

12.19 Section 36B of Central Excise Act, 1944 is similarly worded as Section 65B of Indian Evidence Act 1872. The Hon'ble High Court of Delhi in the case of CCE Vs Jindal Nickel Alloys Ltd., 2020 (371) ELT 661 (Delhi) considered the admissibility of electronic evidence where the allegation was suppression of production of finished products and clearance of goods. The Hon'ble High Court held that the provisions of Section 36B are mandatory. The Court held as under: -

"There is nothing to indicate compliance with the strict stipulations contained in sub-sections (1) and (2) of Section 36B of the Act in the present case. We, therefore, find no reason to interfere with the findings of the CESTAT regarding non-compliance of Section 36B of the Act either".

12.20 The pen drive and laptop are not seized from the appellant. Therefore Section 36A does not apply. These were seized in 2017 from M/s SvPNSN Balasivaji who was a co-noticee in the earlier proceedings. These are therefore nothing but third-party documents as regards the appellants. From the aforesaid analysis we hold that the data from

electronic items i.e. pen drive and laptop are not admissible or acceptable in evidence.

13. The other evidence mainly relied by department is the statement given by co-noticee Shri. B. Saravanan. He was a co-noticee in the proceedings against M/s Standard Fireworks Ltd. As already stated, he had opted for the SVLDR Scheme and paid duty as per scheme. In para 29.10 of impugned order (reproduced in para 10.26 above) the adjudicating authority has held that the electronic evidence is admissible as Shri B. Saravanan from whom it was seized has filed application under SVLDRS. Thus, the application filed under SVLDRS, by Shri B. Saravanan is construed by the adjudicating authority as admission of liability. We are unable to agree to this view. The scheme offers benefit and immunity to a declarant. As per Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 the FAQ issued would be relevant and a few noticed below:

Q.25. what are the benefits under the scheme?

Ans: The various benefits available under the Scheme are:

- *Total waiver of interest and penalty*
- *Immunity from prosecution*
- *In cases pending in adjudication or appeal, a relief of 70% from the duty / tax demand if it is Rs.50 lakhs. The same relief is available for cases under enquiry, investigation, and audit where the duty is quantified on or before 30.06.2019.*
- *In case of amount in arrears, the relief is 60% of the confirmed duty / tax amount if the same is Rs.50 lakhs or less and it is 40% in other cases.*
- *In cases of voluntary disclosure, the declarant will have to pay full amount of disclosed duty/tax.*

Q.32. What will be the benefits of discharge certificate issued under the Scheme?

Ans: Every discharge certificate issued under Section 127 with respect to the amount payable under the Scheme as to the matter and time period stated therein, and:

- (a) the declarant shall not be liable to pay any further duty/tax, interest, or penalty with respect to the matter and time period covered in the declaration.*
- (b) the declarant shall not be liable to be prosecuted under the indirect tax enactment with respect to the matter and time period covered in the declaration; and*
- (c) no matter and time period covered by such declaration shall be reopened in any other proceeding under the indirect tax regime."*

13.1 In para 29.10 it is observed by the adjudicating authority that as Shri B Saravanan filed application under SVLDRS, it is an admission of the entire thing. That therefore, the integrity of the electronic evidence (pen drive and lap top) cannot be disputed and would suffice compliance of Section 36B of Central Excise Act, 1944. We are unable to fathom any logical or legal sense to this reasoning and as to how the application filed under SVLDRS would suffice compliance of Section 36B of C.E. Act, 1944. The findings of the adjudicating authority in para 29.10 of impugned order reads as under:

Now I proceed to decide on the evidentiary value of the evidences more particularly the electronic evidences in compliance with Section 36B of the CEA. As narrated above, the reliance of electronic evidences recovered from M/s SvPNSN Balasivaji & Co by way of a pen drive and a laptop vide Mahazar dated 26.10.2017, has been used as an evidence under the earlier proceeding and the said proceeding has culminated by way of, all the notices settling their case under SVLDRS scheme. It is also pertinent to mention that Shri B. Saravanan who is the proprietor of M/s. SvPNSN Balasivaji & Co from whose premises the said evidences including electronic evidences were recovered and who had also given various admissions, has also applied for SVLDRS scheme as a co-noticee. The patent admission by Shri B. Saravanan who is the author of the evidences including the electronic evidences is nothing but a testimony of the integrity and evidentiary value of the various evidences including the electronic evidences and compliance to Section 36B of the CEA. That being so when the author of the evidences including electronic evidences has himself accepted and filed the SVLDRS application as a co-noticee in the earlier proceeding, any attempt to controvert the same would not

stand the scrutiny of the test of logic or reasonability as well as legal scrutiny. So, I am constrained to discard the various attempts made by the notices namely M/s CGC and others to dispute the integrity of the electronic evidences and hold that the electronic evidences resumed from the pen drive and the laptop are in compliance with Section 36B of the CEA and thus are admissible evidence under the CEA.

(emphasis supplied)

13.2 In regard to the statement given by Shri. B Saravanan in earlier investigation and present investigation the adjudicating authority in the same para observes as under:

Further Shri B. Saravanan has been consistently inconsistent in his depositions, right through the proceeding, which only renders his depositions as unstable and unreliable thus making his application to SVLDRS scheme as the only credible, stable and reliable act from his end and hence I have no hesitation in holding that the electronic evidences resumed from Shri B. Saravanan and relied upon in the current proceedings are credible in law.

13.3 If an assessee has opted for SVLDRS to conclude a case, it cannot be construed to be admission of liability. It is an amnesty scheme offered to reduce litigation. The assessee when opted under the scheme to give up litigation cannot be said to have admitted the liability. Shri B. Saravanan was cross-examined by an advocate in the earlier proceedings. In such cross-examination, he denied the allegations and even denied that the pen drive and lap top belong to him. The cross examination was in the presence of the Commissioner of Central Excise (adjudicating authority of earlier proceedings). He stated that the statements were not given voluntarily and were obtained from him by investigating officers of DGGI Chennai, under duress and co-ercion. Along with his reply to show cause notice in the present case, Shri. B. Saravanan furnished the copy of cross-examination. The deposition of Shri B. Saravanan and Shri B.

Thirumaniselvan (Accountant) recorded in earlier proceedings on 25.9.2019 are noteworthy and reproduced as under:

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Record of Cross Examination of Shri B Saravanan, Proprietor of M/s. SvpNSNBalasivaji & Co before the Commissioner of CT & CE, Madurai, held on 25.09.2019 under Section 9D of the Central Excise Act 1944 in connection with Show Cause Notice No. 141/2018 Dt. 27.10.2018 (F.No.INV/DGGSTI/CZU/CE/41/2017) issued to M/s Standard Fireworks (P) Ltd.

Q1. Are you Shri B Saravanan, Proprietor of M/s. SvpNSNBalasivaji & Co?

A1 Yes and submit my proof of Identity. (copy of Aadhar Card)

Q2 Have you given the statement dated 26.10.2017, 28.10.2017, 31.10.2017, 3.11.2017, 9.11.2017, 20.12.2017 and 21.12.2017 to the officers of DGGSTI (statements copy were shown) in the investigation against Standard Fireworks.

A2 Yes

Q3 There has been a seizure of over Rs.1 Crore from you while in transit and there has been seizure of a pen drive from your office. Does this cash and pen drive belong to you?

A3 No.

Q4 If it is not yours then to whom does it belong?

A4 The pen drive belonged to one Mr Anandavel who was a temporary employee with us and maintained by him. He is not in service with us any more. Apart from maintaining our company accounts he had also maintained some other accounts in the pen drive which was without our knowledge. I have no knowledge or any information about the same. Regarding the cash seized, the same does not belong to me but I was forced to admit that it belonged to me. Now I disown both the cash and the pen drive as they do not belong to me.

Q5 Do you have any office in Mumbai? Is Mr Senthil Kumar an employee of your company?

A5 No I don't have an office in Mumbai and I own a residential flat in Kumkum Housing Society which has been rented to Mr Senthil Kumar who belongs to my native place. He is not an employee of my company and except for collecting rent I do not have any transaction with him.

Question by Adjudicating authority.

Q6 Have you told before the investigation that the pen drive belong to Anandavel?

A6 Yes but the officers did not record the same.

Q7 You have given several statements before the investigation earlier which are primarily based on the pen drive / cash seized. Now you have disowned both the pen drive and the cash. This is a statement given before an adjudicating authority as per law in which you are required to state the facts. Do you disown entire set of statements given earlier?

A7 Yes. I disown the entire set of statements given earlier. Though I have I tried to refuse the contents of the earlier statements before the investigation, I was forced to give the same as the pen drive was seized in my premises. What I have stated now is true and correct.

B. Saravanan
Signature of the deponent

S. Jai Kumar
Signature of the Advocate

Received the copy
Wang

T. M. Kennedy
B. Saravanan
30/8/21

Record of Cross Examination of Shri B Thirumani Selvan, Accountant of M/s. SvPNSNBalasivaji & Co before the Commissioner of CT & CE, Madurai, held on 25.09.2019 under Section 9D of Central Excise Act 1944 in connection with Show Cause Notice No. 141/2018 Dt. 27.10.2018 (F.No.INV/DGGSTI/CZU/CE/41/2017) issued to M/s Standard Fireworks (P) Ltd.

Q1. Are you Shri.B Thirumani Selvan, Accountant of M/s. SvPNSNBalasivaji & Co?

A1 Yes and submit my proof of identity. (copy of Aadhar Card)

Q2 Have you given any statement dated 28.02.2018 and 01.03.2018 to the officers of DGGSTI (statements copy were shown) in the investigation against Standard Fireworks.

A2 Yes

Q3 Today in the cross examination before Commissioner, Mr B Saravanan has disowned the pen drive seized by the investigation and has claimed that the same was maintained by Mr Anandavel, a temporary employee of the company and who is no more in service. In your above statement you have answered some questions based on the said pen drive. Are you involved in the maintenance of the pen drive and do you agree to the said statements given before the investigation?

A3 I agree with the deposition of Mr B Saravanan that the said pen drive was maintained by our ex-employee Mr Anandavel. I have no knowledge or information about the contents of the pen drive and both the statements referred above were typed by the officers and I was made to sign them.

Question by Adjudicating authority.

Q5 This is a statement given before an adjudicating authority as per law in which you are required to state the facts. Do you disown entire statements given earlier?

A6 Yes. I disown the entire set of statements given earlier. Though I have I tried to refuse the contents of the earlier statements before the investigation, I was forced to give the same as the pen drive was seized in our premises. What I have stated now is true and correct.

B. Thirumani Selvan.

Signature of the deponent

S. Jai Kumar

Signature of the Advocate

Copy Received
B. Thirumani Selvan.

M. Kennedy

Signature of the Commissioner

B. Thirumani Selvan.

30.09.2021

13.4 From the above, it can be seen that in earlier proceedings these witnesses (noticees) have completely denied the allegations. In the

present investigation the statement of Shri B. Saravanan and Shri. Thirumaniselvan were recorded again on 09.12.2020 and 23.12.2020. The department was fully aware that they had denied the allegations as well as pendrive and laptop during cross-examination in earlier investigation. The statement so recorded in present proceeding is in a question-answer form, and recording the statement they have deposed supporting the case of the department. Question No.7 and its answer is relevant and reads as under:

Q.7 Please go through the printouts of the ledgers (bound into 5 books) in the names of M/s. Sri Saravanan Traders, Virudhunagar at Bombay and M/s Ganesh Traders, Virudhunagar at Virudhunagar, which were seized from your Virudhunagar office on 26.10.2017 and append your dated signature on first and last pages of all the books as a token of having seen the same. Please explain about these ledgers.

A-7 I have gone through the printouts of the ledgers (bound into 5 books) in the names of M/s Sri Saravanan Traders, Virudhunagar at Bombay and M/s Ganesh Trader, Virudhunagar at Virudhunagar, which were seized from our Virudhunagar office on 26.10.2017 and appended my dated signature on first three pages and last three pages of all the books as a token of having seen the same. As per my directions the ledgers were maintained by our accountant Mr. B. Thirumani Selvam at Virudhunagar office of SVPNSN in the name of M/s Ganesh Traders, Virudhunagar at Virudhunagar for collection of cash at Mumbai from the dealers of fireworks manufacturers at Sivakasi and in the name of M/s. Sri Saravanan Traders Virudhunagar at Bombay for handing over the collected cash from the dealers of fireworks manufacturers at Gujarat and Maharashtra to fireworks manufacturers at Sivakasi.

13.5 Thus while recording the statement under Section 14 of Central Excise Act, 1944 during investigation of the present proceedings Shri. B. Saravanan and Shri. Thirumaniselvam have again deposed in tune with the case of the department. They were also asked to sign the documents (5 bound books printouts of pen drive recovered in the search conducted in 2017) and then these books are made as evidence

at Sl.No.12 of RUD to the present proceeding. Shri B Saravanan immediately sent his retraction of statement on 15.12.2020 to the department enclosing a copy of the earlier cross-examination.

13.6 Shri B Saravanan was cross examined by Advocate in the present proceedings before the adjudicating authority on 02.11.2022. Shri B Saravanan has again denied the allegations and reiterated his deposition made during the cross-examination conducted in 2019. The relevant part is as under:

Q.2. You had given various statements before the officers of the Department on 26.10.2017, 28.10.2017, 31.10.2017, 03.11.2017, 09.11.2017, 20.12.2017, 20.12.2017 and 21.12.2017 during a proceeding initiated against M/s Standard Fireworks (P) Ltd., which was subsequently clarified and disowned by you during a cross-examination conducted before the Commissioner of Central Excise on 25.09.2019, a copy of which is shown to you today. Kindly confirm the contents of the said cross-examination proceedings as to its truth and veracity.

A.2 I have seen the record of the cross-examination dated 25.09.2019 as referred above and have appended my signature of having seen the same. I concur totally with the depositions made during the above said cross-examination and confirmed the same as true and correct.

13.7 The evidence tendered by the key witness from whom the pen drive and lap top were recovered shows that he has denied the allegations. The original authority has disregarded his retraction of statement as an afterthought. We fail to understand how it can be an afterthought as department was already aware that they have denied the allegations during cross-examination in earlier proceedings. The adjudicating authority observes that Shri B Saravanan has been consistently inconsistent but however, proceeds to make his application under SVLDRS as a reliable, stable act. Though adjudicating authority considers the deposition of Shri B Saravanan to

be unreliable, has based his entire findings, merely on the act of Shri B Saravanan in preferring an application under SVLDRS.

13.8 A mere retraction may not make a statement irrelevant or inadmissible. In the present case, the witnesses were already subject to cross examination in 2019 as per Section 9 D of the Central Excise Act, 1944. After such cross-examination and filing of SVLDRS application, he is again summoned to give statement under Section 14 on the very same set of facts. It is deposed by him that on 09.03.2021 and 10.03.2021 he has given statements before the officers only because he was assured that he would not be implicated in the proceedings.

13.9 The entire investigation is in a skeptical manner which lacks credibility. Though huge number of mobile phones were seized and the data retrieved from them, the adjudicating authority has observed that such electronic evidences are not relied and only pen drive and laptop of 2017 are relied. Several SMS and Whatsapp messages are noted in the SCN. The relevant para of the impugned order in regard to whatsapp messages has already been reproduced. In para 29.11 the adjudicating authority has referred to the decision of the Hon'ble Apex Court in the case of *Ambal Sarabhai Enterprises Ltd., Vs K.S. Infraspace LP Civil Appeal No (s) 9346/2019 dt. 06.01.2020* to rely on the whatsapp messages. In the said case the appeal was filed before Hon'ble Supreme Court against order dated 30.08.2019 of the Hon'ble High Court affirming the order of injunction. In para 19 it was stated that whatsapp messages are matters of evidence to be proved during trial. The reliance placed by the adjudicating authority on this decision

is misconceived and misplaced as it does not lay down any ratio as to the admissibility of whatasapp messages as such.

13.10 In their reply to the show cause notice, the appellants have given the details of transactions. It is submitted by the Ld. Counsel that there has been no under valuation and no clearances have been made without issuing invoices. In the show cause notice there is an allegation that goods / fireworks have been cleared without invoices. However, in last sentence of para 29.13 of the impugned order the adjudicating authority has held that all clearances have been made only with invoices and such allegation in SCN is incorrect. The relevant part reads as under:

*.....Coming to the other allegation that the notices have cleared excisable goods without issuance of invoices, though there is an allegation, the same has neither been substantiated in the Show Cause Notice nor has any demand of duty been demanded on the said count. Hence, I am of the view that there is no clearance without issuance of invoices in the current proceeding. To amplify further, the entire Show Cause Notice is only for redetermination of the excisable goods manufactured and cleared by the notice for the period 01.08.2016 to 30.06.2017 and not for any removal of excisable goods without issuance of invoice. Accordingly, **I hold that, though there is passing reference of clearance of finished products without issuance of invoices, the same is inconsequential and irrelevant to the current proceedings.***

(emphasis supplied)

13.11 In page 80 of the SCN at point (xi), it is stated that CGC supplied goods to dealers without issuance of invoices. The undervaluation alleged in SCN to demand duty is on the basis of both suppressing the actual value in the invoices and also supply of goods without invoices and thereafter collecting the consideration in cash. In para 5.12 of SCN at page 83/108 while explaining the modus operandi, it is stated that the cash so collected was handed over to M/s Vijaya

Jewellery & others. But none of them have been made co-noticees or any investigation made in this regard. The relevant part of SCN reads as under:

“One of the person/places, as per the instruction of Shri. Jeyasankar, to whom where commission agents particularly. Shri. Hitesh Jain handed over the amounts in cash is M/s. Vijay Jewellery, Sivakasi.”

Though SCN was issued to Shri Hitesh Jain the penalty proposed against him has been dropped by adjudicating authority holding that there is no involvement by Shri Hitesh Jain in the current proceedings.

13.12 The crux of allegation in SCN is that appellant has received consideration in cash over and above the invoice value which was collected through Shri. B. Saravanan and other agents/brokers etc. The evidence relied by department to allege that there are payments received more than the invoice value (or undervaluation of finished product) is the electronic evidence (pendrive and laptop). In the search conducted in the present proceedings, though CPU, laptop, mobile phones were seized these have not been the basis for allegation of undervaluation or demand of duty. Other than the electronic evidence of 2017 and the retracted statements there is no evidence to establish undervaluation. We have to therefore conclude that department has miserably failed to establish the allegation of undervaluation.

13.13 The Ld. Counsel for appellant has argued that the quantification of duty is highly erroneous. On the basis of the data retrieved from the pendrive /laptop the price of the goods sold by dealers at Gujarat and Maharastra has been adopted to quantify duty

on the goods cleared by the appellant. The price of such goods which have seasonal demand (festival seasons) would vary when sold by dealers, at different places. The quantification of duty on the basis of dealer price at Maharashtra and Gujarat appears to be too extra ordinary method for quantification of duty and in appropriate too.

13.14 The appellants were engaged in manufacture of 'Practice Hand grenade' for supply to defence. There is no dispute with regard to supply of items to defence.

13.15 Before we part, it has to be noted that an amount of Rs.1,82,25,000/- was seized in cash from the residential premises of Shri K Jeyakumar. However, the show cause notice does not propose to confiscate the same or appropriate towards the excise duty. The adjudicating authority has also not appropriated towards duty liability. Therefore, it is to be understood that the seizure of cash is of no relevance or consequence to the case set up by the department. Consequently, the seized cash has to be refunded to the appellant, if not done already. So, ordered accordingly.

13.16 From the foregoing, we have to conclude that the demand of duty, interest, penalties cannot sustain. The impugned order is set aside. In the result, the appeals are allowed with consequential relief if any as per law.

(Pronounced in open court on 20.03.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI. C.S)
Member (Judicial)

psd