CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI.

COURT NO. II

Excise Appeal No. 50169 of 2019

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/CEX/032/2018 Dated 27.02.2018 passed by Commissioner, Customs Central Excise and Service Tax, Raipur)

M/S Navbharat Fuse Co. Ltd., **Appellant**
Post Raikot, Tokapal, Jagdalpur (C.G.)

Versus

Commissioner of Customs, Central Excise and Service Tax, **Respondent**
GST Bhawan, Central Excise Building,
Tikrapara, Raipur (C.G.)

And

Excise Appeal No. 50170 of 2019

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/CEX/032/2018 Dated 27.02.2018 passed by Commissioner, Customs Central Excise and Service Tax, Raipur)

Shri Vishal Singh, Director **Appellant**
of M/s. Navbharat Fuse Co. Ltd.,
Post Raikot, Tokapal, Jagdalpur (C.G.)

Versus

Commissioner of Customs, Central Excise and Service Tax, **Respondent**
GST Bhawan, Central Excise Building,
Tikrapara, Raipur (C.G.)

Appearance
Present for the Appellant : Shri Jitin Singhal, Advocate
Present for the Respondent: Shri R.K. Mishra, Authorised Representative

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOS. 50006-50007/2020

Date of Hearing: 24.12.2019
Date of Decision: 08.01.2020

ANIL CHOUDHARY:

That the appellant company and its director have filed the appeals against the common impugned Order-in-Original No. RPR/EXCUS/000/COM/

CEX/032/2018 dated 27.02.2018 whereby the learned Commissioner has confirmed the duty demand along with interest and equivalent penalty against the appellant company on the allegation of suppression of production and clandestine clearance thereof and further imposed penalty of Rs. 5 Lacs on Sh. Vishal Singh, Director of the appellant, under Rule 26 of Central Excise Rules.

2. That the facts in brief are, that the appellant is registered with the department and engaged in the manufacture of Sponge Iron (dutiable) falling under Chapter Heading 72 of the Central Excise Tariff Act, 1985. The department conducted simultaneous search at the factory and office premises of the appellant on 05.05.2015. During the course of search at the factory premises, the department recovered incriminating documents and electronic data devices in the form of 2 pen drives and 2 computer hard disks. Prima facie if appeared a case of evasion of central excise duty. Shri D.P. Singh, General Manger of the appellant declared the stock on 06.05.2015. Thereafter, the department conducted stock verification on 06.05.2015, and found shortage of finished goods and raw materials (coal). The data contained in the two electronic memory devices (hard disks) recovered and seized on 05.05.2014 was retrieved under Panchnama dated 03/04.07.2014, at Computer Cell of Central Excise Hqrs, Raipur. The department has retrieved one hard disk on 03.07.2014 and sealed it (the said Panchnama has not been relied upon in SCN). That, vide Panchnama dated 04.07.2014, the officers took printout of the retrieved data, however, the other hard disk was not retrieved on 04.07.2014. The print out data comprised of the 'Monthly Production Reports' containing data sheets named 'Actual Sheet' and Monthly Report Sheets files, purportedly containing entries related to actual production and booked production quantity of sponge iron for the years 2011-12, 2012-13 and 2013-14 (upto Nov, 2013).

The department compared the said monthly production report with the RG-1 register and found matching with the data mentioned under heading 'Book' and it was also found that data mentioned under heading 'Actual' was quite higher. The department also compared the raw material as mentioned in monthly production reports and after comparison with the Form-IV register, found suppression in consumption of raw material as well. Thereafter, the department also allegedly found Daily Report in email id and took print out of the same from the computer. The department also took various statements of employees of the appellant on various occasions. Based on the above, the department was of the view that the appellant had suppressed some quantity of its finished goods to the tune of 13,477.780 MT for the period April, 2011 to Nov, 2013, valued at Rs. 26,41,15,498/- and therefore duty of Rs. 3,03,41,494/- is short paid. Therefore, based on the above investigation, a show cause notice dated 26.04.2016 was issued to the appellant requiring as to why:

i. Demand of Central Excise Duty Rs. 2,81,953/- on allegation of shortages of finished goods and raw materials found short,
ii. Demand of Central Excise Duty of Rs. 3,03,41,494/- for the period April, 2011 to Nov, 2013 on allegation of suppression of production and clandestine removal of Sponge Iron on the basis of incriminating data recovered from computer.
iii. Penalty on Director Sh. Vishal Singh and others.

2.1 The appellants filed its reply refuting each of the allegations and further prayed for cross-examination of witnesses. However, the learned Commissioner, Raipur vide the impugned order dated 27.02.2018, denied the request for cross-examination and confirmed the duty demand along with interest and equal penalty on the appellant company and further imposed penalty of Rs. 5 Lakhs on Sh. Vishal Singh, Director of the appellant.

3. The learned Counsel for the appellant vehemently argued that the impugned order is liable to be set aside on the following submissions or grounds:-

3.1 Demand of Central Excise Duty of Rs. 3,03,41,494/- for the period April, 2011 to Nov, 2013 on allegation of suppression of production and clandestine removal of Sponge Iron on the basis of incriminating data recovered from computer:, and the statements recorded.

3.2 It is urged that the huge demand has been confirmed merely on the basis of records retrieved from the computer (which is otherwise not admissible as per Section 36B of the Central Excise Act, 1944) and various statements (which is otherwise not admissible as per Section 9D of the Central Excise Act, 1944), without adducing any other corroborative evidence. It is well settled law, that as held by the Hon'ble High Court of Allahabad in the case of ***Continental Cement Company Vs Union of India, 2014 (309) ELT 411 (All.),*** the department is required to adduce clinching evidence of the purchase of raw material, use of electricity, sale of final products, payment, realization of sale proceeds, mode and flow back of funds. The relevant extract of the judgment is reproduced here for ready reference:-

> **"***12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :*

(i) To find out the excess production details.

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department."

3.3 It is submitted that, similar view has been taken by different High Courts and this Tribunal. That for the charge of clandestine removal, the evidence that is required to be adduced, is well settled by the Tribunal in the case of ***M/s. Nova Pharmaceuticals Pvt. Ltd.*** **v.** ***CCE*** **- 2014-TIOL-15-CESTAT-AHM = 2014 (311) E.L.T. 529 (Tri.-Ahmd.)**. The ratio therein has been confirmed by the Hon'ble High Court in the case of ***Flevel International*** **- 2015-TIOL-2230-HC-Del-CX = 2016 (332) E.L.T. 416 (Del.)**; the judgments of Hon'ble Gujarat High Court in the cases of ***CCE*** **v.** ***Vishwa Traders Pvt. Ltd.*** **- 2013 (287) E.L.T. 243 (Guj.);** ***Sakeen Alloys Pvt. Ltd.*** **- 2014 (308) E.L.T. 655 (Guj.),** ***Mahesh Silk Mills*** **- 2015 (319) E.L.T. A52 (Guj.)**, wherein the law has been laid down that the allegation of clandestine removal should be evidenced properly by the department.

3.4 In the present case, no corroborative evidence has not been adduced by the department to prove the serious charge of clandestine removal of goods. The department has also not enquired at the end of buyers, when name of the some alleged buyers came on record. The department has not been able to adduce evidence with respect to suppliers of the appellant, who supplied the raw materials. That, no unexplained cash or cash trail was found at any of the premises of the appellant.

3.5 It is urged that the documents retrieved from the computer are not eligible evidence as per the provisions of Section 36B of the Central Excise Act, 1944.

3.6 It is urged that the demand raised in the show cause notice was on the basis of data retrieved from hard disk and such data is not admissible under the provisions of Section 36B of Central Excise Act, 1944.It is further submitted that, as per ruling of Hon’ble Supreme Court in the case of *Anvar P.V*. v. *P.K. Basheer,* reported at Manu/S.C./0834/2014 = 2017 (352) E.L.T. 416 (S.C.), as held in Para-13 of the said ruling, that on interpreting the provisions of Section 65B of Evidence Act, 1872 (which is *para materia* with Section 36B of Central Excise Act, 1944). The purpose of these provisions is to sanctify secondary evidence in electronic form and that the Section starts with a *non obstante* clause, which says that notwithstanding anything contained in the Evidence Act, any information contained in an electronic form, shall be deemed to be a document only if the conditions mentioned under sub-sec (2) are satisfied and that the admissibility of such document retrieved from electronic record needs to satisfy four conditions. It is further submitted that on interpretation of Section 65B(4) of Evidence Act the Hon’ble Supreme Court has held in Para-15 of said ruling that a certificate as specified must accompany the electronic record, like computer printout, Compact Disk, pen drive etc., pertaining to which a statement is sought to be given in evidence and the same is produced as evidence. Further, the computer printout which have been retrieved in the present case are not in compliance with the provisions of Section 36B(2) and (4) of Central Excise

Act, 1944, in as much as the condition that the printout should be produced by a computer during the period over which the computer was used regularly to store or process information by the person who was in total control, and who was using the computer and that there should be regularity in use of such computer. That in the present case the data was retrieved from the storage device called Hard disk and it was not established that it was used regularly and was under the control of an authorized person. It is further submitted that, no certificate has been produced by the department in order to comply the provisions of Section 36B of the Act.

3.7 In the present case, the print out of the 'Monthly Production Reports' has been taken vide Panchnama dated 04.07.2014. However, on perusal of the said Panchnama, it shows that the departmental officers have opened and retrieved the said hard drive on 03.07.2014 also, on which date neither the appellant was present nor the said Panchnama dated 03.07.2014 has been made as RUD, which shows that the said hard disk has been tempered with and no reliance can be placed on the said print outs taken from the said hard disk on 4.7.2014. It is also pertinent to note that why only one hard disk was retrieved on 03.07.2014, when both the hard disks were in one envelope. It means, the seal of other hard disk was open on the said day, and other hard disk could be tampered with. It is submitted that, as per Section 36B, neither any certificate has been produced by the department nor they were able to show that the said hard disk has been used in the said computer on regular basis by the authorised person.

3.8 It is also pertinent to note that, if the said computer was used on regular basis, then why there was production report upto Nov, 2013 only, when search took place on 05.05.2014. There should have been data upto 04.04.2014, if allegation of department is correct. However, there was data only upto Nov, 2013, which itself raises suspicion on the reliability of the said documents (electronic record) to prove the charge of clandestine removal.

3.9 The appellant places reliance on the following judgments that the department has to comply with the provisions of Section 36B of the Central Excise Act, if the department wants to rely upon the said evidence:

(i) Kuwer Industries Vs CCE, Noida, 2018 (11) TMI 1033 – CESTAT Allahabad

(ii) Premier Instruments & Controls Ltd. Vs CCE, Coimbatore, 2005 (183) ELT 65 (Tri-Chennai)

(iii) Anwar P.V. Vs P.K. Basheer, 2017 (352) ELT 416 (SC)

(iv) Popular Paints and Chemicals Vs CCE, Raipur, 2018 (8) TMI 473 – CESTAT New Delhi

3.10. It is urged that no employee has been charged in the show cause notice with respect to alleged activities of suppression of production and removal thereof. The appellant would also rely upon the grounds taken in the appeal.

3.11 It is urged that the statements recorded under Section 14 of the Central Excise Act, 1944 during investigation cannot be straight away relied upon as evidence as held by the jurisdictional High Court in the case of **Hi-Tech Abrasives Vs CCE&ST, Raipur, 2018 (362) ELT 961 (Chhattisgarh).** Similar view has been taken by the Punjab and Haryana High Court in the case of **G-tech Industries Vs Union of India, 2016 (339) ELT 209 (P&H)**, this Hon'ble Tribunal in the case of **CCE, Delhi-I Vs Kuber Tobacco India Ltd., 2016 (338) ELT 113 (Tri-Del.)** and **Elora Tobacco Co. Ltd. Vs CCE, Indore, 2017 (347) ELT 614 (Tri-Del.)**. In the present case, the learned Commissioner, has not followed the provisions of Section 9D of the Central Excise Act, 1944, hence the statements cannot be relied upon as evidence and has to be eschewed from the evidence.

3.12 Even otherwise, the appellant had requested for cross-examination of the witness, which has been denied by the learned Commissioner vitiating the impugned order. It is respectfully submitted that, as held by Hon'ble Supreme Court in the case of **Andaman Timber Industries Vs CCE, Kolkata-II, 2015 (324) ELT 641 (SC)** and Allahabad High Court in the case of **CCE Vs Kurele Pan Products Pvt. Ltd., 2014 (307) ELT 42 (All.)**, if a cross examination is not allowed, then the said statements cannot be relied upon as evidence.

3.13 In view of the above submission, the demand along with interest and penalty is liable to be set aside.

3.14 <u>Demand of Central Excise Duty Rs. 2,81,953/- on allegation of shortages of finished goods and raw materials found short:</u>

3.15 It is urged that the entire stock verification has been conducted on eyes estimation basis, therefore, demand on the alleged shortages is liable to be set aside, without any evidence of clandestine removal of goods.

3.16 It is well settled law that the shortages of raw material and finished goods, by itself is not sufficient, unless it is corroborated by clandestine removal of finished goods, for which there was no material evidence. The appellant places reliance on the following judgments rendered by Hon'ble High Court and Tribunal: -

i. **B.K. Rolling Mills Pvt. Ltd, & Others Vs CCE, Raipur, 2018 (2) TMI 1557**

ii. CCE, Kanpur Vs. Minakshi Castings, 2011 (274) ELT 180 (All.)

iii. CCE&ST, Ludhiana Vs. Anand Founders & Engineers, 2016 (331) ELT 340 (P&H)

iv. Shahi Exports Pvt. Ltd. Vs. CCE&ST, Ghaziabad, 2017 (347) ELT 310 (Tri-Del.)

3.17 It is respectfully submitted that, the penalty of Rs.5,00,000/- is liable to be set aside on Sh. Vishal Singh, Director of the appellant, inasmuch as there is no evidence of clandestine removal of goods nor any goods have been confiscated or held liable to confiscation.

3.18 It is respectfully submitted that the extended period cannot be invoked in the present case inasmuch show cause notice has been issued beyond one year of normal limitation period. It is further submitted that no interest and penalty can be imposed against the appellant. In view of the submissions made above, impugned order is liable to be set aside, and appeals be allowed with consequential relief.

4. The learned AR appearing on behalf of the department reiterated the findings in the impugned order and further relied upon the ruling of this Tribunal in the case of M/s Guruharkishan Industries Vs CCE, Delhi-II, Final Order No. 51970-51979/2018 dated 23.05.2018 and Shri Ulaganayagi Ammal Steels Vs CCE, Trichy, reported as, 2008 (231) ELT 434 (Tri-Chennai), to support his plea that computer prints out are admissible as evidence and the provisions of Section 36B of the Central Excise Act, 1944 has been complied with. He therefore further requested to dismiss the appeals of the appellant.

5. Having considered the rival submissions at length and pursued the records, we find that the entire case of the department is based upon the computer printouts taken from the computer hard disk, from the premises of the appellant, at the time of search. That, on careful perusal of the Panchnama dated 04.07.2014 (RUD-15) drawn at the Room No. 113, Computer Cell of Central Excise, Hqrs, Raipur, we find that the officers have taken the printout (on the basis of which, Central Excise Duty of Rs.3,03,41,494/- for the period April, 2011 to Nov, 2013 has been demanded)from the one time writable DVD (after copying), however, the said DVD has been written from Hard Disk No. 2 on 03.07.2014. We further find that the Panchnama dated 03.07.2014 has not been relied upon in the show cause notice, and neither the appellant nor his authorised representative was present on 03.07.2014, when the data from the Hard Disk No. 2 was retrieved on DVD. The relevant part of Panchnama dated 04.07.2014 is reproduced below:-

> "After the process of retrieval of data from pen drive, the officers informed that on 03.07.2014, hard disk No.2 was retrieved and written to one time writable DVDs. Now the officers intend to take a few printout of the retrieved documents in our presence and also in the presence of the Shri Sanjeev and Shri Pandey to which all of us gave our consent. Then the officers took a few print outs from the DVD in which Part 3 of the data was written. After the printout was taken, all of us put our dated signature on all the pages of the printout as token of having been printed out in the our presence."

6. We find that it is clear that the said Hard Disk could have been tempered, therefore, cannot be relied upon as evidence inasmuch the said data has been retrieved without ensuring the presence of the appellants. We further find that no certificate has been produced by the department as envisaged under Section 36B of the Central Excise Act, 1944, which provides the conditions to be fulfilled in order to admit the said documents in evidence. This Tribunal in the case of **Popular Paints and Chemicals Vs**

CCE, Raipur, 2018 (8) TMI 473 – CESTAT New Delhi after considering the judgement of the Hon'ble Supreme Court of India in the case of **Anwar P.V. Vs. P.K. Basheer, 2017 (352) ELT 416 (SC)** and various other case laws held as follow:-

> **"***14. We hold that computer printouts cannot be held to be an admissible evidence unless the conditions as laid in the provisions of Section 36B of the Central Excise Act are fully complied with. A perusal of section 36B would indicate that the Act has prescribed very stringent conditions for computer printouts to be a piece of admissible evidence. The Ld. Counsel for the appellants has invited our attention particular to provisions of Section 36B(2) and (4) of the Central Excise Act. For the better appreciation of facts, it is relevant to cite Section 36B of Central Excise Act is as below:*
>
> > *36B. Admissibility of microfilms, facsimile copies of documents and computer print outs as documents and as evidence*
> >
> > *(1) Notwithstanding anything contained in any other law for the time being in force,*
> >
> > *(a) a 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 regular 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 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 reproduces 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 subsection (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 certify 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;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. -For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

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

"13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B.Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify

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

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

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

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence.

Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

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

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

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

15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is inadmissible for want of cross examination of, Sh. Vipul Saxena, who has done cloning of the data from the computer system. We, therefore, hold that the computer printouts cannot be held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand.

7. We find that similar view has been taken by the Gujarat High Court and this Tribunal in the following cases.

(i) Ambica Organics V/S CCE Surat 2016 (334) ELT 97 (T) which has been upheld by the Gujarat High Court as reported in 2016 (334) ELT A 67.

(ii) Premier Instruments & Controls Ltd V/S CCE Coimbatore – 2005 (183) ELT 65 (T)

(iii) Kuwer Industries Vs CCE, Nodia, 2018 (11) TMI 1033 – CESTAT Allahabad

(iv) Final Order No A/ 70518-12/2018- Ex (DB) dated 07.03.2018 in the case of Trela Footwear & Others Vs CCE Agra

8. The ld. AR has relied upon the ruling of this Tribunal in the case of M/s Guruharkishan Industries Vs CCE, Delhi-II, Final Order No. 51970-51979/2018 dated 23.05.2018 and Shri Ulaganayagi Ammal Steels Vs CCE, Trichy, reported as, 2008 (231) ELT 434 (Tri-Chennai) to support his plea that even without the certificate, the computer printouts are admissible. On careful perusal of the these judgements, we find that in the case of M/s Guruharkishan Industries Vs CCE, Delhi-II, Final Order No. 51970-51979/2018 dated 23.05.2018, did not consider the applicability of Section

136B of the Customs Act, 1962 which is parimateria with Section 36B of the Central Excise Act, 1944, therefore the said judgement would not support the plea of the revenue. We further find that the decision in the case of Shri Ulaganayagi Ammal Steels Vs CCE, Trichy, reported as, 2008 (231) ELT 434 (Tri-Chennai) has been rendered prior to the judgement of Hon'ble Apex Court in the case of Anwar P.V. Vs P.K. Basheer, 2017 (352) ELT 416 (SC). Therefore the said judgements also do not support the plea of the revenue. We therefore find that the judgements relied upon the revenue are not applicable to the facts of present case.

9. We find that the computer printouts relied upon by the revenue are not admissible in evidence in view of the discussions above. As far as statements recorded under Section 14 of the Central Excise Act, which have been relied upon by the revenue, we find that the learned Commissioner had denied the cross-examination of witnesses, therefore, in view of the decision of Andaman Timber Industries Vs CCE, Kolkata, 2015 (324) ELT 641 (SC) and CCE Vs Kurele Pan Products Pvt. Ltd., 2014 (307) ELT 42 (All.), the said statements cannot be relied upon as evidence. We further find that the Hon'ble High Court of Chhattisgarh in the case of **Hi-Tech Abrasives Ltd. Vs. CCE&C, Raipur, 2018 (362) ELT 961 (Chhattisgarh)**, has held that statements recorded under Section 14 of the Act cannot be relied upon as evidence without following the rigor of Section 9D of the Act. It has been further held that the provisions of Section 9D is mandatory in nature. The Hon'ble High Court held as under:-

> "9.5 Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not merely directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of

evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that, before the statement is treated as relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough, but there has to be conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D, and opinion formed ignoring the mandate of law, the statement recorded by the Investigation Officer would not constitute as relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer committed illegality in placing reliance upon the statement of Director, which was recorded during investigation, when his examination before the adjudicating authority in the proceedings, instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of *Ambica International* v. *UOI* rendered by the High Court of Punjab and Haryana.

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We find that, similar view has been taken by the Hon'ble High Courts and the Larger Bench of this Tribunal, as mentioned below:-

i. Ambika International Vs. UOI, 2018 (364) ELT 90 (P&H)

ii. G-Tech Industries Vs UOI, 2016 (339) ELT 209 (P&H).

iii. Final Order No. 62244-62245 of 2018 dated 23.04.18 in the case of Bhupinder Steel Pvt. Ltd. Vs. CCE, Delhi-IV, in Appeal No. E/2328/09 and E/2617/09 passed by Larger Bench of this Hon'ble Tribunal.

iv. CCE, Delhi-I Vs. Kuber Tobacco India Ltd, 2016 (338) ELT 113 (Tri-Del.)

10. In view of the settled law and facts of the present case, the statements relied upon by the revenue are not admissible and cannot be relied upon as evidence and has to be eschewed from evidence.

11. We further find that there is no corroborative evidence adduced by the department in order to allege huge production and removal of goods. We find that as held by Hon'ble High Court of Allahabad in the case of ***Continental Cement Company Vs Union of India, 2014 (309) ELT 411 (All.),*** the department is required to adduce clinching evidence of the nature of purchase of raw material, use of electricity, sale of final products, payment, realization of sale proceeds, mode and flow back of funds.

12. We find that in the present case, there is no reliable evidence adduced by the department in order to prove clandestine production and removal of goods. In view of the above discussion, we find that demand of Rs. 3,03,41,494/- along with interest and penalty for the period April, 2011 to Nov. 2013, on allegation of suppression of production and clandestine removal of Sponge Iron, is hereby set aside. We further find that the appellant has not contested the demand of Central Excise Duty Rs. 2,81,953/- on allegation of shortages of finished goods and raw materials, before the learned Commissioner. Hence, the duty demand of Rs. 2,81,953/- is confirmed , however we set aside the penalty. We further set aside the penalty imposed on Sh. Vishal Singh, Director of the appellant.

13. We therefore set aside the impugned order dated 27.02.2018 except to the above extent of confirmation of duty demand of Rs. 2,81,953/-. Both the appeals are allowed in the above manner, with consequential relief, as per law.

(Pronounced on 08.01.2020)

ANIL CHOUDHARY
MEMBER (JUDICIAL)

BIJAY KUMAR
MEMBER (TECHNICAL)

JB