

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO-1

Excise Appeal No. 50072 of 2016

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

The Commissioner, Central Excise, Jaipur Commissioner, Central Excise Commissionerate Jaipur. New Central Revenue Building, Statue Circle, C-Scheme, Jaipur-302005	Appellant
--	------------------------------

VERSUS

Bansiwala Iron & Steel Rolling Mills Balupura Road, Adarsh Nagar, Ajmer (Raj.)	Respondent
--	------------------------------

Appearance

Shri Rakesh Agarwal, Authorized Representative for the Appellant

Shri A.K. Prasad & Ms. Surbhi Sinha, Advocates for the Respondent

**With
Excise Appeal No.53549 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Shri Murtaza Authorized Representative M/s Alamdar Traders, High School Road, Pratapgarh Distt. Chittorgarh (Raj.) Pin-312605	Appellant
--	------------------------------

VERSUS

Commissioner of Central Excise, Jaipur New Central Revenue Building, Statue Circle, C-Scheme, Jaipur-302005	Respondent
---	-------------------------------

**With
Excise Appeal No.53550 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Sh. Bansilal Jadiya Manager M/s Bajrang Iron Store 14A Sukhadia Market Near Chandralok Cinema Chittorgarh-312001	Appellant
---	-----------------------

VERSUS

Commissioner of Central Excise, Jaipur New Central Revenue Building, Statue Circle, C-Scheme, Jaipur-302005	Respondent
--	------------------------

**With
Excise Appeal No.53551 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Abdul Hafiz Partner M/s Rajasthan Enterprises Near Yes Bank, Shastri Nagar Chauraha Bhilwara Road Chittorgarh (Rajasthan)	Appellant
--	-----------------------

VERSUS

Commissioner of Central Excise, Jaipur New Central Revenue Building, Statue Circle, C-Scheme, Jaipur-302005	Respondent
--	-----------------------

**With
Excise Appeal No. 53572 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

M/s Bansiwala Iron and Steel Rolling Mills Balupura Raod, Adarsh Nagar Ajmer (Rajasthan)	Appellant
---	-----------------------

VERSUS

Commissioner of Central Excise, Jaipur

.....Respondent

New Central Revenue Building,
Statue Circle, C-Scheme, Jaipur-302005

**With
Excise Appeal No.53573 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Shri Amit Ghai Partner

.....Appellant

M/s Bansiwala Iron And Steel Rolling Mills

VERSUS

Commissioner of Central Excise, Jaipur

....Respondent

New Central Revenue Building,
Statue Circle, C-Scheme, Jaipur-302005

**With
Excise Appeal No.53574 of 2015**

[Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Saurabh Ghai

Authorized Signatory

.....Appellant

M/s Bansiwala Iron And Steel Rolling Mills
Balupura Road, Adarsh Nagar,
Ajmer (Rajasthan)

VERSUS

Commissioner of Central Excise, Jaipur

.....Respondent

New Central Revenue Building,
Statue Circle, C-Scheme, Jaipur-302005

**And
Excise Appeal No.53632 of 2015**

(Arising out of Order-in-Original No. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 passed by the Commissioner, Central Excise, Jaipur]

Meghraj Solanki Proprietor

.....Appellant

M/s Global Steel Corporation
F-9, First Floor, Agrasen Tower

Central Spine, Vidyadhar Nagar
Jaipur-302023 (Rajasthan)

VERSUS

Commissioner of Central Excise, Jaipur**Respondent**
New Central Revenue Building,
Statue Circle, C-Scheme, Jaipur-302005

Appearance

Shri A.K. Prasad & Ms. Surbhi Sinha, Advocates for the Appellant

Shri Rakesh Agarwal, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: OCTOBER 01, 2021
DATE OF DECISION: JANUARY 28, 2022

FINAL ORDER NOS. 50078-50085 /2022

P V SUBBA RAO

1. All these appeals are filed by the Revenue, the assessee and other appellants assailing the same order-in-original¹ dated 30th June 2015 passed by the Commissioner deciding the issues in the show cause notice² dated 2.01.2013 issued by the Additional Director General of Directorate General of Central Excise Intelligence, Delhi Zonal Unit. He confirmed part of the demand proposed in the SCN and imposed penalties and dropped part of the demand.
2. Excise appeal No. E/50072/2016 has been filed by the Revenue and assails the dropping of demand of Rs. 5,70,44,458/-.

1 impugned order
2 SCN

3. M/s Bansiwala Iron and Steel³ filed Excise Appeal No. 53572/2015 assailing the confirmation of demand of Rs. 38,89,972/- along with interest and imposition of penalty under Section 11AC.
4. Excise Appeal No. 53549/2015 is filed by Shri Murtaza Authorised Representative, assailing the personal penalty of Rs. 1,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.
5. Excise Appeal No. 53550/2015 is filed by Shri Bansilal Jadiya, Manager, of the assessee assailing the personal penalty of Rs. 2,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.
6. Appeal No. 53551/2015 is filed by Shri Abdul Hafiz, Partner of the assessee assailing the personal penalty of Rs. 1,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.
7. Excise Appeal No. 53573/2015 is filed by Shri Amit Ghai working Partner, assailing the penalty of Rs. 10,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.
8. Excise Appeal No. 53574/2015 is filed by Shri Saurabh Ghai, Authorised Signatory assailing of the assessee assailing the personal penalty of Rs. 5,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.

9. Excise Appeal No. 53632/2015 is filed by Meghraj Solanki assailing personal penalty of Rs. 1,00,000/- imposed upon him under Rule 26 of the Central Excise Rules, 2002.

10. The facts of the case, after filtering out unnecessary details, are that the assessee - a partnership firm of Shri Manohar Lal Ghai and Shri Amit Ghai- manufactures TMT bars of brand name BRN and also angles and channels. It also trades in iron and steel items. Officers of Directorate General of Central Excise Intelligence⁴ searched the premises of the assessee, some dealers and transporters and seized a large number of documents. They also recorded statements of various persons. After completing the investigation, the Additional Director General, DGCEI issued the SCN dated 2.1.2013 to the assessee and others alleging that the assessee had clandestinely manufactured and removed finished goods totally valued at Rs. 53,21,78,463/- thereby evading duty of Rs. 6,09,34,430/-. The SCN proposed to recover the duty allegedly evaded under Section 11A along with interest under Section 11AA and 11AB and to impose penalties. This allegation of short payment was on various counts on the basis of various sets of documents details of which were as follows:

S. No.	Period	Quantity	Value (in Rs)	Duty amount of Rs)	Remarks
A.	1.12.2007 to 14.09.2010	16043.50 MT	49,39,94,027.50	5,70,44,458/-	As per Booking Registers 2/1-2/6 recovered from New Vikas Transport Co. Ajmer.
B	3.1.2008 to	536.5 MT	1,83,33,257/-	20,12,479/-	As per 42 Triplicate

4. DGCEI

	28.06.2012				copies of GR's recovered from bound books of New Vikas Transport Co. (in addition to above)
C	19.02.2009 to 3.07.2011	85.125 MT	29,52,213/-	2,92,846/-	As per 7 original copies of GR's recovered from dealers/buyers.
D	May, 2011 to August 2011	207.49 MT	76,27,146	7,85,596/-	As per a handwritten slip recovered from Bajrang Iron Store, Chittorgarh.
E.	July, 2012	7.580 MT	3,03,200/-	37,476 (duty @ 12.36%)	Goods seized from Trade invoice without payment of duty
F	November 2010	27.3 MT	8,42,503/-	87,778/-(duty @ 10.3 %)	Goods cleared on Trade invoice without payment of duty.
G	January, 2010		81,16,116/-	6,68,736/- (duty @ 8.24%)	As per the case booked by Commercial Tax Department Jaipur
	TOTAL		53,21,78,463/-	6,09,34,430/-	

11. The Commissioner has, in the impugned order dropped demand with respect to **A** of the above table against which Revenue is in appeal. He confirmed the demand with respect to **B to G** of the above table against which the assessee is in appeal. Since each of these components of the demand is based on separate, distinct evidence, they were examined separately in the impugned order and each component was also argued individually by both sides before us.

12. Section 11A of the Central Excise Act is similar to Section 28 of the Customs Act, 1962 and Section 73 of Chapter V of the Finance 1994 (which deals with Service Tax) inasmuch as all these provide for recovery of duty/tax. However, this power is given to 'the proper officer' under Section 28 of the Customs Act while it is given to 'the central excise officer' under section 11A of the Central Excise Act and section 73 of the Finance Act, 1994. Proper officer under the

Customs Act is defined under section 2(34) as the one who has been assigned the functions by the Board or by the Commissioner. In respect of Customs Act, the power under Section 28 has been held by the Supreme Court to be one of re-assessment of duty already assessed in **Commissioner vs. Sayed Ali**⁵. The relevant extract as follows:

16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, **in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of [Section 2\(34\)](#) of the Act, was not competent to issue show cause notice for re-assessment under [Section 28](#) of the Act.**

13. In **Cannon India Ltd.**⁶ **vs Commissioner of Customs** the power under Section 28 has been held by the Supreme Court to be **a power to review and reopen the assessment and reassess**. The relevant para is as follows:

12. **The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the**

⁵ 2011(265) ELT 17(SC)

⁶ 2021(3) TMI 384-Supreme Curt

officer of the rank of the officer who initially took the decision to assess the goods.

14. Thus, it has been held in **Cannon India** that the officer who has done the assessment in the first place is 'the proper officer' empowered to issue a demand under section 28. Officers of DRI were also held to be not 'proper officers' to issue notices under Section 28.

15. The nature of powers under section 11A of the Central Excise Act and Section 73 of the Finance Act, 1994 are similar to the power under Section 28 of the Customs Act. However, this power has been conferred on '**the proper officer**' under the Customs Act and on '**the Central Excise officer**' in the other two Acts and this dissimilarity implies that the Central Excise officer need not be 'proper officer' and the similarity lies in the use of the definite article 'the' instead of 'a' or 'any' or 'any of the', etc. The meaning of the definite article 'the' when used in any law was explained by the Supreme Court in **Consolidated Coffee Ltd. and others vs Coffee Board, Bangalore**⁷ and it was held as follows:

"14. Secondly, and more importantly, **the use of the definite article 'the' before the word 'agreement' is, in our view, very significant.** Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression '**the agreement**' **would refer to that agreement which is implicit in the sale occasioning the export.**"

7 (1980) 3 SCC 358

16. The scope of the article 'the' was again examined by the Supreme Court in **Shri Ishar Alloy Steels Ltd. vs Jayaswals Neco Ltd.**⁸ and it was held as follows:

"9. 'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what a particular thing we are to assume to be meant. **'The' is always mentioned to denote particular thing or a person.**"

17. **Thus, the settled legal position is that when the legislature uses the definite article 'the' it refers to a particular thing or particular person. This brings certitude as to who can issue a Show Cause Notice to demand duty or tax not levied short levied, not paid, short paid, etc. in all these three Acts viz., Customs Act, Central Excise Act, and the Finance Act, 1994. We also find legislature has also used definite article in subsequent enactments.** In the Central Goods and Services Tax Act, 2017 (CGST Act) section 73 deals with demands other than cases of fraud, wilful mis-statement or suppression of facts while section 74 deals with cases where these elements are present. In both sections, the notice can be issued by 'the proper officer'. These provisions of CGST Act, 2017 are also made applicable to Inter-state Goods and Services Tax Act. Similar provisions are also there in the State Goods and Services Tax Acts of various states. **What is common in these provisions of various enactments is**

8 (2001) 3 SCC 609

that the power to issue notice demanding tax or duty is always conferred on a particular officer which legislative intent is clarified by using definite article 'the' instead of 'a' or 'any' or 'any of the'. Thus, a demand under section 11A of the Central Excise Act can also be issued by a particular officer who is **'the central excise officer'** in that case. The question whether 'the central excise officer' in this case was the Additional Director General of DGCEI or the jurisdictional Range officer who received returns and had done the assessment or any other officer is open. Evidently, there cannot be more than one such officer in view of the use of definite article 'the' in the section which has been held consistently by the Supreme Court to mean a particular thing or person.

18. However, the issue of jurisdiction was not a ground in any of the appeals before us nor was it argued before us. We, therefore, now proceed to discuss the arguments on merits from both sides and record our findings with respect to each of the demand above. Both sides relied on various case laws which apply to more than one component of the demand. Therefore, before we proceed to discuss the facts of each component of the demand, we proceed to discuss the case laws relied upon and the ratio laid down therein.

19. Learned Departmental Representative of the Revenue relied on the following case laws:

- i) **National Boards vs Commissioner of Central Excise, Calicut⁹** wherein it is held that no standard formula can be applied across the board and each case is unique and the entirety of the particular material facts of the case.
- ii) **Commissioner of Central Excise, Salem vs. CESTAT Chennai¹⁰** in which it has been held that if the department is able to prima facie establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent. The SLP against this judgment has been dismissed by the Supreme Court.
- iii) **Power Control Corporation vs CCE &ST Jaipur-I¹¹** in which it was held that the statement before the tax authorities is admissible evidence and cannot be discarded summarily on ground of subsequent retraction.
- iv) **N R Sponge Pvt Ltd. vs Commissioner of Central Excise, Raipur¹²** in which a vague averment by the assessee that the statement was made by the appellant on threat and coercion from the Revenue was rejected.
- v) **Nipon Zip Industry Pvt. Ltd.¹³** in which the Tribunal held that demand based on confessional statements is justified.
- vi) **Peers Technologies Pvt. Ltd.¹⁴** in which the contention that the statement was made under threat, coercion and

9 2014(313) ELT 113 (Tri-Bang)

10 2019(366) ELT 647 (Mad)

11 2019 (369_ ELT 471 (Raj)

12 2020 (372) ELT 321 (Chattisgarh High Court)

13 2009 (236) ELT 554 (Tri-Mumbai)

duress was not accepted because they never complained about such the alleged threats, etc. at the earliest opportunity.

- vii) **Collector of Customs, Madras and others vs. D. Bhoormull**,¹⁵ in which it was held that the prosecution or department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the facts in issue.
- viii) **Jagdish Shanker Trivedi vs Comm of Customs Kanpur**¹⁶ in which confessional statements of the appellants who made them were binding on them. Failure to give him opportunity to cross examine the witnesses was held to be not violative of principles of natural justice.
- ix) **Kollatra Abbas Haji vs GoI and others**¹⁷ in which the High Court held that statements of the co-accused, even though liable to doubt, have got sufficient evidentiary value for the purpose of concluding against the petitioner in the departmental proceedings. The High Court also found the retraction suspicious.
- x) **Surjeet Singh Chhabra vs UOI**¹⁸ in which the Supreme Court held that the confession by the appellant binds him.

14 2019 (27) GSTL 701 (Tri-Hyd)
 15 1983 (13) ELT 1546 (SC).
 16 2006 (194) ELT 290 (Tri- Del)
 17 1984 (15) ELT 129 (Ker)
 18 1997 (89) ELT 646 (SC)

- xi) Kanungo & Co. Vs Collector of Customs, Calcutta and others¹⁹** in which the Supreme Court held that all the materials on which the Customs Authorities have relied was set out and it was then for the appellant to give a suitable explanation.
- xii) Jethamal Pithaji vs Assistant Collector of Customs, Bombay and another²⁰** in which the Supreme Court held that if two parts of the statement are inextricably linked together, they must be read together but if they are severable, one part can be accepted which the court finds no reason to disbelieve.

20. Learned Counsel for the assessee relied on the following case laws:

- (i) **Ambika International vs UOI²¹** in which the High Court held that procedure prescribed under Section 9D of the Central Excise Act, 1944 is mandatory and must be followed to admit statements made before the officers of Central Excise.
- (ii) **Commissioner of Central Excise, Delhi-I vs Vishnu & Co. Pvt. Ltd.²²** in which Delhi High Court distinguished **Bhoormull** and said that it was passed in the context of Sea Customs Act where the initial onus of proof on the Department can be sufficiently discharged by circumstantial evidence and then the onus shifts on to the

19 1983 (13) ELT 1486 (SC)
20 1983 (13) ELT 1524 (SC)
21 2016- TIO- 1238 – HC P&H
22 2016 (332) LET 793 (Del)

person who was found to be in the possession of contraband and similar provisions do not exist in the Central Excise Act.

- (iii) **Ambika Organics vs Commr. Of C Excise & Cus Surat-I**²³ in which a learned Member of this Tribunal doubted the accuracy of the statements considering the cross-examination. Computer printouts were not accepted as evidence in the absence of certification as required under Section 36B (4) of the Central Excise Act and this decision was upheld by the High Court of Gujarat²⁴.
- (iv) **R A Castings Pvt. Ltd vs Commissioner of C EX Meerut**²⁵ in which this Tribunal rejected the allegation of clandestine removal in the absence of evidence based on the Balance sheets and electricity consumption. This decision was upheld by the High Court of Allahabad²⁶ and the Supreme Court²⁷
- (v) **Continental Cement Company vs UOI**²⁸ in which High Court held that clinching evidence is required for alleging clandestine removal and found several aspects which were not investigated by the Department.
- (vi) **Commissioner of C EX. Chandigarh-I vs Laxmi Engineering works**²⁹ in which the High Court held that even if there were some private records and supporting

23 2016 (334) ELT (Tri- Ahm)
 24 2016 (334) ELT A 67 (Guj)
 25 2009 (237) ELT 674 (Tri-Del)
 26 2011 (269) ELT 337 (All)
 27 2011 (269) ELT A 108 (SC)
 28 2014 (309) ELT 411 (All)
 29 2010 (254) ELT 205 (P&H)

documents, in the absence of positive evidence of clandestine production and removal of goods, the allegation does not sustain.

21. We have examined the various case laws cited by both sides. What emerges from them is that:

- a) Allegation of clandestine manufacture and removal can be sustained only on the basis of sufficient evidence and not merely based on presumptions and assumptions.
- b) The nature of evidence available in each case must be examined thoroughly and appreciated in that case to determine if a case is made out to support the allegation of clandestine removal.
- c) Statements recorded by the officers can be used as evidence provided they are relevant to prove the case in terms of Section 9D of the Central Excise Act. This procedure, being a mandatory requirement under the Act must be followed.
- d) Confessional statements can be used against the persons making them and also against the co-accused provided they are relevant (as per Section 9D of the Central Excise Act).
- e) Allegations of statements being made under threat, duress or coercion must be supported by the facts. If a person is under coercion and forced to make a statement, as soon as the coercion or threat is removed, it is reasonably expected that the person would complain. Therefore, belated retractions must be examined with circumspection.

- f) Merely because the statement is retracted, it does not nullify the statement completely. It must be appreciated in the context of the other evidence available on record.
- g) If cross-examination is held, the results of the cross-examination must also be considered.
- h) If documents in the form of Computer printouts are relied upon, then they must be accompanied by the necessary certificates to render them admissible as evidence.
- i) Demand cannot be raised presuming clandestine removal simply based on electricity consumption or figures in the balance sheets. They must be examined along with the other documentary evidence.

22. To sum up, every case of alleged clandestine removal must be examined based on the evidence available produced by the department. It is true that everything is recorded in the official records, then the production and removal cannot be clandestine. It can only be deduced from the records and other evidence collected during the investigation including the statements and cross examination. The totality of the evidence must be considered in each case to decide.

23. We now proceed to examine in detail the evidence produced to support the allegation of clandestine removal in this appeal.

A. Demand of Rs. 5,70,44,458/-

24. This part of the demand was raised for the period 1.12.2007 to 14.09.2010 demanding duty on 16,043.50 MT

of final products alleged to have been clandestinely manufactured and cleared which were said to be worth Rs. 49,39,94,027.50/- on which a duty of Rs. 5,70,44,458/- has been demanded. This part of the demand is made on the basis of booking registers 2/1 to 2/6 recovered from the transporter, New Vikas Transport Co., Ajmer and the statements of its proprietor Shri Moin Khan. Based on the entries in these registers, it was concluded that goods were manufactured clandestinely and cleared without issuing any invoices and without paying duty and that the clandestine removals of goods were reflected in the Booking Registers.

25. Learned Commissioner in the impugned order dropped this demand holding as follows:

- (a) The show cause notice places reliance on these registers and the statements of Shri Moin Khan, Proprietor of the transport company whereas the noticees have placed reliance on the cross-examination of Shri Moin Khan. These registers were, admittedly booking registers of trucks and not registers of goods receipts (GR). When Shri Moin Khan was cross-examined during the adjudication proceedings he explained that on the left side of the registers they have noted truck numbers and mobile numbers of truck drivers who approached them for loading the goods but denied that they provided load to all the trucks, saying that there should be availability of load for the weight and destination desired by the drivers. As

regards entries available on the right hand side of these registers he said that these relate to requisition of trucks made by the parties for the particular destination and weight which are noted by him and his employees. He further clarified that these are only booking registers and not registers of actual supply of trucks or dispatch the goods from the factory. He further clarified that whenever a truck is supplied to a party he issued a GR and made entries in the GR wise register. The trucks provided to the noticee are also entered in the GR wise register. The GR wise registers were resumed from his office by the DGCEI officers but they were later released to him. As regards the statements which he made before the inquiry officers, he submitted that they were not voluntary but given under pressure. He said that he had deposed true facts before the inquiry officers but he was not allowed to write them. He further stated that his original statements were, therefore, not correct and the statement made during cross-examination is true.

- (b) The RUD 24 (booking registers) are third party documents.
- (c) The booking register is a rough record maintained by the staff of Shri Moin Khan according to his convenience and the statements made by Shri Moin Khan during the investigation. During cross-examination he did not support the allegation of clandestine removal.

- (d) GR wise registers maintained by Shri Moin Khan were, according to him, the records of actual transport of goods. These GR wise registers were resumed by the officers from him but they were returned. These registers had the invoice numbers issued against each of the GRs.
- (e) The booking registers do not indicate against which booking and which truck number available on the left side of the page of the register were supplied to M/s Bansiwala.
- (f) The show cause notice and the table annexed thereto do not indicate the GR numbers of the transporters and the truck numbers but only alleged goods were clandestinely cleared and actually transported.
- (g) The investigation has also not brought on record any other corroborative evidences which can authenticate the original statement of Shri Moin Khan. This could have easily been done by recording statements of the truck drivers/owners who were the persons who are said to have actually transported the allegedly clandestinely removed goods. The names of the drivers as well as their mobile numbers were available in the booking registers. There was no reason why those drivers could not have been asked whether they actually transported the goods.
- (h) As the truck drivers also maintain date-wise log book and detail and duplicate copy of consignment book duly

receipted by the company, the fact of transport could have been verified.

- (i) The GRs resumed from the transporters vide Panchnama dated 14.09.2010 and 20.07.2012 have not been relied upon on the show cause notice. Shri Moin Khan has explained during cross- examination that he used to issue GRs and make entries in the GRs registers in respect of supplies of trucks to parties. The comparison of the invoices with the GR wise registers proved this contention.
- (j) The alleged clandestine clearance is of huge quantity of 16,043.53 MT of excisable goods valued at around Rs. 50 crores. To produce such quantity of finished products raw materials of a still larger that quantity are required and there should also have been a large scale money transaction and evidence in respect of either is missing.
- (k) The show cause notice made allegations that the noticee had procured main raw-material that ingots/billets clandestinely from suppliers and has not accounted for them so that goods can be clandestinely manufactured. However, when stock was taken and the places were searched, the show cause notice does not allege that there was any variation in the stock of finished goods or raw materials nor was there any unaccounted money recovered from the assessee.

- (l) The assessee has submitted statements from 135 of its buyers who deposed that they received excisable goods from the assessee only on duty paid central excise invoices.
- (m) For all the reasons the demand of duty made in the SCNs based on RUD-24 (booking registers) of the transporter alone is not sustainable as it is a third party document, not authentically maintained, contrary to customary practice and there are no backward and forward linkages by way of documentary evidences such as investigation pertaining to purchase of raw-material financially flow back.

26. The assessee supports this part of the impugned order. Revenue is aggrieved by this part of the impugned order and has appealed against on the following grounds:

- (i) Booking registers resumed from the transporters indicate date wise entries destination for trucks provided by the transporter to the assessee. When the entries of trucks in these registers were compared with the invoices, it is found there were invoices against some entries and no invoices against others. On some dates even all entries matched with the invoices. Therefore, the Commissioner has wrongly held that booking registers did not relate to the actually supply of

trucks and dispatch of goods from the factory by the assessee.

- (ii) Shri Moin Khan, proprietor of the transport company has admitted in his statements before the officers during investigation that in respect of all entries made in the booking registers, trucks were provided to the assessee.
- (iii) Shri Moin Khan in his statement 20.07.2012 also admitted that he provided trucks for 'Kachche ka Sariya' (clandestinely cleared bars) to the assessee. Therefore, the trucks so provided by the transporter company for which no corresponding invoices has been raised have been used for removal of the finished goods without raising invoices and without paying duty.
- (iv) The goods seized at M/s Rajasthan Enterprises, Chittorgarh also prove that the assessee has indulged in clandestine removal of its finished goods.
- (v) Loose attendance sheets recovered from the factory premises were not reflected in their official records such as wages register. These loose sheets show normal work and attendance on Sundays, but no production was shown in their RG-1 registers on Sundays so that the production on Sundays can be used for clandestine removal.

- (vi) Shri Hussain Khan, Labour Contractor, has, in his statement dated 19.10.2012, confirmed that production work was done in the factory on Sundays for which cash payments were being made by the owners of the factory.
- (vii) The daily electricity consumption of the assessee as communicated by Ajmer Vidyut Nigam Limited, Ajmer shows that the power consumption on Sundays was same as on other days of the week which implies that there was clandestine manufacture of Sundays and the goods so manufactured were cleared without payment of duty.
- (viii) There is sufficient irrefutable and cogent evidence in the form of the booking registers, corroborated by statement of Shri Moin Khan to transporter, statement of Shri Hussain Khan, Labour Contractor and information provided by AVVNL, Ajmer to substantiate the case that the assessee had removed 16,043.500 MT of their finished goods clandestinely without payment of duty during December, 2007 to July, 2012.
- (ix) In the case of **D. Bhoormull**, the Hon'ble Apex Court observed that "the law does not require the prosecution to prove the impossible. All that it

requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue.”

27. It is, therefore, the submission that Revenue has proved the clandestine removal of the activity, with sufficient evidence in the form of booking registers, Statements of Shri Moin Khan and Shri Hussain Khan and the electricity consumption that there was indeed clandestine manufacture. It is the submission of the Revenue that the Commissioner was not correct in dropping the demand on this account.

28. Learned Counsel for the appellant vehemently contends the Department’s appeal and supports the impugned order so far as this part of the demand is concerned. He submits as follows:

- (i) The six booking registers were seized from New Vikas Transport Company on 14.09.2010, i.e., 22 months earlier while investigating a case of another company.
- (ii) Of the four statements dated 14.09.2010, 04.10.2010, 20.07.2012 and 16.11.2012 of Shri Moin Khan, proprietor of M/s Vikas Transport Company, two, i.e., statements dated 14.09.2010 and 04.10.2010 were recorded while investigating a case against the another company before the

initiation of the present proceedings against the appellant/ assessee.

- (iii) Shri Moin Khan was cross-examined on 27.09.2012 and he clarified that there were two types of registers one for booking orders and another for actually supply of trucks for transport of the goods. All the bookings made do not necessarily result in transport of goods. The company may book a truck of the transporter company and may decide not to dispatch the goods subsequently. The only reliable document is another register called the GR register. Along with the GR register there are GRs which are issued by the transporter acknowledging receipt of the goods. The GR registers and the GRs which have been issued match with one another. In fact, during the course of investigation the GR registers of Shri Moin Khan were resumed by the Department but they were not relied upon but were returned to him.
- (iv) The entire case has been booked on the basis of booking register which contains entries which may or may not result in booking of dispatch of the goods and their transportation. It is for this reason that booking register has entries against which there are invoice numbers in some but not in others. Shri Moin Khan is the proprietor of the as transport

company but does not own the trucks that he provides. He, in turn, liaises with various trucks owners and those requiring transport arranges for trucks. As clarified by him during cross examination, he would enter the details of truck owners or drivers who approach him on one side of the booking register and he would enter details of those requiring transport on the other side of the booking register. Whenever he gets a request from the assessee or any other company he arranges for a truck and driver and enters the same in his booking register. If it does not result in finally transporting the goods there will not be in further entries. On the other hand, if it results in actual transport of goods, a GR is issued which is the acknowledgement of the receipt of goods from the manufacturer by the transporter. GRs are entered in the GR register along with corresponding invoice numbers.

- (v) The booking registers also contain details of actual clearances by the assessee appellant of 2095.555 MT of finished goods on payment of duty. These were not considered at all by the Department and demand has been made against all entries made in the booking registers treating them as clandestine removal even in cases where there is corresponding

invoice number and evidence of duty having been paid.

- (vi) So far as the statements of Shri Moin Khan are concerned, they were tested during adjudication through cross-examination and Shri Khan clarified to position as above. Further, it is to be noted that the adjudicating authority had dropped penal proceedings under Rule 26 of Central Excise Rules, 2002 against Shri Moin Khan for abetment. And this dropping of penalty against Shri Khan has not been assailed by the Revenue.
- (vii) So far as the alleged consumption of power as reported by AVVNL is concerned, this pertains to months of May, June and July of 2012 whereas the demand, based on the six booking registers covers the period 1.12.2007 to 14.09.2010. Therefore, the allegation of excess power consumption does not support the alleged clandestine manufacture and removal.
- (viii) Shri Hussain Khan, Labour Contractor is said to have stated that manufacture is being done in full force on Sundays by the assessee and the labour for the same is being paid in cash. Cross-examination of Shri Hussain Khan was not allowed by the

adjudicating authority and therefore, the statement does not support the revenue's case.

29. We have considered the arguments of both sides and have perused the records. In so far as this part of the adjudication is concerned, the demand has been made based on the booking registers by the transporter supported by the statements of the transporter Shri Moin Khan recorded during investigation. It is further supported, according to the Revenue, by the fact that the consumption of power on Sundays to the same extent as on any other day by the factory as reported by the AVVNL, Ajmer but no manufacture was recorded on Sundays by the assessee. It is further supported by the statement of Shri Hussain Khan, Contractor, who in his statement before the authorities, explained that the production continues as usual on Sundays and for Sundays he gets paid in cash by the owners.

30. Any statement made before an adjudicating officer of Central Excise is relevant for the purpose of proving a fact subject to the provisions of section 9D of the Central Excise Act which reads as follows:

9D. Relevancy of statements under certain circumstances.—

(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.

31. This section and the corresponding sections under the Customs Act Section (138 B) lay down the circumstances under which the Statements made before the officers are relevant in either a prosecution in the court or any other proceedings under the Act to prove a fact are relevant only if the procedure laid down under Section 9D of the Central Excise Act is followed.

32. In this case, the statement of Shri Moin Khan was relied upon in the SCN and he was cross-examined during the adjudication proceedings. In his statements before the investigating officer Shri Khan had said that trucks were supplied against all the entries in the booking register to the assessee/ appellant. During cross-examination he said that those statements were made under duress and that he was not allowed to write the correct facts by the Department at the time of recording the statements. He further explained

that whenever a truck owner approached him, he would enter his details on the left side of the booking register and if he can find a suitable load for the destination, he would arrange. On the right side of the register, he would write details of customers who want trucks to transport goods. He further clarified that he has two types of registers one for booking the trucks in which he enters details as soon as he receives the orders. Another register called the GR register is maintained when the goods are actually dispatched. Every booking may not result in the goods actually being received and dispatched. Whenever the goods are received he makes the entry in the GR register and he would also make a corresponding entry of invoice number, etc. in the booking registers. It is for this reason that in the booking register, against some entries there are invoice numbers while against others they are not. So far as the GR register is concerned, it matches with the GR issued by the transporter and the corresponding invoices. There is no dispute so far as the goods cleared under GR are concerned, the invoices match the GRs and GRs match the GR register. GR registers taken from the transporter by the Department were returned and have not relied upon in the show cause notice. This part of the demand is made considering that all entries in the booking register have actually resulted in transport of goods by the trucks of numbers given in the register and therefore, there was clandestine manufacture of the goods. Even in cases, where the entries in the booking registers show

corresponding invoice numbers (evidencing payment of duty), a demand has been made.

33. We find it impermissible to allege clandestine manufacture and removal and demand duty from the assessee merely because there are entries in the booking register made by the transporter who, during cross-examination has confirmed that these are merely tentative entries and do not reflect actual transportation of the goods. As correctly observed by the Commissioner in the impugned order, the investigating officers could have called the drivers or owners of each of the trucks (when their phone numbers were available in the register itself) and asked them if they had transported the goods against those entries or not. They could have further been questioned about how the goods were loaded and transported which would have revealed whether or not the goods were transported. Further follow up investigations could have lead the officers to ascertain how the goods allegedly removed were manufactured.

34. Revenue's appeal is on the basis of Shri Moin Khan original statement and ignores his cross-examination. The original statements of Shri Moin Khan are relevant only if the pass through the procedure prescribed under section 9D of the Central Excise Act and pass the test of cross-examination. Clearly the statements could not stand the cross examination. It was open for the revenue to declare him a hostile witness and re-examine him to establish that

his original statement was true and whatever was stated in the cross-examination was not correct. We do not find from the records that Revenue had done so. Therefore, insofar as the statement of Shri Moin Khan is concerned, the Commissioner has, in the impugned order, correctly relied upon on the clarification provided by Shri Moin Khan during the cross-examination before him.

35. The next argument of the Revenue is that in respect of those entries in the booking register against which there is no corresponding invoice number there were clandestine clearances. The best person to explain the entries in the register is the one who maintained it, i.e., Shri Moin Khan himself. He clarified as to why there were invoice numbers against some entries in the booking registers but not against others. He also said that he told the correct position to the officers but he was not allowed to record it in his statements. He further said that whenever the booking resulted in actual transport of goods, a GR was issued and a GR register is also maintained by him which was also taken by the officers during the investigation but returned to him. We find Revenue also admits that there were invoice numbers against some entries in the booking registers. However, the demand has been raised against all entries in the booking register whether or not there were any invoice numbers against the entries (which show duty paid clearances of goods). Revenue has not established that what Shri Khan explained during

cross examination was not correct and that their understanding of how Shri Moin Khan maintained the register is correct and that every entry in the booking register implies clandestine removal of goods.

36. The next statement Revenue relies upon in its appeal is that of Shri Hussain Khan, Labour Contractor who said before the officers that production continues as usual on Sundays also and he gets paid in cash for labour on Sundays. This is a very serious allegation. However, as discussed above, for a statement made before an officer of Central Excise to be relevant, the procedure Section 9D of the Central Excise Act has to be followed. Learned Counsel for the assessee submits that they sought cross-examination of Shri Hussain Khan but it was denied. Therefore, it is impermissible to solely rely on the statement of Shri Hussain Khan recorded during the investigation by the officers without testing the validity of the statement at the time of adjudication and allowing cross-examination by the assessee.

37. The next submission of the Revenue is that electricity consumption by the assessee on Sundays was the same as on the other days which implies that there was, indeed, clandestine manufacture because no production was recorded on their registers on Sundays. Learned Counsel for the appellant is correct in pointing out the readings of AVVNL, Ajmer pertain to May, June and July 2012 whereas the booking registers on the basis of which this part of the

demand is raised pertains to a period of almost two years earlier. Therefore, the report from the AVVNL does not substantiate the allegation of clandestine removal based on the booking registers of the transporter.

38. Learned Departmental Representative relied upon the **Bhoormull** to assert that Revenue is not required to do something impossible to prove clandestine clearances. All that is required is that production of evidence of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. We agree with the learned Departmental Representative. In matters of such as clandestine removal it is impossible to establish the mathematical decision the *modus operandi* and the documents. If everything is recorded that it will not be clandestine manufacture. Revenue cannot be expected to do the impossible. However, we find ourselves in agreement with the Commissioner that if there were entries in the booking register without corresponding invoice numbers, and the truck numbers and the mobile phone numbers of the drivers were also given, the least Revenue could have done without any difficulty was to ask the drivers if they had transported the goods on those dates and if so, the details. This could have led to further evidence if there was any clandestine removal. The officers could also have cross checked the GR register with the booking register to see against which entries there were no invoice numbers and

confined their investigations and consequent demand to that extent. They could have written to the AVVNL regarding power consumption for the relevant period (as they did for a period two years after the relevant period). They could have produced the labour contractor for examination and cross examination so as to make his statement admissible as evidence as per Section 9D of the Central Excise Act. We do not see why any of these obvious actions were impossible for the officers. At this stage, what is required by us is to determine, if there is sufficient material and evidence so as to convince a prudent man to believe in the probability of the fact of clandestine removal. In the factual matrix of this appeal, we find that the main basis of the demand are the booking registers supported by the statements of Shri Moin Khan, Shri Hussain Khan and the electricity consumption. The registers and the statements of Shri Moin Khan and his cross examination do not support the case of the Revenue that there was clandestine manufacture and removal.

39. As the statement of Shri Hussain Khan, Labour Contractor was not passed through the procedural rigour of Section 9D of the Central Excise Act and the appellant was not allowed to cross-examine him during adjudication, his statement is not relevant to prove the fact of clandestine removal. There is a third piece of evidence relied by the Revenue, namely the electricity the consumption on Sundays being the same as on some other days. However, as pointed

out by the learned Counsel for the appellant, the report of the electricity authorities pertain to a different period. Therefore, this also does not support the case of the Revenue.

40. Considering all the above, we find that no prudent man can on the basis of these pieces of evidence, assume that the assessee has manufactured goods valued at about Rs. 50 crores and cleared them clandestinely.

41. We also find that learned Commissioner was correct in pointing out that there is no evidence of purchase of such large quantity of raw-material or flow back of money. He also correctly pointed out that no cash was seized during searches nor was any major discrepancies noticed during stock taking.

42. In view of all the above we find that appeal filed by Revenue is liable to be rejected.

B. Demand of Rs. 20,12,479/- on 536.5 MT of goods which are said to be clandestinely removed during the period 3.1.2008 to 28.6.2012

43. This part of the demand was raised in the SCN and confirmed in the impugned order based on 42 Triplicate copies of GRs recovered from bound books of New Vikas Transport Co. which when compared with the original copy of the GR and the invoice issued by the assessee showed discrepancies.

44. The case of the Revenue is that in respect of these 42 GRs which were found in the office of New Vikas Transport Co., goods were transported but there is no corresponding excise invoice to evidence payment of duty. The case of assessee is that there were some typographical errors resulting in discrepancies but it does not demonstrate that another set of goods were cleared as reflected in the Triplicate copy of the GRs without invoices and without paying duty in addition to clearing the goods on the strength of the original copy of the GRs which are supported by the invoices. The findings of the Commissioner with respect to **B** is a sub-paragraph of paragraph 132 which is reproduced below:

"B. Investigation on the basis of statements of Shri Hussain Khan, Labour Contractor, Electricity Consumption Meter reading provided by AVVNL for the month of three months i.e., April, May and June 2012 and further corroborated by statement of Shri Vasudev Bherwani, part time accountant has established that production work was done in the factory on Sundays as per the normal capacity and was not recorded in the RG-1 Register properly, therefore, the demand of duty on the quantified value in the table to the Show Cause Notice which is based upon 42 GRs of New Vikas Transport Company, Ajmer alleging clandestine clearance of 536.69 MT of excisable goods valued at Rs 1.83 crores is maintainable. The argument given by the notice that demand is raised on technical defect in triplicate/office copy of GR and minor variation in truck numbers due to typographical and other error is an afterthought and therefore, no satisfactory answer is given to production on Sunday and to the statements of Shri Hussain Khan Labour Contractor and Shri Vasudev

Bherwani who is noticee's part time employee, I hold that duty on the amount of value of Rs. 1,83,33,257/- amounting to Rs. 20,12,479 is maintainable and consequential interest along with penalty is justified."

45. Learned counsel submits that the Adjudicating authority has accepted whatever was alleged in the SCN and brushed aside their entire submissions before him with respect to this part of the demand as 'an afterthought' and held that no satisfactory explanation was given for the production on Sunday and to the statements of the Labour Contractor Shri Hussain Khan and part time accountant Shri Vasudev Bharwani. Learned Departmental Representative has prepared a detailed chart of the discrepancies found with respect to the 42 GRs. Learned Counsel explained the reasons for the discrepancies in respect of each of the invoices and took the bench through copies of the relevant documents. The summary of the submissions by the learned counsel are as follows:

46. Of the 42 GRs, there were five against which the goods were not supplied at all by them due to the fact that subsequent to the issue of the GRs, the orders were cancelled by the buyers. In respect of the remaining 37 GRs, goods were despatched and original copies of the GRs (which accompany the goods) were procured by either the department or by the assessee from the buyers. The question which arises is whether goods were supplied against the triplicate copies of the GRs without paying duty to the

buyers. The 42 GRs pertain to 27 different buyers of which statements of 9 were recorded by the department. They were cross examined during the adjudication during which they clarified that they have never received any non-duty paid consignments. Of the remaining 18, most have filed affidavits to the effect that they had not received any non-duty paid consignments. GR is a third party document prepared by the transporter over which the assessee has no control and if there are any discrepancies in them, it cannot be held against them. During cross examination before the adjudicating authority, Shri Moin Khan, the owner of New Vikas Transport Company clarified that it is their practice that the name of the consignor, truck number and date are entered in the GRs using carbon paper but details of the consignee and the actual weight are obtained at the time of loading and entered in the original and duplicate copy of the GRs which accompany the goods along with the invoice. These details are obtained by the transporter on phone and entered in the triplicate copy of the GR (the office copy). Therefore, these details are not entered using carbon copy. At times, in noting down the details on phone some errors may occur resulting in discrepancies between the original copy of the GRs (which reflect the correct details) and the triplicate copy of GRs (which are filled after ascertaining on phone and may result in some errors). Learned Counsel points out that in the chart provided by the learned Authorised Representative of the Department, there were no

discrepancies between the invoice and the original GRs for this reason. He further submitted that GR is not a document under the Central Excise law and cannot be held against them. Learned Departmental Representative supports the impugned order and submits that the GR is the document which evidences that the goods were cleared from the factory and transported to the customer. There is no reason for two copies of the GR (original and triplicate) to have different details. This only supports the finding that the goods were removed twice- once with the invoice as reflected in the original copy of GR and again as per the details in the triplicate copy of the GR for which there is no corresponding invoice. This inference is further supported by the facts that the factory's electricity consumption on Sundays was the same as on any other day but no production was recorded on Sundays in the RG-1 register (Production register). It is further confirmed by the statements of the labour contractor Shri Hussain Khan and the part time accountant.

47. We have considered the arguments on both sides. We find that the entire findings of the Commissioner in the impugned order on this count are rather cryptic upholding the allegations in the SCN and dismissing the submissions by the appellant assessee as 'after thought'. Learned Departmental Representative has presented details of the discrepancies before us, GR wise and learned Counsel has made submissions explaining each case GR wise which we have summarised in the above paragraph. The question

before us is considering these submissions and records whether there is sufficient evidence to uphold the allegation of clandestine clearance of goods as reflected in the triplicate copies of the 42 GRs or not.

48. Learned Counsel submitted that GRs are not prescribed documents under the Central Excise Act. In our view, it does not matter because, clandestine removal, by definition, is removal without recording and without paying duty. If everything is recorded in the statutory records, there is nothing clandestine about it. Evidence of clandestine removal most usually comes from other records – formal or informal. What is important is whether those documents provide sufficient evidence to hold that there was clandestine removal or not. The allegation of clandestine removal in this case was upheld by the Commissioner based on:

- a) The discrepancies between the original and triplicate copies of GRs
- b) Power consumption details from the AVVNL which showed that power consumption on Sundays during three of the months was at par with the consumption on other days of the week but no production was recorded in the RG-1 register by the assessee. Thus, the inference was that the goods so clandestinely manufactured on Sundays were cleared against the triplicate copies of the GRs.
- c) Statements of the labour contractor Shri Hussain Khan and part time accountant of the assessee that production does take place on Sundays.

d) So far as the discrepancies between the original and triplicate copies of GRs and the explanation for the discrepancies provided by the assessee were dismissed as an afterthought.

49. We find that the primary evidence for this part of the demand are the triplicate copies of the GRs which, varied from the original copies in some details. These documents were prepared by the transporter. Shri Moin Khan, the transporter was cross examined about the discrepancies and he clarified that it is his practice to leave details of the consignee and the actual quantity while preparing the GRs which details are filled in the GRs after the goods are loaded at the factory. He obtains these details on phone from the driver and fills in the triplicate copies. Thus, the triplicate copies have all details filled using a carbon paper except the quantity and details of the consignee which are filled in with a pen later. Sometimes, errors are made in noting them so. If a third party document such as GR and the discrepancies therein are to be relied upon to hold that the assessee has clandestinely manufactured and removed goods from the factory, we find it impermissible that the clarifications by the person who prepared the third party documents may be ignored or brushed aside lightly. It is not unlikely that over a period of almost four years, if GRs are prepared and in 42 GRs some errors may have crept in. Nine of the consignees were cross examined and they confirmed that they received only duty paid goods and some of the rest filed affidavits to

that effect. The assessee itself asserts that no goods were clandestinely cleared. Thus, according to the consignor, consignee and the transporter, no extra goods were transported against triplicate copies of the invoices. The power consumption details obtained by the department pertain to only three months of the four years, covering about 8 of the 42 invoices which can at best provide supporting evidence because the power consumption does not establish that goods have been removed. Similarly, the statements of the labour contractor and the part time accountant neither of whom appear to have specifically stated that the goods were indeed removed against the triplicate copies of the 42 GRs. The main basis for this part of the demand are the triplicate copies of the GRs which are presumed by the department to evidence a second removal of the goods without paying duty because of the discrepancies with the original copies. In our considered view, the transporter, Shri Moin Khan, the transporter who prepared the GRs has given satisfactory explanation for the discrepancies leaving no room for a presumption of clandestine removal of goods by the assessee. This part of the demand, therefore, cannot sustain and needs to be set aside and we do so.

C. Demand of Rs. 2,92,846/- on 85.125 MT of goods valued at Rs. 29,52,213/- based on the discrepancies between seven (7) invoices and the original copies of the corresponding GRs and the statements of the consignees

50. The findings of the Commissioner in the impugned order with respect to this part of the demand is as follows:

"C. The next part of demand of duty pertaining to Serial No. C of the table amounting to Rs. 2,97, 846/- is for alleged clandestine clearances of 85.125 MT goods, from the factory of the notice, based on the statement of three consignees, namely, Sudhir Kumar, Proprietor of M/s. Udai Ram and Sons, Balotra, dated 5.11.2012 of Shri Arpit Bhatia of M/s Jugal Industries, Jaisalmer dated 21.11.2012 and of Shri Murtaza of M/s. Almadar Traders, Pratapgarh dated 25.10.2012 wherein they have admitted that the main noticee has cleared the different consignments of excisable goods on the strength of GRs and invoices mentioned in this table separately. The noticee has contested the demand on the grounds that no inquiry has been conducted from the authors of the GR, the drivers of the trucks and has relied on the cross-examination of three persons, held before the Commissioner on 15.4.2014, 21.3.2014 and on 12.3.2014 respectively. Since the demand in this regard is based on upon the admission of the co-noticees, contained in their statements and corroborated with the said documents, etc. there appears no need for further inquiry from the authors of the GR or from the truck drivers. I therefore, hold that the demand of duty amounting to Rs. 2,97, 846/- made vide impugned table of the show cause notice, is recoverable from the notice, under proviso to erstwhile section 11A (1) now Section 11A (4) of the Act, and the notice is liable to penal action under section 11AC *ibid.*"

51. Learned departmental representative supports the above findings. Learned Counsel for the appellant contested this part of the demand. Firstly, he submits that all the three persons whose statements were relied upon by the Commissioner were cross-examined and have denied having received consignments separately against the GRs and Invoices. The differences were minor clerical errors which do not lead to a conclusion that two separate consignments were cleared one against the invoice (on which duty is paid) and another against the GR without paying duty. Out of the

hundreds of GRs issued by the transporter during the period, there were some discrepancies in 49 GRs of which 42 were dealt with above and 7 GRs in which there were differences between the original invoices and the GRs. He submitted details of the discrepancies and produced before us copies of the GRs and the Invoices and pointed out the nature and extent of the discrepancies. In one GR No. 16362 dated 3.9.2010 the articles were mentioned as Iron bars while the corresponding invoice mentions Iron angles. In other GRs, the truck number was wrongly mentioned usually one letter in the truck number.

52. It is said *to err is human* and we find the above errors within the realm of possibility of typographical errors. Mistakes occur not only in the documents prepared by transporters but also in show cause notices, adjudication and appellate orders. Corrigenda are often issued to correct such mistakes. An error in the GR may be a ground for an investigating officer to investigate the matter to find out if there was any fraud or evasion but errors are not conclusive proof of clandestine removal. The Commissioner has, in the impugned order, relied on the statements of the consignees recorded during the investigation wherein they said that they received separate consignments on the GRs and Invoices. The consignees were cross examined during examination and they denied having received separate consignments on the GRs and invoices. While recording that the consignees were cross-examined, the Commissioner is surprisingly silent on

what was said during cross-examination. He, however, indirectly records that they have denied receiving double consignments by mentioning that the assessee has relied on the cross examination. In other words, the learned Commissioner has found it proper to rely on the original statements made during investigation and ignore the cross examination before him without any giving any reason. He also recorded that the assessee argued that no inquiry was conducted with the authors of the GRs and the truck drivers and held that it is not necessary because the consignees had stated that they had received separate consignments under the cover of GRs and invoices. Errors do not automatically lead to conclusion of malice - be it by an assessee, transporter or an officer. If an officer issues an SCN with an error, it does not mean that the officer had an evil motive and so is it with errors by an assessee or a transporter. We find it surprising that having found that there were discrepancies in the GRs, learned Commissioner found that it was unnecessary to ask those who prepared the GRs about the discrepancies and concluded that separate consignments were cleared on the strength of the GRs without paying duty. He also found it unnecessary to ask the drivers if they had actually carried the consignments. He said that since the consignees have admitted to receiving the consignments, any inquiry with the drivers or authors of the GRs is unnecessary. But the consignees have denied receiving consignments during cross-examination. He found it unnecessary to even

mention let alone discuss details of cross examination and record as to why he did not trust the statements during the cross examination. The least that could have been done by the officers was to check whether the trucks with the numbers mentioned in the GRs existed and if so, who they belonged to and if they carried goods from the consignor to the consignees on those dates. Truck movements could also have been checked from the toll gates and RTOs. We find that this part of the demand is based merely on typographical errors extrapolated to imply clandestine removal supported by statements which did not survive during cross examination. This part of the demand cannot be sustained and needs to be set aside.

D. Demand of Rs. 7,85,596/- on 207.490 MT of goods valued at Rs. 76,27,146/- based on slip (RUD 49 to the SCN) recovered from M/s. Bajrang Iron Store, Chittorgarh supported by a statement Shri Bansilal Jadiya, Proprietor(RUD 50 to the SCN)

53. A hand written slip (RUD 49 to the SCN) was recovered by the investigating officers from M/s. Bajrang Iron Store, Chittorgarh and its manager Shri Bansilal Jadiya who in his statement before the officers that the left portion of the slip related to receipt of TMT bars from the assessee herein without invoices while the entries on the right side of the slip pertain to consignments received from M/s. Bagherwal Traders, Kota.

54. The assessee sought and was allowed to cross-examine Shri Jadiya by the Commissioner. During cross examination,

however, he said that the entries (on the left side of the slip) related to supplies made by M/s Bagherwal Traders, Kota to third parties on which they (i.e., Bajrang Iron Store) received commission. In support of this statement, Shri Jadiya submitted 13 invoices issued by M/s. Bagherwal Traders, which clearly indicated the quantities and truck numbers in the slip. He said that these were supplied directly to the customers by M/s. Bagherwal on instructions of M/s. Bajrang Iron Steel who received a commission. In the impugned order, the Commissioner has recorded this fact but declined to accept the invoices submitted by the noticee (M/s. Bansiwala) and co-noticee (M/s. Bajrang) on the ground that M/s. Bagherwal had not submitted an affidavit along with the invoices and in the absence of such an affidavit, third party documents cannot be considered. He rejected the clarification given during the cross-examination as well as the invoices produced in support of the clarification and confirmed the demand based on the original statement before the authorities.

55. Learned counsel submits that the Commissioner rejected the invoices without verifying their genuineness. He also submits that the assessee was never questioned about the hand written slip recovered from M/s. Bajrang Iron. The slip was written by the son of Shri Bansilal Jadiya who was not even questioned. The slip itself is a third party document which cannot be used against the assessee without giving corroborative evidence. No efforts were made by the

investigating officers to track the transporters to ascertain if the goods were delivered and if so, from whom to whom. The assessee had, obtained a report from National Highways Authority of India (NHA) regarding the movement of trucks of the numbers mentioned in the slip which showed that they moved from Kota (where M/s. Bagherwal was located) to Chittorgarh(where M/s. Bajrang was located) and not from Ajmer (where the assessee was located). Learned counsel took us through the report which he received from NHA. Learned Departmental representative supports the impugned order.

56. We have considered the submissions advanced from both sides on this part of the demand and have examined the records of the case. We find it rather strange that the Commissioner refused to accept the cross examination before him and the invoices produced before him on the ground that they were third party documents and were not accompanied by an affidavit. The hand written slip, on which the demand was made, itself was a third party document and was not issued by the assessee and was accepted by the Commissioner without any affidavit. When the slip was first recovered and there was suspicion that the assessee had supplied the goods mentioned in them, the least that could have been done by the officers was to question the assessee about the slip which they did not. They could have also enquired if the trucks had indeed carried the goods mentioned in the slip on those dates from the assessee to

M/s. Bajrang which they did not. So the entire basis of this part of the demand was the slip recovered from M/s. Bajrang and the initial statement recorded by the officers from Shri Jadiya. The evidence against this part of the demand is the result of the cross examination before the adjudicating authority supported by the invoices issued by M/s. Bagherwal. The Commissioner preferred to accept the statement recorded before the investigating officers and rejected the cross examination before him and also evidence in the form of invoices produced before him on the sole ground that the invoices were not accompanied by an affidavit. If the original hand written slip and all the other documents used as RUDs in the SCN could be accepted without any affidavits, there is no reason why the invoices could not be accepted so. The slip recovered from M/s. Bajrang is not in dispute. What the figures therein represent was explained in the original statement of Shri Jadiya which must pass through the procedure under Section 9D of the Central Excise Act to be admissible. On passing through this procedure, cross examination has negated the explanation given before the officers and has also provided invoices in support of such a negation. Further, the report of NHAI produced by the assessee also support its case that the trucks did not move from its place, Ajmer to Chittorgarh but moved from Kota (where Bagherwal is located) to Chittorgarh (where Bajrang is located) Thus, there is no basis left for this

part of the demand and it cannot sustain and needs to be set aside.

E. Demand of R.s 37,476/- on 7.580 MT of goods valued at Rs.3,03,200 seized from M/s. Rajasthan Enterprises, Chittorgarh

57. Steel Bars weighing 7.580 MT were seized by the officers from the premises of M/s Rajasthan Enterprises, Chittorgarh, a dealer on 20.7.2012 after variation was found in the stocks. Steel bars bearing BRM mark (which belongs to the assessee herein) were found in the premises of M/s. Rajasthan Enterprises and also one invoice dated 5.7.2012 was found and the quantity found physically was in excess of what was indicated in the invoice. When questioned, Shri Abdul Hafiz, the owner said that he had received the excess quantity from the assessee without invoice and that it was transported from the assessee's factory to his business premises in his family owned vehicle RJ 09 G1536 about five days before the issue of the above invoice (i.e., about five days before 5.7.2012). Thereafter, the goods were seized and the demand of duty has been raised on the assessee.

58. The assessee contested the demand on various grounds. Firstly, it was contested that the Panchnama does not disclose how the stock was taken. Secondly, it was contested that the goods were available in the market in Chittorgarh itself and also in other places and they could have been procured from anywhere. Thirdly, it was contested on the ground that the Panchnama was drawn in English and

Shri Abdul Hafiz has, during cross-examination, explained that he does not know English. Fourthly, it was contested on the ground that the goods were, as per the statement of Shri Hafiz, cleared from the assessee's factory about five days in truck RJ 09 G 1536 but no inquiry was made whether this truck had passed through that route during the relevant five day period, i.e., between 25.6.2012 to 4.7.2012. Fifthly, it was argued that if the truck was to travel from Ajmer (where the assessee is located) to Chittorgarh, it has to pass through Kanwaliaawas and Jojowas Keda toll nakas and the assessee obtained a report from NHA I under the RTI Act which shows that the truck with number RJ 09 G 1536 had not passed these nakas during the period. Sixthly, it was contested on the ground that during cross examination that after the report from NHA I was explained to him by Shri Yadav, Superintendent, he admitted that the truck had not passed the nakas during the period. When asked as to why he had included the number of the truck in his statement on 20.7.2012, he said that he had added under pressure from the officers which was recorded in the presence of two police officers. He denied having ever purchased goods without bill from the assessee.

59. The Commissioner has, in the impugned order, rejected the contentions of the assessee. He held that although the Panchnama was drawn in English, it also contains the statement by Shri Abdul Hafiz in his own handwriting in Hindi. During cross examination, Shri Hafiz said that he

procured the seized goods in exchange of sale of TMT bars of other brand but has not given the details of the dealer or details of invoice. Therefore, it was held that the seized goods do not lose their evidentiary value. He also held that the toll nakas do not indicate that goods manufactured by M/s. BRM have not crossed the toll nakas during the period and have not gone to the premises of Shri Hafiz. Therefore, the Commissioner has upheld this part of the demand.

60. Learned counsel reiterates the submissions made before the Commissioner and argues that the department has not produced any clinching evidence of the goods having been clandestinely cleared by the assessee. Learned departmental representative supports the impugned order in respect of this part of the demand.

61. We have considered the submissions advanced from both sides and the records of the case. The undisputed fact is that the stock of the dealer M/s. Rajasthan Enterprises was taken and excess stock with BRM brand (which belongs to the assessee) was found. This stock taking was contested by the learned counsel on the ground that it was done through visual inspection and actual weight was not taken. However, it is not always necessary to weigh each piece in stock taking. For instance, if a bag of cement weighs 50 kg and 1000 bags are found somewhere, the weight can be calculated by just multiplying. TMT bars and rods are of standard widths and lengths. Since the specific gravity of iron and steel does not vary with the product, stock can be taken

by simply counting how many rods of what thickness are available in stock. Therefore, there is no force in the submission of the learned counsel that unless the entire stock is individually weighed the stock taking exercise is defective and tainted.

62. It is also undisputed that the panchnama was drawn in English and that Shri Hafiz said that he did not know English; however, his statement was written by him in his own handwriting in Hindi in the Panchnama. Therefore, the suggestion of the learned counsel that Shri Hafiz did not know what was written cannot be accepted.
63. It is also undisputed that during cross examination, Shri Hafiz gave another explanation for the excess stock which was seized and said that he had obtained them in exchange for some other goods from other traders but failed to provide any evidence, details or invoice of such a transaction.
64. The next question is whether the excess stock of the bars bearing the trademark of the assessee found in the premises of the dealer M/s. Rajasthan Enterprises which could not be satisfactorily explained by Shri Hafiz, the owner can lead to the conclusion that there was clandestine removal of these goods from the premises of the assessee. This was sought to be proved in the SCN based on the statement of Shri Hafiz that the goods were transported in truck no. RJ 09 G 1536 before five days of the date of the seizure. The report from NHA I obtained by the assessee shows that this truck did

not pass the intervening toll nakas between Ajmer (where the assessee is located) and Chittorgarh (where the goods were seized) during the entire five day period. The Commissioner has held that the report from NHA I only says that particular truck has not passed that route and it does not say that BRM branded goods have not passed that route. Therefore, the implication is that even if the particular truck has not passed, goods could have still been removed and he confirmed this part of the demand. We disagree with this reasoning. Even if BRM branded goods had passed that route during the five day period, it does not prove that they were removed clandestinely from the assessee's premises to the premises of M/s. Rajasthan Enterprises. There could be other movement of BRM branded goods from the assessee or anybody else from Ajmer to anybody in Chittorgarh during the five day period. What is important is to establish whether the seized goods were transported without paying duty from the assessee's premises to the premises of M/s. Rajasthan Enterprises. The burden of proving, of course, rests on the Revenue which asserts so. The evidence produced by the Revenue is the statement that they were carried in the truck of the particular number which has not even passed that way during the relevant period. Therefore, this part of the demand cannot be sustained and needs to be set aside.

F. Demand of Rs. 87,778/- on 27.3 MT of finished goods valued at Rs. 8,42,503/-

65. The assessee not only manufactures and sells but also trades in steel products. It had shown sale of 27.30 MT of finished goods in its trading account but there was no corresponding entry in the purchase ledger. Treating this as clandestine manufacture and sale, the demand was raised. The assessee's explanation was that these were the goods which they had manufactured and cleared on payment of duty on 29.1.2010 to M/s. ACCME (Urvashi Pumps) Engineers Pvt. Ltd. Jaipur but they were rejected by this buyer and returned under the cover of buyer's invoice no. S/36/10-11 dated 19.4.2010. Instead of bringing them back into the factory, they left them at the transporter's premises and resold them to another buyer under trading invoice No. 47 dated 11.11.2010. This trading invoice had a cross reference to the invoice under which the first buyer had rejected the goods. This explanation has not been accepted by the Commissioner and the demand was confirmed.
66. The Commissioner observed that the goods said to have been returned by the first buyer on 19.4.2010 were only entered in the books of accounts of the assessee on 11.11.2010 seven months later. The goods were said to have been kept this long in the premises of the transporter. However, the details of the transporter or where they were stored for this long nor was there any evidence of demurrage/ storage or detention charges.
67. We find that it is undisputed that the goods sold under a trading invoice did not have a corresponding purchase

invoice. Since the assessee is both a manufacturer and a trader, the conclusion was that these goods were manufactured and cleared without paying duty by the assessee. The assessee does not dispute having cleared the consignment under the trading invoice nor does it claim that it has been paid on duty paid invoice. The assessee's defence is that these goods were originally sent to another buyer who rejected them and hence they were resold to another buyer without bringing them back to the factory. The dates of the invoices and the entries made in the books of accounts do not make this version of the assessee credible. According to the assessee the goods were sold on 21.1.2010 to the buyer in Jaipur and they were returned after over four months on 19.4.2010. The entire quantity of 27 MT of goods was not brought into the factory but are said to have been kept in the transporter's premises for a period of seven months until 11.11.2010. It is also said that the returned goods were not even entered into the assessee's books of accounts for seven months and were entered only on 11.11.2010. There is no satisfactory account of where the goods were stored this long and if the transporter had kept them for the entire seven months free of cost. The assessee is both a manufacturer and a trader of the goods and we find it unbelievable that if goods are returned by the buyer after four months, they accept the rejection and thereafter do not enter the details of the goods for another seven months and do not sell the returned goods for seven months. The day the next invoice is issued, they

entered the goods returned seven months before. Given the factual matrix of this case, we find that the Commissioner was right in concluding that the assessee's explanation was not acceptable and that there is no corresponding purchase invoice for the goods sold on 11.11.2010 on a trading invoice and hence, it was a case of removal without paying duty. This part of the demand must be sustained and is upheld.

G. Demand of Rs. 6,68,786/- on value of goods valued at Rs. 81,16,116/- found short when stock was taken by the officers of Commercial tax officers and based on unsigned slips found by those officers

68. When officers of Commercial tax department of the State Government took stock of the assessee's premises, they found shortage of goods weighing 39.835 MT. The assessee agreed and paid Commercial tax on this shortage. The officers also found some slips of paper on the premises of the assessee which were not entered in the books of account. The assessee paid Commercial tax on these quantities as well. Thereafter, the assessment order issued by the Assistant Commissioner of Commercial Tax in this regard was appealed against by the assessee and the appeal was dismissed on 17.5.2011. Based on these shortages and slips based accepting which the assessee has paid VAT, this part of the demand of Central Excise duty was made by the Revenue.

69. The assessee's contention was that the weighment was done correctly by the Commercial tax officers and that there were no panchas. Therefore, the stock verification report is

incorrect. It is also its contention that they not only manufacture but also trade in goods and both manufactured and traded goods are subject to VAT and excise duty can be levied only on manufactured goods. The mere fact that the assessee paid VAT does not establish that the goods were manufactured.

70. We do not find force in the argument of the counsel for the appellant that although they have accepted shortages, validity of the unsigned slips and paid VAT and even their appeal has been rejected by the Commercial Tax department, it should be still be considered that the stock taking was not proper. The assessee cannot have multiple stands with respect to the same stock taking. If it was a shortage it does not cease to be so because another department is looking at the same document. However, we find force in the submission of the counsel that there was no mention of clandestine manufacture and Commercial tax is paid on both manufactured and traded goods. Therefore, it cannot be inferred that the goods found short were manufactured by them; they could have been traded. Therefore, this part of the demand needs to be set aside and is set aside.

Penalties

71. In so far as the personal penalties are concerned, since findings have been recorded in favour of the assessee in respect of all components of the demand, except one amounting to Rs. 87,778/- we find that the penalties under

Rule 26 need to be set aside. The penalty on the assessee under Section 11AC is reduced to Rs. 87,778/-corresponding to the demand of Rs. 87,778/- confirmed under Section 11A.

72. In view of the above, the appeals are disposed of as below:

- a) Excise Appeal No. 50072/2016 filed by the Revenue is rejected.
- b) Excise Appeal No. 53572/2015 filed by M/s. Bansiwala Iron and Steel Rolling Mills is partly allowed upholding confirmation of demand of Rs. 87,778/- under Section 11A and penalty of equal amount under Section 11AC and setting aside the rest of the demand and penalty.
- c) Excise Appeal No. 53573/2015 is allowed and the penalty imposed on appellant Shri Amit Ghai under Rule 26 of the Central Excise Rules, 2002 is set aside.
- d) Excise Appeal No. 53574/2015 is allowed and the penalty imposed on appellant Shri Saurabh Ghai under Rule 26 of the Central Excise Rules, 2002 is set aside.
- e) Excise Appeal No. 53549/2015 is allowed and the penalty imposed on appellant Shri Murtaza under Rule 26 of the Central Excise Rules, 2002 is set aside.
- f) Excise Appeal No. 53550/2015 is allowed and the penalty imposed on appellant Shri Bansilal Jadiya under Rule 26 of the Central Excise Rules, 2002 is set aside.
- g) Excise Appeal No. 53551/2015 is allowed and the penalty imposed on appellant Shri Abdul Hafiz under Rule 26 of the Central Excise Rules, 2002 is set aside.

h) Excise Appeal No. 53632/2015 is allowed and the penalty imposed on appellant Shri Meghraj Solanki under Rule 26 of the Central Excise Rules, 2002 is set aside.

(Order pronounced on **28.01.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Tejo