CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH,
COURT NO. 1

EXCISE APPEAL NO. 51004 OF 2019

[Arising out of the Order-in-Original No. DDN/EXCUS/000/COM/021-2018 dated 27/06/2018 passed by The Commissioner, Central Excise Commissionerate, Dehradun.]

M/s U.P. Bone Mills (P) Ltd., **...Appellant**
Vill. Simloni, Tehsil – Roorkee,
Distt. Haridwar (Uttarakhand).

Versus

Commissioner, Central GST, Dehradun, **...Respondent**
E-Block, Nehru Colony,
Dehradun (Uttarakhand).

WITH
EXCISE MISCELLANEOUS APPLICATION NO. 50402 OF 2019
(ON BEHALF OF THE APPELLANT)

AND
EXCISE APPEAL NO. 50056 OF 2019

[Arising out of the Order-in-Original No. DDN/EXCUS/000/COM/021-2018 dated 27/06/2018 passed by The Commissioner, Central Excise Commissionerate, Dehradun.]

Shri Aay Agarwal, Ex-Director, **...Appellant**
M/s U.P. Bone Mills (P) Ltd.,
Vill. Simloni, Tehsil – Roorkee,
Distt. Haridwar (Uttarakhand).

Versus

Commissioner, Central GST, Dehradun, **...Respondent**
E-Block, Nehru Colony,
Dehradun (Uttarakhand).

WITH
EXCISE MISCELLANEOUS APPLICATION NO. 50403 OF 2019
(ON BEHALF OF THE APPELLANT)

AND
EXCISE APPEAL NO. 50057 OF 2019

[Arising out of the Order-in-Original No. DDN/EXCUS/000/COM/021-2018 dated 27/06/2018 passed by The Commissioner, Central Excise Commissionerate, Dehradun.]

Shri Javed Rana, Ex-Director, **...Appellant**
M/s U.P. Bone Mills (P) Ltd.,
Vill. Simloni, Tehsil – Roorkee,
Distt. Haridwar (Uttarakhand).

Versus

Commissioner, Central GST, Dehradun, ...Respondent
E-Block, Nehru Colony,
Dehradun (Uttarakhand).

WITH

EXCISE MISCELLANEOUS APPLICATION NO. 50404 OF 2019
(ON BEHALF OF THE APPELLANT)

APPEARANCE:
Shri Aalok Arora, Advocate for the appellant.
Shri O.P. Bisht, Authorized Representative for the Department

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

FINAL ORDER NO. 50912-50914/2022

DATE OF HEARING : 19.09.2022
DATE OF DECISION: 26.09.2022

P.V. SUBBA RAO

M/s U.P. Bone Mills (P) Ltd.[1] filed appeal No. E/51004 of 2019 assailing order-in-original dated 27.06.2018 passed by the Commissioner, Central Goods and Service Tax, Dehradun whereby he decided the show cause notice dated 08.05.2017 and confirmed a demand of Rs. 18,72,41,951/- upon the assessee and imposed an equal amount of penalty.

2. Appeal No. E/50056 of 2019 is filed by Shri Ajay Agarwal assailing the same order in so far as it relates to imposition of penalty of Rs. 1,00,00,000/- upon him.

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[1] **assessee**

3. Appeal No. E/50057 of 2019 is filed by Shri Javed Rana, Ex-Director assailing the same order by which a penalty of Rs. 1,00,00,000/- is imposed upon him.

4. All these appeals have been heard and are being disposed of together.

5. The facts of the case, in brief, are that the officers of the Department received intelligence that the assessee has been manufacturing and removing excisable goods without paying central excise duty. Based on this intelligence, the premises of the appellant were searched on 08.10.2013 and a Panchnama was drawn. The stock of the goods i.e. MS Ingots in the factory were taken and compared with the stock as per the records. It was found that there was a shortage of 623.275 M.T. of Ingots. Shri Anshul Kumar, Accountant of the factory was present during the stock taking and none of the Directors were available at that time. Shri Anshul Kumar agreed with the stock which was taken and calculated the duty on the stock which was found short by Rs. 23,11,104/-. He debited this amount through the assessee's personal ledger account and cenvat account. He also made a statement before the Superintendent, Central Excise, Anti Evasion, Meerut – I confirming that the duty has been debited and further confirmed that the statement was made by him without any pressure and it was true to the best of his knowledge and belief and has been made voluntarily without any threat, coercion, undue inducement or fear of arrest, assault or other

physical injury. During search, 65 records as annexed to the Panchnama were resumed from the premises of the assessee, the last of which was a Pen drive sealed in the paper envelope.

6. After examining various records which were seized, the officers had written to the Director of the Company Shri Ajay Agarwal for opening the Pen drive in his presence to carry out further investigation. Despite repeated letters and reminders he did not appear. Thereafter, on 25.05.2016 officers opened the sealed envelope in which the Pen drive was present under a Panchnama in the presence of two witnesses and a copy of the files in the Pen drive were printed in the computer of the department. Based on the information collected from the Pen drive and also various documents which were resumed during the search and investigation, a show cause notice was issued to the appellants which culminated in the impugned order.

7. Learned Counsel for the appellants submitted that the procedure prescribed under Section 36B of the Central Excise Act, which is in pari-materia to the provisions of section 65B Indian Evidence Act, was not observed with respect to the Pen drive. Therefore, the Pen drive is not admissible in evidence and no demand could have been confirmed on that basis.

8. Learned Authorized Representative for the Department has not been able point out anything from the records of the case that the mandatory procedure prescribed under section 36B was followed with respect to the Pen drive.

9. Thus, when the statutory procedure was not followed, the pen drive is not admissible in evidence.

10. Another preliminary objection raised by the learned Counsel for the appellant is that the two Panch witnesses had given their addresses as per the Panchnama as Ghaziabad and Saharanpur but the Panchnama was drawn in Roorkee, Haridwar. He, therefore, submitted that the Panch witnesses were not residents of the area and, therefore, the Panchnama itself was not proper. On a specific enquiry from the bench as to whether this issue was raised before the Original Authority in the reply to the show cause notice or during personal hearing, learned Counsel for the appellant showed us the reply dated 15.05.2018 to the show cause notice filed by the appellants before the Commissioner. The reply shows that the question of the address of the Panch witnesses was not raised before the Original Authority. Further, the Panch witnesses could have recorded their permanent addresses in the Panchnama and unless it was alleged that they were not residents of the area, and an opportunity was given to the department, the appellant cannot be permitted to raise this issue at this stage.

11. We also find that the impugned order has confirmed a demand of Rs. 18,72,41,951/-. This covered some demands which were made on the basis of the documents which were resumed as well as some demands raised on the basis of evidence in the Pen drive. Since the amount covered in the Pen

drive was larger, they have been reckoned to subsume the demands raised on the basis of other documents which were resumed. Since we have now found that as the mandatory requirement under Section 36B of the Central Excise Act was not followed in this case, the Pen drive cannot be taken as evidence, the Original Authority should be given an opportunity to examine the demands in respect of the other documents resumed *de-hors* the data derived from the Pen drive and determine, whether any duty liability can be sustained. The details of the demands confirmed are as follows :-

Sl. No.	As per	Para no.	Duty calculation in	Period covered/	Other	Duty involved (in Rs.)	Remarks
1.		6.8	Annexure 'A'	01.12.12	31.03.13	2,94,71,968/-	Period covered in Sr. No. 7 of this table
2.		7	Table (D)	06.04.2013		32,947/-	Period covered in Sr. No. 8 of this table
3.	**the documents resumed**	8.1	Table (E)	20.09.12	02.02.13	10,40,991/-	Period covered in Sr. No. 7 of this table
4.		9.3	Table (F)	Parallel	Invoices	7,76,198/-	Period covered in Sr. No. 5 & 8 of this table
5.		**10.1**	**Table (J)**	**01.10.13**	**08.10.13**	**20,27,312/-**	
6.		13.1	Table (K)	April 12	June-12	5,47,98,862/-	Period covered in Sr. No. 7 of this table
	the Data retrieved from Pen Drive			October 12	December 12		
7.		**14.1**	**Table (L)**	**April 12**	**March 13**	**11,46,88,991/-**	
8.		**16.1**	**Table (O)**	**April 13**	**September 13**	**7,05,25,648/-**	
9.		15.1	Table (M)	31.05.13	07.10.13	4,56,33,	Period

						628/-	covered in Sr. No. 5 & No. 8 of this table

12. Of the above, Sl. No. 1 to 5 are demands based on documents which have been resumed, while demands at Sl. No. 6 to 9 are based on data in the Pen drive. The Adjudicating Authority should consider the documents at Serial nos. 1 to 5 which were resumed and examine whether the said proposed demand can be confirmed on their basis.

13. Accordingly, we set aside the impugned order and remand the matter to the Adjudicating Authority to decide the matter afresh ignoring the evidence in the Pen drive in regard to the demands proposed at Serial no. 1 to 5 and pass an appropriate order.

14. The impugned orders are set aside and the appeals are allowed by way of remand to the extent indicated above. The miscellaneous applications also stand disposed of.

(Order pronounced in open court on 26/09/2022.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

PK