CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH- COURT NO. I

EXCISE APPEAL NO. 51148 OF 2020

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/CEX/004/2020 dated 09.06.2020 passed by Principal Commissioner of CGST, Raipur)

M/s Surya Wires Pvt. Ltd. **.....Appellant**
20, Industrial Area, Birgaon,
Raipur (CG) – 492001

versus

Principal Commissoner, CGST, Raipur **.....Respondent**
Principal Commissioner, Central Tax & Central Excise
Central GST Building, Dhamtari Road, Tikrapara
Raipur – 492001

WITH

EXCISE APPEAL NO. 51096 OF 2022

(Arising out of Order-in-Original No. RPR/EXCUS/000/COM/CEX/004/2020 dated 09.06.2020 passed by Principal Commissioner of CGST, Raipur)

Shri Harsh Agrawal **.....Appellant**
Director, M/s. Surya Wires Pvt. Ltd.,
20, Industrial Area, Birgaon,
Raipur (CG) – 492001

versus

Principal Commissoner, CGST, Raipur **.....Respondent**
Principal Commissioner, Central Tax & Central Excise
Central GST Building, Dhamtari Road, Tikrapara
Raipur – 492001

APPEARANCE:

Shri K. Krishnamohan Menon, Ms. Parul Sachdeva and Ms. Prerna Jain, Advocates for the Appellant

Shri Rakesh Agarwal, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 19.03.2025
DATE OF DECISION: 01.04.2025

FINAL ORDER NO's. 50453-50454/2025

JUSTICE DILIP GUPTA:

Excise Appeal No. 51148 of 2020 has been filed by M/s. Surya Wires Pvt. Ltd.[1] to assail the order dated 09.06.2020 passed by the Principal Commissioner, Central Sales Tax & Central Excise, Raipur[2] confirming the demand of central excise duty on the goods found short in the factory premises and for its recovery under section 11A(4) of the Central Excise Act, 1944[3] read with rule 14 of the CENVAT Credit Rules, 2004[4] after appropriating the amount earlier paid by the appellant. The order also confirms the demand of central excise duty involved in the clandestine removal of finished goods without payment of central excise duty and without issue of valid invoices. The aforesaid demands have been confirmed with interest and penalty.

2. **Excise Appeal No. 51096 of 2022** has been filed by Harsh Agrawal, Director of the appellant, to assail the aforesaid order dated 09.06.2020 passed by the Principal Commissioner to the extent it imposes penalty upon him under rule 26 of the Central Excise Rules, 2002[5] for his act of omission and commission leading to evasion of duties.

3. The appellant is engaged in the manufacture of HB Wire, GI Wire, Stay Wire, Barbed Wire and Binding Wires. It availed CENVAT credit of duty paid on the inputs, capital goods and input service under the 2004 Credit Rules and utilized such credit towards payment of duty on the final products.

4. It is stated that on 08.04.2016, the Central Excise Officers of the Preventive Wing of the department conducted an investigation in the factory premises of the appellant. The Officers scrutinized the records found in the premises and some documents were also seized for further scrutiny. A

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1. **the appellant**
2. **the Principal Commissioner**
3. **the Central Excise Act**
4. **the 2004 Credit Rules**
5. **the Central Excise Rules**

panchanama was drawn on 08.04.2016. Statements of Harsh Agrawal and Surendra Kumar Jain (Directors of the appellant), Narendra Kumar Rathod (security guard), Satyanand Soi (security-in-charge) and Ishwar Prasad Verma (loading-in-charge) were recorded under section 14 of the Central Excise Act.

5. Thereafter, a show cause notice was issued to the appellant after a period of almost 2 years and 7 months on 13.11.2018 invoking the extended period of limitation contemplated under sub-section (4) of section 11 of the Central Excise Act. The show cause notice mentions that there was a shortage of the finished goods and raw material found during the course of physical verification and as the difference found in respect of the stock of Barbed Wire, Stay Wire and Chain Link was negligible, central excise duty involvement was arrived at only in respect of GI Wire, HB Wire, Wire Rod and Waste and Scrap found short. The relevant portions of the show cause notice are as follows:

> "4.4 **Thus the officers in the presence of two independent Panchas and Shri Harsh Agrawal, Director of the Noticee No. 1 ascertained shortages of stock as declared by Shri Harsh Agrawal**, Noticee No. 2 in respect of GI Wire, HB Wire, Wire Rod & Waste - Scrap as 476.206 MT, 7759.274 MT and 245.306 MT & 112.088 MT respectively. **On being asking about the shortage of stock, so ascertained, Shri Harsh could not tender any satisfactory reply to the officers and accepting such shortage of stock, he assured of paying total Central Excise Duty of Rs. 3,04,24,623/- thereon shortly.** He also deposed in reply to question no. 7 of his Statement dated 08/09.04.2016 (RUD-2), recorded under Section 14 of the Central Excise Act, 1944 as also inter-alia deposed in reply to question no. 1 of his another statement dated 11.04.2016 (RUD-3), recorded under Section 14 of the Central Excise Act, 1944,

that he has perused his statement recorded on 09.04.2016 and signed on it in token of having seen the same. He reiterated that the said statement had been given by him in his complete senses and was very much true to the best of his knowledge. Shri Harsh Agrawal, Noticee No. 2 in his statement dated 08/09.04.2016 submitted that they had debited CENVAT Credit Account of Rs. 65,00,000/- dated 08.04.2016 and assured to pay the remaining Central Excise Duty within 30 days.

5. **It therefore appeared that the Noticee No. 1 had surreptitiously removed GI Wire, HB Wire, Wire Rod & Waste - Scrap weighing 476.206 MT, 7759.274 MT, 245.306 MT & 112.088 MT respectively valued to Rs. 24,33,96,987/- from their factory premises without following the proper procedure and without payment of Central Excise duty of Rs. 3,04,24,623/-.** The particulars of duty calculation on the goods, indicating therein the basis of arriving at the assessable value, are summarized in Chart - A below:-

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6. **It appears that once the quantum of production that is recorded and shown in the books & accounts in not physically found in its entirety during the course of its physical verification, the shortage thereto the said excisable goods, in the lack of any plausible reasoning is deemed to have been removed from the factory in a clandestine manner. It therefore appears to reveal from the above that, the Noticee No. 1 had clandestinely removed excisable goods from its factory premises, which had consequently resulted in shortage in the stock of the goods, ascertained during Panchnama proceedings, supra.** Noticee No. 2, who is the Director of Noticee no. 1 and who was phusically present during the entire physical stock verification along with independent Panchas has admitted the staid shortages and also assured to pay the corresponding duty voluntarily.”

(emphasis supplied)

6. The show cause notice also deals with duty liability arrived at on the basis of loose papers recovered from the premises of the appellant. The relevant portions of the show cause notice relating to this allegation are reproduced below:

> "11.1 **Loose papers recovered from the premises of the Noticee No. 1 containing details of truck number, Estimated Bill of loaded vehicle, description of goods, name of the party, Kanta Parchi in respect of GI Wire, Steam Coal, HB Wire, Stay Wire, Wire Rod and Barbed Wire loaded for dispatch containing pages from 1 to 277. The details of such loose papers recovered from the factory premises of the Noticee No. 1 are mentioned in the Panchnama dated 08.04.2016.** Each of the documents was perused by Shri Harsh Agrawal, Director of Noticee No. 1 and he accepted in very unambiguous terms that all the documents recovered and which were perused by him, pertained to his factory and prepared by his staff as deposed in reply to question no. 5 of his statement dated 08/09.04.2016 (RUD-2) recorded under Section 14 of the Central Excise Act, 1944. On verification/comparison from/with Sales Register for the month of April 2016, submitted by the Noticee No. 1 vide their letter dated 07.06.2018, it appeared that in some cases, clearance of said goods have been made clandestinely without accounting for in its books of accounts, without issuing of Central Excise Invoice and without payment of Central Excise Duty.
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> 11.2 **On the basis of the aforesaid documents recovered from the factory premises of the Noticee No. 1, containing entries of movement of goods, a chart was prepared showing the entire clearances of excisable goods from the factory premises of the Noticee No. 1, during the period from 06.04.2016 to 08.04.2016 in Chart B.** This chart reveals the details of clearances for which invoices were issued/not issued by the Noticee No. 1 as under:-

> *****
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> 12.2 **Thus, it appears that Noticee No. 1 have evaded Central Excise Duty amounting to Rs. 1,76,650/- (Inclusive of Cesses) resorting to clandestine removal of GI Wire without payment of Central Excise duty as evident from the incriminating documents seized from the factory premises of Noticee No. 1 under Panchnama dated 08.04.2016** (RUD-1)."
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> **(emphasis supplied)**

7. The appellant filed a detailed reply dated 25.07.2019 to the show cause notice and denied the allegations made therein.

8. The Principal Commissioner, by order dated 09.06.2020, confirmed the demand and ordered for its recovery. After referring to the statements of the Director of the appellant, security guard, security-in-charge and loading-in-charge recorded under section 14 of the Central Excise Act, the Principal Commissioner recorded the following findings:

> "8.26 **I find that all the aforesaid statements recorded under Section 14 of the Central Excise Act, 1944 which includes the Statement of the Director of Noticee no. 1 who in very unambiguous terms has certified the veracity of the documents recovered from the factory premises of Noticee no. 1 and its authenticity.** The stand taken by the Noticee in their defense, disowning the veracity and the details mentioned in these documents at a later stage is nothing but a ploy and an alibi to escape the central excise liability. **Further once the quantum of production that is recorded and shown in the books & accounts is not physically found in its entirety during the course of its physical verification, the shortage thereto of the said excisable goods, in the lack of any plausible reasoning as was found during the physical stock verification as discussed in the preceding para,**

the said shortage is deemed to have been removed from the Noticee no. 1's factory in a clandestine manner. It therefore establishes that, Noticee No. 1 is engaged in clandestinely removing excisable goods from its factory premises, which had consequently resulted in shortage in the stock of the goods, ascertained during Panchnama proceedings, supra Noticee No. 2, who is the Director of Noticee no. 1 and who was physically present during the entire physical stock verification along with independent Panchas and has admitted the said shortages and also paid a good chunk of the corresponding Central Excise duty voluntarily. This in itself also stands testimony to the activities of clandestine clearances in which Noticee no. 1 was engaged in. *************** **The details of such loose papers recovered from the factory premises of the Noticee No.1 are mentioned in the Panchnama dated 08.04.2016. Each of the documents were perused by Shri Harsh Agrawal, Director of Noticee No. 1 and he has accepted unequivocally that all the documents pertained to his factory and was prepared by his staff as deposed in reply to question** no. 5 of his statement dated 08/09.04.2016 recorded under Section 14 of the Central Excise Act, 1944. In another statement dated 11.04.2016 of Shri Harsh Agrawal, Director of Noticee No. 1 recorded under Section 14 of the Central Excise Act, 1944 before the Superintendent (P), Central Excise (Hqrs.), Raipur, he inter-alia has deposed that he has perused his statement dated 08/09.04.2016 and signed on it in token of having seen the same. He reiterates that the said statement has been given by him in his complete senses and in very much true to the best of his knowledge. *****

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8.31 **Thus, Central excise duty amounting to Rs.3,04,24,623/- and Rs. 1,76,650/-(Inclusive of Cesses) involved in the shortage of finished**

> **goods and raw material and on clandestine removal of the said GI wire, HB Wire, Wire Rod and Scrap without payment of Central Excise duty and on the removals as evident from the incriminating documents seized from the factory premises of Noticee No. 1 under Panchnama dated 08.04.2016, so evaded by Noticee no. 1 is recoverable from them.** ***** From the above facts, it gets established that Noticee No. 1 had cleared finished goods and raw materials clandestinely without issuing Central Excise Invoice and without payment of Central Excise duty, which is recoverable from it invoking extended period of five years under Section 11A(4) of Central Excise Act, 1944 read with Rule 14 of CENVAT Credit Rules 2004 *****"
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> **(emphasis supplied)**

9. Shri K. Krishnamohan Menon, learned counsel for the appellant assisted by Ms. Parul Sachdeva and Ms. Prerna Jain made the following submissions:

(i) Statements of witnesses recorded under section 14 of the Central Excise Act before a Gazetted Central Excise Officer during the course of investigation cannot be relied upon unless the procedure contemplated under section 9D of the Central Excise Act is scrupulously followed. Such statements would have no evidentiary value if the persons making them are not examined before the adjudicating authority and they are admitted in evidence in the interests of justice as is contemplated under section 9D(1)(b) of the Central Excise Act. In this connection reliance has been placed on the following decisions:

(a) **Jindal Drugs Pvt. Ltd.** vs. **Union Of India**[6];

(b) **G-Tech Industries** vs. **Union of India**[7];

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6. 2016 (340) E.L.T. 67 (P & H)

(c) **M/s. Anjani Steels Ltd.** vs. **Commissioner of Central Excise and Service Tax, Raipur**[8];

(d) **M/s. Drolia Electrosteel P. Ltd.** vs. **Commissioner, Customs, Central Excise & Service Tax, Raipur**[9];

(ii) The case of the department is based only on shortage of finished goods and raw material not available in the factory on the date of investigation. It is settled law that a demand based solely on the basis of shortage of stock is not sustainable in the absence of corroborative evidence. To support this contention, learned counsel placed reliance upon the following decisions:

(a) **Commissioner of C. Ex. & S.T., Ludhiana** vs. **Anand Founders & Engineers**[10];

(b) **Super Smelters Ltd.** vs. **Commissioner of Central Excise & Service Tax, Durgapur**[11];

(iii) There is no corroborative evidence regarding allegation of clandestine manufacture and clearance of goods. In this connection reliance has been placed on the following decisions:

(a) **Continental Cement Company** vs. **Union of India**[12];

(b) **Abba Rubbers** vs. **Commissioner of Central Excise, Cochin**[13] which has been affirmed by the Kerala High Court in 2016 (342) E.L.T. A59;

(c) **Commissioner of C. Ex., Cus. & S.T., Bharuch** vs. **Shree Krishna Industries**[14];

(d) **Tara Chand Naresh Chand** vs. **Commissioner of C. Ex., Jaipur**[15];

(e) **Anand Founders & Engineers**;

(iv) The appellant had given satisfactory explanation for the difference in the shortage of finished goods and raw material;

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7. 2016 (339) E.L.T. 209 (P & H)
8. Excise Appeal No. 51380 of 2019 decided on 15.09.2022
9. Excise Appeal No. 52612 of 2018 decided on 30.10.2023
10. 2016 (331) E.L.T. 340 (P & H)
11. 2020 (371) E.L.T. (Tri. - Kolkata)
12. 2014 (309) E.L.T. 411 (All.)
13. 2006 (193) E.L.T. 471 (Tri. - Bang.)
14. 2017 (345) E.L.T. 629 (Guj.)
15. 2017 (355) E.L.T. 445 (Tri. - Del.)

(v) A demand based on internal documents/loose papers is not sustainable in law;

(vi) The extended period of limitation could not have been invoked in the facts and circumstance of the case; and

(vii) Penalty under rule 26 of the Central Excise Rules could not have been imposed on the Director.

10. Shri Rakesh Agarwal, learned authorized representative appearing for the department, however, supported the impugned order and made the following submissions:

(i) The appellant did not make any request for cross-examination during the adjudication proceedings and, therefore, he cannot allege violation of section 9D(1)(b) of the Central Excise Act. In support of this contention, learned authorized representative placed reliance upon the judgment of the Bombay High Court in **Harisons Steel Pvt. Ltd.** vs**. Union of India**[16];

(ii) The Director of the Company whose statement was recorded under section 14 of the Central Excise Act was correctly not cross-examined as that would amount to self-incrimination. In support of this contention, learned authorized representative placed reliance upon the following decisions:

(a) **Silicone Concepts International Pvt. Ltd.** vs. **Principal Commissioner of Cus., Icd, Tkd (Import), New Delhi**[17];

(b) **Conybio Healthcare (India) Pvt. Ltd.** vs. **Commissioner of Customs, Chennai**[18];

(iii) The right to cross-examine is not an absolute right. It is largely dependent on the facts of each case. In support of this contention reliance has been placed upon the judgment of the

16. 2017 (354) E.L.T. 442 (Bom.)
17. 2019 (368) E.L.T. 710 (Tri. - Del.)
18. (2022) 1 Centax 97 (Mad.)

Allahabad High Court in **Shyam Lal Biri Merchant** vs. **Union of India**[19];

(iv) When shortage of goods has been proved, there is no requirement in law to prove clandestine removal. In this connection reliance has been placed on the decision of the Tribunal in **Commissioner of C. Ex., Cus. & Service Tax, BBSR-I** vs. **Prinik Steels Pvt. Ltd.**[20];

(v) The appellant has not been able to make out a case for violation of the provisions of section 9D of the Central Excise Act. In this connection reliance has been placed on the judgment of the Calcutta High Court in **Commissioner of CGST and Central Excise, Howrah** vs. **Ashirwad Foundries Pvt. Ltd.**[21]; and

(vi) What is admitted need not be proved and in this connection reliance has been placed upon the decision of the Tribunal in **M/s. Satya Power & Ispat Ltd.** vs. **Commissioner of Central GST, Central Excise and Customs, Raipur**[22].

11. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

12. A perusal of the impugned order shows that it is based primarily on the statements of Harsh Agrawal, Director of the appellant, Narendra Kumar Rathod, security guard of the appellant, Satyanand Soi, security-in-charge of the appellant and Ishwar Prasad Verma, loading-in-charge of the appellant. These statements were recorded by the Officer under section 14 of the Central Excise Act.

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19. 1993 (68) E.L.T. 548 (All.)
20. 2009 (248) E.L.T. 829 (Tri. - Kolkata)
21. (2023) 4 Centax 265 (Cal.)
22. Excise Appeal No. 53076 of 2018 decided on 27.08.2024

13. The first and foremost issue that arises for consideration is whether such statements could have been considered as relevant and relied upon without following the procedure contemplated in section 9D of the Central Excise Act relating to relevancy of statements under certain circumstances.

14. The statement of witnesses are recorded under section 14 of the Central Excise Act and section 9D of the Central Excise Act deals with relevancy of these statements under certain circumstances.

15. The statement of witnesses are recorded under section 108 of the Customs Act, 1962[23] and section 138B of the Customs Act deals with relevancy of statements under certain circumstances.

16. It would, therefore, be appropriate to examine these sections of the two Acts at length.

Central Excise Act

17. Section 14 of the Central Excise Act deals with power to summon persons to give evidence and produce documents in inquiries under the Central Excise Act. Any Central Excise Officer duly empowered by the Central Government in this behalf has the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document in any inquiry which such Officer is making for any of the purposes of the Central Excise Act.

18. Section 9D of the Central Excise Act deals with relevancy of statements under certain circumstances and it is reproduced below:

> "**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

23. the Customs Act

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 proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

Customs Act

19. Section 108 of the Customs Act deals with power to summon persons to give evidence and produce documents. It provides that any Gazetted Officer of customs shall have the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Customs Act.

20. Section 138B of the Customs Act deals with relevancy of statements under certain circumstances and it is reproduced below:

"**138B. Relevancy of statements under certain circumstances.**

(1) A statement made and signed by a person before any Gazetted Officer of customs 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
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> (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 proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-

section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

22. It would now be appropriate to examine certain decisions interpretating section 9D of the Central Excise Act and section 138B of the Customs Act.

23. In **Ambika International** vs. **Union of India**[24] decided on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that if

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24. 2018 (361) E.L.T. 90 (P&H)

none of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority. The relevant portions of the judgment are reproduced below:

> "15. **A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.**
>
> 16. Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.). Para 12 of the said decision clearly

holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.

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22. **If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence.** Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

23. **There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory.** Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

24. **The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion.** It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in

order to extract confessional statements. **It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudication authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.**

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

26. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

27. **It is only, therefore, -**

(i) **after the person whose statement has already been recorded before a gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and**

(ii) **the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,**

that the question of offering the witness to the assessee, for cross-examination, can arise.

28. **Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.**"

(emphasis supplied)

24. The Punjab and Haryana High Court in **Jindal Drugs** that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 138B(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.

25. In **Hi Tech Abrasives Ltd.** vs. **Commissioner of C. Ex. & Cus., Raipur**[25] decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on the

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25. 2018 (362) E.L.T. 961 (Chhattisgarh)

statement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in **Ambika International**, the Chhattisgarh High Court held:

> "9.3 **A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.**
>
> 9.4 **The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police**

power of the Investigating authorities by coercion or undue influence.

9.5 ***** **The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory.** Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. **Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers.** Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. **We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the**

> **proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice.** In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana."
>
> **(emphasis supplied)**

26. In **Additional Director General (Adjudication)** vs. **Its My Name Pvt. Ltd.**[26] decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 138B of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 138B(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant. The relevant paragraphs of the judgment of the Delhi High Court are reproduced below:

> "76. **We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the Learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus :** *****
>
> **A Division Bench of this Court has, speaking through A.K. Sikri, J. (as he then was) held, in J & K Cigarettes Ltd. v. Collector of Central Excise [2009 (242) E.L.T. 189 (Del.)] that, by virtue of sub-section (2), Section 138B(1) of**

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26. 2021 (375) E.L.T. 545 (Del.)

the Act would apply, with as much force, to adjudication proceedings, as to criminal proceedings.

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We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act - or, for that matter, Section 9D of the Central Excise Act, 1944.

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. **The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the Learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.**"

(emphasis supplied)

27. In **Drolia Electrosteel** decided on 30.10.2023, a Division Bench of the Tribunal examined the provisions of section 9D of the Central Excise Act and after placing reliance upon the decision of the Punjab and Haryana High Court in **Jindal Drugs**, observed that if the mandatory provisions of section 9D(1)(b) of the Central Excise Act are not followed, the statements cannot be used as evidence in proceedings under Central Excise Act. The relevant portions of the decision of the Tribunal are reproduced below:

"14. Evidently, the statements will be relevant under certain circumstances and these are given in clauses (a) and (b) of subsection (1). There is no assertion

> by either side that the circumstances indicated in (a) existed in the case. **It leaves us with (b) which requires the court or the adjudicating authority to first examine the person who made the statement and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence. Of course, the party adversely affected by the statement will have to be given an opportunity to cross examine the person who made the statement but that comes only after the statement is, in the first place, after examination by the adjudicating authority, admitted in evidence.** This has not been done in respect of any of the 35 statements. Therefore, all the statements are not relevant to the proceedings.
>
> 15. **It has been held in a catena of judgments including Jindal Drugs Pvt. Ltd. versus Union Of India [2016 (340) E.L.T. 67 (P&H)] that section 9D is a mandatory provision and if the procedure prescribed therein is not followed, statements cannot be used as evidence in the proceedings** under Central Excise Act. *****
>
> 16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible."
>
> **(emphasis supplied)**

28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be

admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.

29. Learned authorized representative appearing for the department has, however, placed reliance certain decisions of the Tribunal. These decisions do not make any reference to the judgments of the High Courts on section 9D of the Central Excise Act or section 138B of the Customs Act. In fact, these decisions relate to rejection of prayer for cross-examination at the stage of inquiry/investigation conducted by the Officers of the department either under section 14D of the Central Excise Act or section 108 of the Customs Act.

30. In **Silicone Concepts**, the show cause notice placed reliance upon certain statements made during the course of inquiry/investigation. A perusal of the said decision also reveals that the appeal before the Tribunal was directed against an inter-locutory order passed by the adjudicating authority rejecting the request for cross-examination of the person whose statements was recorded during investigation/inquiry by the officers of the

department. It is in this context that the Tribunal examined whether the denial of cross-examination of the witnesses would result in violation of the provisions of section 9D of the Central Excise Act. The Tribunal held that since the statement of the Director of the Company was in the nature of a confession, the Director cannot be compelled to be cross-examined and the confession statement would be out of the ambit of section 9D of the Central Excise Act.

31. This decision would not apply to the facts of the present case as it is an admitted fact that the issue of cross-examination in **Silicone Concepts** arose during the course of investigation/inquiry by the Officers of the department under section 14D of the Central Excise Act. In the present case, the issue that arises for consideration is as to whether the statements made during the course of inquiry before the Officers of the department can be relied upon without following the procedure contemplated under section 9D(1)(b) of the Central Excise Act. The question of cross-examination would arise only after the statements are recorded before the adjudicating authority and they are admitted in evidence by the adjudicating authority. It is also pertinent to state here that the issue that arose before the Chhattisgarh High Court in **Hi Tech Abrasives** was in connection with the Director of the Company whose statement was recorded under section 14D of the Central Excise Act by the officers conducting the investigation/inquiry. The Chhattisgarh High Court clearly held that for any relevance to be placed on the said statement, it was absolutely incumbent for the department to have first examined the Director of the Company before the adjudicating authority and it would be for the adjudicating authority to determine whether the statement should be admitted in evidence. The question of cross-examination would arise only after the statement is admitted in

evidence by the adjudicating authority. In view of the judgment of the Chhattisgarh High Court in **Hi Tech Abrasives** and the other judgments of the High Court in **Ambika International**, **Jindal Drugs** and **Its My Name**, learned authorized representative appearing for the department is not justified in placing reliance upon the aforesaid decision of the Tribunal in **Silicone Concepts**.

32. The judgment of the Bombay High Court in **Harisons Steel** also does not help the department. The issue that arose for consideration was regarding cross-examination of a person whose statement was recorded by the officers of the department during the course of inquiry/investigation. The decision primarily decides the contention advanced that principles of natural justice had been violated while refusing to grant permission to cross-examine witnesses whose statements were recorded by the Officers during the course of inquiry/investigation. The High Court found no fault in the decision of the Tribunal upholding the denial of cross-examination for the reason that at no stage a request had been made by the Writ Petitioner to summon a particular person for cross-examination.

33. The decision of the Allahabad High Court in **Shyam Lal Biri** would also not help the department. The High Court held that the right to cross-examine is not an absolute right and the question as to whether a person has a right to cross-examine is a question which largely depends on the facts of each case.

34. The confirmation of demand of central excise duty to the extent of Rs. 3,04,24,623/- is based on the statements of persons who were not examined by the department before the adjudicating authority. This examination was absolutely necessary in terms of the provisions of section 9D of the Central Excise Act. In the absence of examination of such persons

before the adjudicating authority and in the absence of admission of such statements in evidence, such statements would not be relevant. For the reasons stated above, the said demand would have to be set aside.

35. The next issue that arise for consideration is in the context of the confirmation of demand of Rs. 1,76,650/-. This demand is based on loose papers recovered from the factory premises of the appellant. What weighed with the Principal Commissioner while confirming the demand is that loose papers were perused by Harsh Agrawal and he unequivocally accepted that all the documents pertained to his factory and were prepared by his staff.

36. In the first instance, the adjudicating authority while recording the finding on loose papers has placed reliance upon the statement of Harsh Agrawal made during the inquiry/investigation under section 14D of the Customs Act. The procedure contemplated under section 9D of the Central Excise Act was not followed and, therefore, no reliance can be placed on the statement of Harsh Agrawal in connection with loose papers recovered from the factory premises of the appellant.

37. This apart, the contents of the loose papers would not constitute relevant evidence on clandestine removal, if the author is not examined.

38. In this connection, it would be pertinent to refer to the decision of the Delhi High Court in **Commissioner of Central Excise, Delhi-I** vs. **Vishnu & Co. Pvt. Ltd.**[27]. The Delhi High Court held that the statement contained in private documents, without examining the author, would not constitute relevant evidence of clandestine removal.

39. The said decision of the Delhi High Court was subsequently followed by the Chhattisgarh High Court in **Hi Tech Abrasives**. The Chhattisgarh High Court held that without examining the person who made entries in the

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27. 2016 (332) E.L.T. 793 (Del.)

notebook, the contents of the private documents would not constitute relevant material. The relevant portions of the judgment in **Hi Tech Abrasives** is reproduced below:

> "12. *****
>
> Having held that the Director's statement could not be taken into consideration as the same was not relevant and admissible in evidence for want of non-compliance of the mandatory provisions contained in Section 9D of the Act, what remains to be considered is whether the entries made in the notebook 1, which relates specifically to the allegation of clandestine removal by the appellant, herein, could be sustained in law. **It is the contention of counsel for the appellant that the notebook constituted a private document which is said to be recorded by the employee namely Sanjay Kejriwal. His statement was not recorded by the investigation officers. We find that this factual averment is not disputed, meaning thereby that the notebook, which was relied upon by the authority and purported to have been prepared by Sanjay Kejriwal was taken as one of the material to draw inference of clandestine removal. The Commissioner (Appeals), while dealing with this issue has come to the conclusion notebook being private document ought not to be admitted in evidence without recording statements of its author relying upon various decision rendered by the Tribunal. It appears that the view which was taken by the Commissioner (Appeals) was based on the consistent view taken by the** Tribunal in this respect.
>
> *****
>
> 12.2 **We have gone through the detailed order passed by the adjudicating authority and we find that so far as the demand of challenge in the present case is concerned it rested only on two materials.** One was the so called statement of the Director which the adjudicating authority and the

> Customs, Excise and Service Tax Appellate Tribunal received in advance as admission of clandestine removal by the Director of the appellant/Company **and the other was the notebook which contained certain entries, which according to the adjudicating authority constitute relevant material to draw inference of clandestine removal by the avoidance of payment of duty.** Once we have held that the statement of the Director could not be admitted as relevant piece of evidence, there is no question of there being any admission on the statement of the Director of the company. **Then the only other material left is unverified private document in the form of certain entries made in the note book, seized during search operations. In view of what has been held by the Delhi High Court, with which we are in complete agreement and that the Tribunal has also taken a consistent view in this respect that without recording the statement of the author, the contents of private document would not constitute material, we are left with no legally admissible evidence on record to draw inference of clandestine removal.** *****"
>
> **(emphasis supplied)**

40. In the present case, the alleged authors of the loose papers were not examined. The demand of Rs. 1,76,650/- based on loose papers recovered from the factory premises of the appellant, therefore, cannot be sustained and deserves to be set aside.

41. It also needs to be remembered that a demand based solely on shortage of stock cannot be sustained in the absence of corroborative evidence. In this connection, reference can be made to the judgment of the Punjab and Haryana High Court in **Anand Founders & Engineers** and the relevant portion of the judgment is reproduced below:

"6. The Commissioner (Appeals) set aside the findings of the clandestine removal of the goods recorded by the adjudicating authority by holding that the assessee's record which were admittedly lying in the adjoining sister concern M/s. Adhunik Industrial Corporation were not scrutinized. Further, it was held that the assessee had clarified the stock position vide letter dated 9-8-2008 which was rejected summarily as an after-thought without making the verifications. Shri Kamal Kant in his statement has admitted only shortages and not the fact of clandestine removal and there was no evidence to show the clandestine activities as no further investigation was conducted to establish the identity of the buyers or the suppliers of the raw materials. The adjudicating authority had mentioned that the production was recorded by weight but in the sale invoices, the goods were sold by numbers without indicating the weight of the finished goods but nothing was proved that how the stock position was verified regarding sale invoices which only showed numbers without giving their weight. Accordingly, the Commissioner (Appeals) extending the benefit of doubt to the assessee had set aside the order passed by the adjudicating authority. The aforesaid findings of the Commissioner (Appeals) were affirmed by the Tribunal by observing that there was no other evidence on record to prove the clandestine activities of the assessee as the Revenue has not conducted further investigations to establish the identity of the buyers or the suppliers of the raw materials or the transporters. **Further, it was held by the Tribunal that mere shortages detected at the time of visit of the officers cannot ipso facto lead to the allegations and findings of clandestine removal. The relevant findings recorded by the Tribunal read thus : -**

> "7. The Revenue has again reiterated the same stand that as shortages detected at the time of visit of the officers, which has to be held that the respondents had cleared their final product in a clandestine manner. Admittedly, there is no other evidence on record so as to relate to the clandestine

> activities of the assessee. The Commissioner (Appeals) has rightly relied upon the various decisions of the Tribunal including the decision in the case of Jai Timber Company v. CCE & C, Bhopal [2009 (234) E.L.T. 457 (Tri.-All.)] and has rightly concluded that mere shortages detected at the time of visit of the officers cannot ipso facto lead to the allegations and findings of clandestine removal."

> 7. **No illegality or perversity could be pointed out in the aforesaid findings of fact recorded by the Commissioner (Appeals) as well as the Tribunal which may warrant interference by this Court. Accordingly, no substantial question of law arises in this appeal.**"

> **(emphasis supplied)**

42. Learned authorized representative appearing for the department has, however, placed reliance upon the decision of the Tribunal in **Prinik Steels**. This decision would not help the department in view of the law laid down by the Punjab and Haryana High Court in **Anand Founders & Engineers**.

43. What also needs to be noticed is that an inference regarding clandestine removal can be drawn only after detailed investigation and consideration of relevant incriminating material which could be based on the stock of raw material, finished product, use of consumption of electricity, employment of labour and many other relevant materials as has been noticed by the Chhattisgarh High Court in **Hi Tech Abrasives**. The relevant portion of the judgment is reproduced below:

> "12.2 ***** **The inference regarding clandestine removal ought to be outcome of a detailed investigation and consideration of other relevant incriminating material which could be based on the stock of raw material, finished products, use of consumption of electricity, employment of labour and many other relevant material as noticed in the decisions reported in 2014 (309) E.L.T. 411 and 2017 (345) E.L.T. 187** rendered by the High Court of Allahabad and

High Court of Jharkhand, respectively. **What, amongst other things, could be relevant consideration of clandestine removal, was discussed as below :**

> "12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :
>
> (i) To find out the excess production details.
>
> (ii) To find out whether the excess raw materials have been purchased.
>
> (iii) To find out the dispatch particulars from the regular transporters.
>
> (iv) To find out the realization of sale proceeds.
>
> (v) To find out finished product receipt details from regular dealers/buyers.
>
> (vi) To find out the excess power consumptions.
>
> (vii) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like -
>
> (a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.
>
> (b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.
>
> (c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.
>
> (d) Quantity of the packing material used.
>
> (e) The total number of the employees employed and the payment made to them.

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations in cash or kind have been paid by the noticee, such statements are must.

(f) Ostensible discrepancy in the stock of raw materials and the finished product.

(g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. Different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc.

These documents ought to have been collected by the respondent-department, if at all, they are interested in collector of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K. Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the Tribunals but the respondents-departments are turning *deaf-ear* to. In this case, they are also turning *deaf-ear* to their own circular dated 26-6-2014 (Annexure-3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K. Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive.

(I) The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal."

(emphasis supplied)

44. The inevitable conclusion, therefore, that would follow from the aforesaid discussion is that the impugned order dated 09.06.2020 passed by the Principal Commissioner in so far is it confirms the demand with interest and penalty cannot be sustained and would have to be set aside.

45. Excise Appeal No. 51096 of 2022 has been filed by Harsh Agrawal as Director of the appellant to assail the order dated 09.06.2020 to the extent it imposes a penalty upon him under rule 26 of the Central Excise Rules. As the demand on the appellant has been set aside, the penalty imposed upon the Director would also have to be set aside.

46. In the result, the order dated 09.06.2020 passed by the Principal Commissioner is set aside and Excise Appeal No. 51148 of 2020 and Excise Appeal No. 51096 of 2022 are allowed.

(Order Pronounced on **01.04.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Shreya