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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Date **13/03/2012**

Appeal No. E/1025/2005 - EX[DB]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. INDORE
MANIK BAGH PALACE, POST BOX NO. 10, INDORE
452001 (M.P.)

C.C.E. INDORE Appellant
Vs
M/S R.S.COMPANY Respondent

I am directed to transmit herewith a certified copy of **Final order No.** A/257/ 2012 EX[DB] dated 06-3-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
M/S R.S.COMPANY
77A&B, SDA COMPOUND, DEWAS
NAKA, INDORE-MP

2. Adv. / Consult
MR.L.P ASTHANA
R-163, SECOND FLOOR,
GREATER KAILASH-1, NEW DELHI - 110 048.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. M/S. R.S. INDUSTRIES, C/O. VIJAY AGARWAL, 12,13, SIDHARTH VIHAR, PRAKASH NAGAR, INDORE
15. SH. R. NAIR, ADV., 227-B, BANSI TRADE CENTRE, 581/5, M.G. ROAD, INDORE

Assistant Registrar
(Excise Appeal Branch)

P.T.O. 2, BACK

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing : 3 & 4.11.2011
Date of Pronouncement : 06-03-12

Excise Appeal No. 1025 of 2005

[Arising out of Order No. 38-R/2005 dated 22.2.2005 passed by the Commissioner, Customs & Central Excise, Indore)

Coram:
Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

CCE, Indore — Appellant

Vs.

M/s R.S. Company
M/s R.S. Industries
And Others — Respondents

Appearance:

Appeared for Appellant : Shri R.K Verma, AR

Appeared for Respondent : Shri L.P. Asthana, Shri Ramesh Nair, Shri Alok Barthwal, Ms. Nisha & Shri Manish M. Advocate

CORAM: Hon'ble Shri S.S. Kang, Vice President
Hon'ble Shri Mathew John, Member (Technical)

FINAL Order No. A/257/2012-EX(BR) dated...........

Per Mathew John :

This is an appeal filed by Revenue on the basis of review of done by CBEC of an adjudication order dropping proceedings against 13 noticees in a Show cause Notice issued alleging clandestine manufacture and clearance of Pan Masala containing tobacco (Gutka) and directions given by CBEC as per the then existing legal provisions to file appeal against the decision of the Commissioner dropping the proceedings. The demand of duties in the SCN was only from M/s R. S. Company ("RSC" for short) and M/s R. S. Industries ("RSI" for short) situated at Indore. The EA-5 form shows the names of these two respondents namely RSC and RSI specifically. It also shows "Others" as Respondents.

2. This case started as offshoot of an investigation done against M/s Suresh Enterprises ("SE" for short), Pune for clandestine manufacture and supply of scented tobacco to various manufactures of Gutka, including RSC and RSI. There were two other firms namely M/s KGN Manufacturers and M/s Shrada Company who were parties to the Show Cause Notice impugned in this proceeding. All these four firms were franchisees of M/s J. M. Advertising and Marketing Pvt. Ltd. Mumbai who owned a few brand names of Gutka. The four firms mentioned in the notice and which firms were manufacturing Gutka under different brand names are as under:

Sr. No.	**Unit**	**Central Excise Registration No.**	**Brands used**
1.	M/s R.S. Company	R-V/IND-I/CH21, 24/97-98/M-07	Sitar, Fire, Sikandar, My Teacher, Super Sitar, Yarana and J.M.J
2.	M/s R.S. Industries	R-V/IND-I/CH21/M-50/98-99	Sitar, Sikandar and Fire
3.	M/s K.G.N. Manufacturers	R-V/IND-I/CH21/M-51/98-99	Sitar and Sikandar
4.	M/s Sharda & Company	R-V/IND-I/CH21/M-51/98-99	Sitar and Sikandar

3. It is seen from the Show Cause Notice that there is no demand for excise duty from M/s KGN Manufacturers and M/s Shrada Company and the allegation as seen from the opening paragraph is that these firms actively connived with RSC and RSI for evading duty. The Show Cause notice admits that these firms

were also manufacturing "Sitar" and "Sikandar" brand Gutka and it is not coming out clearly as to what were the acts of connivance of these firms in evading duty.

4. It was mentioned during hearing that the proceeding against SE was dropped because it was held that scented tobacco was not excisable. The adjudicating officer in the present case held that the evidences were not strong enough to prove any clandestine removal RSC and RSI, and dropped the Show Cause Notice. Aggrieved by the finding of the Commissioner, Revenue has filed this appeal.

5. We have gone through the reply furnished by RSC and RSI before the Commissioner which was submitted along with the appeal papers, the finding of the Commissioner and considered the submissions made by the Counsel during the hearing.

6. These cases are based on investigation conducted and evidences gathered as below:

(a) Excess production capacity with RSC and RSI;

(b) A pocket size diary recovered from Shri. Ramesh Pardesi, said to be the production and dispatch supervisor of Suresh Enterprises which firm was supplying scented tobacco to RSC and RSI. This diary contained the details of some transactions and some information regarding transportation of scented tobacco from Suresh Enterprises. The statements of Shri. Ramesh Pardesi and another supervisor of Suresh Enterprises are also relied upon;

(c) Investigation conducted with the transporter, Sarita Roadways;

(d) Investigation conducted with the transporter, Vijayant Travels;

(e) Investigation conducted with the transporter, Hari Roadways Corporation;

(f) Statements of a few drivers of the vehicles who transported the goods;

(g) Investigations conducted at M/s Laminar Industries who was supplying the plastic films that was to be used in packing Gutka of the brands manufactured by the Respondents and the statements recorded from the authorized signatory of the firm;

(h) Investigations at the end of suppliers of raw materials like Supari, Katha, Menthol, Kimam and perfume;

(i) Seizure of unaccounted raw materials and Gutka in bulk packing at RSC on 19-02-2000;

(j) Investigations at the end of dealers of final products

7. To appreciate the quality of the evidence it may be better to examine each of the evidence as above and see objections raised by the Respondents as to why they contend that these are not good evidence. Before we proceed we take note of the fact the Adjudicating authority did not allow cross-examination of witnesses. However the Respondents had submitted affidavits given by some of the witnesses they wanted to cross-examine. We take into accounts such affidavits and we consider that no purpose will be served by sending this case back for cross-examination of witnesses after almost 12 years. So we proceed to appreciate the evidence on the basis of available information.

8. Excess production capacity with RSC and RSI.

8.1. The factory of RSC was established in September 1997 with installed capacity of 1,20,00,000 pouches per annum. The factory initially had 4 pouch packing machines and electricity connection for 90 H.P. from Madhya Pradesh Electricity Board. The factory further purchased 2 DG Sets and 39 pouch packing machines in the year 1998. (Further 116 pouch packing machines and 4 DG Sets and other machines in the year 2000 from Sep 2000 onwards. But this period is after the period for which duty is demanded in the SCN). However till 20.2.2000, they had declared to the department that they were using only 8 pouch packing machines for production, vide their declarations submitted on 2.3.98, 2.4.98 and 22.4.98 respectively as required under Trade Notice No. 48/97-CE dated 22-08-1997.

8.2. RSI procured 27 pouch packing machines but declared only 4 machines to the Department.

8.3. RSC point out that though they had 43 machines in their premises, only 8 such machines were installed as is evident from the panchnama dated 19.2.2000. As per panchnama, other machines were found in the bonded store room. Therefore, it is incorrect to infer that all the machines were installed and were being put to use to manufacture Gutkha.

8.4. RSC point out that Shri N.L. Sharda of RSC explained in his statement dated 14.06.2001 that different machines were used for different brands and at the time of visit only five brands were being made. The other machines were either under repair or maintenance. The machines were also kept for future expansion. The Respondents submit that form filling and sealing machines were operated by untrained laborers and often these machines become non-operational due to frequent fault such as burning/short circuiting of heating element, eye mark adjustment out, spacing out between pouches, panel board fault, defective cutting blade, gear problem, belt loosening etc. and that is the reason that they had extra machines.

8.5. It is argued that the allegation that RSC and RSI were using generating sets running on diesel which were purchased in cash is also not sustainable in as much as generating sets were used only in case of power failure which is common phenomenon in Madhya Pradesh. RSC and RSI were having a power connection of 150 HP. The Department has not been able to establish any excessive power consumption towards the alleged clandestine manufacture of Gutkha.

8.6. We have considered submissions about this evidence by both sides. Though Revenue has not been able to prove that the 45 machines of RSC and 27 machines of RSI were put to use simultaneously, the fact that more and more investments were being made in the unit with no addition to accounted production is indicative of clandestine activities. This is a good piece of evidence to indicate clandestine manufacture and removals but not good enough in deciding quantum of such clearance.

9. The diary seized from Ramesh Pardesi

9.1. This diary is said to contain details of scented tobacco clandestinely manufactured and cleared by SE. Statements of Shri. Ramesh Pardesi and Shri. Suresh Chandra Surana said to be factory supervisors of Suresh Enterprises, were also recorded.

9.2. The objection raised by RSC and RSI is firstly that the statement of Shri. Suresh Pardesi does not indicate how he was concerned with SE. It is also pointed out that the diary nowhere mentions the firms to whom the goods were dispatched. The statement of Shri. Pardesi, is recorded in the handwriting of Shri. Ashok Gole. This statement also does not bring out how Shri. Pardesi is concerned with SE. In page 2 of the statement destinations such as Rajnandgaon, Jalna, Kanpur, Bangalore and Hyderabad are mentioned, but Indore is not mentioned. Revenue is bringing a connection between RSC and RSI and the diary through a list annexed to the statement. This list is written in the hand writing of another person. It is the contention of RSC and RSI that in the list attached the name of the station and the name of the transporter M/s Hari Roadways were not mentioned by Shri.

Pardeshi but were added subsequently as a title to the list by the investigating officers. The names of M/s Sarita Roadways and M/s Vijayant Travels were not mentioned in the statement of Shri. Pardesi or the list attached to the statement and therefore these transporters are brought in without any logical link.

9.3. We find the objection raised by the Respondents about their name being not mentioned in the diary and the fact that the annexures to the statements recorded as deposed by Shri. Pardesi with apparent insertions after initial recording to be fatal flaws in respect of these items of evidence. It is fairly apparent that the investigators were initially focused mainly on clandestine removals from SE and not on the issue where the goods were going. But that cannot be reason to interpolate statements with additional details later on. On the whole we do not see any material to support the case of Revenue from this diary. However we are not able to accept the suggestion that the investigations against the transporters were done without any link. If the diary does not provide the link, if the documents recovered from the transporters and statements of the persons concerned with those transporters show such link such evidences cannot be ignored for the reason that the evidence of diary is not a reliable evidence.

10. Evidences collected from M/s Sarita Roadways.

10.01. Here copies of Lorry Receipts and statement of Devi Prasad Pandey, owner/partner of the firm, are relied upon.

10.02. Lorry receipts (LRs) were recovered from the premises of M/s Sarita Roadways, Pune, giving details like date, name of consignee, quantity and description which clearly showed that 2060 bags of scented tobacco and 172 drums of kimam were transported by them from SE Pune to RSC and RSI Indore during 1998-99.

10.03. Statement Shri Devi Prasad Pandey of M/s Sarita Roadways, Pune, was recorded on dated 9.3.2000 wherein he stated that these consignments were produced by SE Pune and that Shri Ramesh Pardesi from SE used to visit them for booking consignments to Indore parties; that RSC, RSI and Shri Suresh Jajra, Proprietor of SE Pune, used to make enquiries if there were any delays in transportation of goods.

10.04. Shri Suresh Jajra, proprietor of SE in his further statement dated 17.4.2000, when confronted with evidence recovered from M/s Sarita Roadways, admitted clandestine clearances of the entire 70.86 tonnes of scented tobacco manufactured and transported through M/s Sarita Roadways to Indore. Further in his statement dated 8.5.2000 Shri Suresh Jajra stated that he accepted the Central Excise duty liability on the entire quantum of scented tobacco manufactured and cleared through M/s Sarita Roadways, Pune. Accordingly, Rs. 1 crore of duty amount was deposited by them voluntarily (as seen in para-17 of the Order-in-Original dated 15.5.02 in the case of SE Pune). It appears that this demand got subsequently set aside because of the finding that scented tobacco was not excisable.

10.05. The Respondents submit that there is no mention about the weight of the goods in the LRs. The weight has been calculated on the basis of statement dated 9.3.2000 of Shri Devi Prasad Pandey of M/s Sarita Roadways, wherein he stated that the consignments of scented tobacco were received in gunny bags weighing 30 Kgs each approximately.

10.06. The Respondents submit that the statement of Shri. Pandey that in cases where consignments were delayed, the persons from the Respondents or some times Shri Suresh Jajra, Proprietor of SE, Pune used to contact him in his office to make enquiries regarding whereabouts the delayed consignments is a very vague statement and cannot be given any credence.

10.07. They submit that the statement of Shri Devi Prasad Pandey is unreliable for the reason that the statement was not written by Shri Devi Prasad Pandey in his own hand writing and the reasons thereof are not apparent.

10.08. The statement of Shri Pandey that some person from the Respondents used to contact him for delayed consignments cannot be relied. It is hard to believe that a transporter regularly transporting the goods to Indore could not name the person of the Respondents who used to contact them, particularly when he has specifically given the phone numbers of other consignees at Indore.

10.09. In his sworn affidavit dated 22.1.2004, received on 6.2.2004, Shri Devi Prasad Pandey affirmed that LRs in the name of RSC and RSI at Indore were prepared as per the information given by persons who approached them and SE had nothing to do with the names of the consignees. He further deposed that the names of the consignees i.e. RSC and RSI were given by the buyers themselves and the transport company was not concerned with the question whether the actual buyers were RSC or RSI. He has further affirmed that SE never paid anything for the consignments and the payment was made by the buyers themselves to the drivers on carrying the goods to destination and that he did not know any person of RSC and RSI of Indore. He also confirmed that he was not aware as to where the consignments were actually delivered and stated that the goods, which were loaded in the vehicle, were accompanied by the person who availed of the services of transportation. Such persons used to travel along with the consignments to Indore. At Indore the goods were (i) shifted in to other vehicles as told by the driver of the vehicle (ii) delivered in open space for disposal by the buyer (iii) shifted to other vehicles in various open spaces at Dewas Road, Indore and that the goods were never delivered as per the report of the drivers at any factory premises and that since the owner accompanying the goods was always there, they have never taken any acknowledgement as they were assured that the goods were delivered to the right persons.

10.10. We have considered rival submissions. What we notice is that the LRs clearly show the names of RSC and RSI. One of the LRs namely C. No. 1009 dated 25-04-98 shows the quantity as 16 bags of loose Scented tobacco and two drums of Kimam. The weight is given as 530 kgs and the value of the consignment is shown as 74,600/-In another LR C. N. No. 1030 dated 08-07-98 the quantity shown is 40 bags of loose scented tobacco and value shown is 174000/-. No weight is shown. Similar is the case with most of the other L.R.s. On Overall appreciation of the documents we do not find any substance in the objection raised by the Respondents that the LRs do not show quantity in KGs and therefore this evidence cannot be accepted. The argument that the names of consignees were indicated in the LRs as told by the persons who brought the cargo and accompanied the cargo can not take away the evidentiary value of the LRs. Transporters may not conduct verification about the owner of each and every consignment but they go by trust. These are documents which were maintained in the ordinary course of business and has to be taken to be correct unless rebutted with clear evidence to show that the names were indicated maliciously. No such evidence is forthcoming. So we find that the evidence gathered from this transporter is of reliable quality. Further the supplier SE did not have any explanation for this unaccounted supplies and opted to pay Rs. 1 crore readily towards excise duty not paid. This is a relevant evidence though the demand was found to be not sustainable for the reason that the goods were not liable to excise duty.

11. Evidences collected from Vijayant Travels Pune

11.1. The names of RSC and RSI are nowhere mentioned in any records of M/s Vijayant Travels, Pune, and LRs showed that the goods were booked in the name of self (i.e. SE). Here Revenue is relying on a peon book maintained at Indore office of the Transporter to show that the goods were delivered to RSC and RSI.

11.2. Shri Pradeep Patel, Manager of M/s Vijayant Travels stated that the scented tobacco received at Pune had been consigned to the Respondents during the year 1998 based on the peon book maintained at Indore. In this statement he mentioned the weight of each bag to be about 35 Kgs. The Respondents submit that the statement cannot be relied upon, inasmuch as it is contradictory about the weight of each bag and name of the consignee. Furthermore, the witness could not name the person of the Respondents' company to whom the said consignments were delivered. Similarly, the peon book of M/s Vijayant Travels and the chart prepared on the basis of entries in the peon book cannot be relied upon wherein some signatures have been appended in the column of signature of receiver. Except for one entry of 29.6.1998 when Shri N.L. Sharda of RSC received by its authorized signatory, no other consignment of scented tobacco was ever received by RSC or RSI. The Department has failed to adduce any evidence as to who received the said goods in the name of the Respondents as shown in the peon book of M/s Vijayant Travels. Officials of M/s Vijayant Travels also failed to name the person receiving the goods from them. How the name of the Respondents cropped up in the statement of Shri Pradeep Patel is a mystery especially when goods were booked in the name of self (SE) at the booking station of the transporters at Pune.

11.3. Reliance has been placed on the statement of Shri Rakesh Bicholia, parcel boy of M/s Vijayant Travels, wherein he stated that the goods shown in the name of RSC in the peon book were delivered to each of the consignees. The Respondents submit that in his statement he stated that he was shown by a person who came to him personally, the place where the goods in the name of RSC were to be delivered, but Shri Rakesh could not even name that person. In his sworn affidavit dated 18.1.2004, he stated that he could not confirm the place where he delivered the goods in the name of RSC as shown in the peon book as consigned to RSC, since the place had no sign board, name board, name plate etc. to indicate that these premises belonged to RSC; that furthermore the place where he delivered the goods shown in the name of RSC was a large godown for the storage of goods and it was a place where no manufacturing was being carried on as there was no machinery. In view of this the statement of Shri Bicholia can not be relied upon.

11.4. They tried to find out the possible place where Shri Rakesh Bicholiya might have made the alleged delivery and enclosed a map with photographs showing the places mentioned by Shri Rakesh Bicholiya in his shorn affidavit in respect of the alleged delivery. They submit that the possible delivery place by Shri Rakesh Bicholiya was as far as 4 Kms. away from the factory of the Respondents and that place did not belong to them. They argue that from the contents of the affidavit by Shri Rakesh Bicholiya, it is abundantly clear that scented tobacco was never delivered to them.

11.5. Though this peon delivery book shows delivery of some consignments to RS Company it is not clear as to what were the goods and what were the quantities involved. The issue as to the person to whom the goods are delivered also needs better affirmation. The statements of the peon cannot be relied upon without a proper cross examination. We do not think that any purpose will be achieved by remitting this matter for cross-examination after a period of almost 12 years. So we do not consider it proper to reckon any clandestine clearance of Gutka based on this evidence.

12. Evidences collected from Hari Roadways Corporation

12.1. The registers resumed from M/s Hari Roadways Corporation indicate only the name of station i.e. Indore. The name of receivers have not been mentioned anywhere in these documents. This is not sufficient in isolation to prove that the Respondents had received anything.

12.2. Reliance has been placed on the statement of Shri Shankar Kawde, Proprietor of M/s Hari Roadways Corporation, wherein he stated that as per telephonic talk with Shri Suresh Jajra and Shri Ramesh Pardesi of SE he used to transport only scented tobacco consignments to Sitar Gutkha manufacturers' premises at Dewas Naka, Indore. The names of the Respondents have never been mentioned in the statement. It has not been pointed out in the statement as to which out of the four firms manufacturing Sitar Gutkha had received the consignments of scented tobacco. Therefore, reliance cannot be placed on this statement.

12.3. Shri Shankar Kawde prepared a list appended to his statement wherein date-wise truck number, vehicle model, name of the driver and remarks such as big truck, ½ (small), full truck etc. have been given. On the basis of this list appended to the statement, the Show Cause Notice proceeds to allege that the Respondents have received 171.780 MTs of scented tobacco from SE through M/s Hari Roadways during June, 1999 to Feb. 2000. Here, the quantity has been considered as average of 80 bags per trip, the basis of which is not known to the Respondents and has not been mentioned anywhere in the statement of Shri Shankar Kawde. He has only stated that per trip there were around 60 to 100 bags of 30 Kgs. each.

12.4. In his sworn affidavit dated 19.1.2004, Shri Shankar Kawde has categorically stated that he had no knowledge, at all, where the goods were delivered at Indore; that the vehicles used for transporting scented tobacco from Pune did not belong to him but to third parties and he was instrumental only for arranging transportation from Pune to Indore in such vehicles, by contacting the parties who owned the vehicles; for this purposes he used to receive certain payment from the drivers for the role performed by him; that the drivers would take the cargo from Suresh Enterprises and thereafter deliver it at Indore to destinations told to them at Pune when they loaded cargo and he had no knowledge of the same; that as such his statement dated 21.01.2000 was incorrect wherein he had stated that the scented tobacco was unloaded at the premises of manufacturers of Sitar Gutkha at

Dewas Naka, Indore; that he was asked to give a statement that the goods are unloaded at Sitar Gutkha.

12.5. On an overall appreciation of the contentions on either side we find that this evidence is not record based but based on statements. There is lack of clarity about the consignee and place of delivery. Further the persons giving statements were not cross examined or re-examined. For these reasons we do not find this evidence good enough to prove delivery of scented tobacco to RSC and RSI which was not accounted by them.

13. Statements of a few drivers of the vehicles who transported the goods.

13.01. Statement was recorded from Shri Jagdish Singh Kartar Singh owner of vehicle No.MH-12-RA – 8811 dt. 10.10.2000 one of the vehicles said to be used in transportation of scented tobacco from Pune to Indore, through M/s Hari Roadways Corporation, wherein he stated that he ha ddelivered the consignment transported in his above vehicle, at RSC, Indore.

13.02. Statement was recorded from Shri Ramesh D. Chandorkar dt. 2.11.2000, driver of vehicle no.MH-14-F-2847, a vehicle used in the transportation of scented tobacco from Pune to Indore, through M/s Hari Roadways Corporation, Pune, wherein he inter alia stated that he had delivered the consignment he carried in his vehicle to RSC, Indore.

13.03. Statement was recorded from Shri Joginder Singh Rajawat, owner of truck No.MP-09-D-7962 dt. 21.2.2000 wherein he stated the consignment transported in his vehicle was loaded at Sitar Gutkha factory, Dewas Naka, Indore.

13.04. The Respondents object to this evidence on the following grounds. On perusal of the statement of Sh. Joginder Singh, it is clear that he was the owner of truck No. MP-09-D-7692 and the statement of Sh. Joginder Singh had been given with regard to the goods cleared in this truck only. This truck number does not appear anywhere in the list prepared by Sh. Shankar Kawde appended to the SCN with regard to M/s Hari Roadways Corporation, whereas Sh. Joginder Singh stated that this vehicle No. MO-09-D-7692 had been attached with M/s Hari Roadways. Moreover, as per the statement of Sh. Joginder Singh appending a map along with his statement, the scented tobacco was delivered at the place behind Prakash Roadlines which is a sale godown. The Respondents submitted a detailed map along with photographs where possibly Sh. Joginder Singh might have delivered the scented tobacco. In one photograph, sale godown is visible. The factory of the Respondents is nowhere near the salt godown and is far away from this place. The Respondents had no godown near salt godown or Prakash Roadlines. Therefore, reliance cannot be placed both on the statement of Sh. Joginder Singh as also the booking register of M/s Hari Roadways to allege that the scented tobacco was received by the Respondents

13.05. The allegation that the entries in the pocket size diary recovered from Sh. Ramesh Pardeshi exactly tally with the booking register of M/s Hari Roadways, also does not withstand the scrutiny in as much it is admitted in the SCN that as many as 11 entries in the diary of Sh. Ramesh Pardesi are not figuring in the records of M/s Hari Roadways Corporation. A note has been appended to the chart showing extraction of entries of the list prepared by Sh. Shankar Kawde of M/s Hari Roadways Corporation. Note reads as under:-

> "Quantity of scented tobacco cleared as per Ramesh Pardeshi's diary but not appearing in the booking register of M/s Hari Roadways Corporation = 3406 Bags – 2366 Bags = 1040 Bags.
>
> Since all the entries <u>except a few</u> found in the personal diary of Sh. Ramesh Pardeshi matched with the entries found in the booking register of M/s Hari Roadways Corporation, Pune <u>it appears that the remaining entries of 1040 bags were also</u>

transported through M/s Hari Roadways Corporation, Pune though missing in their booking due to some reason or the other".

13.06. Nothing has been adduced as to how these consignments were booked by M/s Hari Roadways Corporation.

13.07. As per Annexure-13 to SCN, there are as many as 56 entries in the booking register of M/s Hari Roadways Corporation. Out of these entries in respect of S. No. 1 to 29 of annexure-13 are not appearing in the diary of Sh. Ramesh Pardesi. Out of remaining entries at S. No. 30 to 56 of Annexure-13, 11 entries are not available in the diary of Sh. Ramesh Pardesi.

13.08. It is argued that, the statement of Sh. Joginder Singh is confined only to one consignment dt. 5.12.99 and in that, too, he could not pin point as to which factory making Sitar Gutkha, the goods were delivered. Also nowhere it is mentioned how the name of Sh. Joginder Singh, Driver came into picture, in as much as his name has not been mentioned in the statement tendered by Sh. Shankar Kawde of M/s Hari Roadways Corporation. Therefore, no reliance can be placed on his statement. The other unmatched entries have not been explained in the SCN. Therefore, it is contended that the entries in the diary of Sh. Ramesh Pardesi and the entries in the booking register of M/s Hari Roadways Corporation do not prove anything relevant and reliable.

13.09. Reliance has been placed on the statement dt. 10.10.2000 of Pune based truck owner Sh. Jagatjit Singh Kartar Singh Gandhi wherein he has admitted that he has transported scented tobacco from SE through M/s Hari Roadways Corporation, Pune in his vehicle No. MH-12-RA-8811 on 08.10.99 and 14.10.99 and confirmed that it was delivered to the Respondents. The Respondents submit that no reliance can be placed on the statement of Sh. Gandhi as the summons were issued in his wife's name Smt. Prabhjot Kaur Gandhi, who was the owner of the truck. It is not known as to how he appeared in place of the owner. This statement was written by an intelligence officer and the reasons therefore are not forthcoming. Further, Sh. Jagatjit Singh could not name the driver as to who had taken and delivered the consignment to RSC and RSI. The name of the driver is also not mentioned in the list prepared by Sh. Shankar Kawde.

13.10. Reliance has been placed on the statement of Sh. Ramesh D. Chandorkar said to be driver of truck No. MH-14-F-2847 wherein he had admitted that on 20.06.99 he had delivered the consignment to the Respondents with regard to the scented tobacco 85 bags weighing approximately 2.5 MTs booked by SE. The RSC and RSI submit that reliance on this statement too cannot be placed as the statement appears to have been written by Sh. J.S. Bhat, Intelligence Officer and the reasons therefore are not forthcoming. Moreover, truck No. MH-14-F-2847 mentioned in the statement does not tally with the truck No. MH-14-M-2847 mentioned in the list prepared by Sh. Shankar Kawde of M/s Hari Roadways Corporation as well as Annexure-13 appended to the SCN.

13.11. Vehicle No. MH-14-F-2847 as per his statement was owned by one Mrs. Kamal Ananda Shedge and that he at the time of recording the statement was working with M/s K.B. Transport. Neither there is any statement from the owner of the truck that Sh. Ramesh D. Chandorkar was the particular driver at the time of alleged transportation of scented tobacco nor is there any background as to how his name was brought into picture. He too could not name the person of the Respondents as to whom the goods were delivered.

13.12 We have considered submissions on both sides. We have already considered the evidences recovered from M/s Hari Roadways and found it to be not very reliable. The evidences from the persons above is not improving the quality of evidence gathered from M/s Hari Roadways significantly since the the Respondents have been able to successfully challenge the connection with the vehicles involved and the impugned consignments. Further there is haziness about the place of delivery of the goods. So we feel that the benefit of doubt should go to the Respondents in the matter of the evidences from the transporters discussed in this para.

14. The results of seizure at M/s Laminar Industries, Pen and statements recorded from the concerned persons

14.01. In a follow up action search was also carried out at M/s Laminar Industries, Pen on 11.3.2000 by the West Zonal Unit of DGCEI, Mumbai and certain documents showing clandestine production of laminated film rolls (packaging materials) of 'Sikandar' brand Gutkha for RSC, Indore were recovered and statements of following persons were recorded.

(i) Sh. Jagdeep Nanjappa, partner of M/s Laminar Industries, Pen
(ii) Sh. Sadanand Dixit, Office Supervisor, M/s Laminar Industries, Pen
(iii) Sh. Pandurang Namdeo Naik working as sitting Machine Operator in M/s Laminar Industries, Pen
(iv) Sh. Vasudeo Ganpat Malap, printing Operator in M/s Laminar Industries, Pen

14.02. During the aforesaid search, the officers recovered 3 books as mentioned in Sl. No. 1, 2 & 3 of Annexure-A to Panchnama dt. 11.3.2000 from the factory of M/s Laminar Industries, Pen. On being shown these notebooks to Sh. Vasudeo Ganpat Malap, working as Printing Operator at M/s Laminar Industries in his statement dt. 11.3.2000 (relied upon as Annexure 45A to the show cause notice) deposed that the seized notebooks contained details of 'Sikander Brand Laminated Film' made in the factory of M/s Laminar Industries and also confirmed that the total quantity produced as per these notebooks were reflected in the Daily Production reports prepared by him. Copy of the Panchnama dt. 11.3.2000, the three seized notebooks and the chart prepared on the basis of said books showing the production of the laminated film rolls of Sikandar Brand Gutkha are relied upon as annexure-14, Annexure-15 and Annexure-16 to the SCN.

14.03. Sh. Pandurang Namdeo Naik working as Slitting Machine Operator for M/s Laminar Industries, Pen in his statement dt. 14.3.2000 (relied upon as Annexure-46 to the SCN), interalia, confirmed that the chart prepared on the basis of said note books showing production of 'Sikandar' brand laminates is true and correct and shows date wise slitting of 'Sikander' brand printed laminates.

14.04. Sh. Sadanand Dixit, Office Supervisor of M/s Laminar Industries, Pen in his statement dt. 13.3.2000 (relied upon as Annexure-45 to this SCN), interalia, admitted the fact that M/s Laminar Industries Ltd. had manufactured more than 28 M.T. of laminated film rolls for 'Sikandar brand gutkha' for RSC, Indore as against the recorded production and clearance of only 495.50 kgs. and 486.10 kgs. Of laminated films of Sikandar brand sold to RSC, Indore under invoice No. 214 dt. 22.12.99 and 251 dt. 12.2.2000 respectively. He also admitted to having not recorded the remaining production of Sikandar brand rolls in their statutory RG-1 register.

14.05. Sh. Jagdeep B. Nanjappa, Partner of M/s Laminar Industries, pen in his statements 11.3.2000 and 14.3.2000 (relied upon as Annexure-42 to this notice), interalia, deposed that they had supplied 'printed flexible laminated film' bearing 'Sikandar' brand to RSC, Indore only during the period 1999-2000; that they did not receive any formal orders in writing. Sh. Jagdeep Nanjappa confirmed the facts stated by Sh. Vasudeo G. Malap dt. 11.3.2000 to be true and correct. On being shown the statements of Sh. S. Dixit dt. 13.3.2000 and Sh. P.N. Naik dt. 14.3.2000, Sh. Jagdeep Nanjappa admitted their contents to be true and correct and voluntarily admitted that they had started manufacturing Sikandar brand laminated films for RSC, Indore since August, 1999 and till the date of statement had manufactured and cleared 5.00 M.T. of laminated rolls to RSC, Indore. He further clarified that the said laminates were partly cleared on invoices in the name of RSC and largely under the name of fictitious buyers, although the material was sent to RSC, Indore, and the transport was arranged by RSC and the payment of the goods were received by them in cash.

14.06. Statement of Sh. Natwarlal Sharda, partner of RSC, Indore was recorded on 11.4.2000, (refer Annexure-55 to SCN) wherein he interalia admitted that RSC, Indore had been manufacturing Sikandar Brand Gutkha from 1998 and that since September, 1999 manufacturing of Sikandar Brand Gutkha was done only by RSC, Indore. On being shown the statement dt. 14.3.2000 of Sh. Jagdeep Nanjappa, Sh. Natwarlal Sharda informed that they had been buying Sikander brand laminated rolls from M/s Laminar Industries since September, 1999. He did not accept having received 5 M.T. of Sikander brand printed rolls from M/s Laminar Industries as deposed by Sh. Jagdeep Nanjappa of M/s Laminar Industries but admitted to have received only 981.60 kgs. from M/s Laminar Industries.

14.07. Thus from the above records and statements it appeared that M/s Laminar Industries, Pen had actually manufactured about 28 MT of Sikandar brand laminated films and cleared about 24 MTs without payment of duty. Out of these 5 MTs were cleared to RSC as deposed by Sh. Sadanand Dixit of M/s Laminar Industries. Out of this only 0.9816 MT was cleared on payment of duty to RSC. The SCN in respect of duty liability against M/s Laminar Industries, Pen on the goods cleared without payment of duty has been separately issued by DGCEI, Mumbai.

14.08. The Respondents make the following submissions about this evidence. On one hand Department is relying on Sikandar brand laminates allegedly supplied by M/s Laminar Industries to the Respondents. The Sikandar brand laminates are for smaller pouch of 1 gm having MRP of Rupee 0.50 and on the other hand demand has been calculated on the basis of pouch of 2 gms. each with MRP of Rs. 1/-per pouch.

14.09. It is contested that as per Laminar Industries alleged supply of Sikandar brand laminate, the numbers that could be manufactured using 8 machines out of 171.78 MT of scented tobacco supplied through M/s Hari Roadways Corporation would be 3013684211 pouches which is 54 times of the capacity of the Respondents. If it is bigger pouch of MRP Rs.1/- (of 2 gms. each), it still would be 27 times of the capacity. If the pouches which have been accounted for by the Respondents are taken into account, the inflation by the Department would be more. Capacity would be surpassed 5 to 10 times, even if it is presumed that all 43 machines were utilized. Further, the period of alleged receipt of scented tobacco is also incorrect as reflected in various annexures.

14.10. We have considered the objection raised by the Respondents that Sikander brand Gutka was being packed in sachets of MRP Rs. 0.50 per pouch containing 1 gms per pouch whereas the demand is worked out on the basis of Gutka of pouches containing 2 gms and MRP Rs. 1/-. We do not see much merit in this argument. The demand for duty is based on unaccounted receipt of scented tobacco. Since Revenue was not able to establish the quantity of each variety of Gutka manufactured. The duty liability is the same if calculations were to be done assuming packets of net content of 1 gms and MRP Rs.0.50.

14.11. The next objection is that if the 28 MTs of Sikander brand films manufactured by M/s laminar Industries were received by RSC and RSI the quantity of gutka that would have been manufactured is much beyond the capacity of the Respondents. But we note that there is no argument in the SCN issued to M/s Laminar Industries that 28 MTs of the film was supplied to RSC. At any rate the actual quantum of unaccounted production of the goods by Laminar Industries is to be decided in separate proceedings.

14.12. Since we have already discarded the evidence regarding scented tobacco transported through M/s Hari Road ways we see no reason to examine the discrepancy pointed out. From the evidence from this supplier of laminated films the supply of accounted to unaccounted material is in the ratio of 0.981 to 4.019 which is roughly 1:4 which is consistent with the case made out by Revenue. We also keep in mind that M/s KGN Manufacturers and M/s Sharda Company also were manufacturing Gutka of these brands against whom Revenue has not been able to bring other evidences and for that reason there is no demand against them. On the whole this is a good evidence to support the case of Revenue.

14.13 On the whole we consider the evidences recovered from Laminar Industries to be a good evidence to prove that RSC had been getting unaccounted packing material. This is because of two reasons. Firstly this evidence is based on records rather than statements. Secondly this is based on inculpatory statement of Sh. Jagdeep Nanjappa, partner of Laminar Industries causing duty liability on himself also and the possibility of being just a statement given to get rid of the investigating officers is remote. This evidence indicates clandestine activities of RSC.

15. Investigations at the end of suppliers of raw materials like Supari, Katha, Menthol, Kimam and perfume.

15.1 Investigations were also carried out in respect of various other suppliers of raw materials i.e. lime, kathha, menthol, supari, kimam & perfume to the said units, used by RSC and RSI in the manufacture of Gutkha. The records of the Respondents revealed that they were mostly purchasing their raw materials from common suppliers (a) Supari from M/s Gajanan Areca-nut Traders, Shimoga (b) Kathha from M/s N. K. Laminates, Kanpur (c) Menthol from Vivek Kumar Ashish Kumar, Indore (d) Kimam from S.S. Traders, Lucknow and Rambhari Kimam Udyog, Sitapur (e) Scented Tobacco from Yogesh associates, Silvassa (f) Perfume from M/s J.M. Perfumery, Silvassa (g) Lime from Om Enterprises, Satna (h) Laminates from Uma Polymers, Jodhpur. Further, from Feb. 1999, a trading firm in the name of M/s Shaan Trading Company ("STC" for short), 34 SDA Compound, Dewas Naka, Indore was started by Sh. Amarlal Kamat with the financial assistance of Rs. 7 lacs which was provided by a firm M/s Rajendrakumar Satishchandra, in which Sh. Harivallabh Agrawal, who is a partner in RSC, is also a partner. While on records STC was trading only in Supari and Katha powder for the said units, the investigation revealed that after December 1999 the consignments of scented tobacco from SE were cleared in the name of STC, as admitted by Sh. Suresh Chandra Surana in his statement dt. 27.2.2000 (Annexure-44 to SCN) while it was not reflected in the records maintained by them.

15.2 Inquiries from the recorded sources of purchase of the said units revealed that the said units were purchasing raw materials also in cash and in such cases they were personally taking the delivery of the goods. In the case of purchase of lime and kimam from the units at Satna, Maihar and Sitapur, it was found that the purchases were in cash only. In case of Katha purchased from M/s N.K. Laminates, Kanpur the investigation revealed that apart from the recorded purchases in the name of said units, there were many other dispatches to Indore in names which appeared to be nonexistent. List of such dispatches by M/s New Mahavir Forwarding Agency, Kanpur and M/s Satna Express, Kanpur and LR's of M/s Patel Roadways Ltd. Kanpur was enclosed to the SCN as Annexure -7. The list and the L.Rs. show that there were even dispatches in the 'self' name while the delivery shown in the L.R. was at Dewas Naka, Indore. Sh. Manish Jain, Director of M/s N.K. Laminates, Kanpur when asked to explain the same stated that their buyers might have booked the same in their name. Similarly there have been cash sales in respect of perfume by M/s J.M. Perfumery, Silvassa to Indore parties, the addresses of whom were not ascertainable. In respect of supari and katha a trading firm in the name of M/s Shaan Trading Company was also started from Feb. 1999, which was exclusively opened for the purpose of trading in supari & kathha for these franchisee units.

There were many cash transactions by STC also, shown in the names, which appeared to be non existent and whose addresses were neither given on the bills nor were known to STC. It is alleged by Revenue that these cash transactions shown by STC were nothing but a mode of adjustment in respect of unaccounted quantities of supari supplied to the said franchisee units. From the sale invoices of STC (relied upon as Annexure -74 to SCN) it is evident that they have sold 10.50 MT of supari as cash sales during the period 23.2.99 to 17.2.2000 and on specific enquiry regarding names and addresses of the buyers of such sales they gave an evasive reply that in case of cash sales they were not required to indicate the addresses of the buyers. The difference in quantity of supari and katha found on stock verification on 19/20.2.2000 at STC further indicates the said modus operandi of making available the raw materials to the said units, which is not accounted for in the records. It may be pertinent to note here that STC is a trading firm in which financial interest of one of the partners of RSC are involved.

15.3 The Respondents submit that STC was engaged in processing of supari and trading of supari; that it cannot inferred that wherever the buyers in the bills issued by STC could not be located the supply was either to RSC or RSI. They also submit that no adverse inference can be drawn from the fact finace was provided to STC by a firm in which Shri. Harish Vallabh Agarwal who was also a partner in RSC, was a partner.

15.4. As may be seen from discussions elsewhere in this order no conclusion is being drawn that scented tobacco sent in the name of STC was used by RSC. The evidence produced by Revenue is only good enough to locate the possible source of unaccounted raw material and arrangements was in place for such procurement. The evidences are not good enough to ascertain the quantity of unaccounted raw material procured.

16. Seizure of unaccounted raw materials from the factory of the Respondents on 19/20-02-2000

16.1 On the date of search 529 Kgs of scented tobacco and 6228.8 Kgs of Supari was lying unaccounted at RSC.

16.2 The Respondents point out the proceedings against RSC and RSI have been dropped by Order-in-Original No. 53/2002 dated 07-05-2002 passed by Commissioner of Central Excise (Adjudication) Mumbai in respect of the seized goods.

16.3 The reason for dropping the Show Cause Notice is not explained. We note that there is no claim before us that the raw material was in fact accounted in their books of accounts. We consider this to be a good evidence in support of the case of Revenue that they were receiving unaccounted raw materials.

17. Investigations at the end of dealers of finished goods

17.1 Further investigation was carried out in respect of the dealers of the finished goods, i.e. 'Sitar' and 'Sikandar' brand Gutkha manufactured by the said units and transporters of the said finished goods. It was revealed that the said units were selling their goods through same net work of dealers namely M/s Rajendrakuamar Satishchandra, Indore, in MP; M/s Chetija Traders, Raipur in Chattisgarh, M/s Goyal Marketing Nanded in Maharashtra and M/s Sharda Agencies, Jaipur in Rajasthan. M/s Rajendrakumar Satishchandra, Indore is owned by Sh. Harivallabh Agarwal who is one of the partners in RSC and M/s Sharda Agencies by Sh. Natwarlal Sharda who is also a partner in RSC. The said units had engaged transporters viz. M/s Deluxe Roadways, Indore, M/s Belgaum Indore Roadways Indore, M/s Prince India Roadlines, Indore, M/s Hyderabad Roadlines, Indore, M/s Safexpress, Indore etc. On enquiry it was found that most of the transporters were such that they did not keep the records for the past periods and stated that the same have been destroyed. However, few copies of dispatch memo and one loading register were recovered from M/s Deluxe Roadways Indore. From the scrutiny of these records maintained by M/s Deluxe Roadways, it appeared that they had transported 'Sitar and Sikandar' brand Gutkha manufactured by RSC and RSI to M/s Goyal Marketing, Nanded. It also appeared that on some occasions, the names of the consignees were not shown in the record and in some cases the description of goods was shown as Amla/Katta/A goods. In his statement dt. 8.3.2001, Proprietor of Deluxe Roadways, Indore, Sh. Khalil Ahmed admitted that all the consignments to M/s Goyal Marketing, Nanded were 'Sitar' and 'Sikandar' brand Gutkha only and the same had been sent by the said four franchisee units and the description had been sometimes wrongly shown as Amla etc.

17.2 Revenue has also recovered a purchase register from Goyal marketing relied upon as Relied Upon Document 79 showing unaccounted receipts of final products from RSC and RSI.

17.3 On enquiries from the said units, they produced copies of invoices showing similar quantity of goods dispatched to M/s Goyal Marketing and thus contended that the said goods were duty paid.

17.4 However, on scrutiny of these invoices showed that all the invoices produced by the said units showing same quantity were actually not relatable to the goods shown in the transport records of Deluxe Roadways for the reason that mostly these invoices were not carrying the LR no. or the vehicle no. and some of the invoices which were carrying vehicle numbers were not tallying with the transporters records. It was observed that the date shown in the invoices of the said units, the date of LR and dispatch memo of M/s Deluxe Roadways was also not co-relatable to the date shown in the purchase register of M/s Goyal Marketing. For example the goods shown to have been dispatched on 18.12.99 as per dispatch notes dt. 18.12.99 by vehicle No. MP09K-9714 of M/s Deluxe Roadways could not have been received on different dates i.e. 21.12.99, 13.12.99 and 15.12.99 as shown in the purchase register of M/s Goyal Marketing, Nanded. Further, the goods shown as Amla in the dispatch notes of M/s Deluxe Roadways dt. 29.02.2000 have been claimed to have been received on 29.3.2000 have been claimed to have been received on 29.3.2000 by M/s Goyal Marketing, Nanded i.e. after one month which appeared to be not factually correct. Also the goods shown dispatched on dates 02.01.2000 as per dispatch notes of M/s Deluxe Roadways does not appear to be related to the corresponding invoices i.e. invoice No. 37 dt. 31.1.2000 of M/s SAC and invoice No. 38 dt. 31.01.2000 of M/s KGN produced by the said units as the date of dispatch shown i.e. 02.01.2000 is prior to the date of relevant invoices i.e. 31.01.2000. It thus, appears that the said units were removing the goods clandestinely as evident from the transporters records discussed above. The wrong description of goods as Amla/ Katta / A. goods shown in the LR and the transport register and admitted by the transporter further corroborates the fact that the goods shown in the said records were actually removed clandestinely without payment of central excise duty.

17.5. We note that part of the evidence is record based like the record showing receipt of final products by Goyal Industries. The Respondents have not been able to clearly demonstrate that the entries were relatable to duty paid clearances. So we consider that these evidence supports the case of Revenue.

18. It is the contention of Revenue that Gutka is a highly evasion prone commodity because of the minimal investment in plant and machinery needed for setting up a unit, the high level of the tax incidence of the commodity and the fact that this is consumer item marketed to small retail traders situated in various part of the country and it is not easy to produce evidence to prove every link in the chain of procurement of raw material, manufacture and marketing. Revenue relies on the decision of the Apex Court in the case of Collector Vs. D. Bhoormal-1983 (13) E.L.T. 1546 (S.C.) and argues that it is not necessary to produce complete documents to prove every aspect of clandestine activity. They also rely on the following decisions

(a) Sobha Gudaku factory Vs. CCE -2001 (135) ELT 1055 (Kol)
(b) CCE Vs. Madras Chemicals-1986 (24) ELT 308(T)

19. Revenue points out that the investigators have produced substantial evidence regarding procurement of main raw materials namely scented tobacco and plastic pouches. There are evidences of procurement of other raw materials also though such evidences are not exhaustive. There is evidence that the Respondents have been investing more and more money in procuring more packing machines over the years with hardly any increase in accounted production. They also point out that there is good evidence of unaccounted disposal of non-duty paid goods as seen from Purchase register of one of the buyers namely Goyal Marketing Co. They content that the demand in the Show Cause Notice is well reasoned and the order of the Commissioner dropping the demand is perverse.

20. The Respondents on the other hand argues that the evidences are not reliable. They rely on a few decisions of Tribunal and Courts to argue that Revenue has not produced reliable evidence to prove clandestine manufacture and clearance. The decisions pointed out are the following:

(1) Kothari Pouches Ltd. Vs. CCE – 2001 (135) ELT 531.
(2) Kalyan Glaze Tiles Vs. CCE – 2008 (222) ELT 417
(3) Kothari Synthetic Indus. Vs. CCE – 2002 (141) ELT 558.
(4) Sidhartha Tubes Vs. CCE – 2006 (195) ELT 52.
(5) Indo Green Textile Pvt. Ltd. Vs. CCE – 2007 (212) ELT 343.
(6) Sunhill Ceramics Pvt. Ltd. Vs. CCE – 2007 (217) ELT 353.
(7) Standard Cotton Spinners Vs. CCE – 2009 (239) ELT 181.
(8) Deccan Tobacco Processors Ltd. Vs. CCE – 2006 (200) ELT 265.
(9) Amar Ceramics Ltd. Vs. CCE – 2007 (213) ELT 64.
(10) Veer Bahadur Products Vs. CCE – 2006 (201) ELT 359.
(11) Someshwara Cements & Chem. Ltd. Vs. CCE – 2005 (191) ELT 1062.
(12) Hilton tobaccos Ltd. Vs. CCE – 2005 (183) ELT 378.

(13) Ghodavat Pan Masala Products Ltd. Vs. CCE - 2004 (175) ELT 182.
(14) Chariot Cement Company Vs. CCE - 2003 (161) ELT 598.
(15) CCE Vs. G.M. Re-Rollers - 2003 (153) ELT 392.
(16) Durga Trading Company Vs. CCE - 2002 (148) ELT 967.
(17) Nav Karnataka Steels Pvt. Ltd. Vs. CCE - 2008 (225) ELT 454.
(18) Parle Beverages Ltd. Vs. CCE - 1999 (114) ELT 872.
(19) P.S.P. Appliances (P) Ltd. Vs. CCE - 2005 (186) ELT 128.
(20) CCE Vs. G.M. Products - 2007 (207) ELT 723.
(21) CCE Vs. Abhisek Enterprise - 2007 (217) ELT 142.
(22) Abba Rubbers Vs. CCE - 2006 (193) ELT 471.
(23) Mohan Steels Ltd. Vs. CCE - 2004 (177) ELT 668.

21. We have gone through the case laws quoted by either side. In a case based on evidences to prove clandestine manufacture and clearance the evidence in each case have to evaluated as a whole. We are not inclined to read one sentence from one decision and another from another decision and synthesize such sentences to hold that a case is proved or not proved. But we have considered the principles laid down in these decisions. In the first place we agree with the contention of Revenue that assesses records attested with his signatures cannot be produced to prove clandestine activities. In such context reliance on third party documents are made. However statements of third parties who were cross-examined are not good pieces of evidences because quite often such third parties tend to give statements as desired by investigating officers so long as it does not implicate them. However records maintained by third parties in the ordinary course of business has to be given due weightage while appreciating evidence. Further a conclusion has to be arrived at on the basis of all the evidences seen together. We have adopted this approach while appreciating the evidences produced.

22. Thus on an overall appreciation of the facts of the case and arguments on both sides we have come to the conclusion that

though some of the evidences put forward by Revenue is not quite reliable the defects cannot be basis for setting aside the entire demand. We find that the evidence showing unaccounted receipt of scented tobacco as evidenced by the records recovered from M/s Saritha Roadways is maintainable. This evidence is supported by good evidence of clandestine procurement of packing material and also clandestine removals as is evidenced by purchase registers of Goyal and Company though these entries do not cover all the clandestine removals it confirms the fact the Respondents were engaged in such activity.

23. In respect of the rest of the demand based on scented tobacco allegedly transported by other Transporters we come to the conclusion that the case is not adequately proved.

24. The other respondents against whom the Revenue is seeking imposition of penalty are,-

(i) M/s KGN Manufacturers, manufacturers of Sitar and Sikandar brands;
(ii) M/s Sharda and Company, manufacturers of Sitar and Sikandar brands ;
(iii) Shri Natwarlal Sharda, Partner of RSC;
(iv) Shri Harivallabh Agarwal, Partner of RSC;
(v) Shri Jan Mohamed, Partner of RSC;
(vi) Shri Vijay Aggarwal, Partner of RSI;
(vii) Shri Mukesh Sharda, Partner of M/s Sharda and Company;
(viii) Shri. Mohamed Nissar, Partner KGN Manufacturers;
(ix) M/s Shaan Trading Company, supplier of Supari and Kathha;
(x) Shri Amarlal Kamat, Proprietor Shann Trading Company;
(xi) M/s Delux Roadways-Transporters of Gutka.

25. Para 17 of SCN proposes penalties on the above persons under Rule 209A. However the SCN does not specifically mention the action of each of the above persons for which penalty is to be

imposed. On a scrutiny of the SCN we find from paras 1, 9.6 and 9.6.1 of the SCN that the charge against KGN Manufacturers and Sharada and Company are that they were clandestinely manufacturing Sitar and Sikandar brand Gutka. However there is no demand of duty evaded from these two units. So we are not able to understand the case for imposing penalty under Rule 209A of Central Excise Rules 1944 (replaced by similar rule 26 in Central Excise Rules,2001). From paras 2 and 9.7 of the SCN it is seen that M/s Shann Trading Company was supplier of raw materials namely Supari and Katha. In respect of these items there is no excise duty. So we do not see any case for imposing penalty under Rule 209A/Rule 26.

26. So we have to examine the case for imposing penalties on the three partners of RSC and one partner of RSI and Delux Roadways only. In the case of Delux Roadways there is no specific para in SCN bringing out their culpability. But from the statement of Shri. Khalil Ahmed proprietor of M/s Delux Roadways relied upon it appears that the charge against them is that they transported some non-duty paid Gutka under false descriptions like Katta/Amla/A.Good. The Dispatch Memos of M/s Delux Company produced show only two instances of transport of the goods of RSC one with description of "Katta" and another with "Amla". Other entries relate to other parties like Sharada and Company KGN Manufacturers etc about which there is no demand for duty. The fact that these goods were actually Gutka is admitted by the proprietor Shri. Khalil Ahmed but the fact that he had knowledge that the goods were not duty paid is not brought out in the statement. So on overall appreciation of the evidence appearing against M/s Delux Roadways we are of the view that there is no reason to impose penalty on them under Rule 209A of Central Excise Rules, 2004 or Rule 26 of Central Excise rules 2001/2002.

27. We find from the copies of L. R.s submitted at pages 50 to 88 of the copies of relied upon documents being those LRs recovered from Sarita Roadways that some of them are in the

name of RSC and some are in the name of RSI. All the LRs do not figure in Annexure-6 to SCN. May be some of these LRs correspond to material accounted by these firms. So adjudicating authority may re-check the documents and identify the LRs not accounted for in the books of the respective firms and work out duty demand on the basis that clandestine removals are proved only in respect of such quantities of scented tobacco as evidenced by LRs recovered from M/s Sarita Roadways showing the names of these firms and goods that are not accounted in their books. Penalty under section 11AC may also be re-determined accordingly. While determining and communicating the penalty the adjudicating authority should give the option to the Respondents that if duty, interest and 25% of the duty amount as penalty are paid within thirty days of receipt of the order, that will be in full discharge of the penalty under section 11AC of the Act.

28. Now the issue to be decided is whether penalty can be imposed separately on the partners of RSC and RSI after imposing penalty on the firms and if so how much. The partners of the firms were involved in the clandestine activities of the firms. The legal issue whether penalty can be imposed on the partners after imposing penalty on the firms has been considered by Bombay High Court in the case of Textoplast Industries Vs. Additional Commissioner of Customs-2011 (272) E.L.T. 513 (Bom.) and it is decided that such separate penalties are maintainable.

29.1. After going through the statements recorded from the persons we find that Shri. Natwarlal Sharda, Partner of RSC was in charge of the day-to-day operations of RSC. Shri Harivallabh Agarwal, Partner of RSC was involved in marketing of the products. Further the proprietor of M/s Rajendrakumar Satishchandra, Indore which was a firm dealing in the products of RSC and RSI. Shri Jan Mohamed, Partner of RSC was looking after the marketing work as per instructions of Shri. Natwarlal Sharada. Considering the role played by each and the penalty already imposed on the firm we are of the view that it will be adequate if a penalty of 10% of duty evaded is imposed on Shri. Natwarlal

Sharda and penalty of 10% of duty evaded is imposed on Shri Harivallabh Agarwal and a penalty of 5% of duty evaded is imposed on Shri. Shri Jan Mohamed.

29.2 Shri. Harivallabh Agrawal partner of RSI was in charge of the day-to-day operations of RSI. So we order that a penalty of 10% of the duty evaded by RSI be imposed on Shri. Harivallabh Agrawal.

29.3 The quantum of penalty may be communicated by the adjudicating authority after re-quantifying the duty evaded.

(Pronounced on 06/03/12)

(S.S. Kang)
Vice President

(Mathew John)
Member (Technical)

RM

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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
EXCISE APPEAL BRANCH

Dated: **05/09/2012**

MISC Order No : 953/2012
ROM Application No. : E/ROM/3189/2012
Appeal No. : E/1025/2005-EX[DB]

1. Appellant :
C.C.E. INDORE
Manik Bagh Palace, Post Box No. 10,
Indore 452001 (M.P.)

2. Respondent :
R.S.COMPANY
77A&B, SDA COMPOUND,DEWAS
NAKA, INDORE-MP

3. Advocate(s) / Consultant(s) : SH. R.P. JINDAL, CPM
C-110, BASEMENT,
SHIVALIK, MALVIYA NAGAR,
N. DELHI-

4. C.D.R

5. Bar Association, CESTAT, New Delhi

6. Director Publications, Customs, Excise. I.P. Estate, New Delhi

7. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-110003

8. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-600017

9. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

10. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

11. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

13. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

14. Office Copy

15. Gaurd File

15. Second Folder

Assistant Registrar
EXCISE Appeal Branch

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No. 2, R.K. Puram,
NEW DELHI

COURT NO. II

E/ROM/3189/2012 in
Central Excise appeal No. 1025/2005

Date of hearing/decision: 31st August, 2012

CCE, Indore — Appellant
Reptd. By Shri R.P. Jindal, Advocate

Versus

M/s. R.S. Company — Respondent
Reptd. By Shri N. Pathak, D.R.

Coram: Hon'ble Shri D.N. Panda, Judicial Member;
Hon'ble Shri Mathew John, Technical Member

MISC. ORDER NO. 953/2012-Ex(BR) DATED

Per D.N. Panda:

Both sides agree that the order impugned was Order-in-Original No. 09/COMMR/CEX/IND/2004 dated 26.2.2004 and that was subject matter of challenge in Revenue's appeal before Tribunal registered as appeal case No. 1025/2005. But in the cause title the impugned order was described as 38-R/2005 dated 22.2.2005. Accordingly, both sides suggest that the cause title, if amended, substituting the number 09/COMMR/CEX/IND/2004 dated 26.2.2004 in place of order No. 38-R/2005 dated 22.2.2005 that shall bring cause title in order.

2. Noticing factual position as suggested by both sides is correct, M.A. ROM is allowed with aforesaid observation of substitution. This order shall be read in conjunction with appeal order passed by the Tribunal and shall be read together.

(Dictated & pronounced in the Open Court.)

(D.N. PANDA)
JUDICIAL MEMBER

(MATHEW JOHN)
TECHNICAL MEMBER

RK