

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

Appeal No. E/365 /2009-368 /2009,435 /2009 - EX[DB]

Date 29/05/2012

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

To :  
M/S PAN PARAG INDIA LTD.(FORMERLY KNOWN AS  
KOTHARI PRODUCTS LTD.)  
PAN PARAG HOUSE, 24/19, THE MALL, KANPUR-  
208001.

Appellant

Vs  
Respondent

**M/S PAN PARAG INDIA LTD.(FORMERLY KNOWN AS  
KOTHARI PRODUCTS LTD.)**

**C.C.E. KANPUR**

I am directed to transmit herewith a certified copy of **Final order No.621-625**  
passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

2012 EX[DB] dated 23-5-2012

*b 2*

Assistant Registrar  
(Excise Appeal Branch)

**Copy to :**

1. Respondent  
**C.C.E. KANPUR**  
117/7, SARVODAYA NAGAR,  
KANPUR 208005.

2. Adv. / Consult  
**MR.K.K ANAND**  
A-5,BASEMENT,LAJPAT NAGAR-III NEW DELHI-24

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publications 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

*b 2*  
Assistant Registrar  
(Excise Appeal Branch)

*P.T.O*

15 DEEPAK KOTHARI,  
PAN PARAG HOUSE, 24/19, THE MALL, KANPUR.

16 M/S EKTA FLAVOURS LTD.  
PAN PARAG HOUSE, 24/19, THE MALL, KANPUR.

17 SH. MITESH KOTHARI,  
PAN PARAG HOUSE, 24/19, THE MALL, KANPUR.

18 SH. D.R.ARORA  
NO. 22, Q-BLOCK GROUN FLOOR RAJORI GARDEN  
NEW DELHI

**IN THE CUSTOMS, EXCISE AND SERVICE TAX  
APPELLATE TRIBUNAL, NEW DELHI**

**PRINCIPAL BENCH, COURT NO. III**

**Excise Appeal No.365-368 & 435 of 2009**

[Arising out of Order-In-Original No.10/Comm/MP/2008, dated 05.11.2008 issued by CCE, Kanpur)

**For approval and signature:**

Hon'ble Ms. Archana Wadhwa, Judicial Member

Hon'ble Mr. Rakesh Kumar, Technical Member

|   |                                                                                                                                       |      |
|---|---------------------------------------------------------------------------------------------------------------------------------------|------|
| 1 | Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?         | No   |
| 2 | Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | Yes  |
| 3 | Whether Their Lordships wish to see the fair copy of the Order?                                                                       | Seen |
| 4 | Whether Order is to be circulated to the Departmental authorities?                                                                    | Yes  |

M/s Pan Parag India Ltd.  
(formerly M/s Kothari Products Ltd.)  
Shri Deepak Kothari  
Shri Mitesh Kothari  
M/s Ekta Flavours Ltd.  
Shri D.R.Arora

Appellants

Vs.

CCE, Kanpur

Respondent

Coram: Hon'ble Ms. Archana Wadhwa, Judicial Member  
Hon'ble Mr. Rakesh Kumar, Technical Member

**Appearance:**

Shri K.K.Anand, Advocate for the Appellants

Shri A.K.Raha, Advocate for the Respondent

Date of Hearing : 16.03.2012

*FINAL* **ORDER NO .A/621-625/2012-<sup>EXCISE</sup>DATED**

**Per Ms. Archana Wadhwa:**

All the appeals are being disposed of by a common order as they arise out of a same impugned order passed by Commissioner in de-novo proceedings vide which he has held as follows :-

| S.No. | Name of the Noticee  | Duty confirmed             | Penalty imposed |
|-------|----------------------|----------------------------|-----------------|
| 1.    | M/s KPL              | Rs.19.37 crores & interest | Rs.19.37 crore  |
| 2.    | M/s EKTA             | NIL                        | Rs.1 crore      |
| 3.    | Shri Deepak Kothari  | NIL                        | Rs.1 crore      |
| 4.    | Shri Mithesh Kothari | NIL                        | Rs.1 crore      |
| 5.    | Shri D.R.Arora       | NIL                        | Rs.1 crore      |

2. The said impugned order stands passed by the Commissioner in terms of earlier order of the Tribunal vide which the matter was remanded with the directions to re-adjudicate the matter.

3. As per the facts on record, M/s Kothari Products Ltd. [formerly known as M/s Kothari Products Ltd.(KPL)] are engaged in the manufacture of Sada Pan Masala, Gutka and Mawa. The appellants have four factories at different places but the present appeal relates to their Kanpur factory. Supari and Kattha are main raw materials for the manufacture of the appellants' final product. After purchase of the said raw materials, Supari was being sent by the appellants to M/s Ekta Flavours Ltd., Unit-I for cutting on job work basis and Kattha was being sent to M/s Ekta Flavours Ltd., Unit-II for crushing/grinding. It may be mentioned here that the said two units of M/s Ekta Flavours Ltd. are subsidiary of the main manufacturer of M/s Kothari Products Ltd. in as much as the Managing Director and Director of the three units were common. The said units were also situated adjacent to the factory of M/s Kothari Products Ltd. The raw materials after being purchased from various suppliers were being offloaded directly at the units of M/s Ekta Flavours Ltd., Unit-I and M/s Ekta Flavours Ltd., Unit-II and after cutting the Supari and grinding the Kattha, the same

were being sent by the said job worker to the factory of M/s Kothari Products Ltd.

4. As per facts on record, Revenue conducted search in the appellants' factory as also in their sister concern's premises on 18.10.02. As per Revenue, prior to search of the said premises, the Central Excise Commissionerate, Kanpur came to possess substantial number of original documents (hereinafter referred to as "sourced documents") indicating clandestine removal of the appellants' final product. These sourced documents consisted mainly delivery challans, loading slips, in-out marketing documents, raw material reports and Xerox copies of invoices for the period November, 1999 to December, 2000. The same were approximately 2900 in number. As examination of the said sourced documents lead the Revenue to believe that the appellants are indulging in large scale suppression of receipt of raw material resulting in clandestinely manufacture and clearance of their final product, the appellants' premises were put to search. During the course of search, the Revenue seized number of incriminating records and evidences resumed for further investigation. Follow up investigation were conducted and statements of various persons were recorded. Assistance from various agencies/govt. departments was sought during the course of investigation. It is seen that during the course of investigation randomly selected sourced documents together with corresponding and contemporary accounted for documents (documents recorded in their books of accounts) and corresponding sample signatures of the signatories on sourced documents were sent to Govt. Examiner of Questioned

Documents (GEQD, Shimla), for examination. As per the report of the said organisation, the signatures on these documents and the signatures appearing on the sourced documents are of the same person and have been made at the same time in all cases. According to the Revenue, during the course of investigation, the author of the sourced documents admitted that these sourced documents were written/prepared and duly signed by them only.

5. Further investigations were conducted at the raw materials suppliers' end and it was found that the processed betel-nuts and Kattha supplied by M/s Ekta Flavours Ltd. to M/s Kothari Products Ltd. were far in excess of what has been accounted for by them. The packing materials issued from the Packing Material Godown (another premises of the appellants was also found not matching with the IN documents prepared by the appellants). Discrepancies in the stocks of betel-nuts and Kattha were also found on the day of search at M/s Ekta Flavours Ltd.

6. Based upon the sourced documents and the inquiries conducted thereafter and follow up investigation made by the Revenue, demand of duty was raised against the appellants, which stands confirmed by the Commissioner vide his impugned order.

7. It may be mentioned here that total demand confirmed against the appellants can be bifurcated into two different portions in as much as the reasons for confirmation of the same are different. The details are as follows :-

- a. Rs.18,33,83,943.00 This demand of duty has been confirmed solely on the basis of Sourced documents. (Mainly & solely on 719 loading slips) Other documents have been used for corroboration.
- b. Rs.1,03,26,220.00 This demand of duty has been confirmed based on alleged "photocopies of invoices" said to have been recovered from the appellants' factory premises.

8. We have heard both the sides duly represented by Shri K.K.Anand, Advocate for the appellants and Shri A.K.Raha, Advocate for the Revenue. The matter was heard on various dates when Shri K.K.Anand appeared for the appellants and advanced arguments. On conclusion of the hearing, time was given to both sides for filing written submissions and to advance arguments, if required.

When the matter was listed on 16.03.12, Id. Advocate Shri K.K.Anand appeared and submitted that written submissions stand filed by them in the Registry on 08.03.12. However, Revenue's representative submitted that written submissions are in the process of preparation and would be filed as soon as possible. The same were subsequently filed on 19.03.12 in the Registry. However, it is seen that Shri Raha in his written submissions filed after conclusion of the hearing, has submitted that owing to time

constraint, he, the special fee counsel for the Revenue was constrained to conclude his argument in a day on 03.02.12 while the Id. Counsel took preceeding two days and also part of 3<sup>rd</sup> day for his rejoinder.

We may mention here that though the matter was argued by Shri K.K.Anand, Id. Advocate for the appellants for the longer period than Shri Raha, as admittedly, the facts are required to be placed before the Bench by the first party arguing the matter, Shri Raha took his own time to put-forth his arguments and there was no pressure or compulsion from the Bench on him to conclude his arguments. It is only after Shri Raha finally concluded his arguments on 03.02.12, the matter was closed and written submissions were required to be filed by both the sides by 12/16.03.12. The notesheet very clearly records that after the filing of written submissions, both the sides are free to advance arguments. As such when the matter was listed for filing of written submissions, both the sides were free to do so. However, it is noted by the Bench on 16.03.12 that written submissions were filed by the appellants but there were no written submissions filed by the Revenue, the same stands filed subsequently on 19.03.12. As such the deposition made in the written submissions that Revenue was constrained to conclude his arguments in a day, does not appear to be fair and correct reflection of the court proceedings. Senior counsel Shri Raha was free to continue his arguments on the next day of hearing and if we remember it correctly, Shri Raha submitted that his arguments should be taken as concluded in as much as he is leaving the country for one



month. Actually, longer period to file written submissions was given at Shri Raha's behest only. In view of the above, Revenue's contention that owing to time constrain, they have to conclude their argument in a day, is not true.

9. Dealing with the merits of the case, we find that the Revenue's case as projected through their special counsel Shri A.K.Raha, is based upon the documents which came into possession of the Revenue through unknown sources. Even on repeated questioning, Shri Raha has not been able to place on record the source of possession of the said documents. These sourced documents are the starting point of investigation against the appellants.

10. It is seen that during the course of investigation, the said documents, randomly selected, were sent to GEQD, Shimla for examination. As per the report of the GEQD, the said documents are related with the documents maintained by the appellants in the normal course of their business. Revenue also conducted investigations as regards the receipt of quantity of raw materials, which were purchased by the two units of M/s Ekta Flavours Ltd. Further investigations were conducted at the Packing Material Godown maintained by the appellants and comparison of the same with the documents prepared at the appellants' factory revealed excess receipt of raw materials. As per the Revenue, the fact of excess raw materials stands mentioned by the appellants in the documents like GRs/challans/bills of purchase of betel-nuts recovered from the Head Office premises of appellants on 18.10.02.

11. According to the Revenue, the investigations transpired a unique modus operandi to suppress the receipt of processed beetle nuts and Kattha. According to them, majority of delivery challans were tampered with by pencil cutting of entries, thereby either reducing the original figures or replacing the same with reduced figures. In a few cases the original quantity was found to be slightly increased. However, according to Revenue such increase in the quantity of raw material was to resolve accounting issues.

12. According to Revenue, for certain work like packing, loading, unloading of raw materials, packing materials, semi finished goods and finished goods, the payments have been made through Debit Cash Voucher (DVC), prepared on the basis of 'Cartage Slips' (having the date wise details of nature of work done by the labours of contractors). Accordingly, the following two accounted for documents namely (1) Delivery Challans of Supari/Kattha/gutkha as reflected in their Raw Material Report etc. were compared with (2) the cartage slips attached to DCV of M/s Kothari Products Ltd., showing the details of unloading of Supari/Kattha/lamination/tobacco/movement semi finished gutkha etc. Upon such comparison/tally, it was found that there was huge variation in respect of quantities in these two accounted for documents, on day to day basis. No explanation could be offered by the appellant for such wide variation and discrepancy, with two accounted for documents. This strongly suggested that for reason of wide scale and unrestrained manipulation of records, M/s Kothari Products Ltd. lost track of matching entries and timely reconciliation of various accounted for documents, thus resulting in mis-matches.

13. On the day of search, the officers got the proforma filled by all available labour present in M/s Kothari Products Ltd. and the same was duly verified by the labour supervisor and the General Manager of M/s Kothari Products Ltd. Subsequently during the investigation, it was found that the party was trying to suppress the number of labour employed so as to justify lesser production, as on their record. Nonetheless, their manipulation of records was exposed during the investigation. As for instance, the quantities of semi finished Gutkha shown as shifted in the DVC/cartage slip were much more than the corresponding quantities of semi finished gutkha shown in their Raw Material Report, thus revealing an attempt to suppress the actual quantity of production of semi finished gutkha and consequently, their finished products. On the basis of the number of pouch packing machines installed/working during the relevant period at the factory of M/s Kothari Products Ltd., the appellant was found to have the capacity to produce finished goods out of the unaccounted raw materials over and above the accounted for production.

14. M/s Kothari Products Ltd. were preparing miscellaneous packing slips at the time of packing of the finished goods. They were also preparing loading slips, (quite a few of which were supplied in original by the informer, which are referred to as source documents) for the despatch of finished goods. The department compared all those source loading slips with the accounted for invoices of the corresponding dates. On comparison it was found that in respect of many entries the above two documents matched. This validated authenticity of the source

loading slips. However, on comparison it was also seen that against a large number of loading slips, no corresponding accounted for invoices have been raised/issued by M/s Kothari Products Ltd. This clearly indicated that the party had removed large quantities of finished goods clandestinely. The source documents namely Xerox copies of invoices issued by M/s Kothari Products Ltd. were found as completely matching on comparison with the photocopies of invoices resumed from the premises of M/s Kothari Products Ltd.

15. As the South-bound consignments of M/s KPL, whether meant for delivery within Andhra Pradesh or for transiting through that State to another southern territory, were invariably passing through the border check post of Andhra Pradesh, inquiry was made by the department with Commercial Tax Officer (CTO), Hyderabad, with reference to their computerised data (CTO data) maintained at the check post. On scrutiny of the said data alongside the accounted for invoices of M/s KPL as also resumed photocopy of invoices, the following glaring discrepancies were noticed :-

- There were many entries of KPL consignments in CTO data which did not have any corresponding accounted for invoices. This meant that M/s KPL had removed many consignments without issuing any accounted for invoices.
- There were many entries in CTO data showing same invoice number for two consignments of the party delivered on different dates, thus smacking of double invoicing. In other words, the computerised CTO records suggested that KPL

had been transporting two consignments to the southern states but accounting for only one in their statutory records as details of only one entry of such CTO data matched with the accounted for invoices issued by the party.

- On comparison of the details of Transit Passes, corresponding CTO data and accounted for invoices issued by M/s KPL, it was found that against several Transit Passes, no corresponding accounted for invoices had been issued by the party. However, the Transit Passes clearly suggested physical movement of goods through the A.P. check post.
- Quite a few resumed Xerox copies of invoices which did not correspond to accounted for invoices of KPL were found to match with corresponding CTO data, thus revealing that those unaccounted consignments were clandestinely removed by KPL

16. To put in a nutshell M/s KPL had resorted to clandestine removal of their finished products by adopting the modus operandi of well orchestrated manipulation/forgery of records at all stages and levels, starting from raw materials upto the stage of removal of finished products. In the process, their total duty evasion has been estimated as amounting to Rs.19,37,10,163.00

17. In terms of Hon'ble Allahabad High Court's order dtd. 11.07.06, appellant was allowed to seek opinion of their own hand writing expert in respect of sourced documents. The appellants produced the opinion of one Shri Qazi M.Junaid, a hand writing expert, whose opinion was contradicting the opinion of GEQD. It is Revenue's contention that opinion of Shri Junaid produced by the

appellants cannot be accepted primarily on the ground that the later was not technically qualified and the certificate issued by Lucknow Document Expert Bureau, Khare & Company, Nazirabad, Lucknow, was not proper in as much as on inquiry from the Circle Officer (Police), Kesarbagh, Lucknow as also from Senior Superintendent, Post Office, Lucknow, it transpired that said institute was never in existence at Nazirabad. The department in their summons issued to Shri Junaid required him to produce necessary evidence in support of his claim of membership of American Academy of Forensic Science, USA, as also the claim that he was Director of Lucknow Document Expert Bureau, Nazirabad, Shri Junaid in his cross examination stated that he had worked on latest machine namely VSC-2000(HR), and such claim was found to be entirely different from the requirement mentioned by Shri Junaid in his cross examination conducted on 31.07.08. It is strongly contested by Shri Raha that credentials mentioned by Shri Junaid on his letterpad are fake and the submissions made by him during the cross examination were factually incorrect and false. As such he pleaded that report of Shri Junaid cannot be taken into consideration.

18. Shri Raha also referred to a criminal complaint filed against Shri Junaid before Chief Metropolitan Magistrate, Kanpur on 26.03.11 for giving fake credential on his letter-head as also during his cross examination. As such he submits that the adjudicating authority has rightly rejected the opinion of Shri Junaid which is contrary to the opinion of GEQD. He places on record a table indicating the educational qualification of Shri L.Nato

Singh, GEQD, Shimla as against the qualification of Shri Junaid. He also submits that whereas GEQD being a reputed organisation accredited by National Accreditation Board for Testing and Calibration Laboratories, Shri Junaid has been working privately as hand writing expert, finger prints & document expert. He also submits that whereas the documents were examined in laboratory at GEQD, Shri Junaid had examined documents in his own laboratory. By referring to various discrepancies in the opinion of Shri Nato Singh and also opinion of Shri Junaid, he submits that his report cannot be referred to and relied upon and has been rightly discarded by the Commissioner.

19. Shri Raha further submits that there is sufficient corroboration of sourced documents with the accounted for documents of the appellants. By referring to Exhibit No.3 of the Show Cause Notice, he submits that there are 15 kinds of documents available with the Revenue, pertaining to 7 premises of the appellants. These sourced documents pertain to the period two year prior to the date of search on 18.10.02. The same were mainly prepared by the Supervisor of M/s Ekta Flavours Ltd., M/s Kothari Products Ltd. and Guards posted at various premises of the appellants. He also referred to the documents recovered on 18.10.02 from the residence of Shri Rajesh Sharma, employee of the appellants, which were in the nature of delivery challans of Supari and delivery challans of Kattha. When these documents were compared with corresponding accounted for documents namely delivery challans of Supara and Kattha, it was found that the corresponding accounted for documents were different than

the one recovered. He also referred to the cross examination of Shri Rajesh Sharma wherein he admitted that the peon of the company used to keep the records related to company at his residence as his residence was close to the Head Office. He also clarified that the records were kept at his residence on the direction of Shri Rajeev Porwal, Head of Audit. He was also inquired about the said documents to which he replied on 01.04.03 that "I have gone through the files and have signed at ten different places in every file. These documents pertain to M/s Kothari Products Ltd. and its related units". From the above, Shri Raha submits that documents recovered from Shri Rajesh Sharma were third copy of challan whereas source delivery challans were only the first or second copy of the same documents. From the above, he seeks to prove that all the sourced documents were pertaining to M/s Ekta Flavours Ltd. and were the documents relating to the appellants.

20. Similarly by comparing the source delivery challans pertaining to M/s Ekta Flavours Ltd., Unit-II with the Kattha challans recovered from the premises of Shri Rajesh Sharma, he seeks to emphasise that they are comparable in every respect in as much as the details, hand writing, manner of their preparation, relative placement of the details etc. are exactly the same.

21. Shri Raha further submits that these sourced documents match with the accounted for documents maintained by the appellants. He submits that sourced documents were prepared by the Guard on duty at the main gate of the M/s Kothari Products Ltd. to record the entire movement of incoming material and



outgoing material. These records were maintained by the Guard on single sheet of paper on daily basis by using one side of the sheet for each of these entries whereas one part of the sheet was used for the goods purchased from the local market of Kanpur and received in M/s Kothari Products Ltd. The said sheet maintained by the Guard was recovered from the date of search also and it was being prepared in the same fashion as sourced documents. He submits that more than 84% of such entries in the said sourced documents were traced by the officers in the relevant records which have been accounted for by the appellants. As such this fact is sufficient to establish that the sourced documents were relatable to the appellants only.

22. Shri K.K.Anand, Id. Advocate appearing for the appellants has vehemently contested the confirmation of demand of duty on the findings of clandestine removal based upon some of documents, the source of acquisition of which is not available with the Revenue. He submits that these sourced documents, relied upon by the Revenue were nothing but fabricated documents by one Shri Anil Srivastava who was working with the appellants as Cashier till December, 2000. He submits that the above fact has come on record from various angles that it was Shri Anil Srivastava who fabricated the documents in question for the purpose of getting reward from the Central Excise department. The same cannot be made the basis for holding against the appellants in as much as the Revenue has not disclosed the source of acquisition of the same thus denying the appellants an opportunity to contest the same.

23. Elaborating on his arguments, Shri Anand draws our attention to the various statements of employees recorded by Revenue during the course of investigation. Specific attention stands drawn to the statement of Shri Ashok Soni, Supervisor, M/s KPL; Shri Prashant Dutta, Supervisor, M/s Ekta Flavours Ltd.; Shri Chandrabhan Pande, Supervisor, M/s Ekta Flavours Ltd.; Shri G.S. Sachan, Guard of Kothari Products Limited; Shri Manish Chauhan Data Entry Operator of M/s Kothari Products Limited; Shri Rajesh Shah, Cashier of Kothari Products Limited; and Shri Suresh Rai-Supervisor of Ekta Flavours Limited. The statements of all the said employees reveal that more than one challan was prepared under the instructions of Shri Anil Srivastava. It is his submission that inspite of the fact that many employees of the appellants disclosed the fact in their recorded statements that they have prepared more than one delivery challan (which are part of the sourced documents) under the directions of Shri Anil Srivastava, the said Anil Srivastava was never summoned by the investigating officers for recording of his statement. He also submits that though Shri Anil Srivastava was an employee of M/s KPL, his signatures are found even on the loading slips of M/s Ekta Flavours Ltd. which fact itself prove that the documents are fabricated documents, fabrication done at the instance of Shri Anil Srivastava.

24. As regards the evidentiary value of the sourced documents, he submits that presumption of documents in certain cases under section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned. For the sake of convenience, we

reproduce the arguments advanced by him in the written submissions filed on 31.01.12:-

**SECTION 36A. Presumption as to documents in certain cases**

— Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, —

(a) Unless the contrary is proved by such person, presume —

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence. He accordingly submits that it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized that the presumption U/S 36-A is available. In the present case admittedly none of the source documents was produced by the Appellant or seized from the Appellant's custody or control. It is also not the Department's case that the Appellant and the informer

were being jointly tried. The fact that all the Source Documents were handed over to the Department by the informer has been admitted by the Commissioner himself in **Para 2.0 at Page-1 of Volume-1.**

In view of the above, he submits that when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove that the source documents related to the Appellants' factory and that any goods under the source documents were actually manufactured at and cleared from the Appellants' factory. This burden has not at all been discharged in the present case.

The investigating officers could not have simply accepted the source documents from the informer on its face value and the same needed strict corroboration which is completely absent in the present case. They were required to satisfy themselves about its genuineness and the motive behind providing the same to them after more than one year and ten months. It is the strong contention of the appellant, any documents which has been handed over long after the relevant period does not command any evidentiary value.

He further submits that the Commissioner is totally wrong in relying upon the source documents merely on the ground that since the GEQD had established its authenticity the same become admissible in law and duty can be demanded from the appellant on that basis. Once it is amply stood proved that these documents

were fabricated by Shri Anil Srivastava it could not be said that they were genuine and authentic. The same would be termed as genuine and authentic only if the appellant would have maintained the same in their normal course of business.

Shri Anand further submitted that in respect of delivery challans relied upon by the Revenue for showing the delivery of Supari and Kattha from M/s Ekta, there is no evidence of procurement of such a huge quantity of Supari and Kattha by M/s Ekta I & II. In the absence of such evidence of receipt of the said raw materials, the delivery of the same by the said two units becomes meaningless. Similarly as regards the loading slips, he advanced arguments that as per the evidence on record the said loading slips were being destroyed by the appellants after the same were converted into cartage slips and debit vouchers cash. This fact also stands admitted by the adjudicating authority. As such he submits that it is surprising as to how after destruction of the said loading slips, the same came into the possession of the Revenue. He submits that this fact itself strengthens the appellants' stand that the loading slips along with other relevant documents stands fabricated by Shri Anil Srivastava and supplied to the Revenue. He also submits that the Revenue has nowhere examined the author of the said loading slips or the drivers and the transport authorities to substantiate the allegation of clandestine removal of the goods. It is also the contention of the Id. Advocate that their contractor Shri Yadav has nowhere accepted the fact of receipt of excess cash for doing the job of loading/unloading of their final manufactured goods.

The appellants have also contested that they never used to prepare in/out documents at any of their premises. The said fact becomes clear from the statement of Shri Vinod Sharma, General Manager (Excise) & Managing Director, M/s KPL. The so called in/out documents recovered by Revenue on the day of search itself is a fabricated document.

Ld. Advocate also submitted that the demand is limited to around 12 months only. The officers visited the factory premises on 18.10.02, i.e., after the period of one year and ten months subsequent to the period of duty demand. If the appellants would be indulging in clandestine activities, there would be some evidences available for the period prior to November, 1999 or subsequent to December, 2000. In fact there is none. The officers also did not find any unaccounted raw material or finished goods in the factory at the time of their visit.

The appellants submit that in the manufacture of their final product, they need number of raw materials apart from the main raw material, i.e., Supari and Kattha. He gives details of such raw materials/ inputs/ packing materials required by them to manufacture their final product.

- (a) Supari,
- (b) kattha,
- (c) perfume,
- (d) cardamom
- (e) Lime
- (f) Menthol
- (g) Lamination
- (h) Tins
- (i) Inner Polly/Inner Cartons and
- (j) HDPE Bags/Cartons

There is neither any allegation nor any evidence to reflect upon the fact of procurement of other raw materials required for manufacture of huge quantity of Pan Masala/Gutka as alleged by the Revenue. In the absence of any such evidence, the reliance by the Revenue on the sourced documents without any corroboration is not in accordance with the principles of evidence enunciated by the courts in various decisions. He has also placed on record a chart showing break up of various quantities of receipt of the raw materials as annexed in the SCN and submits that the period in all of them are different and do not even match with each other. The documents even relied upon by the department do not represent the true picture. By referring to the charts, he submits that even according to the Revenue, the period involved in sourced documents is from 05.04.2000 to 04.10.2000 whereas the demand stands confirmed for the period 13.11.99 to 01.04.2000. Even in the various so called inculpatory statements, their employees have not referred to such delivery challans.

Similarly by referring to some instances relied upon by the Commissions as regards transfer of Supari to their Baroda unit, Shri Anand submits that the Commissioner has not accepted their stand of transfer of Supari to their Baroda Unit on the ground that two out of five vehicles were tankers. He submits that the said transportation was through one 'New Skyking Roadlines, Kanpur'. Statement of Shri Dharmendra Singh was to the effect that the said GRs although issued in his firm's name were not issued by him or his staff. During the course of cross examination on

17.10.02, he categorically stated that the transactions of five consignments were entered in his books of accounts. This Supari was also accounted for by their Baroda unit on 12.08.2000 and was used in manufacture of finished goods, cleared on payment of duty. The mistake in the vehicles nos. might have occurred on account of possibility of mistake in mentioning the correct vehicle number. He submits that as long as their Baroda Unit had received and accounted for the said Supari in their account and payments were made to Shri Dharmendra Singh vide 'account payee cheque', no adverse inference can be drawn that such Supari was not transferred to Baroda unit and the same was used in the manufacture of final product at the appellants' unit at Kanpur.

Dealing with the statements he submits that no reliance could be placed on the so called inculpatory statements which were retracted and un-corroborative. The fact that the same were recorded under coercion stands substantiated from the retraction of the same. The cross examination of the deponents conducted in terms of the Hon'ble High Court's directions revealed that majority of the deponents submitted that they had retracted from various statements as the same were given by them under the directions of department. Many of the employees have admitted that such documents were being fabricated by them at the instance of Shri Anil Srivastava. He submits that the above fact clearly establishes the role of Shri Anil Srivastava who was getting the documents fabricated from these employees. He has also drawn our attention to the result of cross examination conducted before the



adjudicating authority. He submits that the Commissioner while passing the impugned order in de-novo proceedings should have independently applied his mind to the various evidences on record instead of repeating the earlier order which was already set aside by the Tribunal. He also submits that some of the evidences which has come on record during the course of investigation and were against the Revenue have not been taken into consideration by the adjudicating authority and as such impugned order passed by the Commissioner is highly perverse in as much as he has not accepted the averment made by various witnesses during their cross examination without according any reason for discarding the same. He submits that such cross examination was allowed by the Hon'ble High Court with a prima-facie view that the statements of various witnesses were of doubtful character and there was need to bring on record the correct facts through the tool of cross examination. The deposition made by the witnesses at the time of cross examination could not be brushed aside lightly or discarded by the adjudicating authority on the ground that the same was being made after three years and as such was not acceptable.

Ld. Advocate also made submissions in respect of the two opinions of the hand writing expert, i.e., GEQD and Shri Qazi M.Junaid. He submits that it was the department itself which was seeking the opinion of Shri Junaid in the earlier matters and such opinion sought by the Revenue was being relied upon in various adjudications by the department. Merely because in the present such opinion is against the Revenue, the Commissioner has sought to challenge the authority and expertness of the said person.

Number of submissions stands made on the above ground which we shall be dealing in our finding portion.

It further stands contested that though the Revenue has alleged that M/s Ekta I & II were grinding and crushing Supari and Kattha on the higher quantity, there is no allegation or evidence of payment of excess job charges to them. He submits that M/s KPL as also M/s Ekta I&II were duly showing job charges paid and received respectively for the entire financial year in their Balance Sheet and the Revenue has not disputed the said accountal as reflected in the Balance Sheets. There is no evidence of extra flow of cash from M/s KPL to M/s Ekta. Further department has not made any efforts to find out as to whether M/s Ekta I&II were able to crush and grind more Supari and Kattha than the quantity reflected in their records. No evidence in the shape of consumption of excess electricity, water, labour etc. to undertake job work stands produced by the Revenue. In the absence of such evidences, the Revenue's stand that M/s Ekta I&II crushed excess Supari and Kattha and supplied the same to the appellants which was used in the manufacture of their final product cannot be sustained.

He submits that the statement of Shri Deepak Kumar, Managing Director recorded on various dates has very clearly stated that the sourced documents were never prepared by their units and he, in categorical terms doubted genuineness of the same. He very clearly stated that he never allowed such clandestine activity in their factory premises and expressed his doubt that the documents shown to him might be fake.

Shri Anand further submitted that the charges of clandestine removal are serious charges and are in the nature of quasi criminal proceedings. In support of his contention that the proceedings under Central Excise Act are quasi criminal, he drew our attention to various decisions as also the Rules and Acts.

Both sides relied upon various decisions of quasi judicial as also judicial authorities in support their contentions. We shall be dealing with said judgements in the subsequent parts of our order.

25. After appreciating the submissions made by both the sides, we find that the demand of an amount of Rs.18.33 cores (approximately) stands confirmed against the appellants on the basis of 719 loading slips which came to the possession of Revenue from uninformed and undisclosed sources. Shri Raha, Id. Advocate appearing for the Revenue during the course of hearing of the appeal has not been able to disclose or clarify the source of acquisition or the possession of the said loading slips inspite of being queried by the Bench repeatedly. On the other hand, it is the appellants' contention that the said loading slips along with other documentary evidences (which have been considered as corroborative by the Revenue) stands supplied to the Revenue by one Shri Anil Srivastava who was working with the appellants for a period of last ten years. As he was closed to higher management and was designated as Cashier and was exercising control over subordinate staff at the appellants' factory, it is their contention that during 1994-2000 as said Shri Srivastava was indulging in unlawful activities, his services were terminated in December,

2000. After about a period of one and half years, he became informer and handed over 2910 fabricated documents to the department.

26. For the proposition that the said documents were handed over by Shri Anil Srivastava only, the appellants' had relied upon the proceedings before Chief Information Commission, New Delhi. From various applications filed under RTI by Shri Srivastava, it becomes clear that said documents stand provided by Shri Srivastava. The appellants contention is that as the informer was in knowledge of the documents being prepared by the appellants in the ordinary course of their business, he had prepared the sourced documents in such a manner so as to resemble the original documents.

27. We find from the pages 1 to 44 appearing in Volume-84 of Paperbook that various RTI applications stands filed by Shri Anil Srivastava seeking information from the Revenue about the reward money. The proceedings conducted before CPIO, first Appellate Authority as also before Chief Information Commissioner, second appellate authority lead us to believe that the so called sourced documents were provided by Shri Anil Srivastava to the department. When the above stand was taken by the appellants before the Commissioner, he has nowhere denied that it was Shri Anil Srivastava who supplied the said documents to the department.

28. We find that the statements of various employees of the appellants, recorded during the course of investigation are also to

the effect that the sourced documents were being prepared by them under the instructions of Shri Anil Srivastava.

Ld. Advocate draws our attention to the provisions of Section 36A of Central Excise Act and submits that the documents supplied by the informer have no legal validity and cannot be used against the assessee. He has raised the grounds :-

- That presumption of documents supplied by an informer u/s 36A was not available to the department as stated above.
- Even otherwise informer is a person who is very much an interested party and goes to any extent in fabricating the documents.
- It has clearly come on record that it was Sri Anil Srivastava who as cashier of the appellant was systematically getting the documents forged.
- This fact has clearly come on record from the statements of the various persons.
- Various witnesses stated in their respective cross examinations that they had fabricated the various documents such as delivery challans, in/out documents and loading slips under the instructions of Sri Anil Srivastava.
- Hence it must be held that the source documents have no credibility as they were tendered by the informer one year and ten months from the date of their fabrication. If that be so, no demand of duty can be confirmed against them, based upon the said 719 sourced invoices.

29. In terms of the provisions of Section 36A, the presumption in respect of documents as regards their correctness is available only when such documents stands in evidence against the person who produced the same or from whose custody or control it was seized. The Commissioner in para 2.0 of his order has candidly admitted that these documents were handed over to the department by an informer. In the absence of presumption as available u/s 36A, we agree with the appellants that the burden to prove that the sourced documents related to the appellants' factory lies very heavily on the department. The documents supplied by an informer and in the absence of any presumption of their correctness in terms of provisions of 36A are required to be corroborated in each material particular and the onus to do so lies very heavily on the Revenue especially in terms of the stand taken by the appellants that the informer was the disgruntled employee of the appellants and was terminated from his service on the allegation of misconduct. This becomes relevant keeping in view the fact that Shri Anil Srivastava was the Cashier of the company for a period of ten years and was aware of all the documents being prepared by the appellants. Various witnesses at the time of recording of their statements as also subsequently at the time of their cross examination have deposed to the fact that such documents were being prepared by them under the instructions of Shri Anil Srivastava. In as much as the sourced documents came into the possession of Revenue after a period of 1 ½ years from the date of their alleged issuance, the credibility of the same becomes doubtful in view of the clear evidence on record that the

same were tendered by the disgruntled employee of the appellants as is clear from the proceedings pursued by the said informer before the Central Information Commission.

30. We find that Tribunal in the case of Ashwin S.Mehta reported in 2006(197)ELT386(Tri.-Bom.) has observed as that the origin of seized documents on the basis of which under valuation is alleged was always questioned by the appellants and the Commissioner's order does not indicate how and where from they were recovered. The fact that the same were shown to the appellants when their statements were recorded, does not mean that the same were recovered from the office of the appellants.

Tribunal in the case of Chariot Cement Company reported in 2003(161)ELT598(Tri.-Kol.) held that allegation of clandestine removal based entirely on railway receipts lying with railway authorities cannot be upheld without independent corroborative evidence available to support clandestine removal. In the case of Chandrakant H.Sanghvi reported in 2000(121)ELT788(Tri.) while dealing with the case of under valuation of the imported goods observed that the procured documents supplied by an informer does not legally constitute an acceptable evidence and has to be viewed with utmost caution. The informer is obviously a person very much interested in the outcome of the proceedings either for his reward or other factors which motivated his tendering information. To the similar effect was the observation of the Tribunal in the case of Farooq Desai reported in 2000(118)ELT641 observing that the statement of informer is hardly an evidence of credible nature.

We find that the fact of recovery of the documents is very important and the silence on the part of the Revenue to disclose the source of acquisition and possession of the same is fatal to the Revenue's case especially when the same do not stands corroborated in material particular. We, further, note that serious allegations has been made by the appellants as regards supply of these documents to the Revenue by submitting that the same is the brainwork of Shri Anil Srivastava, resulting in fabrication of the documents and supplying the same to the Revenue with an intent to win the reward money as also to take revenge against management. Shri Anil Srivastava has subsequently entered into correspondence with the Revenue claiming the reward money and to know about the development of the case before the Revenue resulting in filing of appeals against rejection of his RTI application before the higher appellate authority. It may not be out of place to mention here that though the name of Shri Anil Srivastava appeared repeatedly in the statements of various persons recorded during the course of investigation, he was never summoned by the department for recording of his statement. We really fail to understand as to why Revenue did not deem it fit to record his statement and to conduct investigation at his end especially when he as the person responsible for managing the affairs of the appellant company, during the relevant period.

31. In view of the above background, the sourced documents are required to be scrutinised very minutely and the evidences leading



to the allegation of clandestine removal are required to be appreciated with a pinch of salt.

At this stage, we may take into consideration latest majority decision of the Tribunal in the case of M/s Kuber Tobacco P.Ltd. and others vide Final order No.A-83/110/2012, dtd. 03.02.12. It is seen that the order of the then Hon'ble President extending relief on the basis of doubt about the seizer of the documents stands agreed upon by the third member. As such the observation made by the Hon'ble President stands reproduced below for better appreciation of the dispute and the evidentiary value of the documents seized from various places.

*"12. The credibility of the documentary evidence which is relied upon to hold that the appellants were involved in clandestine removal of the products is sought to be disputed on various grounds. Firstly, the seizure proceedings are themselves contended to be illegal, secondly, the author of those documents has not been identified and has neither been examined nor produced for cross examination, thirdly, the documents are merely duplicate copies, fourthly, the contents of those documents are not proved to be true and in any case, the said documents were not seized from the factory premises of the appellants, or from the premises in possession of the appellants.*

*13. It is well settled law that the seizure of documents from any premises in support of any serious charge must be established to have been done by following the procedure known to law, minor lapses being*

*condonable. However, the mandatory rules of procedure to ensure the authenticity of such seizure and of the seized materials must be established to have been complied with. It requires to take proper care to ensure that the documents seized in the course of such proceedings are properly kept in an envelop or cover and duly sealed and due care is taken to protect the same from any third party interference. Panchanama should disclose the steps taken by the seizing authority to ensure the absence of any opportunity to any stranger to interfere with such documents. The panchanama should also disclose proper description of the documents. When such document is very vital in nature, it should refer to the important aspects of the documents so that there can be no room to doubt about the genuineness of the document or about the genuineness of the contents of such document, and of course, the seizure thereof."*

After having observed as above, the order points out to various discrepancies in drawing of Panchnama as also the place of seizer, the act of assumption of records and non-disclosure of various factors like the source of obtaining keys of the rooms, the availability of person or persons in the premises before the drawal of the Panchnama, the nature of use of the premises from where the documents were recovered etc. Further recording in the said order is to the effect that Panchnama is a record of the goods usually perceived or actually expressed in the cross investigation. After taking into account the entire factors, it was observed as under :-

22. *As rightly pointed out by the learned Advocate for the appellants, a panchnama should disclose proper description of the premises and the things found in the premises. The information in this regard assumes more importance when there is serious dispute about the articles alleged to have been recovered and seized from such premises and such articles are sought to be linked with the activities of the concerned party. The panchnama and the proceedings in relation thereto should not leave any room to entertain any doubt as such and for the possibility of planting any article and/ or document by third person or of the scope for interference by strangers with the documents or contents thereof. Obviously, therefore, any article or document seized from any premises is required to be properly sealed after being packed with necessary wrapper or envelop or covering, as the case may be, so as to avoid any possibility of third party interference with such article or document. In the absence of such steps being taken in the course of seizure of the articles or documents, certainly the credibility of not only of the seizure and recovery but of the material seized and recovered can also be doubted. It is also necessary to record not only the description of the premises but also the movement of the officers and the panchas searching the premises and every relevant action of every such person has to be precisely recorded in the panchnama to avoid any doubt about the seizure proceedings. None of such precautions were taken in the cases in hand.*

However, the contention of the appellants that in as much as seizure itself was illegal and as the recovery stands vitiated therefore, nothing recovered can be considered as relevant material to substantiate the charge against them was not accepted by observing that rules of evidence as they are in force do not expose relevant material on the ground that it was obtained by illegal search and seizure. If the recovery is of relevant material and the department is able to establish the link between such material and the charge against the assessee, certainly such

material cannot be discarded for having found in the course of illegal search and seizure. By referring to various decisions of the Hon'ble Supreme Court, it was observed that if the material found is otherwise admissible as evidence then the court is not concerned about how it was obtained. As such by taking into account the subsequent decision of the Hon'ble Supreme Court, it was observed as under :-

*"25. In **Khet Singh vs. Union of India** reported in 2002 (142) ELT 13, the Apex Court while reiterating its earlier view in Pooran Mal's case had held that Court has consistently refused to exclude relevant fact merely on the ground that it was obtained by illegal search or seizure. It was further ruled that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby would not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice has been caused to be accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then it could be said that the evidence is not liable to be admissible in evidence. But mere irregularity, and even illegality in the course of search and seizure cannot by itself render the documents seized in the course of such search or seizure to be inadmissible in evidence. Albeit, the relevancy thereof can be certainly questioned."*

After holding so, the Bench proceeded to discuss the evidentiary value of the documents so recovered from various premises of the appellants. After taking into consideration the fact that documents so recovered were disowned by the appellants, it was observed that neither the author of the documents has been identified nor examined and the documents are carbon copies and

being private documents unless a link is established between the said documents and the activities of the appellants in their factory, no credibility can be given to the said documents, the Bench accordingly held as under :-

*"32. ....Being so, one wonders whether these were the very documents which were seized from the said premises? If not, how and from where these documents were recovered? We have no clue either from the records before us or from the impugned order in that regard. In the absence of this vital information, we fail to understand as to how these documents can be of any help to establish the charge of clandestine removal of the goods by the appellants, and that to by applying the curious methodology of two digit reduction theory applied by the department without disclosing any basis for such theory."*

By applying the ratio of the above majority decision to the facts of the present case, we note that there is no source of acquisition of the documents disclosed by the Revenue. Even in a case where there was a search and recovery of documents found from the various premises of the assessee, it stands held by the majority decision that such documents lose their evidentiary value in the absence of recording of detailed procedure in the Panchnama, disclosing various factors as to how the keys of the premises were obtained who were present in the premises when the officers entered, the details of the documents recovered and seized, placing of the documents in the sealed cover etc. The Bench had observed in the absence of such detailed recording of the procedure at the time of drawing of Panchnama, there is a

chance of tampering with the said documents. In the present case apart from the fact that these documents came into the possession of Revenue from non-disclosed sources, we are of the view that the evidentiary value of the same is required to be adjudged strictly specifically in the light of the appellants' claim that the same were fabricated documents supplied by their disgruntled employee to the Revenue with an intent to put the appellants in difficulty and to win reward.

32. Revenue has in support of their plea that the said documents are authenticated documents, has relied upon the report of GEQD, Shimla. On the other hand, the expert opinions of hand writing expert Shri Qazi M.Junaid obtained by the appellants, which is in their favour stand discarded by the adjudicating authority on the ground that he was not technically qualified in as much as the certificate issued by Lucknow Document Expert Bureau was found to be not genuine in as much as the said institute was never in existence. Shri Raha has also placed on record a table listing out the reasons for preferring the opinion of Shri L.Nato Singh of GEQD than the opinion of Shri Junaid, hand writing expert engaged by the appellants.

On going through the said table listing out the reasons for not accepting the opinion of Shri Junaid, the qualifications of Shri Junaid and his expertise stands disputed by the Revenue. It is seen that during the course of arguments, Shri K.K.Anand, Id. Advocate of the appellants submitted that opinion of Shri Junaid was being obtained by the Revenue in number of matters to support the Revenue's contention and was being pressed into

service while arguing the matters before the judicial forum. When the same Shri Junaid has given an opinion in favour of the assessee, Revenue has come up with all sort of objections to discard his opinion. The fact that opinion of Shri Junaid was also being obtained by the Revenue in the past to support Revenue's views, does not stand disputed by Shri Raha but he submits that at that point of time, there was no doubt about his qualification and expertise.

Without going into the technical qualification of both the experts, we note that when it is the appellants case that the documents which are in the possession of the Revenue were being fabricated by Shri Anil Srivastava and it has come on record that the same were being signed at the instructions or direction of Shri Anil Srivastava, we are of the view that the fact that signatures on the said documents might have matched with the signatures on the accepted statutory documents. In our views, in the backdrop of the above submissions, the fact of matching of the signatures by itself does not lead us to any specific finding of clandestine activities on the part of the appellants and the said facts also does not reflect upon the genuineness and the authenticity of the said documents. The GEQD has opined that all the above documents have been written/signed by one and the same person but there is no opinion to the extent that as to whether the said documents stand issued in the ordinary course of business or were fabricated. Possibly such an opinion may not be possible to be given but the probable time of preparation of documents could have been given. Admittedly when the same are fabricated at the instance of Shri

Anil Srivastava who was having control over the employees of the appellants' company, the signatures on these documents are bound to be same. Without further adverting to detail on the said issue, we proceed to decide the evidentiary value of the said documents.

33. Having observed as above, we proceed to discuss the evidences on the basis of which the demands stands confirmed against the appellants. It is seen that various documents which came into the possession of the Revenue, are in the nature of delivery challans, loading slips, in-out marketing documents, raw material reports and some Xerox copies of the invoices pertaining to the period November, 1999 to December, 2000. It is seen that the demand of Rs.18.33 crores (approximately) stands confirmed only on the basis of 719 loading slips which is a part of the said sourced documents. The other sourced documents which are in the nature of delivery challans, in-out marketing documents, raw material reports etc. stands considered by the Commissioner for corroborating the allegations of clandestine removal of goods covered by 719 loading slips.

34. The appellants have taken a categorical stand that the loading slips prepared in the appellants' factory for loading of the finished material was being converted into a cartage slip. Based upon such cartage slips, debit voucher cash (DVC) were being prepared. The same were being placed before one of the Directors of the company who used to be present. The Director would sign the said DVC which would be subsequently presented to the



Cashier who would make payments to the contractors. It is the appellants' contention that after the preparation of loading, unloading slips and conversion of the same into cartage slips and DVCs, these loading, unloading slips were being destroyed by them. As such the question of presence of loading, unloading slips does not arise at all. For the above proposition, our attention stands drawn by the appellants to the various statements recorded during the course of investigation.

35. During the course of investigation, statements of various persons were recorded. Shri Rajesh Shah, employee of the appellants' company in his statement, dtd. 17.01.03 deposed as under :-

*"The cartage slip prepared by me on the basis of loading/unloading slip prepared by the guard at the factory gate is attached to the voucher and given to Shri Sunil Srivastava. Once the voucher is checked and approved by Shri Srivastava then I take the same to the director available in the factory (usually Shri Mithesh Kothari and occasionally Shri Deepak Kothari) personally. The director signs the voucher after going through the contents of voucher and that of the loading/unloading Slip. After this the loading / Un Loading Slips are destroyed by Shri Sunil Srivastava himself through paper shredding machine so that the said loading/unloading slips are destroyed completely. If Shri Srivastava is not available then I destroy the same personally through the said paper shredding machine. In/Out paper prepared by the guard are destroyed by me personally. The loading and Un Loading Slips, In/Out paper prepared by guards move only among myself, Shri Sunil Srivastava, Shri P.N. Mishra and the director available in the factory. These documents do not move through any other persons"*

36. Similarly, Shri P.N.Mishra in his statement dtd. 18.10.02 and 27.12.02 in response to a question stated as under:-

*"Once the vehicle is loaded, the guard hand over the "Slip" containing the details of quantity of the goods. I hand over this slip to Sri Rajesh Shah, (Cashier) after checking. Sri Shah destroys the slip after making payment to the labour contractor".*

*"I have sent 100 bags of 2 gm Gutkha to M/s Safexpress through UP-78AN-0205. Loading Slips comes in my hand and I send the same to Rajesh Shah for payment to contractor after verification. I have sent this consignment at 13.40. Later on this slip is destroyed".*

37. Based on the above investigation and the statements recorded, it was Revenue's own case in the SCN that the sourced documents were being destroyed by the appellants' in a systematic manner once they were perused by the senior staff / Director of the company. It is seen that Shri P.N.Mishra, authorised signatory of the company, in his various statements has repeatedly deposed that the loading slips on the basis of which payments were being made to the contractor were being destroyed subsequently. There was an allegation to the same effect in the SCN in respect of loading slips as also in respect of destruction of delivery challans.

The appellants' contention is that if such loading slips were being destroyed by the appellants after payments were being made to the contractor in terms of the DVC prepared on the basis of said loading slips and even when the same is Revenue's case as reflected in the SCN than how come the same loading slips were recovered by the Revenue from nowhere. In such a scenario, the

question of loading slips being physically available does not arise at all. Though the above question was raised before the adjudicating authority as also at the time of hearing before us, we find that there is no answer to the same. We note in the absence of disclosure of the source of acquisition of the sourced loading slips and in the light of the fact coming on record during the course of investigation that such loading slips were destroyed subsequent to their conversion into cartage slips and DVC, we are of the view that the confirmation of demand of duty based upon the sourced loading slips is not justified.

38. The appellants in their written submissions have vehemently contested the new stand of the Revenue as reflected in their written submissions that these documents were required to be destroyed but were not destroyed by the appellants and that is how they came into the hands of Revenue. We note that the above stand taken by the Id. Advocate appearing for the Revenue is contrary to the allegation made in the SCN and the Revenue's own stand that the appellants were destroying the said Loading slips. In fact we note that in the SCN, the Revenue has made allegation at various places that the appellants were not informing the Revenue about the generation of the loading slips and their subsequent destruction. All the deponents in their statements have clearly stated that said loading slips after being converted into DVC were being destroyed in the papershredded machines. Even during the course of cross examination, the said deponents have not changed their stand. If that be so, the physical presence of the said loading slips on the basis of which huge demand stands

confirmed against the appellants is in grave doubt and keeping in view the appellants stand that the said loading slips were fabricated by their employee who had supplied the same to Revenue in the light of the evidences relating to the RTI application filed by the Shri Anil Srivastava and the subsequent appellate proceedings, the very fact of presence of these loading slips is doubtful.

39. Another lacunae in the investigation is that though Shri Rajesh Shah as also Shri P.N.Mishra in his statement had very clearly stated that the said loading slips were destroyed as soon as the same were converted into cartage slips, they were never confronted with these loading slips and was never questioned on the fact of availability of the same with the Revenue. When the Revenue has these 719 loading slips in their possession and when the employees of the appellants have in very categorical and unambiguous language stated that no loading slip is preserved after cartage slips are made, the least expected from the Revenue was to confront the said deponents with the loading slips available with them and to seek their clarification. Not only that the said deponents were not confronted with the loading slips but no question on availability of the same with the Revenue was put to them so as to seek their clarification. We also find favour in the appellants' contention that the same very statement of Shri Rajesh Shah and Shri P.N.Mishra stands relied upon by the Revenue but part of the same where they have deposed that the loading slips were being completely destroyed in all cases, is not being referred to and relied upon by the Revenue. It is well settled legal principle

that the statement has to be accepted or rejected in its entirety and part of the same cannot be held to be incorrect and another part as acceptable.

40. The other fact which reflects upon the lacunae in the investigation is that the labour contractor Shri Thakur Prasad Yadav was never put a direct question as to whether he has received any payment in cash against the extra work done by him in respect of 719 loading slips. It is seen that the two statements of Yadav were recorded on 18.10.02 and 26.02.03. He was never confronted with the said sourced loading slips. It is also not the Revenue's case that any other person different from Shri Yadav was working as labour contractor for the appellants. In our views, Shri Yadav was the only person who could have clarified the fact as to whether any extra payments were being made to him other than in terms of DVCs. Though we find that in his statement recorded on 26.02.03, he had stated that payments made payment to him many times, did not match with the receipts of cheques but he also submitted that there was possibility that the amount disbursed to him and shown in the voucher could be more or less than shown in the said vouchers and it was not necessary that when he received the payment, he simultaneously signed the DVC. He clarifies that sometimes signature on DVCs are taken after a gap of days.

Scrutiny of the above statement does not advance the Revenue's case in as much as there is no clear admission on the part of Shri Yadav that he has received the payment without signing the DVCs. There is also nothing in his statement to reflect

upon the fact that some cash payments were being made to him over and above as reflected in the DVCs. The difference given in the DVCs and the actual payment made to the labour contractor, according to the appellants could be on account of various factors like non-production of loading slips, calculation mistakes, changing of cost rate and the same gets settled subsequently. We find that Shri Yadav was a star/prime witness for the Revenue and a direct question put to him as regards the excess receipt of payment than what was being paid to him in terms of DVCs would have clarified the entire situation. We find that no such direct question was ever put to him, neither was he confronted with the loading slips in the possession of the Revenue so as to seek his comments on the same. The fact that Shri Yadav was signing the DVCs subsequently or in some cases a fact that the payment was being made to him on different dates than reflected in the DVCs cannot be held to be a factor sufficient so as to arrive at a finding that the payments were being made in excess than what was being reflected in the DVCs, to such a large extent as relatable to the loading slips.

41. However, it is the contention of Shri Raha that in answer to a question Shri Yadav had stated that he got Rs.1.30 per Jhal for stitching and he used to receive payment for the same in cash. As such he contends that some payments were being made to Shri Yadav in cash. The said plea of the Revenue stands strongly contested by the Id. advocate appearing for the appellants by submitting that stitching of Jhal is admittedly different than loading/unloading of goods and such stitching was being done by

Shri Yadav only in respect of goods which were meant for export. In as much as there was no duty on the exports, no manufacturer would show cash payment in respect of such goods. He also submits that even the payments made in terms of DVCs were being made to Shri Yadav in cash and not by cheque or bank documents. As such the statement of Shri Yadav that he was being paid in cash for stitching Jhal cannot lead to the fact that extra payments were being made to him in terms of loading slips. He also draws our attention to some of the cartage slips where the fact of payment of Rs.1.30 under the heading 'Packing' appears. Such cartage slips showing payment in cash under the head 'Packing' are the relied upon document of the Revenue.

42. It is also seen that Shri Yadav was cross examined during the course of adjudication where he clearly deposed that there was no in/out documents prepared in the factory and there is no admission on his part that he was getting more than what was being paid to him in terms of DVCs.

43. In view of the foregoing, we find that the Revenue's entire case based on the 719 loading slips which do not stand corroborated by any independent evidence on record, stands on a weak footing.

44. It is also seen that all but except 19 loading slips out of 719 loading bore only single signature of either the Supervisor of the appellants or the Guard. It is the appellants' contention that as per the procedure adopted by them, the loading slips were signed either by the Supervisor or the Guard and subsequently signed by the Cashier. In the loading slips possessed by the Revenue, there

are no signatures of the Cashier appearing on the same. In as much as the Cashier was Shri Anil Srivastava who used to sign all the loading slips, the absence of his signatures on the loading slips possessed by the Revenue indicate that the same were fabricated documents. Apart from that it is seen that 19 loading slips also bore the signatures of drivers along with truck nos. However, the Revenue did not bother to either record the statements of the drivers or conduct investigation at their ends. Further, the signatures of Shri Anil Srivastava appears on some of the loading slips belonging to M/s Ekta Flavours Ltd.. Admittedly Shri Anil Srivastava was an employee of M/s KPL and the appearance of his signatures on these loading/unloading slips of M/s Ekta I & II without there being any explanation leads us to believe that the said documents cannot be held to be prepared in the ordinary course of their business and were prepared at the behest of Shri Anil Srivastava. The said fact read with the fact that there appears a single signature on the sourced loading slips, indicate fabricated character of the same.

45. It is also seen that out of 719 loading slips, 415 were prepared by Shri Umesh Pal, Supervisor of the appellants' company. In spite of the fact that his signatures are appearing on the said loading slips, he was never summoned by the Revenue for recording his statement or to further investigate at his end.

Further truck numbers were mentioned on 147 slips. As per the appellants 50% trucks are owned by them and 50% of the trucks of the transporters are used. Revenue neither approached the transporters nor recorded statements of drivers to establish



the fact that the goods were actually loaded and transported. We note that the names of the drivers were available at least on 20 slips. In spite of that the statements of said drivers were not recorded for the reasons best known to the Revenue. It is also seen that out of the total loading slips, 132 slips did not even mention the name of the appellants, i.e., M/s KPL. They simply say - "*Bora load hua*". Some of the loading slips were on old stationery, like VAT of GP1, refund sanctioned document etc. It is a well settled principle of law that charges of clandestine removal are serious charges and cannot be established on the basis of some loose documents of doubtful nature, without there being any link between the documents and the person concerned. If the loading slips merely mention "*Bore load hua*" that too on a piece of scrap paper, without there being any name of the manufacturer, we really fail to understand as to how the Revenue has linked the said loading slips to M/s Kothari Products, especially when the same have not been recovered from the appellants' premises but came to the possession of the Revenue from an undisclosed source. Even where name is appearing, half hearted investigation stand made in as much as neither the scribe of the loading slips, nor the drivers, nor the transporters stand examined. Shri Yadav, contractor, who was the beneficiary of excess payments as regards excess loading slips was never put any direct question as regards the excess payment received relating to the said loading slips.

We may here refer to the majority order of the Tribunal in the case of M/s Tejwal Dyestuff Industries reported in 2007(216)ELT310(Tri.Ahmd.) wherein it was observed that having

obtained confessional statements, Revenue officers did not carry out the detailed investigations into the relevant aspects of the case, particularly the bank accounts and working of the assessee's factory. It was further observed by the then Hon'ble President to whom the difference of opinion was referred that recording of a confessional statement would not put an end to investigation and the Revenue officers should be careful to ensure that they are not tricked out of a regular and detailed investigation. By observing so, the dispute was decided in favour of the appellant. The said decision stand confirmed by Hon'ble Gujarat High Court when the appeal filed by Revenue stand rejected as reported in 2009(234)ELT242(Guj.)

It is well settled law by catena of judgements (with which we shall be dealing with at appropriate place) that the demands cannot be raised on the basis of loose papers/loading slips even recovered from an assessee's place, unless the same are corroborated (admittedly not to the extent of 100%) in material particulars by production of admissible, positive and tangible evidence. In our views, these loading slips recovered from nowhere cannot be accorded any status of evidence, so as to confirm the huge demand against the assessee, especially in the light of various discrepancies and shortcomings, as discussed by us in the preceding paragraphs.

46. At this stage, we discuss the other corroborative evidences relied upon by the Revenue. As per Shri Raha, Revenue came to possess 15 kinds of various documents. The same are in the

shape of delivery challans, in/out documents, raw materials reports and Xerox copies of invoices issued by M/s KPL pertaining to 7 premises of the appellants. Though we have already observed that the entire case of the Revenue is based upon the loading slips and other documents are only in support of the said loading slips and having held that such loading slips cannot be made the basis for arriving at the clandestine activities of the appellants, nevertheless we proceed to decide the evidentiary value of the said documents.

47. The delivery challans of supari issued by M/s Ekta-I and delivery challans for Kattha issued by M/s Ekta-II stands relied upon by the Revenue along with some delivery challans recovered from the premises of Shri Rajesh Shah, one of the employee of M/s KPL. It is the Revenue's case that the number of bags as also the weight of the goods mentioned in the delivery challans was cut by M/s Ekta I & II and the quantities were being shown on the lower side. It is the Revenue's contention that when such delivery challans were compared with the Xerox copies of the delivery challans recovered from Shri Rajesh Shah and when the same were compared with entries made by M/s KPL, the discrepancies were found and the same were found having not been entered in the records. The appellants have strongly contested the above corroborative evidence by submitting that these sourced delivery challans of M/s Ekta pertained to the period 01.05.2000 to 02.08.2000 whereas the period of duty demand pertains to 13.11.99 to 02.11.2000. Similarly other sourced documents are available only for the period May, 2000 to October, 2000 and in

some cases for a few days only from 16.05.2000 to 31.05.2000. The appellants have placed a chart on record to support their contention that these documents are fabricated in nature and in as much as the same pertain to small period, the allegations of clandestine removal for the period in question cannot be established. The Revenue's contention based upon the said delivery challans to show that they have procured sufficient quantity of Supari and Kattha to manufacture the finished goods, cannot be appreciated in as much as their final product requires so many other raw materials for which there is no evidence of procurement. A perusal of the chart would show that on some days and even some weeks, the appellants did not receive any Kattha or supari and on some days, raw material received was much more in quantity than required for manufacture of final product in a particular day.

48. We find that there is no one to one co-relation of the delivery challans with the procurement of supari and Kattha by M/s Ekta I & II and for delivery of the same to manufacturer M/s KPL. Admittedly in a running business, raw material keeps on arriving on various dates and there is no legal binding that raw material should be consumed either as soon as the same is received in the factory or the said raw material should be consumed on first receive basis or more raw material cannot be procured before exhausting the earlier received raw material. We have also seen that in many cases these delivery challans showing the number of bags and the weight of the material was cut by pencil even to show the higher quantum of the same. Even otherwise we note

that the genuineness of these documents does not stand established and in view of our observations that the same are fabricated, the evidentiary value of the said delivery challan cannot be accepted on the wider ground without Revenue establishing the authenticity of the same by co-relating with the receipt of so much unaccounted raw materials. We find that there is no evidence on record to show that for M/s Ekta I & II have been given more job charges for grinding/crushing raw material at their end. Similarly, procurement of Kattha/supari by M/s Ekta more than what is reflected in their records has not been established. Job charges tallied in the Balance Sheet of both the companies. It is also seen that in some cases, Kattha and Supari was supplied by M/s Ekta to their Baroda unit who have accounted the same in their records. As such we find that in absence of any clarity on the said delivery challans and their association with the actual delivery of Kattha and supari, the said delivery challans cannot be held to be corroborative evidence. According to the adjudicating authority such delivery challans issued by Ekta I & II reflect upon the delivery of unaccounted for grounded and crushed Kattha and supari. If that be so, for delivering such a huge quantity of Kattha and Supari, they have to first receive the same. There is absolute silence by the Revenue on this issue. How Ekta has received so much Kattha and Supari; from which source they have received; who were the suppliers of the said raw material; how payments were being made to the said suppliers; how the same were being transported; there is no answer to all these vital questions. Admittedly without first receiving the raw material, the same



cannot be crushed/grinded and further supplied to M/s Kothari. There being virtually no evidence of procurement of Kattha/Supari, by M/s Ekta, we are of the view that so called delivery challans cannot be adopted as evidence for arriving at finding of clandestine removal.

49. Revenue's case is further based upon in/out documents being prepared by the appellants. As per the appellants such in/out documents were not being prepared by them at all. In any case, we find that reference to said documents which also involve movement of the goods other than the final product in the backdrop of our findings that loading slips cannot be made the basis for arriving at clandestine activities, would not further the Revenue's case.

50. During the course of arguments, a question arose as to whether the proceedings under the Central Excise Act are civil proceedings or quasi criminal/criminal proceedings, requiring a proof beyond reasonable doubt to establish the charge of clandestine removal. Ld. Advocate has submitted that the consequence of the relied upon documents without any explanation on the source of their acquisition and in the light of the Managing Director's statement, questioning genuineness of the same and indicating the fabricated nature is of serious nature and the burden to prove the genuineness and authenticity of the same lies very highly upon the Revenue. Admittedly, apart from placing financial burden on the manufacturer resulting in confirmation of demand of duty u/s 11A and imposition of penalties upon them, prosecution is also one of the consequences. Such prosecution is

in the nature of criminal law as provided under section 9 of Central Excise Act and may result in imprisonment of Directors/Managing Director or other concerned employees. Ld. Advocate has relied upon the Hon'ble Supreme Court's decision in the case of Vinod Solanki reported in 2009(233)ELT157 wherein while dealing with various provisions of Foreign Exchange Regulation Act, 1973, it was observed in para 17 that proceedings under the said Act are quasi criminal in nature. Particular support from above observations stands drawn by us as the proceedings under the Central Excise Act are similar in nature to the proceedings under FERA Act, 1973 resulting in confirmation of demand and imposition of penalties to the extent of 100% as also for launching of prosecution against the manufacturer in terms of provisions of section 9 and 9AA, 9B & 9C of Central Excise Act. The offence if proved are punishable with a imprisonment or a term which may be extended to seven years with fine.

Similarly the Hon'ble Supreme Court in the case of Tukaram Dighole reported in 210(4)SCC329 while dealing with the issue of election petition and the evidentiary value of documents placed on record laid down the following precedent law:-

- "(a) *A mere production of VHS cassettes was not sufficient. Further evidence was required to be adduced to prove as to how the said cassettes were obtained by the appellant.*
- (b) *In that case the charge of corrupt practices is equated with a criminal liability and, therefore, standard of proof would not be preponderance of probabilities as in a civil action, but proof beyond reasonable doubt as in a criminal trial.*
- (c) *If stringent test of proof is not applied, a serious prejudice is likely to be caused to the successful candidate whose election would not only be set aside, but he may also incur*

*disqualification to contest an election for a certain period, adversely affecting his political carrier. Thus, a heavy onus lies on election petitioner to prove charge of corrupt practice in the same way as a criminal charge is proved. In the absence of any cogent evidence regarding the source and the manner of its acquisition, the authenticity of the cassette was not proved and it could not be read in evidence despite the fact that the cassette is a public document. No relevant material was brought to our notice which would impel us to hold that the finding by the Tribunal is perverse, warranting our interference."*

It is the contention of the Id. Advocate that the legal proposition as laid down by Hon'ble Supreme Court are equally applicable to the fact of the present case in as much as the Revenue has not brought proof beyond reasonable doubt to substantiate the allegation of clandestine removal based upon documents, the source of which is not disclosed. He submits that if these documents are accepted, the same would result in huge unwarranted financial liabilities on the appellants along with launching of criminal proceedings against the Directors. It is their contention that in the case of Tukaram, the issue is only setting aside the election of the candidate even than the Hon'ble Supreme Court observed that standard of proof would not be preponderance of probabilities as in a civil action and evidence to proof beyond reasonable doubt is required as in the criminal trial. As such he submits that the present proceedings being quasi criminal, the standard of proof should be beyond reasonable doubt and not on preponderance of probabilities. Reliance also stands placed on Tribunal's decision in the case of Chandan Tobacco Co. reported in 2011(270)ELT87 observing that the charges of clandestine



removal are quasi criminal and requires production of positive and tangible evidences. On the other hand Shri Raha has placed reliance on the decisions of Tribunal in the case of Buta Steels P.Ltd. reported in 2004(167)ELT536; Devidas Garg reported in 2010(257)ELT289 and in the case of D.Bhuralamal reported in 1983(13)ELT1546(SC) in support of his contention that Revenue is not expected to prove its case with 100% mathematical calculation and preponderance and probabilities should be adopted as criteria for establishing the case of clandestine removal. As such by referring to the various sourced documents and the result of investigation, he submits that going by the reasonable prudent man's view, it can be safely concluded that the appellant had been indulging in clandestine activities.

In rejoinder Shri Anand submits that the reliance of Shri Raha in case of Buta Steels P.Ltd. is misplaced in as much as the facts are not identical. In the case of Buta Steels P.Ltd., GEQD report was not disputed by the appellants and it was in these circumstances, the duty demand was upheld against them whereas in the present case, the genuineness of the source documents stands disputed by the appellants along with the contest to GEQD report. The Hon'ble Supreme Court in the case of Shri Bhagwan Das reported in 1974(4)SCC46 has held that evidence of a hand writing expert, unlike that of finger print expert is generally of frail character and its fallibility have been quite often noticed. The courts should therefore, be wary to give too much importance to evidence of hand writing expert. The conclusion based upon mere

comparison of hand writing must yield to the positive evidence in the case.

Similarly the decision in the case of Devidas relied upon by the Revenue has no applicability to the facts of the case in as much as fictitious firms were floated in the name of S.K.Gautam who was working as Pujari in the temple in the house of R.K.Garg. He also submits that while disposing of the appeal no findings on the demand confirmation were given by the Tribunal and as such it appeared that duty demand was not contested by the manufacturer. In any case, we find that facts and circumstances available in each and every case are required to be scrutinised for concluding the activities of clandestine activities, it is only broad principles enunciated in various decisions which have to be followed, in as much as no two cases involving clandestine allegation can be of similar nature in respect of evidences.

Meeting with Shri Raha's reliance on the Hon'ble Supreme Court's decision, he submits that his contention that duty can be confirmed on the basis of circumstantial evidence, does not flow from the above decision. He submits that the said judgement stands considered by various courts and by holding that the same relates to the goods which were found to be of smuggled nature, the same was not followed. He draws our attention to various decision where the decision of the Apex Court in the case of D.Bhuramal stands distinguished on the ground that the same is not applicable to the legal issue that even where there is no admissible evidence available, demands can be confirmed on the basis of presumptions.

We note that the Commissioner in various parts of his order has himself observed that there was no direct evidence of clandestine removal of the case. However, he proceeded to confirm the demand by observing that it was not necessary to link clandestine removal without any break and mathematical procedure of each entry was not required to be proved. We find that the theory of preponderance of probabilities adopted by the adjudicating authority is applicable only when there are strong evidences leading to only one and one conclusion of clandestine activities. The said theory cannot be adopted in cases of weak evidences of doubtful nature. Admittedly Revenue cannot be accepted to prove its case upto the last degree but the least accepted is that the evidences brought on record should be logical and inspiring confidence in the Revenue's case. The decision cannot be arrived on the basis of figment of imagination and unwarranted assumptions in as much as the distance between "may be and must be" is a long distance required to be travelled by production of at least acceptable positive evidences.

We also note that the Hon'ble Supreme Court in the case of D.Bhuramal were taken note by the Hon'ble Supreme Court in another decision in the case of O.Konavalov reported in 2006(197)ELT3(SC) involving the issue of seamen wages under the maritime law. By dealing with the contention of applicability of D.Bhuramal judgement, it was observed that in as much as that decision related to goods which were found to be of smuggled nature, the said ratio of law cannot be invoked for confiscating the vessel. The said decision was also considered by the Tribunal in

the case of R.A.Castings P.Ltd. reported in 2009(237)ELT674 wherein the judgement was distinguished and it was held that the allegation of clandestine removal of the final product, based on electricity consumption are required to be proved by production of positive and tangible evidences and not on the basis of theoretical calculations. The said decision of the Tribunal stands confirmed by the Hon'ble Allahabad High Court as reported in 2011(269)ELT337. Subsequent appeal by the Revenue before the Hon'ble Supreme Court also stands dismissed as reflected in 2011(269)ELTA106.

In view of our foregoing discussions, it becomes clear that the charges of clandestine removal which also result in criminal liabilities by way of prosecution of concerned persons are required to be proved by sufficient evidences and cannot be decided on the basis of some documents which came into the possession of Revenue from nowhere. Even the examination of the said documents have led us to conclude that they are fabricated documents and which at the most can raise doubt against the appellants but cannot fasten duty liability on the same. We have already discussed the evidentiary value of loading slips as also the other documents used by the Revenue for corroborating the loading slips.

When viewed in the light of the above decisions referred to by us, we note that the investigation in the present case do not lead to the logical end and do not result in the alleged clandestine activities on the part of the appellants. Apart from the loading slips which we have already held as not carrying much evidentiary value, there is virtually no evidence on record to establish

clandestine activities of the appellants. The said loading slips along with other documents could have been the starting point of the investigation which have failed miserably at the hands of Revenue. They have failed to establish the source of acquisition of Kattha and Supari by M/s Ekta. Further as rightly contended by the appellants, the manufacturer of their final product required number of other raw materials. There is not even an iota of evidence to show procurement of such other raw materials. Admittedly in the absence of all the raw materials, the appellants could not have manufactured their final product. Even the source of procurement of other raw materials like Kattha and Supari does not get substantiated by production of any evidence to that effect. Even the suppliers of the raw materials does not stand identified by the Revenue. To manufacture such huge quantity of final product, the appellants required all the raw materials to the same extent. There is no whisper of procurement of such huge raw materials.

Apart from above, we note that the final product allegedly cleared clandestinely is for further sale in the market. As such there need to be certain buyers for the same. There is no evidence on record as to whom the said alleged clandestinely manufactured final product stands sold by the appellants. Further, there is no evidence showing as to how the consideration for the same stands received by them from various buyers. In the absence of all these details, confirmation of demand based upon procurement of loading slips from unknown sources cannot be upheld.

At this stage, we may proceed to refer to some of the decisions dealing with the issue of clandestine activities of the assessee and laying down that such charges connote accusations of serious nature and are required to be established with cogent evidences and while the evidence cannot be discarded totally, the same should be scrutinised and examined carefully.

51. It has been constantly held by various decisions that the charges of clandestine removal cannot be upheld on the basis of documents recovered from the third party's premises. Reference in this regard can be made to Tribunal's decision in the case of Rutvi Steel & Alloys reported in 2009(243)ELT154(Tri.) as also to the Tribunal's decision in the case of Bhandari Industrial Metals Ltd. reported in 2009(254)ELT613(Tri.). Similarly there is catena of judgements laying down that the inculpatory statements alone cannot be made the basis for arriving at a finding of clandestine removal. In a nutshell, it has been the constant stand of quasi-judicial and judicial appellate forums that for establishing the fact of clandestine removal, there need to be sufficient evidence on record leading to conclusive proof of production of goods, their removal from the factory by any mode of transportation and clandestine clearance to the buyers. Mere doubts, howsoever strong cannot take the place of evidence required to be produced by the Revenue. The onus to establish such clandestine activities, resulting in confirmation of demand is placed heavily on the Revenue and is required to be discharged by production of sufficient evidences. Again, it is to be proved by the Revenue that the raw materials required for production of huge quantity of final

product were obtained by the assessee in a manner which is not in its regular course of its business. It stands held by the Tribunal in the case of Mohan Steels Ltd. reported in 2004(177)ELT668(Tri.), that duty demand cannot be confirmed unless it is shown that the manufacturer had procured all the raw materials required to manufacture the goods. There is a long list of decisions and reference to refer to all of them may not be necessary as it is a settled law.

Similarly, the Tribunal in various cases, as detailed below, has held that charges of clandestine removal cannot be levelled or confirmed on the basis of private records, the authenticity of which was doubted by the manufacturer without any corroborative evidence and the private records/registers of third party cannot be the sole basis for arriving at the clandestine removal in the absence of corroborative evidences.

- i. Dalmia Vinyls P.Ltd. – 2005(192)ELT606(Tri.-Bang.)
- ii. Chemco Steels P.Ltd. – 2005(191)ELT856(Tri.-Bang.)
- iii. C.M.Re-Rollers & Fabricators-2004(168)ELT506(Tri.-Del.)
- iv. TGL Poshak Corpn. – 2002(140)ELT187(Tri.-Che.)
- v. Minakshi Steels – 2005(190)ELT395(Tri.-Kol.)
- vi. Sri Jayajothi & Co.Ltd.-2002(141)ELT676(Tri.-Che.)
- vii. Sharma Chemicals – 2001(130)ELT271(Tri.-Kol.)
- viii. Opel Alloys P.Ltd. – 2005(182)ELT64(Tri.-Del.)

Similarly in the case of Paras Laminates P.Ltd. reported in 2005(180)ELT73(Tri.); as confirmed by Hon'ble Supreme Court

reported in 2006(199)ELT-A182(SC); Ruby Chlorates P.Ltd. reported in 2006(204)ELT607(Tri.-Che.); D.P.Industries reported 2007(218)ELT242(Tri.-Del.); Durga Trading Co. reported in 2002(148)ELT967(Tri.-Del.); Durga Trading Co. reported in 2003(157)ELTA315(SC) and Laxmi Engineering Works reported in 2010(254)ELT205(P&H), it was held that charge of clandestine removal must be corroborated by independent and unimpeachable evidences such as purchase of excess raw material, excess consumption of electricity, transport and delivery of goods to consignees mentioned in invoices/ payment to the manufacturers; that the charge of clandestine removal is a serious charge which must be proved by the department by adducing sufficient and tangible evidences and demand of duty cannot be confirmed on the basis of assumptions and presumptions and surmises & conjectures.

52. At this stage, we may refer to the decision of Hon'ble Supreme Court in the case of CBI vs. V.C.Shukla reported in 1988(3)SCC410. Though the said decision does not relate to clandestine removal and confirmation of demand of duty of excise but reference can be made to the observations and findings of the apex court relating to the evidences. While dealing with probative value of the entries made in the books of accounts, the Hon'ble Supreme Court observed that such statements shall not alone be sufficient evidence to charge any person with liability. Entries even if relevant are only corroborative evidences and required independent evidence as to trustworthiness of those entries



necessary to fasten liability. The entries made in the diaries though admissible u/s 34 of the Evidence Act, 1872, truthfulness thereof is not proved by any independent evidence.

Relying on the above observations made by apex court to the facts of the present case, we find that the entire cases of the Revenue is made on the basis of 719 invoices of doubtful nature, the trustworthiness of which do not stand established by the Revenue by any admissible independent evidences.

Similarly in the case of Ratna Fire Works reported in 2005(192)ELT382(Tri.), it was observed that though mathematical procedure is not required to establish the clandestine removal but that does not mean a fact could be proved without sufficient evidence. The Hon'ble Supreme Court in the case of Anjlus Dung Dung vs. State of Jharkhand reported in 2005(9)SCC765 observed that suspicious however strong cannot take place of proof.

53. Though, we find that there is a long list of precedent decisions of various courts to the above effect and instead of referring to all of them, we would like to refer to the latest majority decision of Tribunal in the case M/s Kuber Tobacco Products P.Ltd., Final Order No. A-83/110/2010-EX(Br.), dtd. 03.02.12.

*"26. It would be necessary to analyze whether the evidences, other than the retracted oral evidences, are credible for being used as corroborative evidence. The Hon'ble Supreme Court in case of **Sitaram Sao v. State of Jharkhand - (2007) 12 SCC***

**630**, pithily encapsulated the idea of "corroborative" evidence, in the following words :

"34. The Word 'corroboration' means not mere evidence tending to confirm other evidence. In *DPP v. Hester* - (1972) 3 All ER 10.16, Lord Morris said:

*"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible....."*

There can be, therefore, no "corroboration" of evidence, which is itself unworthy of credence.

27. That, apart from these retracted oral evidence, the main evidence on which reliance is placed by the Revenue are the loose sheets, Hisaba books and Kaccha Challans. It is undisputed facts that any author of these records was not traced and made available for cross-examination. Moreover, these documentary evidence were not recovered from the office or factory premises of the appellant manufacturer company, and there is no tangible evidence on record to conclusively relate the same with the appellant manufacturer company, except the retracted oral evidence. There isn't any untainted, undisputed admission by the concerned Director of the company that these records relied by the department were of company's unaccounted production and removal thereof. The entire accounted production of the appellant manufacturer for the relevant period is not recorded in these Kachha records besides the alleged unaccounted production. The Hon'ble Member (Technical) was persuaded to assume that Shri Bothra would have keys to premises at '4130, Gali Barna, Sadar Bazar, Delhi', and although Panchnama drawn at this premises nowhere records the name of the appellant company, he was persuaded to further assume that it was a guest house of the

appellant company. Although the names of the consignors on GR/RR were found fictitious, the Hon'ble Member (Technical) was persuaded to assume that the same related to the Appellant company. As rightly observed by the Hon'ble President, even the panchnama did not describe or identifies in its annexure which enlists the documents stated to have been recovered from the premises, recovery of any 'hisaba book' or 'Kachha Challans' or 'loose sheets with written pages'. I agree with the findings of the Hon'ble President that entire proceedings have lost credibility and serious doubt arises about the credibility of the materials stated to have been collected by Revenue in the course of proceedings.

29. In the entire records of proceedings, there is no evidence to indicate that there was clandestine manufacturing. There is no independent tangible evidence on record of any clandestine purchases or receipt of the raw materials required for the manufacturing of the alleged quantity of finished goods for its clandestine removal from the factory. In the entire notice and the order there is no satisfactory and reliable independent evidence as regards the unaccounted manufacture and or receipt of the huge quantities of raw materials. The quantities of the alleged bags dispatched from the factory would require some transportation arrangement for delivery from the factory. However, any reliable evidence about any vehicle coming to or going out of the factory without proper entries is not forthcoming. There is also no cogent evidence about any freight payment for any such movement.

30. I do not find cogent evidence of disproportionate and unaccounted receipt and consumption of the basic raw materials and packing material, required for manufacturing alleged quantity of unaccounted finished goods. I do not find tangible proof of unauthorized payment for procuring such unaccounted raw material and packing material. I do not find cogent evidence of disproportionate power consumption, capacity utilization and labour employed, or any cogent evidence of clandestine manufacture of unaccounted quantity alleged as clandestinely removed. I find that unaccounted production in the factory of the appellant company has not been established. In **Ruby Chlorates**

**(P) Ltd. Versus Commissioner Of C. Ex., Trichy, 2006 (204)**  
**E.L.T. 607 (Tri. - Chennai)**, it was held that:-

"21.....The settled legal position is that when several raw materials are involved, when a case of clandestine production and clearance is built on clandestine use of raw materials, the same should be proven with reference to unaccounted use of all such major raw materials".

"22. In a case of clandestine removal the department should produce positive evidence to establish the same. In the absence of corroborative evidence, a finding cannot be based on the contents of loose chits of uncertain authorship. Department has not produced evidence of use of inputs to prove that there was manufacture of unaccounted finished product. ..."

Moreover, in the case of **Atlas Conductors (supra)**, this Tribunal has taken a clear view that the demand cannot be on presumption of manufacture but on the basis of actual manufacture which is the basis to come to conclusion as recorded by Hon'ble President in para 47 onwards that the findings of the adjudicating authority are without any evidence and is not correct view and is liable to be set aside.

31. My above views are fortified by a recent case in the case of *Viswa Traders Pvt.Ltd. & others Vs. CCE Vadodara* being Final Order No.A/1846-1851/WZB/AHD/2011, dt.01.11.2011, a similar issue of clandestine removal was decided by co-ordinate Bench of Tribunal in Ahmedabad, wherein it is held that unless clandestine manufacturing is brought on record, there cannot be any allegation of clandestine clearances, un-corroborated with evidences. I was one of the Members in that Bench and while coming to the conclusion, the Bench had relied upon the judgment of Hon'ble High Court of Gujarat in the case of *Nissan Thermoware Pvt. - 2011 (266) ELT 45 (Guj.)* I am reproducing the relevant

portion of the said order, which is fortifying my view in this case also.

"15. We find that Hon'ble High Court of Gujarat, in the case of **Nissan Thermoware Pvt.Ltd 2011 (266) ELT 45 (Guj)**, has specifically held as under:

"7. Thus, on the basis of findings of fact recorded by the Tribunal upon appreciation of the evidence on record, it is apparent that except for the shortage in raw material viz., HD which was disputed by the assessee and the statement of the Director, there was no other evidence on record to indicate clandestine manufacture and removal of final products. On behalf of the revenue, except for placing reliance upon the statement of the Director recorded during the course of the search proceedings, no evidence has been pointed out which corroborates the fact of clandestine manufacture and removal of final products. In the circumstances, on the basis of the material available on record, it is not possible to state that the Tribunal has committed any legal error in giving benefit of doubt to the assessee."

(Emphasis supplied)

The above ratio, as laid down by Hon'ble High Court of Gujarat, would squarely cover the issue before us.

16. In the absence of any tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods from the factory premises of M/s VTPL, in the peculiar facts and circumstances of this case, we hold that the impugned order which confirms the demand on the appellant M/s VTPL and

*imposes penalty on them is not sustainable and is liable to be set aside and we do so."*

32. *I also do not find tangible evidence of removal from factory, of unaccounted goods so manufactured, by loading from factory and transportation therefrom, of alleged clandestinely removed goods. I do not find any reliable evidence of the actual customer/recipient of the clandestinely removed goods with their confirmation of unauthorized payment towards unaccounted purchase of goods allegedly manufactured and removed in a clandestine manner from the factory of the appellant. There was no recovery of any unaccounted sales proceeds in substantial cash in the factory or office premises or anywhere else in the control of the appellant company, backed by any confirmation oral or written from the person giving such cash against goods removed in clandestine manner without payment of duty from the factory of appellant company."*

54. By taking note of the legal positions as enunciated in the above referred decisions, we note that the confirmation of demand of duty against the assessee based upon the allegations of clandestine removal leading to the financial burden to the assessee as also resulting in criminal prosecution of the authorised persons is required to be done on the basis of evidences which generates confidence in the prosecution case. As observed in the majority order of the Tribunal in the case of M/s Kuber Tobacco Products P.Ltd., the mathematical procedure to the last extent may not be required but the distance between "might have" and "must have" is required to be travelled and filled by the Revenue by producing independent evidences on record, which can lead to inevitable conclusion of clandestine activities. As already discussed in the preceding paras, we find absence of such evidences on record, in which case, confirmation of demand against the appellant and

imposition of penalty on various persons would not be justified. We accordingly hold that confirmation of demand to the extent of Rs.18,33,83,943.00 and imposition of penalty on the said count is unsustainable.

55. Demand of duty of Rs.1,03,26,220.00 along with imposition of penalty stands made on the basis of allegedly recovered photocopies of the invoices from the appellants' factory during the course of search on 18.10.02. Though the appellants have strongly contended that such photocopies were not recovered from their place but were planted and signatures of their representatives were taken on the same forcibly by the officers. But without dealing with said submission, we find that the entire demand is solely based upon these photocopies. As discussed, clandestine removal allegations cannot be fastened against the manufacturer based upon recovery of photocopies of invoices from their premises. The same required material corroboration by an independent evidence. Their being none in the present case, we are of the view that confirmation of duty of demand cannot stand. We also note that the buyers names were available in the invoices and in fact, inquiries were conducted at their end, all the buyers denied having received any goods on the strength of the said invoices. In fact, we note that the Commissioner has himself observed that the demand is being confirmed on the basis of circumstantial evidence. In as much as there is no evidence on record showing any clandestine removal under the cover of the said invoices and in the light of the precedent decisions as

discussed (supra), we are of the view that the said duty confirmation cannot be upheld. Accordingly, we set aside the same along with setting aside of penalty.

56. In as much as the demand of duty against M/s Kothari Products Ltd. along with imposition of penalty imposed stands set aside, we find no justification for imposition of penalties on the other appellants, the same is also set aside.

57. In a nutshell all the appeals are allowed by setting aside impugned order.

(Pronounced in the open Court on 23.05.12)

(~~Archana~~ Wadhwa)  
Member(Judicial)

(Rakesh Kumar)  
Member(Technical)

RK-I