CUSTOMS, EXCISE & SERVICE TAXAPPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066

SINGLE MEMBER BENCH

Appeal No.E/1640-1644/2011

(Arising out OIA No.27 to 35/CE/DLH/2011 dt.31.3.2011 passed by the CCE (Appeals), Delhi-I)

Date of Hearing: 29.12.2017

Date of Decision:23.01.2018

M/s. Cooper Pharma **Appellant**
Rakesh Bhargava
Abhishek Bhargava
Anuj Bhargava
M/s. Dynamic Laboratories Pvt.Ltd.
Vs.
CCE, Delhi-I **Respondent**

<u>Appearance</u>

Shri Naveen Mullick, Advocate for the appellants
Shri G.R.Singh, AR for the respondent

CORAM: **Hon'bleMr.Ashok Jindal, Member (Judicial)**

FINAL ORDER Nos. 50365-50369/2018

Per **ASHOK JINDAL:**

The appellants are in appeal against the impugned order wherein the duty has been demanded against the main appellant alongwith interest and penalty and penalties on all the co-appellants have also been imposed. The goods have been confiscated and option has been given to redeem the same on payment of redemption fine.

2. The facts of the case are that the main appellant, namely, M/s. Cooper Pharma, a partnership firm of Shri Rakesh Bhargava and Smt. Lata Bhargava, who are engaged in the manufacture P&P

Medicines and other pharmaceutical goods. The goods manufactured were cleared on payment of duty. They are maintaining records like RG-1 register issuing invoices under Rule 11 and the records of Central Excise. They appointed following key persons:

(i) Shri Y.K. Bhargava, Chief Chemist

(ii) Shri AtulRawat, Chemist

(iii) Shri Rajiv Tiyagi, Chemist

(iv) Y.K.Sharma, Incharge Testing

(v) Shri Madanlal, Store Incharge of raw materials and finished goods and maintaining RG-1 Register.

The appellants were having a factory at B-59, Wazirpur Industrial Area and had an office at 12/12, Shakti Nagar, Delhi. In such building, the first floor and second floors were used by Bhargava family as residence and the basement was used as a godown by M/s.Dynamic Laboratories, a trader purchasing goods from the main appellant and from the open market. M/s.Dynamic Laboratories, a Private Limited Company had Shri Abhishek Bhargava and Shri Anuj Bhargava as its Directors, who are the sons of Shri Rakesh Bhargava, Partner of the main appellant. The ground floor was used as an office by M/s.Cooper Pharma. On 17.3.2006, a visit of the officers took place in the factory the main appellant, premises at 12/12, Shakti Nagar, Delhi, premises at 1/1, Shakti Nagar, Delhi (Godown) and the premises at Vardhaman Tower, Roop Nagar, Delhi. During the course of search, various documents like chemist diary from the factory, Kacha Slips from Vardhman Tower Roop

Nagar, Delhi, Lotus Diary from Vardhman Tower, Roop Nagar, Deljhi. Kacha slips from one supplier M/s. G.K. Pharma were recovered and thereby seized. On the basis of Katcha slips, the quantum of demand worked out. The demand is on the basis of chemist diary is Rs.26,05,979/- for the period 2004-05 to 2005-06 and Rs.3,25,292/- for the period 2005-06. During the course of investigation, various statements were recorded from the persons, namely, ShriY .K.Bhargava, Chief Chemist on 5.3.2007, Shri Abhishek Bhargava, Director of M/s.Dynamic Laboratories on 14.3.2007, Shri Girish Sardana recorded on 13.1.2006, Shri Bharat Bhushan Jain, Proprietor of M/s. Jain Agencies, Shri Yogesh Kumar, Partner of M/s. Shakti Bottle Agencies recorded on 16.2.2007 and the statement of Shri Rakesh Bhargava was recorded on various dates i.e. 18.3.2006, 28.2.2007 and 15.3.2007. On the basis of seized records and the statements, two show cause notices were issued to the appellants to alleged clandestine removal of the goods without payment of duty. The matter was adjudicated, the demand of duty was confirmed and the goods were confiscatedand the same were allowed to be redeemed on payment of redemption fine and various penalties were imposed on co-appellants. Against the said orders, the appellants have filed appeals before me.

The ld.Counsel for the appellant submits as under:

(a) demand Rs.6,65,616/- with education cess of Rs.13,312/- for the period 2004-05, Rs18,89,266/- with education cess Rs.37,785/- for the period 2005-06, Rs.3,18,914/- with education cess Rs.6,378/- for the period 2005-06 has been based on the chemist diary as per the

panchnama drawn in the factory premises of the appellant total Rs.29,31,271/-.

3. Ld. Counsel for the appellants submits that the Panchnama drawn at the factory revealed that such documents resumed are photocopies and uncertified. Therefore, it is submitted that the panchnama is totally silent in respect of the original records. It is not possible to ascertain the writer/author of such photocopies. Under Section 65 of the Evidence Act such photocopies are not admissible, therefore, very basis to proceed against the appellant on the basis of photocopies is neither legal nor proper. There has been no attempt to ascertain about the original copies of such records. From the photocopies, it cannot be ascertained as to who could be the writer/author. There does not appear if Shri Y.K.Bhargava, Chief Chemist was ever asked about the original documents. Accordingly, in the absence of original records, such alleged recovery of documents cannot form the basis to implicate or draw any adverse inference against the appellants.

4. He further submits that a perusal of the said chemist diary shows about the names/description of some goods/medicines. Such descriptions appearing do not have any batch numbers nor provide any evidence of the same having been allegedly cleared from the factory of the appellants. The name of the appellant also does not appear therein. In fact, it is not possible to draw any adverse conclusions on the basis of such diaries. It is submitted that medicines are never sold by weight. The subject diary refers to the term 'Kg' at various pages. This fact, by itself, is sufficient to

establish about such referred chemist diaries having no relation to manufacture goods.

5. It is further submitted that the statement of Sh. Y.K.Bhargava, Chief Chemist was recorded on 05.03.2007 showed that such diaries related only to issuance of material for any lot. According to the statement of Shri Y.K.Bhargava, he started maintaining such diary from June, 2005 onwards and prior to that one Mr.Duggal was maintaining the same. No investigations have been conducted from Mr.Duggal in respect of such diaries. Further, as per the statement of Shri Y.K.Bhargava, some of the goods from such diaries were cleared in a clandestine manner and he was not in a position to find out the quantity or description of such goods. He stated that the goods produced in lots have to be completed subsequently by the process of packing, testing etc.

6. It is further submitted that there is nothing on record if the alleged photocopies of the chemist diary were confronted to Shri Rakesh Bhargava, partner of the main appellant does not show if it bears the signature of Shri Rakesh Bhargava in confirmation of such documents confronted to him for his explanation during investigation. Therefore no adverse inference can be drawn against the appellant. He further submits that during the course of investigation, it was never enquired from any person about the stage at which entries of alleged production of P& P medicines have been recorded by the chemist in his diaries. Even if it is taken that Shri Y.K.Bhargava, Chief Chemist having maintained the record for issuance of raw material for any lot of medicines, the same does not mean that such, in fact, had been manufactured. Further for

undertaking the process of testing and packing the medicines in the lot, the same have to be transferred to a separate section, where such process takes place and whose incharge was Shri Y.K.Sharma. No statement of Shri Y.k.Sharma was recorded.

7. It is further submitted that in their defence, the appellants provided the process involved in manufacturing of their products and the stage at which the medicines manufactured are entered/recorded in RG-1 register. It was explained that during the course of undertaking the manufacturing process, there occurs dis-forming of tablets/capsules, cracks in the lot produced and the same has not been rebutted by any tangible evidence in the impugned orders. Such processing losses are waste, non-marketable and have to be removed/thrown. Such defective tablets/capsules cannot be entered in RG-1 register. The chemist diaries, as per the statement of Shri Y.K.Bhargava only reflect issuance of material for such lots. The very fact that there are no batch numbers show that such lots have not been tested and packed, even if produced.

8. It is further submitted that the statement of Shri Y.K.Bhargava was not conclusive, the appellant sought his cross examination, which was not allowed. Thus, the appellants have no opportunity to cross examine Shri Y.k. Bhargava. It is well settled that where the statement of a witness is not allowed to be cross examined, such statement cannot be in any proceedings is admissisble as held by Hon'ble High Court of Punjab & Haryana in the case of Jindal Drugs Pvt.Ltd.-2016 (340) ELT 67 (P&H) wherein it has been held that as per Section 9D of the Central Excise Act, 1944, if a statement of any witness has been relied upon, the same

is required to be examined in chief thereafter cross examination is required to be allowed to the appellant. Admittedly, it has not been done in the present case,therefore the statement of ShriY.K.Bhargava is not reliable piece of evidence.

(b) demand of Rs.3,52,399/- with education cess of Rs.7,048/- and Rs.31,354/- with education cess of Rs.627/- by relying on the File No.1 and File No.2 recovered through panchnama dated 17.3.2006 drawn at Vardhman Towers, Roop Nagar, Delhi.

9. It is submitted that it pertains to loose papers and the panchnama is totally silent if the visiting officers took any reasonable steps for placing such record in any envelope with proper seal. In this regard, he has relied upon the decision of this Tribunal in the case of Kuber Tobacco Products Pvt.Ltd. vs. CCE-2013 (290) ELT 545 (T) which has been affirmed by theHon'ble Apex Court in 2015 (317) ELT A150 (SC) wherein it has been held that where defiance of law and procedure leaves scope for tempering with the material seized, then certainly such material cannot be of any relevancy. On account of various legal and procedural infirmities in the panchnama, it is apparent that the entire proceedings have lost their credibility and serious doubts arises even about the credibility of the materials stated to have been collected in the course of proceedings.

10. It is further submitted that there is reference in the statements recorded about the katchha slips having the title "Cooper" recovered from Rajendra Vardhaman Tower, Roop Nagar, Delhi pertaining to the goods clandestinely manufactured and

cleared by the main appellant. On perusal of such copies provided would show about the name "Cooper" being different hands than the rest of the contents of the said document. Not only that a different handwriting is there but even the print of the word "Cooper" is different than the other impressions. It creates a strong suspicion about the credibility of such documents. Even the panchnama drawn from the premises at Rajendra Vardhaman Tower Roop Nagar, Delhi do no show if the loose papers recovered therefrom had the title "Cooper". Accordingly, no adverse inference can be drawn against the appellants in respect of such alleged kachha slips. Moreover, such alleged slips recovered from Rajendra Wardhman Tower, Roop Nagar, Delhi do not show any sign of removal of any goods from the factory of the main appellant nor provide the name of any alleged buyer. Accordingly, no adverse inference can be drawn in respect of such alleged slips against the main appellant. The charge of clandestine manufacturing and removal cannot be based on presumptions and surmises. The documents, on the basis of which the said demand has been raised and confirmed, have no credibility. It is well settled that where creditability of the documents is in dispute, the demand raised cannot be confirmed.

11. With regard to the demand of Rs.20,072/- for the period 2002-03 and Rs.2,33,757/- for the period 2003-04 by relying on File No.6, it is his submission that the premises are partly the residence of the Bhargava family. The basement of such building belongs to M/s. Daynamic Lab, who is trader and thereby purchases goods not only from the main appellant but also from the open market from different suppliers. The panchnama and annexure relates to the documents resumed from M/s. Daynamic Lab Pvt.Ltd..

Such file pertaining to the period from 2004 onwards and accordingly the same is not relevant with the period 2002-03 and 2003-04. Some of the slips of File No.6 also show repacking. Accordingly, the confirmation of demand for the year 2002-03 on the basis of File No.6 recovered from M/s. Daynamic Lab Pvt.Ltd cannot form the basis to confirm such demand.

12. With regard to the demand of Rs.10,87,204/- and education cess of Rs.21,744/- based on Lotus Note Book was recovered through panchnama dated 17.2.2006 from the premises at Rajendra Vardhman Tower, RoopNagar, Delhi, Ld. Counsel submits that Shri Abhishek Bhargava in his statement has explained about the Lotus Notebook belonging to M/s. Daynamic Lab and written by Shri Krishna Singh. In such statement, in connection with the Lotus Notebook, he did not mention M/s.Coooper Pharma being the supplier of the said goods appearing therein. Therefore, there is no tangible evidence to raise and confirm the demand against the main appellant. Such record belonged to M/s.Dynamic Lab Pvt.Ltd. and was written by one Sh. Kishen Singh and the statement of Shri Kishen Singh was not recorded. In fact, such, Lotus Notebook pertained to the orders received by M/s.Dynamic Lab Pvt.Ltd. A perusal of such Lotus Book, by itself, reveals about there being no indication of any amount/price. Further, there has even no investigation conducted from the names appearing in such Lotus notebook for ascertaining if they purchased any goods from M/s.Dynamic Lab. In any case, on the basis of such Lotus Notebook, no demand can be raised against the main appellants. Further the finding of the lower authorities confirmed that even Shri Abhishek Bhargava also did not name M/s.Cooper Pharma for having

received the goods covered under the Lotus notebook from the main appellants. The period in dispute in the Lotus notebook is from 2004.05. In the statement dated 14.3.2007, Shri Abhishek Bhargava clarified in respect of Lotus Notebook that he did not remember as to from where the goods entered in the Lotus note book belonging to his company were procured. In short, he did not name M/s.Cooper Pharma in respect of goods entered in Lotus notebook having been procured from the appellants. It is on record about M/s.Dynamic Lab Pvt.Ltd. also being a trader and purchasing the goods from various suppliers. Purchase of goods in cash by a trader from the open market does not invoke the provisions of Central Excise. Further, even M/s.Dynamic Lab Pvt.Ltd. and its Directors Abhishek Bhargava and Anuj Bhargava have not committed any offence under the provisos of Central Excise.

13. With regard to the demand of Rs.15,504/- and education cess of Rs.310/-, it is submitted that Kacha slips referred have been recovered from G.k.Pharma, which claims itself to be the supplier of empty Gelatine Capsules. M/s. G.K.Pharma is not even the co-noticee, from whose possession kacha slips have been recovered. In terms of Section 36A of the Central Excise Act, no adverse inference can be drawn against the Appellants on third party records. Accordingly, the demand needs to be set aside.

14. It is further submitted that even Shri Rakesh Bhargava, in his statement, did not admit of having received and utilized the material from M/s.G.K. Pharma. The kachha slips recovered from M/s.G.k.Pharma were not even in the hand writing of Shri Rakesh Bhargava. Thus, there is no tangible evidence about M/s. Cooper

Pharma having used and utilized the material of M/s.G.K.Pharma in their manufacturing. The demand, thus, confirmed is based on assumptions and presumptions.

15. With regard to the statements having been recorded of Shri Rakesh Bhargava, Abhishek Bhargava, Anuj Bhargava, it is submitted that the alleged statements being uncorroborated and cannot form basis to demand duty. It is his submissions that is well settled that mere alleged admissions in the statements are not enough to establish the charge of clandestine removal. It has been a consistent view of this Tribunal that unless there exists on record corroborate evidence, it will not be proper to merely rely on the statements for establishing the charge of clandestine removal. To support his contention, he relied on the decision of the Tribunal in the case of Devender Sandhu Impext Limited vs. CCE, Ludhiana-2016 (337) ELT 99 (Tri.).

16. He further submitted that suspicion, however, so grave cannot substitute for evidence to support the charge of clandestine removal. It is submitted that the whole case is made out presumptions and surmises. Even suspicious circumstances existing cannot establish the charge of clandestine removal. To support his contention, he relied on the following decisions:

(a) Belguim Glass and Ceramics Pvt.Ltd. vs .CCE (MANU/CS/0054/2015)

(b) P & J Auromatics' vs. CCE, Delhi-2016 (334) ELT 675 (Tri.)

(c) Arya Fibres Pvt.Ltd. vs. CCE, Ahmedabad-2014 (311) ELT 529 (T).

17. With regard to the demand of Rs.1,01,14,54/- on the goods lying with M/s.Dynamic Laboratories of Rs.6,18,961/- and Rs.4,436/- on goods of a value of Rs.27,180/- lying as waste at 1/1, Shakti Nagar, Delhi, is it submitted that all the stocks were tallying with the Central Excise invoices issued from Serial No.301-350, which were part of the resumed records. These invoices were issued to M/s.Dynamic Laboratories, from whose possession the stocks were recovered. However, total relief about the same has not been given on the alleged ground of batch numbers in some invoices not tallying. There is no further clarification on such account by the adjudicating authority. In any case, it is not the case of the department that the quantum of goods tally with the invoices produced and merely alleged error of batch numbers is not enough to disregard such invoices. Therefore, confirmation of demand of Rs.1,01,014,54/- lawfully purchased by M/s.Dynamic Laboratories needs to be quashed.

18. With regard to the demand of Rs.4,436/- pertains to the expired medicines. Thus, no demand could be confirmed. Even the panchnama drawn at the factory shows about the stock of expired medicines lying therein and which are waste.

19. With regard to the seizure of raw materials for which redemption fine has been imposed, it is submitted that it is not the case of the department that the raw materials lying in small quantities in the factory of M/s.Cooper Pharma were non duty paid. Unless it is proved about such goods being non duty paid and where it is an admitted position of the appellants being not manufacturers

of raw materials, there is no justification to confiscate the raw materials and the same needs to be vacated.

20. With regard to redemption fine on M/s.Dynamic Laboratories, it is submitted that in respect of the stocks lying at the premises of M/s.Dynamic Laboratories, the same were duly covered by the Central Excise invoices issued by M/s.Cooper Pharma. Accordingly, such goods have wrongly been confiscated, particularly, when the Central Excise invoices of duty paid has been produced. Accordingly, redemption fine of Rs.1 lakh imposed needs to be quashed.

21. It is further submitted that as there is no contravention of Central Excise Rules by the appellants, the penalties imposed on them either under Section 11AC of the Act or under Rule 26 of Central Excise Rules need to be set aside.

22. On the other hand, the arguments advanced by the learned Counsel has strongly objected by the learned AR who submitted that the statements recorded during the investigation or thereafter have evidentiary value, the same has not been retracted. Therefore, the statements are reliable piece of evidence as held by this Tribunal in the case of P.B. Nair C & F Pvt.Ltd. vs CC (Gen.), Mumbai-2015 (318) ELT 437 (Tri.), K.K. Saidalavi Vs. CC-2006 (199) ELT 813 (Tri.) and the decision of Hon'le Apex Court in the case of Shri Surjeet Singh Chhabra vs. UOI-1997 (89) ELT 646 (SC). Since there is no retraction of the statements, the statements have evidentiary value.

23. With regard to the cross examination of Shri Y.K.Bhargava, the Chief Chemist of the appellant, it is submitted that Shri Rakesh

Bhargava, Managing Partner of the appellant in his statement dated 15.3.2007 had been examined quo the diaries of the Chemist and also confronted with the statement of Shri Y.K.Bhargava tendered on 5.3.2007. Shri Rakesh Bhargava, Managing Partner of the appellant accepted the assertions made by Shri Y.K.Bhargava, the Chief Chemist. Therefore, no useful purpose would be served by allowing the cross examination of ShriY.K.Bhargava. To support his contention he has relied on the judgments of the Hon'ble Supreme Court in the case of Surjeet Singh Chhabra vs. Union of India-1997 (89) ELT 646 (SC) and the decision of the Tribunal in the case of Suman Silk Mills Pvt.Ltd. vs. CCE, Baroda-1993 (2002 (68) ELT 640 (Tri.-Mum.). He further submits that admitted facts need not be proved. To support his contention, he relied on the following judgements:-

(i) CCE, Madras vs. Systems & Components-2004 (165) ELT 136 (SC)

(ii) Umesh Textiles Pvt.Ltd. vs. CCE, Mumbai-2014 (314) ELT 176 (Tri.)

(iii) MarkasEngg. Pvt.Ltd. vs CCE, Kholhapr-2014 (311) ELT 781 (Tri.)

24. With regard to the seizure, it is submitted that it is an established fact that on 17.03.2006 while conducting the search at B-59, Wazirpur Industrial Area, Delhi, it was found that on some empty cartoons, " SIVROXOL" was printed with the remarks " manufactured by NEC Pharmaceuticals, Jandesh and market by M/s.Shiviling Technologies Pvt. Ltd., Vardhman City Centre, Commercial Complex, Gulabi Bagh, Shakti Nagar, Delhi and on the spot enquiries revealed that those unaccounted empty cartons were meant for use in clearing unaccounted goods manufactured by the

appellant. Shri Y.K.Bhargava in his statement dated 1.3.2006 admitted the facts that the empty cartons of " SIVROXOL" found alongwith other packing material were used for clearing the goods manufactured in the factory of the appellant. It his contention that no demand has been raised based on these unaccounted empty cartons but these cartons have been used as an evidence to uncover their practice of using fictitious invoices of NEC Pharmaceuticals, Jangesu to undertake clandestine removal of the excisable goods manufactured by them. It is not disputed that the said goods were found at the premises of the appellant and it is established that the appellant had received the goods clandestinely from the manufacturing factory and kept for packing and clandestine removal of the excisable goods manufactured by them. The premises at 12/12, Shakti Nagar, Delhi, Head Office of the main appellant and office-cum-godown of M/s. Dynamic Laboratories Pvt.Ltd. was searched on 17.03.2006. It is his contention that it is established fact that physical stock taking of goods lying in the basement of the premises relating to M/s.Dynamic Laboratories Pvt.Ltd. revealed that goods of the appellant valued at Rs.7,58,534/- involving Central Excise duty of Rs.1,23,792/- were found in excess of the recorded balance in the computers/records of M/s.Dynamic Laboratories Pvt.Ltd.Shri Abhishek Bhargava, Director of M/s.Dynamic Laboratories Pvt.Ltd. could not produce any documentary evidence supporting the lawful possession of the said finished goods even till the date of issue of show cause notice dated .15.09.2006. Shri Rakesh Bhargava, Partner and Manager of the appellant in his statement dated 19.07.2006, admitted that the said goods valued at Rs.7,58,534/- seized at 12/12/, Shakti Nagar, Delhi were cleared by the appellant and that he would produce the bills. However, the bills were not produced till date.

25. With regard to the seized goods collectively valued at Rs.4,73,180/-, he submits that it is fact that physical stock taking of the goods in the premises sat 1/1, Shakti Nagar, Delhi (Godown) was conducted and the goods found lying there. Also on demand, Shri M.P.Joshi, General Manager of the appellant failed to produce any bill/challan for the raw materials, finished goods and packing material stored in the said godown. There were 40 numbers of cartons which did not have any description/identification of the goods packed therein. There were three more cartons marked 'CLP' and there were four packages of raw material, Cloxacilin Sodium (IP) packed in 2 drums, Cloxacillin Sodium Compact (IP) packed in one drum, Ampicillin Trihdrate Compacted (IP) packed in one drum. On opening and examination of the cartons numbered 1 to 40, samples form selected cartons were drawn for Chemical Examination. The CRCL, New Delhi had confirmed that the samples from 40 packages were of Paracetamol and samples from 3 packages were of Chloramphenicol. The appellant has failed to produce any bill in respect of the said goods. Shri M.P.Joshi admitted the facts that the said godown was used by the appellant located at B-59, Wazipur Industrial Area and the said godown was owned by Shri Rakesh Bhargava, Partner and Manager of the appellant, who stated that the raw materials were found in 47 cartons, out of 43 cartons were without any nomenclature or any other labelling. He is not able to explain about the said goods, but admitted that the same were used in the manufacture of medicines

at B-59, Wazipur Industrial Area. Therefore, the said goods are liable for confiscation.

26. With regard to the duty demand on past clearances, it is submitted that the documents and records, resumed from the premises searched on 17.03.2006 allegedly containing the katcha records of goods manufactured and removed clandestinely without proper accountal thereof and without payment of duty of excise payable thereon were investigated and a number of persons concerned with the said seized documents were examined in details. Accordingly, based on the evidence collected, during the course of investigation, a show cause notice dated 19.7.2007 was issued to the appellants. The demands have been confirmed on the basis of Chemist Diaries which have been recovered from Shri Y.K.Bhargava, who has made entries in the diaries admitted that the entire quantity of finished goods removed without payment of duty was despatched to M/s.Dynamic Laboratories Pvt.Ltd. on the directions of Shri Rakesh Bhargava, Working Partner.

27. Further, with regard to the demand of Rs.3,59,447/- and Rs.31,981/- and Rs.11,08,948/- based on File No.1 and No.2 & Lotus Note Book, It is submitted that the katcha slips marked 'Cooper' in the said files contained the details of removal of finished goods from their factory to M/s.Dynamic Laboratories Pvt.Ltd. while others pertained to sale of goods by M/s.Dynamic Laboratories Pvt.Ltd. to their buyers. It is further submitted that Shri Yogesh Kumar, Partner of M/s.Shakti Bottle Agencies, Delhi when confronted with File no.2 admitted that they supplied 5.6 lacs of measuring cups and 8.5 lacs of droppers to the appellant for which

payment was received in cash and he failed to submit any bills. Moreover, Shri Abhishek Bhargava admitted that the payment in cash to M/s.Shakti Bottles. The same has been admitted in the statement of Shri Bharat Bhushan Jain, Proprietor M/s. Jain Agencies, who supplied the raw materials to the appellant without any bill. The above assertions made by the suppliers of the raw material are fortified by Shri Rakesh Bhargaa himself in his statement dated 18.3.2006 whereby he has admitted that they procured the raw material from the open market without any bill and the same was not accounted for in their books of accounts, used in the manufacture of goods and removed clandestinely without payment of duty. Therefore, the demand is sustainable.

28. Regarding investigation of M/s.Dynamic Laboratories Pvt.Ltd, a buyer of the appellant, it is submitted that Shri Abhishek Bhargava, Director of M/s.Dynamic Laboratories Pvt.Ltd, who admitted in his statement that the goods received from the appellant without payment of duty, were appearing note-pads; that the pads contained the details of dispatch of goods to their customers; that Lotus Note Book contained details of pharmaceuticals goods supplied by them to various buyers on respective dates without any bill and that payment for the same was received in cash. Therefore, the demands raised on the basis of File no.1 for the period 2005-06 and File No.2 for the period 2004-05 are sustainable.

29. Further, with regard to the demand based on File No.6 and File No.7, it is submitted that there had been manufacture and clandestine removal of goods in past. Shri Rakesh Bhargava

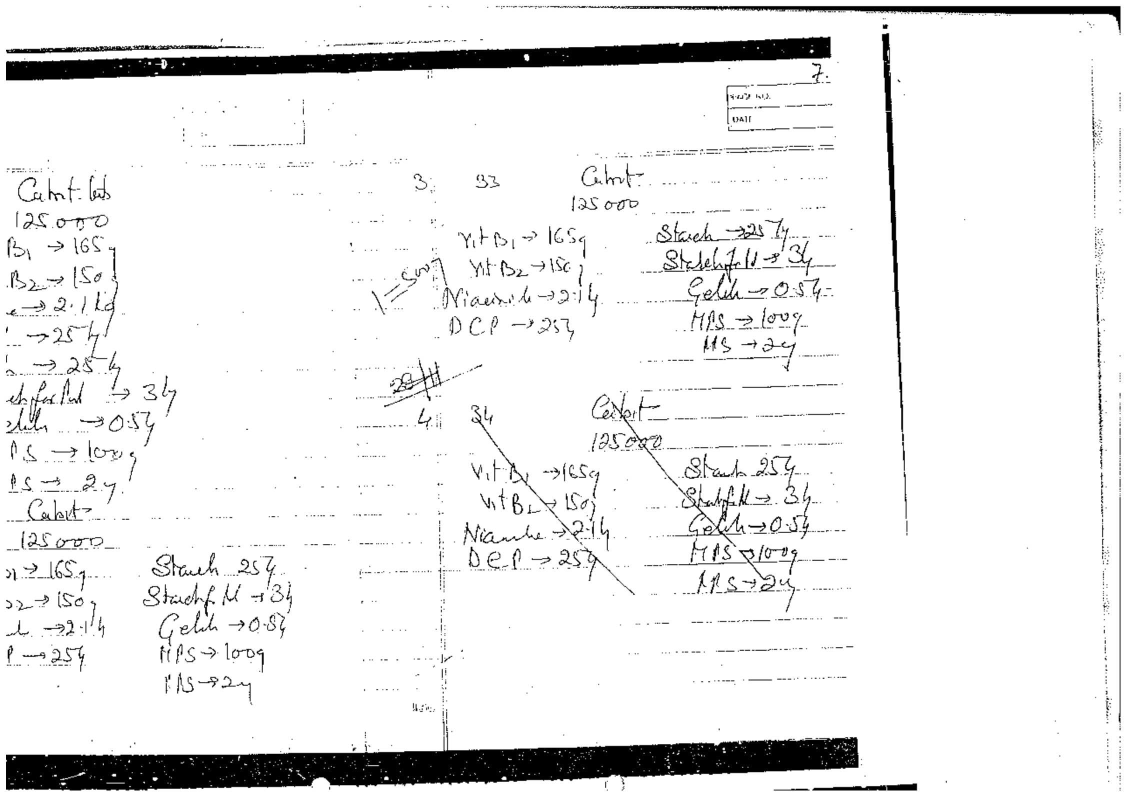
admitted that he cleared the goods covered under the said files without payment of duty.

30. Wirth regard to the demand based on katcha slips from M/s.G.K.Pharma, it is submitted that Shri Girish Sardana, Proprietor of M/s. G.K.Pharma in his statement admitted that the katcha slips recovered from his brief case pertained to sale of 4,80,000 unit of empty gelatin capsules to appellant without any bill and the same was written in the hand of Shri Rakesh Bhargava, Partner of the appellant; that the sale proceeds amounts were received in cash; that in the past also they had made some sales of empty Gelatin capsules to appellant without any bills and the payments were received in cash. He further submits that the show cause notice has been issued within a period limitation. Further second show cause notice dated 19.7.2006 for the period 2002-03 to 2006-08 invoking the extended period of limitation as there was suppression of production and clearances without payment of duty, extended period of limitation is applicable in this case. He further submits that the duty of demands are rightly confirmed alongwith interest and penalties on the all the appellants are imposable. Therefore the impugned orders are to be upheld.

31. Heard both sides and considered the submissions.

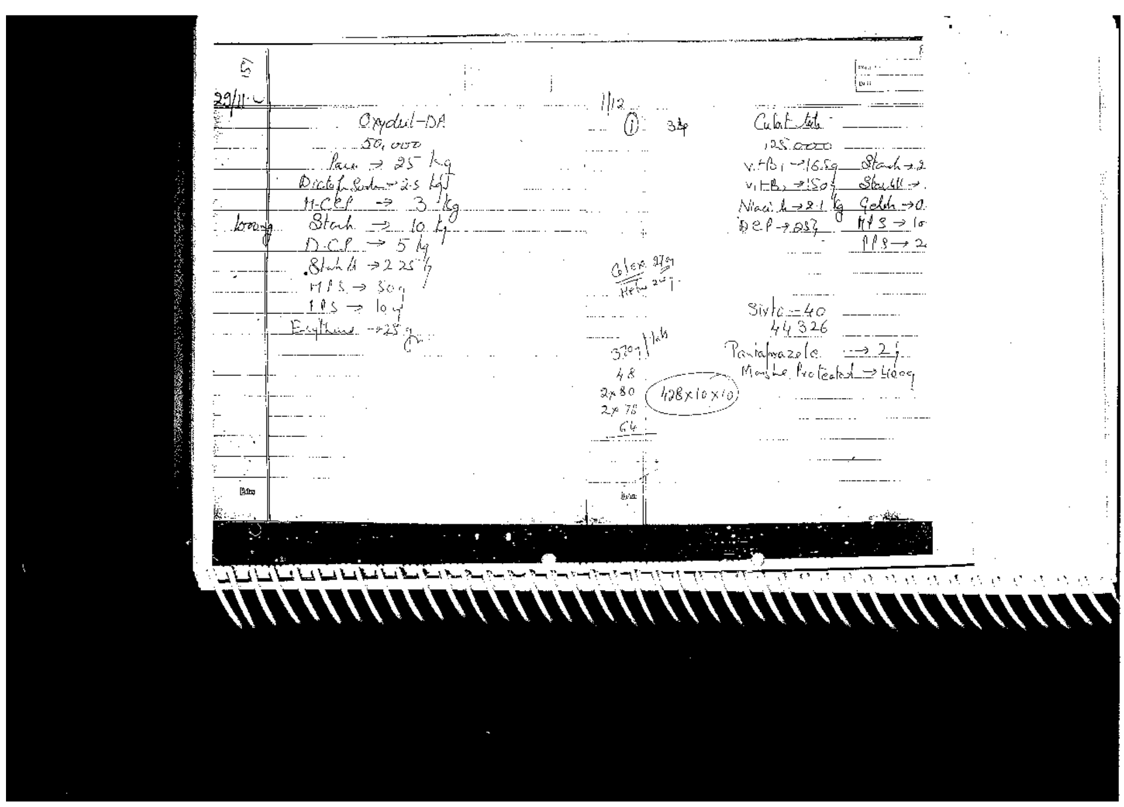
32. On careful consideration of the arguments advanced by both sides, I find that in this case, the charge of clandestine of removal of the goods has been made against the appellant on the basis of chemist diaries recovered from the Chief Chemist, the main evidence and on the basis of statements recorded thereof. I have examined the chemist diaries maintained by Chief Chemist and have

gone through the contents of the diaries. Some of the entries in the Chief Chemist are reproduced below:-



3 33 Calcit
125000
Vit B1 → 165g
Vit B2 → 150g
Niacinamide → 2.1 kg
DCP → 25 kg
Starch → 25 kg
Starch fl → 3 kg
Gelatin → 0.5 kg
MPS → 100g
PPS → 2g

4 34 Calcit
125000
Vit B1 → 165g
Vit B2 → 150g
Niacinamide → 2.1 kg
DCP → 25 kg
Starch 25 kg
Starch fl → 3 kg
Gelatin → 0.5 kg
MPS → 100g
PPS → 2g



29/11
Oxydul-DA
50,000
Para → 25 kg
Diclofenac Sodium 2.5 kg
M.C.C.P → 3 kg
Starch → 10 kg
D.C.P → 5 kg
Starch → 2.25 kg
MPS → 50g
PPS → 10g
Erythrosine → 25g

1/12
(1) 34 Calcit tab
125000
Vit B1 → 16.5g
Vit B2 → 150g
Niacinamide → 2.1 kg
DCP → 25 kg
Sixtc 40
44326
Pantoprazole → 2 kg

33. On-going through the extract of these documents, which reveal that the Chief Chemist diaries showed that the raw material issued for manufacturing of the goods. The document does not reveal that the fact that the raw material issued for manufacturing has actually been manufactured whereas central excise duty to be paid by the assessee on manufacture of goods. Admittedly, the evidence of manufacturing of the goods has not been coming out from the diaries maintained by Shri Y.K.Bhargava. Moreover, Shri Y.K.Bhargava joined the appellant's firm in June, 2005 and prior to that one Shri Duggal as the Chief Chemist and the diaries were maintained by him without examination of the statement of Shri Duggal, the said diaries cannot be relied upon as piece of evidence. Moreover, the contents of the diaries, merely showing issuance of raw materials, in that circumstance, cross examination of Shri Y.K.Bhargava was required to ascertain the truth. During the adjudication, the statement of Shri Y.K.Bhargava was not examined in chief and thereafter no opportunity for of cross examination of Shri Y.K.Bhargava is afforded to the appellant, therefore, there is gross violation of principle of natural justice In terms of Section 9D of the Central Excise Act as held by the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt.Ltd. (Supra), in that circumstance, the diaries recovered from the Chief Chemist, Shri Y.K.Bhargava and the statement of Chief Chemist cannot be relied upon to alleged clandestine removal of the goods. Ld.AR has submitted that the statement of Shri Y.K.Bhargava has been confronted before Shri Rakesh Bhargava, the Partner of the appellant who has admitted the contents as well as the statement of Shri Y.K.Bhargava and the same has not been retracted, therefore,

this statement is as admissible evidence and nothing to be proved. In that circumstance the sole basis is the diary maintained by Shri Y.K.Bhargava and prior to June, 2005, Mr.Duggal was maintaining the diaries. Admittedly, the statement of Shri Duggal has not been recorded. Therefore, the contents of the diaries cannot be examined. Moreover, the contents of the diaries maintained by Shri Y.K.Bhargava which is the fact on record are not with the regard to the clandestine removal, in that circumstance, the statement of Shri Y.K.Bhargava cannot be the basis to allege clandestine removal of the goods in view of the decision of this Tribunal in the case of Devender Sandhu Impext Limited (supra) wherein this Tribunal has held that incriminating statement of the assessee cannot be the evidence to allege the clandestine removal. Therefore, the statement of Shri Rakesh Bhargava cannot be relied upon to allege the clandestine removal of the goods. Moreover, in the case of Arya Fibres Pvt.Ltd. (supra), this Tribunal has laid down the guidelines for alleging clandestine removal and para 40 of the said order is reproduced below:-

> 40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :
>
> (i)There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;
>
> (ii) Evidence in support thereof should be of :
>
> (a) raw materials, in excess of that contained as per the statutory records;
>
> (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

(h) proof of actual transportation of goods, cleared without payment of duty;

(i)links between the documents recovered during the search and activities being carried on in the factory of production; etc.

Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in Centurian Laboratories v. CCE, Vadodara [2013 (293) E.L.T. 689]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [Hindustan Machines v. CCE [2013 (294) E.L.T. 43]. Members of Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal.

34. In view of the guidelines given by this Tribunal in the case of Arya Fibres (supra) has not been followed to allege clandestine removal of the goods, therefore, the demands on the basis of diaries recovered and other documents recovered from the appellant cannot be the basis to allege clandestine manufacture of the goods. In that circumstance, I hold that all the demands are on the basis of assumptions and presumptions, the charge of clandestine removal of the goods is not sustainable, in the absence of positive evidence or corroborative evidence. Therefore, the impugned demands are not sustainable against the appellants in the absence of any concrete proof against the appellants.

35. In the result, the impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Pronounced in the open court on 23.01.2018)

(Ashok Jindal)
Member (Judicial)

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