CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench – Court No. – I

Excise Appeal No. 266 of 2009
(Arising out of Order-in-Original No. 08/2008 dt.30.09.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

M/s VSN Plastics Pvt Ltd
MIGH 172, KPHB Colony, Kukatpally,
Hyderabad, Telangana – 500 072 **......Appellant**

VERSUS

Commissioner of Central Tax
Hyderabad - IV
Posnett Bhavan, Tilak Road, Ramkoti,
Hyderabad, Telangana – 500 001 **......Respondent**

and

Excise Appeal No. 267 of 2009
(Arising out of Order-in-Original No. 08/2008 dt.30.09.2008 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

M.V. Sekhar Rao
Managing Director of M/s VSN Plastics Pvt Ltd,
MIGH 172, KPHB Colony, Kukatpally,
Hyderabad, Telangana – 500 072 **......Appellant**

VERSUS

Commissioner of Central Tax
Medchal - GST
Posnett Bhavan, Tilak Road, Ramkoti,
Hyderabad, Telangana – 500 001 **......Respondent**

Appearance
Ms. Bhargavi, Advocate for the Appellant.
Shri Pradeep Saxena & Shri K. Sreenivasa Reddy, ARs for the Respondent.

Coram: **HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)**
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER No. A/30146-30147/2025

Date of Hearing: 21.02.2025
Date of Decision: 30.04.2025

[Order per: A.K. JYOTISHI]

M/s VSN Plastics Pvt Ltd (hereinafter referred to as the appellant) have come in appeal against OIO dt.30.09.2008 passed by Commissioner, vide Appeal No.E/266/2009 (impugned order).

2. The brief facts of the case are that the appellants are manufacturers of Plastic Moulded Furniture (PMF). The factory was searched by the Department and in the course of search, certain shortages of finished goods were noticed. In addition, certain documents, computer printouts and chits were recovered vide Panchanama dt.03.03.2005. Subsequently, certain statements of Managing Director, some of the key employees, dealers, suppliers of raw materials were also recorded.

3. Based on the investigation, the SCN dt.08.03.2007 was issued, inter alia, demanding duty on excisable goods cleared clandestinely, availment of irregular credit without receiving goods, availment of irregular credit on raw material which is not a raw material. The appellants approached settlement commission in relation to the said SCN, however, the settlement commission referred the case back to the Adjudicating Authority on the grounds of complexity. On adjudication, a total demand of Rs.1,08,48,682/- (Demand of Rs.71,48,792/- (+) Cenvat credit of Rs.36,99,890/-) was confirmed and penalty of Rs.1,08,72,463/- was imposed. In addition, penalty of Rs.5,00,000/- was also imposed on Mr. M.V. Sekhar Rao, Managing Director of appellant company, under Rule 26 of Central Excise Rules, 2002 (CER). Mr. M.V. Sekhar Rao is in appeal against imposition of penalty on him vide Appeal No.E/267/2009. In the same impugned order, the Adjudicating Authority has also imposed penalty of Rs.1,00,000/- each on certain individuals being proprietors and managers of the dealers, dealing with clandestinely removed goods, under Rule 26 of CER, 2002 and also on one M/s Gowra Petro Chemicals P Ltd under Rule 27 of CER, 2002. Except for M/s Gowra Petro Chemicals P Ltd, some of the appellants on whom penalty of Rs.1,00,000/- each was imposed, have come in appeal before this Bench in different appeals against imposition of penalty.

4. Learned Advocate for the appellant has mainly contested that the Adjudicating Authority has not appreciated the facts and evidence and the impugned order is not a speaking order. She has submitted the arguments independently for different demands covered in the SCN in terms of various annexures appended to the SCN in relation to alleged clandestine clearance for the period 2002-03 to 2004-05 (Annexure-D1), where the demand is based on entries contained in certain computer printouts. Further, that the computer printouts (at page no.04 to 11 of Annexure-B56) when compared

with the RG1 clearances, it would indicate that RG1 clearances in respect of most of the items are more than what Mr. Ananda Rao, RM-Sales, has mentioned in his statement as business done from April, 2002 to November, 2002. Further, for the same period, there is another set of figures (distributor wise), which when compared with RG1 clearances would show that RG1 figures are less during the months of August, 2002 to November, 2002 in respect of chairs, whereas, in other months, RG1 figures are more than those in Annexure-B56. Moreover, the department has examined the three dealers only and that too with reference to second set of figures without showing the first set and therefore, learned Advocate doubts the statements given by the said dealers, which have been relied upon by the Adjudicating Authority. She is also contesting that reliance cannot be placed on some of the statements given by the dealers, admitting having received some goods from the appellant without invoice and that the said transaction including cash payment was not reflected in the ledger, as such statements being self incriminating admissions and therefore, cannot be relied upon.

5. Similarly, for other demands also, she has made various arguments but mostly doubting the veracity of the statements relied upon by the department as also reliance on various private documents received from the premises, without any other corroborative evidence. In relation to the allegation of non-receipt of raw material under the cover of invoice on the strength of which credit has been taken, she has submitted that the department has not examined the employees of the factory or the transporter to establish whether the goods were actually received in the factory or not. She further argued that the department has relied on various presumptions including the fact that raw material issued shown in RG23A Part-I should match with consumption shown in the private records. However, it ignored the fact that there was balance of raw material also available on the date of seizure, which is indicative that all issues shown in RG23A Part-I were not consumed and therefore, there was difference in issue and consumption of raw material. This submission was not at all examined by the Adjudicating Authority and he has only relied on entries in private records treating them as sacrosanct.

6. On the other hand, learned AR for the department submits that based on the search carried out at the factory premises of the appellant and

recovery of various incriminating documents relating to production, clearance, receipt of payment in cash, etc., and subsequent investigation from dealers, suppliers, etc., to corroborate the charges of clandestine removal, it would be obvious that the Adjudicating Authority has evaluated all the evidence on record to come to the conclusion about clandestine removal as well as irregular availment of credit. He points out that veracity of said documents was not only the recovery of documents from the possession or room of concerned managers, executives, responsible persons but also the relevant facts explained by them in the statements relating to said documents. Therefore, clandestine clearances of excisable goods to dealers and distributors are evident from the documents recovered and similarly, suppression of production and clandestine clearance is also evident from the private production records and explanatory statements. Fraudulent and irregular availment of Cenvat credit is also established based on statements of the supplier of the said goods.

7. He has specifically submitted the details of the calculation of duty based on certain documents and statements, as under:-

a) The duty demand is based on the documents covered in B-56, a file maintained by Mr. B. Ananda Rao, Regional Manager recovered from the appellant’s factory premises. The period covered in this private record is 04/2002 to 11/2002. These records are maintained by Mr. B. Ananda Rao in his own custody and the contents of the same in his statements had been explained by him as containing the details of the purchase of the raw materials and sale of the finished goods. It consists of monthly extracts of business done with the dealers and distributors in respect of articles of furniture. The figures contain names of the distributors and quantity sold in a particular month along with description of plastic moulded furniture including the sales made on invoices as well as those without invoices. Mr. B. Ananda Rao has admitted the contents of private record. The authenticity of these documents has not been rebutted by Mr. B. Ananda Rao and the duty involvement in respect of the finished goods cleared clandestinely is worked out as Rs.12,49,115/-

b) The private record titled B-47 is recovered diary scribed and maintained by Mr. K. Chinna Rao working as the marketing executive in the appellant's firm. The diary contains entries related to goods sold by the appellant to its distributors during 03/2004 to 11/2004 and also the amounts collected from them in the form of cheques, DDs and cash, etc. The diary has information relating to the name of the dealer to whom the goods were sold without invoices and the amount collected in cash against such unaccounted sales. Mr. K. Chinna Rao has accepted that the sales were made without invoices and the payment was collected in cash against such sales. His statement is further corroborated by the statements recorded from Mr. M. Venkat Rao, Manager (Finance) and authorized signatory of the appellant, Mr. D.V. Satish Kumar, Accountant of the appellant. Further, the dealers or the distributors whose names were found in the diary, viz., M/s Renuka Agencies, Ongole, M/s Prakash Traders, Vijayawada, M/s Rohit Plastics, Hyderabad and M/s Pavan Agencies, Karimnagar, in their statements given under section 14 of the Central Excise Act, 1944 admitted the fact of receipt of goods without invoices as indicated in the diary. Thus, there is sufficient corroboration.

c) The private records B-58 & B-59 contains different manuscript papers containing the details of removal of finished goods for which no duty paid invoices were available. The authenticity of the entries in the private records is corroborated by the admission of the distributors/dealers and Mr. Chinna Rao, Marketing Executive.

d) Similarly, the private records B-61 & B-62 also contained the details of clandestine removal of moulded furniture in the guise of samples and corroborated by the admission of Mr. Badri Vishal Agarwal, Proprietor of M/s Rohit Plastic, Begum Bazar, a distributor of the appellant.

e) The appellants have not been able to rebut the allegations by any positive defence. The private records are to be relied once these were maintained by the responsible personnel of the appellants and the private records is having complete transactions including the unaccounted sales and unaccounted receipt of payments.

f) It is submitted that the private records and other documents recovered during the search and relied upon in SCN contain complete information on the production and clearance. These are complete set of documents, which are maintained in relation to production. The production records are maintained shift wise and give daily stock position also. There are records, which show machine wise and day wise production. These are corroborated by different persons concerned in maintenance of these records. Therefore, these records give complete information on the production and the same has to be accounted in the RG1 or the stock register. In this case, the total production recorded in the private production records is taken against the production reported in the RG1 and it was observed that the excess production was not recorded in the daily stock account and instead cleared clandestinely.

g) The parallel private pass books, cash book and bank statements reveal that an amount of Rs.49,88,820/- shown as received in cash were credited to suspense account (Annexure C-103). Mr. M. Venkat Rao, Manager (Finance) of the appellant firm, in his statement dt.01.01.2007, the admitted that the said cash includes unaccounted sale proceeds of the appellant. Mr. M.V. Sekhar Rao, Managing Director of the firm in his statement dt.05.01.2007 admitted that the amount credited to the suspense account was unaccounted sale proceeds and therefore, unaccounted.

h) It is submitted that the private record B-48 contain the details of cash receipts by the appellant from M/s Gowra Petrochem (P) Ltd, a registered dealer and supplier of inputs to the appellant. B-48 is a private record containing parallel pass books maintained by Mr. D.V. Satish Kumar for accounts of the appellant with ICICI Bank, SBI and GTB and contain entries of transactions in the respective bank accounts of the appellants. In addition, against certain entries, for deposit of cash with above three banks, the author of these books mentioned as 'Gowra' or 'g' or 'G'. Mr. D.V. Satish Kumar, Accountant of the appellant firm, Mr. Gowra Subba Raju, Director of M/s Gowra Petrochem, in their statements, corroborated the version that the inputs were diverted against cash payments and not actually received by the appellant.

8. He has further argued that factory personnel including the Managing Director of the appellant company never retracted the statements. He is relying on the following case laws:-

a) Ramachandra Rexins Pvt Ltd Vs CCE, Bangalore [2013 (295) ELT 116 (Tri-Bang)]
b) CCCE & ST, Hyderabad-II Vs Peers Technologies Pvt Ltd [2019 (27) GSTL 701 (Tri-Hyd)]
c) CCE, Mumbai Vs Champion Confectionery [2010 (262) ELT 865 (Tri-Mumbai)]
d) Moontex Dying & Printing Works Vs CCE, Surat [2007 (215) ELT 46 (Tri-Ahmd)]
e) Gopal Industries Ltd Vs CCE, Indore [2007 (214) ELT 19 (Tri-LB)]
f) Ranjit Bakshi Gupta Vs CCE, Calcutta-III [2007 (149) ELT 407 (Tri-Kolkata)]
g) CC, Pune Vs UD Suryavanshi [2007 (220) ELT 805 (Tri-Mum)]

9. Learned AR has emphatically pointed out that except for denying the allegations, the appellants have not laid any positive evidence in support that there was no unaccounted production or clandestine removal. In fact, the involvement of dealers, raw material suppliers in the clandestine manufacture and removal has remained unchallenged except for mere denial during the appeal. He is relying on the judgment of Madras High Court in the case of Alagappa Cements Pvt Ltd Vs CEGAT [2010 (260) ELT 511 (Mad)], wherein, the Hon'ble Court laid down the law that plea of absence of positive proof of commitment of offence is not a defence for the author thereof. It is settled principle of law that law does not insist upon an impossible threshold of proof to establish allegations, but if on probabilities the statutory authorities can establish evasion, the legal standards are adequately met with.

10. Insofar as the appeal of Mr. M.V. Sekhar Rao is concerned, the facts and evidence on record clearly justify the imposition of penalty. He is relying on the judgment in the case of Sri Rama Machinery Corporation Ltd Vs CCE,

Chennai-I [2017 (348) ELT 540 (Tri-Chennai)] and Global Spin Weave Ltd Vs CCE, Ghaziabad [2006 (193) ELT 478 (Tri-Del)].

11. Heard both sides and perused the records.

12. We find that in the present appeal, the allegation of unaccounted production and clandestine removal are based on recovery of certain documents and explanation/corroboration in terms of statements of the relevant persons of the company as well as that of dealers receiving such clandestinely removed goods and making payments in cash in relation thereto. As regards irregular availment of credit, the reliance is placed on the statements of suppliers of raw material as well as receipt of cash by the appellant company. We also note that the entire investigation and computation of duty has been summarized in terms of certain annexures, which show the grounds for demanding duty as also the nature of evidence relied upon to demand such duty. Therefore, we proceed to examine the entire order in terms of said annexures considering the arguments from both sides for the sake of clarity. These are summarized as under:-

i) In relation to Annexure-D1 to SCN covering period 04/2002 to 11/2002, while the appellant is contesting that demand is not sustainable because it is not known how Mr. Anand Rao obtained these figures and that they are denying figures recorded under category 'business done'. Whereas, the Adjudicating Authority has observed that the record maintained by the Regional Manager, who is responsible person, contains broad category of articles like chairs, stools, names of the dealers and distributors. The record also contains invoice figures and actual removals and net difference is taken for duty demand. The author of this document i.e., Mr. Anand Rao, vide his statement dt.20.12.2005 and the MD Mr. M.V. Sekhar Rao, vide his statement dt.05.01.2007, have accepted the contents of this document. In fact, we note that MD has admitted that there were certain discrepancies in recording of consumption of raw materials, accountal of finished products produced and clearances and had voluntarily paid an amount of Rs.10 lakhs towards discharge of their duty liability and he admitted that he has obliged to take up the responsibility for any violation of law and co-operate with investigation. Thus, we find that the observation of the Adjudicating Authority that private documents is complete source of information relating to clandestine clearances supported by amounts received in cash without bill and in cheques for removals with bills, the entries relating thereto are corroborated by the statement of Mr. D.V. Sathish and Mr. M. Venkat Rao as well as dealers. We also find that the MD of the appellant was asked to explain various entries as also details of cash amounts paid by the customers and statements given by certain dealers, for which he stated that appellants cleared certain PMF without payment of duty of excise and without raising invoices. Therefore, we find that evidence has been correctly appreciated by the Adjudicating Authority and we do not find any infirmity in his findings.

ii) As regards demand covered under Annexure-D2 to SCN, we note that this issue is no longer being contested as the Adjudicating Authority has already set aside demand relating to clandestine clearances of reprocessed granules. However, we note that despite having dropped the demand, the amount of Rs.1,01,588/- was not excluded from the total demand amount and therefore, that amount is liable to be deducted from the total demand. The impugned order is liable to be modified to that extent.

iii) Insofar as Annexure-D3 to SCN for the period 09/2003 to 04/2004 involving an amount of Rs.22,37,929/- is concerned, learned Advocate is contesting that the private records relied upon in their case do not reflect correct figures of consumption of raw materials and the production recorded in the private records cannot be compared with RG1 production. We find that the Adjudicating Authority has observed that there is complete set of documents which are maintained in relation to production and these production records are maintained shift wise, which also indicated daily stock position. There are records, which show machine wise and day wise production. Therefore, he has taken a view that actual production recorded in the private records is required to be reflected in the statutory documents also. We also note that the MD of the appellant has not disputed these private records as being not relevant or not recording correct production. In fact, in his statement, he was shown the production figures as reflected in RG1 as well as private record which showed certain difference. He admitted that entire production was not entered in RG1 and that this happened only in the case of their own brand goods and that difference was possible due to non-consideration of rejections in the production. He stated that he was not able to explain the huge variation. Therefore, we find that the relevancy of private record relied upon by the Adjudicating Authority has not been disputed or contested by the MD of the appellant. We also note that MD has not been able to given any explanation for the variation despite accepting its recording by the concerned people in his factory. In view of the same, we find no infirmity in the conclusion drawn by the Adjudicating Authority in relation to demand covered under Annexure-D3.

iv) As far as Annexure-D4 for the period 05/2004 to 02/2005 involving an amount of Rs.17,79,346/- is concerned, we find that in this case also the appellants have mainly contested the same on similar grounds as contested in relation to demand under Annexure-D3. Therefore, for the reasons discussed supra, we find no infirmity in the order of the Adjudicating Authority in this regard.

v) As regards demand covered in Annexure-D5 to SCN based on private record maintained by Mr. D.V. Sathish Kumar relating irregular credit amounting to Rs.9,58,918/-, availed on inputs from supplier viz., M/s Gowra Petro Chemicals without actual receipt, the sale proceeds of the diverted material were recorded in the private record of the appellant. These facts have been confirmed by the owner of M/s Gowra Petrochemicals i.e., Mr. Gowra Prasad. A detailed investigation was carried out to establish that with regards to certain invoices and transactions, only the amount has been received in cash from M/s Gowra Petro Chemicals and not the material. The appellants have taken credit in respect of said invoices. The Adjudicating Authority has, in his findings, taken into account this evidence and the fact that such statements were never retracted as also that appellant has maintained parallel accounts with ICICI/GTB/SBI for deposit of such unaccounted receipts. Thus, amount of irregular credit was confirmed. In fact, we find that MD of the appellant has categorically stated, when questioned about source of certain credit entries, that the amount credited to the suspense account was unaccounted cash including unaccounted sale proceeds from the appellant. Therefore, we find that observations and conclusion drawn by the Adjudicating Authority is not suffering from any infirmity.

vi) Annexure-D6 concerns with recovery of irregular credit of Rs.13,70,266/- during the period October, 2003 to February, 2005 on inputs without actually receiving in the factory. While the appellants have contested that they are eligible to take credit as the inputs were actually received in the factory and that the private records were unreliable as the raw materials issued from RG23A should not be confused with actual consumption. The Adjudicating Authority held that the private record is complete record of consumption of raw materials during the period 02/2004 to 12/2004 and 2004-05 and that there is no solid evidence to rebut the allegation. We also note that the MD of the appellant, when asked to explain the details in files containing a number of chits admitted that they did not account for the receipt and consumption of RP granules fully in their records and they sent PP waste purchased to MRM for conversion into granules on job-work basis and received on job-work challans and admitted that they failed to account for the receipt and consumption of reprocessed granules.

vii) The demand covered by Annexure-D7 relates to appellant availing credit of Rs.4,64,991/- irregularly on HDPE granules without using the same in the manufacture of FG. The appellants are mainly contesting that HDPE granules were sent to SPM polymers who were using it for manufacturing furniture parts. In the issue slips, since there was no column printed for HDPE granules, as such, the same was not shown. The Adjudicating Authority has observed that even if HDPE granules were sent to their job worker, that should have been under proper procedure and accounting and therefore, the reply is not tenable. We find that it is an admitted position that HDPE granules cannot be an input which has been used for manufacture of chair by the appellant. Though the claim of the appellant is that it was sent for manufacturing of certain furniture parts but there was neither any evidence to that effect nor any prescribed procedure was followed. Therefore, in the absence of any tangible and cogent evidence, the defence of the appellant is not tenable and therefore, we find no infirmity in the order of the Adjudicating Authority in this regard.

viii) Annexure-D8 covers the demand of Rs.1,68,384/- in respect of irregularly availed credit with regard to certain inputs cleared to job worker. We find that Adjudicating Authority has observed that since no record of job challans were issued for inputs supply and receipt of FG, it will not be possible for the department to correlate the same. We also note that the MD of the appellant, in his statement, has stated, inter alia, that they have cleared certain quantity of inputs on which Cenvat credit was availed without raising invoices and without paying duty equivalent to Cenvat credit availed.

13. Therefore, we find that the whole case is based on recovery of private records showing certain production of excisable goods, their clearances and also receipt on payment, etc., in relation to such clandestinely removed goods. The department has also adduced evidence to support as to from where the raw materials were brought in without accounting for the same which have been used for manufacture of certain unaccounted furniture cleared to some of the dealers, who have also corroborated the same by admitting that they have received certain chairs without payment of duty and in respect of some, they have paid to the appellant in cash. We find that when clandestine removal takes place, there has to be certain amount of clandestine production and also use of certain unaccounted raw materials, etc., without taking them on record. Similarly, when clandestine clearances take place, the sale proceeds cannot be reflected in their regular accounts. The detailed investigation has clearly brought out various evidences in this regards, as discussed in detail by the Adjudicating Authority. We also find that authenticity and veracity of these private records have not been denied by the Managing Director of the appellant himself and in fact, it gets further corroborated by the statements made even by the people who are not the employees of the appellant company. Thus, a holistic evaluation of all the evidence on record and categorical averments and statements of MD of the appellant relating to such documents and the statements given by some of his key employees would lead to an inevitable conclusion that clandestine manufacture has taken place in the appellant’s manufacturing facility.

Further, such clandestinely manufactured goods have been cleared to certain dealers who have paid the money in relation thereto to the appellant not through the regular channel, as is normally being done in relation to duty paid furniture received from the appellant but in cash.

14. We find that the various objections taken by the appellant are having one common theme that the entire case is based on self incriminating statements and there is no corroborative evidence. We fail to understand that when the Managing Director himself has admitted the veracity of all the documents relied upon, as also the relied upon statements recorded under section 14 of the Central Excise Act, where is the room for doubting the conclusion drawn based on those documents. It is also an admitted fact that none of these statements have been retracted.

15. We have also perused the judgments relied upon by the Revenue in support of their arguments. In the case of Ramachandra Rexins Pvt Ltd Vs CCE, Bangalore (supra), the Coordinate Bench, inter alia, upheld the demand based on establishment of unaccounted production and other related evidence suggesting clandestine removal and relying on the statements of the employees. It was also observed that in the case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by Department in mathematical precision. The relevant para is cited below:-

> *"7.2 In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by Department in mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt', as the decision is being rendered in quasi-judicial proceedings."*

16. In the case of CCE, Mumbai Vs Champion Confectionery (supra), the Bench, inter alia, upheld the demand of duty in respect of clandestine removal of goods relying on the statements, even when the said statements were retracted by the people who made the statements. While evaluating various evidences including statements, etc., it held that evidence relating to excess unaccounted stock found on the date of visit and the quantum of

unaccounted clearances on certain date itself can be reasonable to conclude that the clandestine clearances are substantial.

17. In the case of Alagappa Cements Pvt Ltd Vs CEGAT (supra), Hon'ble Madras High Court took into account the fact of shortage of clinkers and excess quantity of limestone quarried was sufficient ground to conclude clandestine manufacture. The relevant para is reproduced below:-

> *"6. Having heard the learned counsel for the appellant as well as the learned standing counsel for the respondents, we find force in the submission of the learned standing counsel for the respondents. In paragraph 14(ii) of the Order in Original No.15 of 1996, the names of the officers who were present at the time of inspection have been specifically noted. The officers whose statements were recorded and who pleaded their ignorance for the shortage in clinkers have also been noted. The original authority made a specific reference to the assessee's letter dated 23.7.93, wherein the appellant disputed the manner in which the stock of clinkers was taken, but there was no explanation for its silence between 20th July, 1993 and 23rd July, 1993. The said observation of the original authority is quite convincing and acceptable. If really the inspecting officials did not make proper verification of the stock at the time of inspection, it is quite normal that the aggrieved assessee would have immediately objected to any such improper method of verification of stock then and there. When two of the officials gave their statements expressing their ignorance about the shortage of clinkers, it was for the appellant to satisfactorily explain the said defect in the maintenance of records or the actual availability of stock. Moreover, the stock verification disclosed a book stock of 1214.579 metric tons when the physical stock available was only 123.500 metric tons of clinkers. That apart, the unloading of coke breeze to the extent of 1445.325 metric tons during the period from 8.4.93 to 13.4.93, as against the quantity of 232.2 metric tons disclosed in Form IV register, only shows that such irregular maintenance of stock in the appellant's manufacturing premises was a usual phenomenon. That apart, when the difference in the quantity of limestone was noted, it also showed the excess quantity of removal of limestone by the appellant. The only explanation was that such excess removal of limestone was shown to satisfy the State Government authorities or otherwise, there was every likelihood of cancellation of their permission. Again, when the said defect was noted with reference to the entries found in the daily despatch sheet supported by the statement of the accountant of the factory, the appellant had no answer at all. Admittedly, the manufacture of Portland cement is made by using limestone, clay, coke breeze and gypsum. It is stated that the limestone and clay are mixed in appropriate proportion, which is the raw material, and the raw material is charged with coke breeze and fired in a vertical shaft kiln and the clinker is manufactured. Thereafter, the clinker is mixed with gypsum and the resultant product is called Portland cement. Therefore, when the limestone is the basic raw material which is used for the manufacture of clinker and thereafter for the manufacture of Portland cement, it was incumbent upon the appellant to have satisfactorily explained the missing quantity of clinkers to an extent of 1214.579 metric tons. It is quite apparent that large quantity of limestone quarried, as reflected by the records of the appellant, and the shortage of 1214.579 metric tons of clinkers both put together, the conclusion drawn by the inspecting officials to the effect that it resulted in clandestine*

manufacture of cement not brought into accounts was justified and consequently the escapement of duty in that process as assessed cannot be faulted. We fail to understand as to how the appellant is justified in contending that in the absence of positive proof as regards the actual manufacture of cement not brought into accounts, then alone the conclusion of the original authority as well as the first respondent can be justified cannot be accepted. The inference drawn by the second respondent based on shortage of clinkers and the excess quantity of limestone quarried during the relevant period was sufficient enough for the authorities to conclude as to the ultimate quantity of Portland cement which could have been produced from such excess quantity, which were not noted in the stock register, was well justified and we do not find any illegality or irregularity in such a conclusion drawn by the authorities for the levy of duty and the demand of duty imposed. Inasmuch as the first respondent has chosen to delete the penalty, that itself was a grace shown to the appellant while passing the order impugned in this appeal."

18. The Larger Bench of the Tribunal in the case of Gopal Industries Ltd Vs CCE, Indore (supra), examined, inter alia, the issue of clandestine manufacture and removal based on certain evidences. The relevant para is reproduced below for ease of reference:-

"18.1 The "Daily report tin factory" note-book contained details of production and issue of tin containers by the appellant, which did not reflect in the statutory record. The details of production and clearance of tin containers were also shown in the note-book 'Daily production report' separately in respect of the appellant firm which tallied with the figures shown in the 'Daily report tin factory' which contained figures both for the 'new' tin factory as well in the name of the appellant. In this context, it will be noticed that the managing partner Shri Yogesh Garg confirmed in his statement recorded on 29-9-1998 that the documents recovered under the panchnama on 1-9-1998 were pertaining to production and clearance of tin containers by their factory. He stated that these documents consisted of daily production reports written in note-books, delivery challans, stock record of tins etc. The documents recovered pertained to production and clearance of tin containers. He also stated that amongst other supervisors, even Awadesh Kumar Saxena, Electronics Engineer looked after the production and clearance of the goods of the factory. The authorized signatory of the appellant Girijesh Kumar Rai, confirmed in his statement recorded on 28-9-1998 that the records shown to him were withdrawn from the factory of the appellant in his presence and that he had put his signatures on the said documents at the time of withdrawal on 1-9-1998. The Electronics Engineer, Shri Awadesh Kumar Saxena in his statement dated 28-9-1998 admitted that the portion of daily production reports note-book pertaining to the appellants was prepared by him and that challans and daily production reports which bear his signatures, were prepared by him and they were of the appellant firm. According to him, the daily production report depicted the number of tin containers produced/ manufactured on a specific day. Whenever, he prepared the daily production report/challan he submitted the original copy to the Managing Director. The facts revealed by the Managing Director, Shri Yogesh Garg, the authorized signatory, Shri Girijesh Rai and Shri Awadesh Kumar Saxena make it clear that the said private documents recovered from the appellant premises on 1-9-1998 were maintained by the appellant and that the record, namely, the daily production reports, challans etc. were pertaining to the clandestine production and removal of tin containers

without payment of duty. We have perused copies of these two note-books containing the private record and we find that there were signatures of Awadesh Kumar Saxena, Electronics Engineer at various places. The daily report showed particulars of the opening stock, production and the closing stock of the said excisable goods. Admittedly, the production of the tin containers, which was recorded in these daily record books and which were removed, did not appear in the statutory record i.e. RG. 1 register of the appellant. This not a case where mere private record without anything more is relied upon. The private record was recovered from the factory of the appellant, and it is established beyond doubt and not even disputed that it was so recovered and that it belonged to the appellant. The nature of particulars contained in this private record clearly go to show their intrinsic authenticity about the clandestine production and removal of the excisable goods by the appellants who had obtained the excise registration for the manufacture of such goods in the firm name. There cannot be more authentic evidence than recovery of the said private record from the appellant's factory which admittedly was prepared and bears the signatures of the supervisors of the appellant, and which is proved to have been maintained in the factory, from the statements of the partner Shri Yogesh Garg, the Electronics Engineer, Shri Awadesh Kumar Saxena who has made several daily reports in the said book, and the authorized signatory, Shri Girijesh Rai in whose presence the note-books were recovered under a panchnama. In answer to question No. 18, Shri Awadesh Kumar Saxena who was shown the Daily production reports, stated in his statement dated 29-9-1998 that all these pertained to the appellants who manufactured the tin containers and that these contained information regarding production and clearance. He also stated in reply to question No. 19 that all challans were prepared by Shri Rajeev Agarwal and others whose signatures he recognized. The authenticity of the recovered documents was admitted by the partner Yogesh Garg [noticee No. (2)] and noticee No. (6) (Girijesh Rai) who also admitted that the record pertained to unaccounted for production and clearance of the tin containers by the appellant. Any subsequent retraction by Shri Awadesh Kumar Saxena has been rightly held to be an afterthought to protect the noticees. This is not a case where any defence was taken up about less consumption of electricity that would have impelled the Revenue Officers to examine consumption of electricity. When production and removal of excisable goods in a clandestine manner is established by such positive documentary evidence and the oral evidence of the managing partner and the supervisor, it cannot be said that the Commissioner committed any error in holding that the appellant had manufactured and cleared tin containers in a clandestine manner. The quantum of liability which is worked out, has not been disputed before us. We find ourselves in complete agreement with the reasoning and findings of the learned Commissioner in holding that the charge of clandestine removal of tin containers by the appellants was established beyond doubt. No further corroboration was required in view of the clinching nature of the oral and documentary evidence establishing clandestine production and removal of tin containers by the appellant. It is evident that Shri Yogesh Garg, noticee No. (2), partner of the appellant, was in charge of the unit and was having overall control of the affairs of the unit. It was, therefore, rightly held that he was aware that the goods clandestinely manufactured and removed in the name of his partnership firm were liable to be confiscated."

19. We find that in the case of CCE, Mumbai Vs Kalvert Foods India Pvt Ltd [2011 (270) ELT 643 (SC)], the Hon'ble Supreme Court has dealt with

demand on the basis of clandestine removal, wherein the reliance was placed on the statement of managing director, buyer and production supervisor. The Hon'ble Supreme Court, inter alia, made an observation that for the statements made before Central Excise officer cannot be considered, looked into and relied upon. The relevant paras are reproduced below:-

> *"18. During the course of arguments learned counsel appearing for the respondent submitted before us that although the aforesaid statements of Managing Director of the Company and other persons were recorded during the course of judicial proceedings but the same were retracted statements, and therefore, they cannot be relied upon. However, the statements were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Director of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon.*
>
> *19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides, the Managing Director of the Company on his own volition deposited the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstance of the present case, the aforesaid statement of the counsel for the respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."*

20. We also find that in the case of Erode Annai Spinning Mills (P) Ltd Vs Commissioner [2019 (368) ELT A155 (SC)], the Hon'ble Supreme Court dismissed the SLP filed by the appellant. In this case, the assessee had come in appeal against the order of the Madras High Court, who set aside the order of the Tribunal, wherein the Tribunal had discredited the statements of the buyer. The Hon'ble Supreme Court, inter alia, observed that the department has discharged its initial burden by way of recovery of documents such as in-passes, etc., and recording the statements of the Managing Director/Director of the assessee as well as statement of the buyers of the goods, the assessee had failed to discharge its onus by independent evidences.

21. In the case of CCE, Salem Vs CESTAT, Chennai [2019 (366) ELT 647 (Mad)], the Hon'ble High Court of Madras, inter alia, observed that in the case of clandestine removal, the initial burden is on the department,

however, if the department is able to prima facie establish case of clandestine removal, violation of excise procedure, burden would shift on assessee to prove that he is innocent. Para 7 is reproduced below:-

> *"7. The allegation against the assessee is one of clandestine removal by way of removing dutiable product namely cheese/cone yarn in the guise of exempted product-hank yarn to their buyers. The Tribunal faulted the Commissioner for confirming the duty liability on the ground that there was no acceptable evidence available with him and the assessee cannot be charged with the offence of clandestine removal of goods without payment of duty based upon confession statement, which were retracted. Further, the Tribunal opined that the registers were not properly maintained and they were unreliable and there cannot be any demand for duty, based on those documents. The burden of http://www.judis.nic.in proof in a case of clandestine removal is undoubtedly on the department. It cannot be denied that clandestine removal is often done in a surreptitious and secret manner and will never be an open transaction. At times, in such cases of clandestine removal, clinching documents will be available. Thus, if the department is able to prima facie establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent. Thus, the standard and degree of proof which is required in other cases may not be the same as that of the case, where the allegation is one of clandestine removal. Similar view was taken in the case of M/s. Lawn Textile Mills Pvt., limited vs. CESTAT and others in CMA No.1011 of 2017, dated 04.09.2018."*

The Hon'ble High Court also upheld the conclusion of the Adjudicating Authority to the effect that there are good and sufficient reasons as to why the assessee had effected clandestine clearances observing that majority of buyers of the yarn from the assessee have given statements under section 14 of the Act stating that they are manufacturing terry towels from the goods purchased from the assessee in their power looms, which goes to show that they cannot use hank yarn and this evidence was also brushed aside by the Tribunal. Therefore, the order of the Tribunal was set aside being perverse and the appeals filed by the Revenue were allowed.

22. Essentially, what emerges from the judgments cited in foregoing paras is that when there is clear-cut admitted position and facts in terms of statements recorded by the responsible persons admitting narration in such private records, the conclusion drawn based on said documents along with statements of corroborative nature in itself would be sufficient evidence for alleging clandestine removal. It is obvious that in the case of clandestine manufacture and removal it cannot be proved with mathematical precision and therefore, preponderance of probability in itself would be a good ground for establishing the allegation unless it has been rebutted strongly with the cogent evidence to the contrary. In the present appeal, we find that each

and every argument and defence taken by the appellant has been considered and examined by the Adjudicating Authority before arriving at his conclusion. Therefore, we do not find any infirmity in the order passed by the Adjudicating Authority except to the extent of not excluding the amount from the confirmed demand where the demand itself has been dropped on merit.

23. Accordingly, the OIO is upheld except to the extent modified. Appeal E/266/2009 is dismissed.

24. Insofar as the appeal filed by the MD of the appellant i.e., E/267/2009 is concerned, we find that in the facts of the case, the statements given by the Managing Director is quite clear and it is obvious that he was overall in-charge and was fully aware of various private accounts being maintained by his employees. He has not been able to give any cogent reason or any other evidence that he was not aware about these irregularities and deliberate clearances without following prescribed procedure or receipt of cash in respect of goods cleared clandestinely. Therefore, there was sufficient ground for imposition of penalty on him. Therefore, we do not find any infirmity in the order of the Adjudicating Authority in imposing penalty on Mr. M.V. Sekhar Rao, the Manging Director of the appellant company. Accordingly, Appeal E/267/2009 is dismissed.

(Pronounced in the Open Court on 30.04.2025)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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