IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing: 17.9.2018
Date of Pronouncement: 02.01.2019

Appeal No. E/75654/2015-DB
E/75653/2015

(Arising out of Order-in-Original No. 07/Commr/DGP/15 dated 31.3.2015 passed by the Commissioner of Central Excise, Durgapur)

M/s Amit Metaliks Ltd. Appellant
Shri Amit Kumar Singh, Director

Vs.

CCE & ST, Durgapur Respondent

Appearance

Shri S. Bagaria, Advocate - for the appellant

Shri S.S. Chattopadhyay, AR - for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No. FO/A/75023-75024/2019

Per Bijay Kumar :

Both these appeals arises out of common adjudication order and, therefore, is being disposed of together by this order.

2. The brief facts of the case is that the appellant are having their factory in industrial area, Durgapur and registered with Central Excise department for manufacture of MS billets, MS round, TMT bars etc. falling under Chapter 72 of the first schedule to Central Excise Tariff Act, 1985.

3. Acting upon the intelligence that the appellant is indulging in clandestine removal of their finished goods and also inputs without proper discharge of Central Excise duty, a stock taking was undertaken by the Preventive Wing of Durgapur, Central Excise Division on 30.1.2012. During the Preventive Check the officer undertook the stock challenge of finished goods viz. MS billets and also stock of inputs, such as sponge iron, pig iron and MS billet as raw material within the factory. While conducting the joint physical verification of finished goods and inputs as indicated above, the stock of physical stocks of MS billet (finished goods) inside the factory of Appellant No. (1) was found to be NIL. However, the daily stock account maintained reflected the opening balance on the day of stock taking i.e. on 30.1.2012 as 1948.045 MT. Similarly the shortage was also noticed in the raw materials and inputs being utilised by the Appellant No. 1 in respect of pig iron, MS billet and sponge iron. During the search operation and investigation records were resumed by the departmental officer and the statements of the key person viz. Commercial Manager and Authorised Representative of the Appellant No. 1 and their Director, (Noticee No. 2) were also recorded on various occasions. It was seen during the stock verification that the shortage in respect of finished goods as well as key inputs were found to be not tallying as per the record maintained by the Appellant No. 1 and also ER-I, ER-5 and ER-6

returns submitted to the department. After the completion of investigation, the show cause cum demand notice No. V(15)16/ADJ/DGP-IV/CE/Bol/13 dated 16.1.2013 was issued to both (Noticee No. 1 & 2) demanding the Central Excise duty as per the show cause notice in respect of unaccounted finished goods and also the various inputs as indicated above. The show cause notice culminated into the impugned order, which is under challenge in the proceeding in this proceeding.

4. Ld. Advocate on behalf of the appellant submits that during the search and the process of investigation all the record were resumed and perused by the departmental officer and statements of the key persons were also recorded by the department. However, no evidence whatsoever were collected regarding clearance of the finished goods as well as input, alleged to have been found short at the time of joint stock taking. It is also submitted that such a huge amount of shortage of inputs and raw material and the conclusion thereafter that the same has been removed without payment of appropriate Central Excise duty required large number of rounds of trucks for the transportation. The department has not laid any evidence about such movement of finished goods/input alleged to have been clandestinely removed without payment of duty. No documents relating to transportation of alleged finished goods/raw material from the factory was found to be removed to any of the

buyer. During the investigation, department has got the complete address of most of the appellant's buyers. However, no enquiry was conducted at the buyer's end so as to ascertain about the receipt of any quantity of finished goods or input to them without payment of duty. It is also submitted by the ld. Advocate that the allegation of clandestine removal cannot be substantiated without having any evidence of receipt of additional amount as a sale proceed by the appellant. The department also did not found any evidence about the deployment of extra labour, electricity for the manufacture of finished goods by the appellant.

5. From the statements of key persons, it is not evident that they have admitted any clandestine removal of goods as such. It is on record that Shri Rajendra Kumar Mishra, Commercial Manager and Authorised Signatory of the appellant unit were summoned on various occasions and was asked to explain the shortage noticed in respect of finished excisable goods and cenvatable inputs. While admitting the shortage of these goods, he never admitted the same to have been clandestinely removed. In his statement, he only stated that he will discuss the shortage with the management and take appropriate steps.

6. Statement of Shri Amit Kumar, Noticee No. 2, Director of the company was also recorded by the department on various occasions.

He was categorically asked about the shortage of the finished goods and cenvatable input found during the joint stock taking. While he agreed the shortage found during the joint stock taking by the departmental officer but never ever accepted the clandestine removal of such goods. In reply to repeated question, he stated that he is in agreement with statement given by the Authorised Signatory and Commercial Manager of the appellant. He also submitted that the unit is medium scale integrated plant and physical shortage of finished goods and raw material could be due to various reasons such as stock lying in the furnace or at the TMT shop floor or even in the slags lying scattered in the various area of the manufacturing plant. He further stated that the joint stock verification was not conducted in an appropriate manner considering the entire stock of finished goods and the input lying in the factory. When asked about the recovery of three pen drives from the office of Appellant No. 1, he agreed that these contained the data regarding stock position, bank statement etc. However, the details thereof could be obtained from the Authorised Representative. He also submitted that the stock entry of the raw material and finished goods in their books of accounts are entered on the basis of eye estimation and therefore, there could be reason of the variation in the stock of inputs and finished goods. Thus, he never accepted.

7. It was also submitted by the ld. Advocate that the adjudicating authority failed to appreciate that in the present case, there is no evidence regarding :

(i) About clearance or sale of transportation of extra quantity of raw material;

(ii) About receipt of price for any extra quantity;

(iii) About any buyer having received any extra quantity;

(iv) No extra quantity of finished goods or raw material was found at the factory or any other place;

(v) There was no seizure of goods.

(vi) The appellant was never found clearing any goods without Central Excise invoice in a clandestine manner.

8. Further ld. Advocate submits that the ld. Adjudicating authority has failed to appreciate that the allegation of clandestine removal of finished goods and raw materials are purely based on the assumption and presumption and surmise and conjectures. As stated above, no investigation was carried by the department to substantiate the charge of clandestine removal which is a serious one. Any allegation of clandestine removal is required to be supported by positive and tangible evidence. The burden of proof to support any such allegation is on the department and the said

burden is required to be discharged by a proper corroborative and positive evidence.

9. It is contended, on behalf of the appellant, that the Commissioner in his order failed to appreciate the appellant system of manufacture of goods and manufacturing process. The appellant submits that the sponge iron, pig iron and scrap are used as the raw material for manufacture of TMT billets. The TMT billets so produced are either cleared as final goods or as taken as raw material for the manufacture of TMT bars. During the process of manufacture of MS billets huge quantity of slag is generated, which contains huge quantity of sponge iron, pig iron and brass. Besides, sufficient quantity of sponge iron, pig iron and scrap are within the furnace every time and about 150-200 MT of MS billets were always present within the reheating furnace for production of TMT bars because of its nature of continuous processing. The departmental officers have ignored the same while conducting the joint stock verification. The ld. adjudicating authority also failed to appreciate the fact that the entire stock taking done at the time of joint stock verification could not have been possible within a period of two days considering the quantity involved for the weighment. The weigment slip which have been adduced evidence would not have been carried out in actual since considering the time required for such weighment. From the perusal of the weigment slip, it appears that

the gross amount per truck has been more than 40 MT in each case. It was submitted that when the capacity of truck are around 20-22 MT, such enormous increase in the gross weight evidenced the fact that weighment done by the department is arbitrary and has been conducted in an illegal manner.

10. The ld. Adjudicating authority also failed to appreciate that in the steel industry there is a burning loss on account of poor quality of raw materials, low metal recovery etc. which contribute in a lesser yield, the ld. Advocate states.

11. The ld. Advocate also states that it is evident from the adjudication order that the Commissioner has presumed the clandestine removal of the shortage found on the basis of a statements of authorised signatory and Director of the appellant noticee. However, the Commissioner has failed to appreciate that none of these two authorities have accepted the clandestine clearance of finished goods or raw material but for the alleged shortage.

12. Ld. Adjudicating authority also failed to appreciate that the appellant has taken the credit on the service tax paid on the goods transport agency services on the basis of reverse charge which were used in relation to manufacture of final goods. The department has

adduced no evidence whatsoever to allege that the said inputs were not used in relation to manufacture of finished product. In the last, it was submitted that along with a reply the appellant has submitted a large number of cases in support of the claim that no clandestine removal of the finished/raw materials who were undertaken. However, none of these decisions were considered by the ld. Adjudicating authority. These cases are reproduced as under :

(1) ***Sarin & Sarin & Ors. Vs. CCE*** – 2014 (202) ECR 163 (T);

(2) ***Nissan Thermoware Pvt. Ltd. Vs. CCE*** – 2009 (246) ELT 191 (T);

(3) ***CCE & ST, Vs. Nissan Thermoware Pvt. Ltd.*** – 2011 (266) ELT 45 (Guj-HC);

(4) ***Sakeen Alloys Pvt. Ltd. Vs. CCE*** – 2013 (296) ELT 392 (T);

(5) ***Central Cables Ltd. Vs. CCE*** – 2011 (272) ELT 735 (T);

(6) ***RHL Profiles Ltd. Vs. CCE*** – 2013 (298) ELT 552 (T);

(7) ***Everest Rolling Mills Pvt. Ltd. Vs. CCE*** – 2013 (292) ELT 397 (T);

(8) ***Kakkar Complex Steels P. Ltd. Vs. CCE*** – 2013 (290) ELT 103 (T);

(9) ***Swaroop Casting P. Ltd. Vs. CCE*** – 2013 (290) ELT 392 (T);

(10) ***CCE Vs. Roll Tubes Ltd.*** – 2011 (265) ELT 414 (T);

(11) ***Galaxy Textiles Vs. CCE*** – 2011 (263) ELT 604 (T);

(12) ***Sunder Silk Mills (P) Ltd. Vs. CCE*** – 2003 (153) ELT 176 (T);

(13) ***Kirtibhai Maganbhai Patel Vs. CCE*** – 2003 (159) ELT 1162 (T);

(14) ***Associated Cylinder Industries Ltd. Vs. CCE*** – 1990 (48) ELT 460 (T);

(15) ***CCE Vs. South Asia Tyres Ltd.*** – 2007 (219) ELT 586 (T);

(16) ***Bhushan Strips Ltd. Vs. CCE*** – 2005 (179) ELT 419(T);

(17) ***Oudh Sugar Mills Ltd. Vs. UOI*** – 1978 (2) ELT J-172 (SC);

(18) ***Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CCE*** – 2006 (205) ELT 700 (T);

(19) ***M. Veerabadhran Vs. CCE*** – 2005 (182) ELT 389 (T);

(20) ***Durga Trading Company Vs. CCE*** – 2002 (148) ELT 967 (T);

(21) ***Vikram Cement (P) Ltd. Vs. CCE*** – 2012 (286) ELT 615 (T);

(22) ***Zenith Fibres Ltd. Vs. CCE*** – 2014 (302) ELT 423 (T);

(23) ***R.S. Industries Vs. CCE*** – 2014 (301) ELT 382 (T);

(24) ***Radha Krishna Alloys Pvt. Ltd. Vs. CCE*** – 2010 (262) ELT 939 (T);

(25) ***Castrol India Ltd. Vs. CCE*** – 2008 (222) ELT 408 (T);

(26) ***Air Carrying Corporation P. Ltd. Vs. CCE*** – 2008 (229) ELT 80 (T).

13. In view of above, the ld. Advocate is of the view that the impugned order is not sustainable and is required to be set aside in appeal.

14. Ld. AR supported the impugned order and stated that the shortage has been not only accepted by the appellant but also substantial amount of duty has been paid by them voluntarily either by cash deposit or through adjustment of PLA. The shortage noticed has been accepted by the authorised representative of the appellant including their Director (Noticee No. 2) and, therefore, no further evidence was required to be laid by the department to prove the clandestine removal of finished goods and cenvatable input.

15. Ld. AR also submits that the ld. Adjudicating authority has rightly relied upon the decision of ***Columbia Electronics Vs. CCE*** - 2002 (143) ELT 635

16. Ld. AR also submitted the following case law:

(i) Decision of Hon'ble High Court in the case of ***Bajrang Petro Chemicals (P) Ltd. Vs. CCE, Kanpur-*** 2015 (317) ELT 243, wherein it is held that huge shortage of finished goods for which no explanation was offered by the appellant at the time of stock taking and accordingly the appellant admitted that the goods found short has been removed without payment of duty. Clandestine removal are not required to be explained.

(ii) Further, ld. AR also relied upon the decision of ***Shivam Smelters Pvt. Ltd. Vs. CCE*** - 2015 (325) ELT 362 (T).

(iii) ***Usman Suleiman Darvesh Vs. CCE -*** 2017 (358) ELT 1014, wherein it is held that in case of clandestine removal pre-ponderance of probabilities are required. Relying on the apex court decision in the case of ***CC Vs. D. Bhoormull*** - 1983 (13) ELT 1546 (SC), wherein it is held that law does not require prosecution to prove impossible but requires establishment of such decree or probability that a prudent man may believe in existence of the fact of issue. Thus applying the probability principle, the clandestine removal is required to be upheld in this case.

17. The ld. AR further relied upon the decision in the case of ***CCE, Chandigarh Vs. Vinay Traders*** - 2016 (340) ELT 521(Tri.-Del.), ***CCE & ST BBSR-I Vs. Pentagon Steel P. Ltd.*** - 2013 (288) ELT 271 (Tri.-Kolkata) and decision of Hon'ble High Court in case of ***Pre-stressed Udyog (India) Pvt. Ltd. Vs. CCE*** 2012 (284) ELT 12 (Ranchi). In these cases, it has been held that the assessee has failed to account for the shortages of inputs or finished goods in the stock at the time of verification the liability of payment of duty on such shortage cannot be escaped. In view of aforesaid decision, he argued that the department has made a strong case against the appellant regarding the clandestine removal of the goods.

18. We have heard the ld. Advocate on behalf of the appellant and ld. AR on behalf of the Revenue and also perused the appeal record.

19. The issue before us is to decide as to whether the department was right in fastening the duty on account of shortage of the finished

goods, and raw material found during the joint stock verification. It was presumed by the department that since the authorised representative and the Director of the noticee have accepted the shortage and also made voluntary payment the clandestine removal is accepted by them and hence no further proof is required to that effect. Ld. AR has relied upon the various decisions, wherein it has been held that once the shortage is accepted, no further proof is required for the clandestine removal of the goods. But we feel that the same cannot be applied in the facts and circumstances of present case because the assessee is never accepted the shortage as claimed by the Revenue but paid the Central Excise duty to avoid further litigation and coercion. We also find that the department has not conducted any verification at the buyer/supplier's end in spite of having complete address with them. In this regard, we find that the issue regarding clandestine removal on account of mere shortage of the goods have been subject matter of various decisions by this Hon'ble Tribunal. We would like to refer some of them for the adjudication of present dispute before us. In the case of ***Nissan Thermoware Pvt. Ltd. Vs. CCE, Daman, Vapi*** – 2009 (246) ELT 191 (Tri.-Ahmd.) it is held that a shortage of one of the material and the Director admitting manufacture using said input and clearance of final product. Para 6 of the order is reproduced as under :

> "6. I find in the instant case that, apart from the disputed shortage detected by the officers in one of the raw materials (other being in accordance with the recorded balance in the statutory records) and the statement of the Director, there is

no independent evidence available on the record, indicating any clandestine manufacture and removal of final products. As such, by extending the benefit of doubt to the appellants, I set aside the impugned order and allow all the two appeals with consequential relief to the appellants."

The decision of Hon'ble Tribunal was upheld by Hon'ble High Court of Gujarat in the case of ***CCE, Cus. & Ser. Tax, Daman Vs. Nissan thermoware P. Ltd.*** – 2011 (266) ELT 45 (Guj.):

"In this appeal under Section 35G of the Central Excise Act, 1944 (the Act), the Commissioner, Central Excise, Customs and Service Tax, Daman has challenged order dated 25th March, 2009 [2009 (246) E.L.T. 191 (Tribunal)] made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) proposing the following two questions :-

1. Whether the learned Tribunal is right in law in holding that the clandestine manufacture and removal of final product by the assessee company was not proved in view of absence of independent evidence and was right in allowing appeal extending the benefit of doubt to the appellant when the raw material noticed was short of the statutory record which was noticed in presence of independent panch witness?

2. Whether the learned Tribunal is right in allowing the appeal though the raw material which was being noticed as short and the resultant excisable manufacture goods were removed without account, without producing C. Ex. Invoices and without payment of C. Ex. Duty, as admitted by the director of assessee Unit?

3. The respondent assessee is engaged in the manufacture of water bottles, water jugs, casseroles and tiffins etc. of insulated ware falling under Chapter 39 of the Central Excise Tariff Act, 1985. The Central Excise officers during physical verification of the stock of raw materials while conducting preventive checks at the factory premises of the assessee, found shortage of 9975 kgs. HD as compared to the stock shown in RG-23A, Part-I Register. The Director of the Company admitted the use of the same in the manufacture of water jugs which had been cleared clandestinely without payment of duty. The assessee also debited duty payment of

Rs. 1,23,464/- in its Modvat account. Pursuant to the aforesaid, a show cause notice came to be issued to the assessee, which culminated into an order made by the adjudicating authority confirming the duty and the penalty on the assessee and personal penalty of the Director. The assessee as well as the Director carried the matter by filing separate appeals before the Commissioner (Appeals) who vide order dated 15th February, 2008 dismissed the appeals. Both the assessee as well as the Director preferred separate second appeals before the Tribunal, which came to be allowed vide a common order.

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

9. In the circumstances, there being no infirmity in the impugned order of the Tribunal, the same does not give rise to any question of law so as to warrant interference. The appeal is, therefore, dismissed."

In the case of M/s ***Sakeen Alloys Pvt. Ltd. Vs. CCE, Ahmedabad*** – 2013 (196) ELT 392 (Tri.-Ahmd.), in para 9 and 11, it is held as under

"**9.** It is observed from the case records that in the present proceedings, there are few confessional statements of the persons which were later retracted by the persons concerned. The confessional statements subsequently retracted can be argued to be an afterthought under a proper legal advice but to observe the principles of natural justice, it becomes necessary to provide cross-examination of such witnesses, as held by various judicial courts including the Hon'ble Supreme Court relied upon by the appellants. In the case of *CCE* v. *Omkar Textiles* - 2010 (259) E.L.T. 687 (Guj.), it was held by the Jurisdictional Gujarat High Court that onus is on the Revenue to furnish the evidence to prove the charges of clandestine removal and it is not sufficient if some confessional statements have been given by the Director of the Company. Similarly, in the case of *CCE* v. *Arsh Casting Pvt. Limited* [2010 (252) E.L.T. 191 (H.P.)], the Hon'ble High Court of Himachal Pradesh held that the private records maintained by the staff of the company cannot be made as the sole evidence to hold that clandestine removal of the goods is established and accordingly, the following point of law was decided in favour of the assessee:-

"Whether on the basis of private records, the Central Excise duty can be demanded or not when these private records show higher production than that reflected in the statutory records resulting into removal of the excess stock clandestinely i.e. without issue of invoice and without making entries of production and clearance in the statutory records?"

11. From the above settled law, it is clear that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statements which are retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. In the present case also, it is observed, from the annexures to the show cause notice dated 1-5-2009 issued to the appellants, that there were huge cash transactions to the tune of Rs. 11.23 Crores. When such large number of transactions involving huge amounts are being undertaken in clandestine removal activities, it is very likely that some cash would have been seized. There is not a single instance where either seizure of cash is made or any clandestinely removed goods are seized or raw materials/finished goods were found either short or in excess in the factory premises of the appellant or at any other place. As per the Panchnama drawn at the factory premises it is shown that there was no excess/shortage of the raw materials or finished goods found. The documentary evidences collected from the business premises of M/s. Sunrise Enterprise and the statements recorded by investigation, can at the most raise a reasonable doubt that some clandestine removal activities are undertaken by the appellant. However, such a suspicion or doubt has to be strengthened by positive evidences which seem to be lacking in this case. Any suspicion whosoever cannot take the place of evidence regarding clandestine removal of excisable goods. Moreover, after having positive evidences, quantification of duty on clandestinely removed goods also becomes essential. As already mentioned above, the stock lying in the stock yard of M/s. Sunrise Enterprise, Mehsana was found containing the goods received from M/s. Sakeen Alloys Pvt. Limited under proper invoices. When the goods received under proper invoices are found in the stock yard of M/s. Sunrise Enterprise, then it is possible that out of such goods certain quantities were sold to various customers by accepting payment in cash. In such a situation, the quantification undertaken by the investigation becomes doubtful and incorrect. For this purpose cross-examination of the person Incharge looking after the records of M/s. Sunrise Enterprise was must, which was not allowed by the adjudicating authority. In view of the above observations, the demand of duty of Rs. 1,85,10,861/- is not sustainable and is required to be set aside."

20. Further, the Hon'ble Tribunal in the case of ***Central Cables Ltd. Vs. CCE, Nagpur*** – 2011 (272) ELT 735 (Tri.-Mumbai) held that stock taking by Revenue officers not considering inputs for manufacture and clearance not entered in statutory records before the stock taking. In this case, though the assessee failed to explain the shortage during the visit of Revenue officers, but they did not admit the same and submitted all information along with reconciliation statement. In absence of corroborative evidence, allegation of clandestine removal was not sustainable assessee was only liable for non-maintenance of statutory record. The relevant para 8 is reproduced as under :

> "**8.** In this case we find that the inputs gone into process of manufacture were not taken into account while stock taking. Moreover, the clearance made against the invoices prior to the date of stock taking, which were not entered in the statutory records were not considered by the lower authorities and merely held that it is an after thought. In fact these things were in records at the time of stock taking but the appellants have also not admitted the shortages but they failed to explain the reasons of shortages during the course of investigation. But in reply to the show-cause notice they have given all the information along with reconciliation statement, which are relevant in adjudicating the case. In the absence of proper explanation and without corroborative evidence of removal of the goods from the factory premises of the appellants, the demand is not sustainable. Moreover, the show-cause notice also alleged that the appellants are not maintaining the statutory records in the manner prescribed under the law. In that event, the clandestine removal cannot be alleged. As it is an admitted fact that the appellants are not maintaining their records as prescribed under the law, they are liable to be penalized under Rule 27 of the Central Excise Rules, 2002. Accordingly, for non-maintenance of statutory accounts properly by the appellants, the penalty under Rule 27 of the Central Excise Rules, 2002 is confirmed to the tune of Rs. 5,000/-, otherwise the appeals of the appellants are allowed as discussed here-in-above."

In the case of ***RHL Profiles Ltd. Vs. CCE, Kanpur*** – 2013 (298) ELT 552(Tri.-Del.), this Bench of this Tribunal held that the demand cannot be made only on account of shortage of some of the inputs. The relevant para is reproduced as under :

> "**6.** In the present case, as there is no dispute that shortage arrived at by counting size wise of goods and by taking average weight of one of each category. The Tribunal in above decisions relied upon by appellant held that the demand cannot be made on the quantities found short which was arrived at on average weight. Further, in the case of shortage of input, in the absence of any evidence on record to show that the same was used in the manufacture of finished goods and cleared without payment of duty, the demand cannot be made on these goods.

> **7.** In view of confiscation of amount of Rs. 8.30 lakhs, I find that same has been confiscated on the ground that the same is sale proceeds as clandestinely removed goods, but there is no evidence on record in this regard. On the contrary the Managing Director explained that the amount in question is in respect of marriage expenses of their family member. In the absence of any evidence on record that the amount in question is sale proceeds of clandestinely removed goods, the confiscation is not sustainable. In view of above, the impugned order is set aside and the appeals are allowed.

21. We find that in case of ***CCE, Lucknow Vs. Roll Tubes Ltd.*** – 2011 (265) ELT 414 (Tri.-Del.), the statement of factory Manager only admitting shortages without admission of clandestine removal – Panchnama not indicating the mode of weighment, no inventory on record etc as to how such huge quantity of 1220.676 MT of pipes/tubes was verified by the Revenue officers. It was alleged that the shortage merely to suspicion but positive and tangible evidence is required to establish the clandestine removal. The relevant finding as indicated in para 5 is as under:

> "**5.** The Revenue in their present appeal has not referred to any evidence corroborating the statement of clandestine removal. Their only contention is that the statement of the manager supports their case. However, the said statement is only admitting shortages and there is no admission on the part of the manager in respect of clandestine removal of the same. In such a scenario, the lower authorities have come to a correct finding that such shortages may lead to suspicion but in the absence of any positive and tangible evidence as regards clandestine removal, the allegations cannot be upheld. However it is seen that no mode of weighment stands indicated in the panchnama. There is no inventory on record and no details as to how such a huge quantum was verified by the officers. In these circumstances, the order passed by the lower authorities cannot be faulted upon. The Revenue's appeal is accordingly rejected."

22. We also find in the case of ***Associated Cylinder Industries Ltd. Vs. Collector of Central Excise*** – 1990 (48) ELT 460 (Tribunal), it is held as under:

> "**19.** We find that there is a lot of force in learned Counsel's pleadings in as much as a comparison between physical stock and RG record could only show that the statutory record was maintained properly or not but it was by itself not sufficient to prove conclusively that clandestine removal was also involved. For establishing such a charge either direct physical evidence by way of seizure of goods or document was required or there must be sufficient circumstantial evidence to show preponderance of probability.
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> **20.** We further observe that in view of the Explosives Act and the contracts, the goods are required to be manufactured according to prescribed specification and the process of manufacture is itself subject to inspection. We note that the cylinders can be issued only after tests and inspection records regarding receipt and issue of valves and ISI certificates were also required to be maintained. We find that a co-relation between serial numbers and these documents was possible, as accepted by both the sides. We therefore consider that it was open to the department to have probed these aspects in order to ascertain the facts.
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> **21.** As this has not been done by the authorities and both the sides have submitted that it could be even now done, the orders of the lower authorities are set aside and the matter is remanded to the Asstt. Collector with the directions that he should allow an opportunity to the appellants to submit evidence in support of their contention and show, inter alia, the records maintained in terms of the Explosives Act or the contracts. The Asstt. Collector may also allow them to co-relate the cylinder numbers and particulars with the particulars and specification in ISI certificates and the valve record for this purpose. The Asstt. Collector should grant them a hearing and then pass appropriate order in accordance with law after taking into account, inter alia, the submissions made by them in these proceedings and the above observations."

23. We find that all these judgements support the case of appellant that they have not indulged any clandestine removal of the inputs as well as finished goods. We also find that allegation of clandestine removal is very serious charge and required to be proved with a tangible evidence and supported by corroborative facts. We this we refer and rely in the case of Unio***n of India Vs. Associated Cement Company Ltd.*** – 2011 (267) ELT 55 (Chhattigarh). We find that no such investigation has been conducted by the Revenue.

24. Reliance is also placed on the decision of ***M/s Sugandhi Snuff King Pvt. Ltd., Mr. Vicky Chaurasia, Director Vs. CCE, New Delhi*** vide Final Order 53424-53425/2018 dated 19.12.2018. The relevant portion of the order at para 16, 17, and 18 are reproduced hereinafter:

> "16. At this stage, we may refer to certain precedent decisions of the Tribunals. In the case of M/s Golden Steel Corpoation Ltd. V/s Commissioner of Central Excise, Kolkata-II reported as 2017 (347) E.L.T. 570 (Tri.- Kolkata) it was observed that clandestine removal of goods and demand of duty is a serious charge and cannot be held on the basis of the assumption and presumptions. The confirmation of demand on the basis of few documents recovered from the assessee's factory without their being any corroboration from independent sources cannot be held to be sufficient for arriving at the said findings. Similarly in the case of M/s Paragon Extrusions P. Ltd. V/s Commissioner, CGST, Ghaziabad Tribunal vide its Final Order No.72001/2018 dated 24.08.2018 again reiterated the legal position that the clandestine removal findings cannot be arrived at on the basis of some of the statements made and requires independent evidences to prove so. Reference was made to the Hon'ble

Allahabad High Court decision in the case of M/s Continental Cement Company V/s Union of India reported as 2014 (309) E.L.T. 411(All.) wherein it was held that clandestine removal is required to be proved by clinching evidence in the nature of purchase of raw materials, use of electricity, sale of final products, transportation, the mode and flow back of funds. Such charge being a serious charge is required to be proved by Revenue by tangible and sufficient evidences and mere statements of some of the buyers (which were available in that case, whereas there is none in the present case) given on the basis of their memory are insufficient without support of any documentary evidences. Reference was also made to various other decisions which for the sake of ready reference are reproduced below:-

1. M/s Continental Cement Company V/s Union of India reported as 2014 (309) E.L.T. 411(All.)

2 Commissioner of Central Excise, Ludhiana V/s Renny Steel Castings (P) Ltd. reported as 2013 (288) E.L.T. 45 (P & H).

17. Similarly in the case of M/s Popular Paints and Chemicals and others V/s Commissioner of Central Excise and Customs vide its Final Order No.52716-52718/2018 dated 06.08.2018, the Tribunal lead down the various points required to be referred to for establishing clandestine removal. For better appreciation

the same are reproduced below:-

"It is now established that to prove clandestine clearance the department should produce clinching evidence regarding the followings:-

a. The department failed to establish procurement of unaccounted raw materials.

b. No investigation conducted as to consumption of excess electricity, or employment of extra labors.

c. No investigation conducted as to whether the appellants had installed capacity for manufacturing additional quantities of finished goods.

d. No investigation conducted about involvement of huge cash for procurement of unaccounted raw materials. Similarly, no investigation conducted to find whether the appellants had received huge cash of about 24 crore during the disputed period from the buyers of finished goods. Further neither any trail of *unaccounted cash was found nor any unaccounted cash was seized.*

e. No investigation conducted with the transporters to find out whether the appellants received unaccounted raw materials or cleared finished goods without invoices.

f. Though, the names of the alleged buyers were available but investigations were conducted only from six buyers."

18. Similarly to allege clandestine removal on the basis of the chemical formula or input/output or arithmetic calculation has been held to be as unacceptable by various decisions. Reference can be made to the Tribunal's decision in the cases mentioned below:-

1 Commissioner of Central Excise, Raipur V/s Prachi Resins Pvt. Ltd. reported as 2014 (308) E.L.T. 518 (Tri.-Del.)

2 Tara Chand Naresh Chand V/s Commissioner of Central Excise, Jaipur reported as 2017 (355) E.L.T. 445 (Tri.-Del.).

3 Sunrise Food Products V/s Commissioner of Central Excise, Delhi reported as 2017 (357) E.L.T. 599 (Tri.-Del.).

4 Triveni Engineering & Industries Ltd. V/s Commissioner of Central Excise, Allahabad reported as 2016 (334) E.L.T. 595 (All.)

We find that Revenue has failed to conduct the investigation in a full proof manner so as to sustain charge against appellant following the law laid down discussed above. We also gave due consideration of various case laws cited by the ld. AR, but those are not applicable in view of incomplete investigation by the Revenue. Thus, the demand is not sustainable.

25. In view of above, we set aside the impugned order and allow the appeal filed by the appellants. The appellants is entitled to consequential benefit, if any, as per law.

(Pronounced in Court on 02.01.2019)

Sd/ Sd/

(P.K. Choudhary) (Bijay Kumar)
Member (Judicial) Member (Technical)

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