

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.1

Appeal No. E/75819/2015

Arising out of Order-in-Original No.04/Central Excise/COMMR/2015 dt.
11/05/2015 passed by the Commissioner of Central Excise & Service
Tax, Ranchi.

Bihar Foundary & Castings Ltd.
Marar, Ramgarh Cantt., Jharkhand

Appellant (s)

VERSUS

**Commissioner of Central Excise & Service Tax,
Ranchi**

5-A, Main Road, Ranchi, Jharkhand-831001

Respondent (s)

WITH

Appeal No. E/75822/2015

Arising out of Order-in-Original No.04/Central Excise/COMMR/2015 dt.
11/05/2015 passed by the Commissioner of Central Excise & Service
Tax, Ranchi.

**M/s. Gautam Ferro Alloys (Unit of
M/s Bihar Foundry & Castings Ltd.)**
P. O. Marar, distt. Ramgarh,
Jharkhand (834009)

Appellant (s)

VERSUS

**Commissioner of Central Excise &
Service Tax, Ranchi**

5-A, Main Road, Ranchi, Jharkhand-831001

Respondent (s)

APPERANCE :

Shri Kartik Kurmi & S. B. Sharma, Advocates for the Appellant
Shri D. Haldar, A. R. for the Respondent

CORAM:

**HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)**

Appeal Nos. E/75819/2015 & E/75822/2015**ORDER NO.FO/75994-75995/2019**

Date of Hearing : 05.08.2019

Date of Pronouncement:- 09/08/2019

PER BENCH:

1. The instant Appeals arises out of Order-in-Original dated 11-05-2015 bearing No.04/Central Excise/Commr./2015 read with Corrigendum dated 16-06-2015, passed by Ld. Commissioner, Central Excise & Service Tax, Ranchi.
2. The brief facts of the case are that M/s. Bihar Foundry And Castings Ltd. (M/s BFCL) is engaged in the manufacture of Alloy & Non-Alloy Bar (TMT Bars) and M.S Ingot. M/s. Gautam Ferro Alloys (M/s GFA) (a unit of BFCL) is engaged in the manufacture of Silico Manganese. Both the units are separately registered under the Central Excise Act, 1944. It is the case of the department that on dated 16/17-10-2008 the Officers of the DGCEI, Kolkata conducted simultaneous search operations at the factory of BFCL/GFA and Office premises of BFCL. In the said search the DGCEI officers seized one Laptop from the factory premises of BFCL from which nine printouts were taken and kept under [Doc. No. 01/DGCEI/JRU/BFCL/F/08 to Doc. No.09/DGCEI/JRU/BFCL/F/08]. The Doc.08/DGCEI/JRU/BFCL/08 (Annexure-18(i) & Doc.09/DGCEI/JRU/BFCL/08 (Annexure-18(ii) are "Sale Register" which are made the basis of demand in the instant case. The Doc.06/DGCEI/JRU/BFCL/08 (Annexure-17(i) & Doc.07/DGCEI/JRU/BFCL/F/08 (Annexure-17(ii) are "Purchase Registers". Out of seven files in the Laptop, three files were corrupt. The soft copy back-up of the said three corrupt files were extracted with the help of computer expert which contained data for 11-09-2008 to 15-10-2008 (one and half month). Out of the balance four files, two files were password protected which contained statutory records and the rest two files were un password protected from which the said nine print outs [Doc. No. 01/DGCEI/JRU/BFCL/F/08 to Doc. No.09/DGCEI/JRU/BFCL/F/08] were taken. In the course of

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investigation, statements were recorded from Sri Satya Nanda Jha on dated 19-05-2009 and 09-06-2009 u/s 14 of the Act when he was shown one "Writing Pad" [i.e. Annexure 38(i) (Doc.No.32/DGCEI/JRU/BFCL/F/08) seized from BFCL] containing cash transactions/cash transfer. An extract of the said "Writing Pad" is prepared by the officers of the DGCEI and placed under Annexure 38(ii) of the Show Cause Notice titled as "Cash Transfer Statement" alleging that it contains details of flow back of fund to the Appellants. From the seized laptop certain individual ledgers of vendors of BFCL/GFA were also printed and kept under Doc. No. 02/DGCEI/JRU/BFCL/F/08, Doc.No.03/DGCEI/JRU/BFCL/F/08 and Doc.NO.05/DGCEI/JRU/BFCL/F/08. On the day of search, physical stock of raw materials were taken and no discrepancy of any kind were noticed. Physical stocks of finished goods were also taken and excess stock were detected which were due to not recording production for 2/3 days, hence were allowed to be accounted for in the RG-1/DSA and no demand thereon is raised. In the course of investigation, statements were also recorded from Sri Hari Krishna Budhia, Managing Director, Sri Gaurav Budhia, Director and Md. Abdul Kalam and others under Sec. 14 of the Act.

3. Investigations were also conducted with six transporters i.e. (i) M/s New Sriniwas Road Liners, Ramgarh Cantt, (ii) M/s Gujarat Rajasthan Carrier, Ranchi, (iii) M/s Praveen Transport, Ranchi, (iv) M/s Parmeshwari Road Lines, Ramgarh, (v) M/s Mahaeswari Road liners, Ramgarh and (vi) M/s Sri Trimula Road Liners, Ramgarh Cantt. Statements were recorded from the transporters U/s 14 of the Act.

4. Further, one "loose sheet" Doc. No. 12/DGCEI/JRU/BFCL/F/08 [Annexure-24(i)] was seized from the possession of Md. Abdul Kalam, Production Manager containing details of dispatch of TMT Bars.

5. On the basis of the details of dispatches of TMT Bar i.e. lorry no. etc. as appearing in the said loose sheet i.e. Doc. No.12/DGCEI/JRU/BFCL/F/08 seized from Sri Md. Abdul Kalam, Production Manager, a statement containing lorry numbers was

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prepared by the DGCEI officers and sent to Sales Tax Authorities at Odisha to ascertain whether the said lorries have crossed through the State of Odisha. The Sales Tax Authorities, Odisha confirmed that only 18 lorries from the said statement have crossed through the State of Odisha to South India. The Sales Tax Authorities further provided information about the names and addresses of the consignee of the said 18 vehicles i.e. (i) M/s Radhika Ispat Udyog, Kochin, (ii) M/s P.H Mohamed K. Kunju & Brothers, Kochi, (iii) M/s Jaihind Traders, Kochi and (iv) M/s Vishnu Enterprises, Chennai. The said goods were dispatched through transporters (i) M/s Balajee Corporation, Ramgarh (ii) M/s New Srinivas Road Liners, Ramgarh Cantt, (iii) M/s Parmeshwari Road Lines, Ramgarh, (iv) M/s Sri Trimula Road Liners, Ramgarh Cantt, (v) M/s Mahaeswari Road liners, Ramgarh and M/s Devendra Lorry Transport, Barhi.

6. On the basis of information received from the Odisha Sales Tax Authorities, the DGCEI, Kolkata requested DGCEI, Kochi and DGCEI, Chennai to investigate the delivery of the impugned goods at the end of the Consignees. DGCEI, Kochi and DGCEI, Chennai after conducting investigations at the end of said South India buyers vide reports dated 15-12-2009 [Annexure – 25(ii)] and dated 11-01-2010 [Annexure – 25(iii)] reported that the said goods were sold to the said consignees not by the BFCL/GFA, but by some Traders/manufacturer of Jharkhand i.e. (i) M/s Konark Ispat Udyog, Bokaro, (ii) M/s Sai Trading Co., Koderma, (iii) M/s Mahamayaa Ispat, Bokaro, (iv) M/s Ispat India, Koderma, (v) H.P. Enterprises and (vi) M/s Puja TMT Pvt. Ltd, Bokaro (which is a manufacturer of TMT Rods) and those Consignees have made payment for the value of the goods (including duties etc.) to the said Consignors through proper banking channels. It is also reported by DGCEI, Chennai/Kochi that the Appellants herein are in no way concerned with the manufacture, delivery, dispatch of the goods or receipts of the payment from the said consignees.

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7. Thereupon, further inquiries were conducted with the Jharkhand Sales Tax Authorities in respect of the aforesaid Traders of Jharkhand i.e. (i) M/s Konark Ispat Udyog, Bokaro, (ii) M/s Sai Trading Co., Koderma, (iii) M/s Mahamayaa Ispat, Bokaro, (iv) M/s Ispat India, Koderma. No enquires were conducted with M/s H.P. Enterprises. The Jharkhand Sales Tax Authorities were requested to provide copies of the Sales Tax Returns filled by the said traders for verification. The Sales Tax Authorities provided copies of returns filed by the said traders i.e (i) M/s Konark Ispat Udyog, Bokaro, (ii) M/s Sai Trading Co., Koderma, (iii) M/s Mahamayaa Ispat, Bokaro, (iv) M/s Ispat India, Koderma along with copies of their registration certificate and also other documents submitted by the said traders, at the time of registration.

8. The DGCEI Officers on the basis information received from the Jharkhand Sales Tax Authorities issued summons at the address of (i) Sri Lalan Kumar, Proprietor of M/s Konark Ispat Udyog, Bokaro, (ii) Sri Kailash Prasad Sureka, Proprietor of M/s Ispat India, Koderma and M/s Mahamayaa Ispat, Bokaro, (iii) Sri Prem Singh, Proprietor of M/s Sai Trading Co., (iv) Sri Anil Kumar Mahto, Proprietor of M/s Maa Durga Trading Co. The said summons could not be served. Out of the five traders, summonses could not be served on two firms i.e. M/s Konark Ispat Udyog, Bokaro, and M/s Sai Trading Co. Due to non service of summonses on two firms out of five it is presumed that the said firms are "bogus". However, summonses were served on Sri Kailash Prasad Sureka, Proprietor of M/s Ispat India, Koderma and M/s Mahamaya Ispat, Bokaro. Sri Sureka in response to the said summonses prayed for time to tender his deposition in view of his brain injury suffered by him and his medical treatment at Vellore, however at no point of time, statement of Sri Kailash Prasad Sureka was recorded. Similarly no investigation of any kind was conducted with M/s H.P. Enterprises.

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9. Investigations were also carried out at the different places of buyers by DGCEI Ahmadabad, DGCEI New Delhi and DGCEI Jaipur on the basis of details of transporter, consignors and consignees in the computerized "soft" copy prepared by one agent posted at Bihar UP boarder at the check gate of the Commercial Tax Department. However, no adverse material could be found by DGCEI, Ahmadabad and New Delhi in their investigation. DGCEI, Jaipur was requested to carry out follow up actions at the premises of buyers M/s Dhamani Sales Corporation and M/s Ganpati Enterprises. DGCEI, Jaipur submitted its report dated 30-07-2010 along with Panchnama, Seizure list, copy of statement and documents seized from the premises of above said firms. [Annexure-31]. On the basis of materials seized from M/s Damani Sales Corporation evasion of duty of Rs.12.79 Lacs (on value of Rs.88.71 Lacs) during April'2008 to May'2008 (two months) is sought to be proved.

10. In the investigation carried out by DGCEI, Kolkata it was revealed that the impugned goods were manufactured by other manufacturers i.e. M/s Samriddhi Ispat Pvt. Ltd., M/s Puja TMT Plant Pvt. Ltd. and on job work basis by M/s ASTL.

11. A Show Cause Notice dated 24-09-2012 was issued by Ld. Addl. Director General, DGCEI, Kolkata alleging that the BFCL has clandestinely removed/undervalued 42,851.569 MT of their final products i.e. M.S Ingots/TMT Bars/Miss Rolls/Mill Scale/end Cutting/Risers without payment of duty during the period 1st Setemember'2007 to 15th October'2008. In the show cause notice it is further alleged against M/s GFA that it has resorted to clandestine removal/undervaluation of 9488.635 M.T. of final products i.e. Silico Manganese during the said period. Accordingly, M/s BFCL is required to show cause why Central Excise duty amounting to Rs.22,74,84,876/- should not demanded along with interest and why penalty U/s 11AC/Rule 25 should not be imposed upon them for their purported contraventions of Rule 4,6,8,10,11,12 of the said Rules and Sec.4 read with Rule 6 of the Central Excise valuation (Determination

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of price of excisable goods) Rule, 2000. M/s GFA is also required to show cause why excise duty of Rs.8,69,42,965/- should not recovered along with interest and why penalty U/s 11AC/Rule 25 should not be imposed upon them for purported contraventions of Rule 4,6,8,10,11,12 of the Central Excise Rule, 2002. Sri H.K.Budhia, Managing Director, Sri Gaurav Budhia, Director and Sri Satya Nand Jha are required to show cause why penalty should not be imposed on them under Rule 26 of the Central Excise Rules, 2002.

12. The Appellants in reply to Show Cause Notice, vehemently disputed and denied the allegations on merits and on limitation.

13. By the impugned adjudication Order the Ld. Commissioner rejected the contentions of the Appellants and confirmed Excise Duty demand of Rs.22,74,84,876/- U/s 11A(1) of the Central Excise Act, 1944 on M/s BFCL along with interest U/s 11AA and imposed equal penalty of Rs.22,74,84,876/- U/s 11AC. The Ld. Commissioner further confirmed Excise Duty demand of Rs.8,69,42,965/- U/s 11A(1) on M/s GFA along with interest U/s 11AA and imposed equal penalty of Rs.8,69,42,965/- U/s 11AC of the said Act. The Ld. Commissioner imposed penalty of Rs.15.00 Crores each on Sri Gaurav Budhia, Director, Sri Hari Krishna Budhia, Managing Director of the M/s BFCL and Sri Satya Nand Jha under Rule 26 of the Central Excise Rules, 2002.

14. Being aggrieved with the impugned Order, the M/s BFCL, M/s GFA, Sri Gaurav Budhia, Director, Sri Hari Krishna Budhia, Managing Director and Sri Satya Nanda Jha have preferred Appeals before this Hon'ble Tribunal. The appeals filed by Sri Gaurav Budhia, Sri Hari Krishna Budhia and Sri Satyanand Jha are dismissed for non compliance with the conditions of mandatory pre-deposit of 7.5% under Sec.35F of the Act.

15. The Ld. Advocate for the Appellant Shri Kartik Kurmy submitted that in the instant case that there is absolutely no evidence of manufacture of impugned goods. The investigation carried out by DGCEI, Kolkata/Kochi/Chennai proves that the impugned goods were

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not manufactured/sold by the Appellants. It is further submitted by him that duty is on 'manufacture' of the excisable goods. No duty can be fastened without evidence of manufacture of impugned goods. He further submitted that as per the report of DGCEI, Kochi and DGCEI Chennai, the buyers at Kochi and Chennai have categorically stated that they never bought any goods from BFCL/GFA but through one Mr. Pankaj who is director of M/s Puja TMT Plant P.Ltd., and which is a manufacturer of TMT Bars and further they have purchased from other five traders of Jharkhand through said Sri Pankaj. Therefore, enquiry by DGCEI, Kochi and Chennai demolishes the case of the department. Further, in course of enquiry by DGCEI, Jaipur, one Sri Govind Damani of M/s Damani Sales Corporation, buyer, also stated that they have bought goods from one M/s Maa Durga Trading Co which deals in goods of 'BFCL make' and payment of which were made through banking channels to said M/s Maa Durga Trading Co. and all purchases from BFCL made directly by them are made on payment of duty. Hence, the investigation carried out by DGCEI no way proves that the impugned goods were manufactured and supplied by the Appellant. He added that manufacture of TMT Rod/Ingot (BFCL) and Silico Manganese (GFA) are power intensive process. In the instant case there is no allegation/evidence of any excess consumption of electricity. Further, no investigations were carried out with suppliers of raw materials. It is submitted that more than 48,000 MT of raw materials would be required for the manufacture of alleged quantity of 42000 MT of finished product by BFCL and in case of GFA, against alleged removal of 9,488.635 MT of finished product 31,300 MT of raw materials would be required. In the computer printout i.e. Doc. No.06/DGCEI/JRU/BGCL/F/08 and No. 07/DGCEI/JRU/BGCL/F/08 which are claimed to be Purchase Register, there is no quantification of raw material, hence, there is no materials to sustain the alleged charge of purchase of raw materials. The weightment slips relied upon are for just 358 MT of Ingots and Sponge Iron 19.455 MT aggregating to 377.455 MT against raw material requirement of 48000 MT which

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comes to meagre 0.7% and weightment slips for just 15.500 MT of Manganese Ores against raw material requirement of 31300 MT for manufacture of disputed quantity of Silico Manganese by GFA which is just 0.05%. Hence, there is no evidence of purchase/consumption of raw material. Further, there is no evidence of flow back of fund. The writing pad No. 32/DGCEI/JRU/BFCL/F/08 which allegedly contained details of cash transfer, nowhere shows that a single penny has flown to the Appellants. Further, in one random enquiry with one buyer Sri Hemant Agarwal of M/s Trehan Home Developers has vide letter dated 17-08-2008 stated that all payment were made to BFCL through banking channels only and there is no cash transactions. The Ld. Advocate further submitted that Cross examination of witnesses are not allowed whose statements are adverse hence, their statements cannot be a relevant piece of material under Sec.9D of the Act. He relied on Hitech Abrasives Ltd. Vs. CCE judgement dated 09-07-2018 passed by Hon'ble Chattisgarh High Court in the Tax case No. 54 of 2017 and Ambica International Vs. UOI reported in 2018 (361) E.L.T. 90 (P&H). The Ld. Advocate also submitted that in the impugned order the Ld. Commissioner has not dealt with each and every contention raised by them. He further submitted that the statements of transporters are vague, general and are not linked with any particular entries of alleged clandestine sale under Document No. 08/DGCEI/JRU/BGCL/F/08 and 09/DGCEI/JRU/BGCL/F/08, therefore, are inconclusive. It is submitted by the Ld. Advocate that Statement of Sri Gourav Budhia was recorded at midnight/early morning hours at 3:00 AM 17th-18th of October'2010 and hence cannot be treated as voluntary. Further, Sri Gourav Budhia in his subsequent statement dated 02-02-2009 categorically disowned the 'Laptop' and the 'data' stored therein. The Ld. Advocate relied on the Ramlila Maidan Incident Vs UOI reported in (2012) 5 SCC 1 wherein it is held that sleep is a biological necessity and not allowing a person to have it amounts to metting out third degree torture. He further submitted that the so called Sale Register i.e. Document No.

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08/DGCEI/JRU/BGCL/F/08 and 09/DGCEI/JRU/ BGCL/F/08 are "extraneous materials" and were never seized under any panchanama. The Pancha's did not put their signature as a witness on the 'Laptop Printouts'. Further, one Pancha, simultaneously attended panchnama proceeding at two places hiding his identity and hence, it cannot be said that the Laptop printouts were taken in his presence (Panchnama on 16/17-10-2008). The 'Printouts' under Document No. 08/DGCEI/JRU/BGCL/F/08 and 09/DGCEI/JRU/BGCL/F/08 and other computer printouts are not admissible in evidence as it does not satisfy test of Sec.36B of the Central Excise Act, 1944. The Ld. Advocate contended that in the instant case the allegations are framed on the basis of assumption and presumption and unauthenticated private records/Loose Sheets and there is no tangible, cogent, affirmative corroborative evidence in support of the charge and hence the demand is not sustainable in the eyes of law. The Ld. Advocate relied on the following decisions :-

- i. Balashri Metals P. Ltd. Vs UOI reported in 2017 (345) ELT 187 (Jhar.) [Para 5(vi)]
- ii. UOI Vs. M.S.S. Foods Products Ltd. reported in 2011 (264) E.L.T. 165
- iii. Continental Cement Co. Vs UOI reported in 2014 (309) ELT 411 (All.) (Para 12)
- iv. Hi-Tech Abrasives Ltd. Vs CCE in TAX Case No.54 of 2017 (Chhattisgarh) (Page 68)
- v. Sharma Chemicals Vs CCE reported in 2001 (130) ELT 271 (Tri.-Kol) (Para 14)
- vi. Sulekh Ram Steels Pvt. Ltd. Vs CCE reported in 2011 (273) ELT 140 (Tri.) (Para 15 & 17)
- vii. Ujagar Prints Vs. UOI reported in 1998 (38) E.L.T. 535 (S.C.) and

16. To Sum up, the Ld. Advocate submitted that in the instant case there is no evidence of 'manufacture' of alleged quantity of finished goods by BFCL/GFA, there is no evidence of extra use of electricity, no evidence of purchase/transportation of huge quantity of raw material, no evidence of extra use of labour. Enquiries with buyers by DGCEI Kochi, Chennai, Jaipur, Kolkata, disproves the allegations of

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clandestine removal by BFCL/GFA. There is no evidence of flow back of fund to BFCL/GFA either.

17. Per contra Ld. DR submitted that the Laptop was seized from the possession of the Appellant, hence, the printouts taken from it relates to the business of the Appellants only which amply proves that the Appellants are engaged in clandestine manufacture and sale of excisable goods without payment of duty. It is further submitted that investigation conducted by DGCEI, Kolkata, Chennai, Kochi, Jaipur proves that the Appellant has cleared the impugned goods without payment of duty. It is further submitted that the Appellants have not-cooperated in the investigation and knocked the doors of High Court/Supreme Court to delay the investigation. The Ld. DR further submitted that investigation with buyers, transporters proves that the impugned goods were supplied by the Appellants and removed through bogus trading firms of Jharkhand.

18. Heard both the sides and perused the appeal records. We find that investigations carried out by DGCEI Chennai, Kochi, Kolkata and Jaipur does not bring home the charge of clandestine removal against the Appellants. In their reports dated 15-12-2009 and dated 11-01-2010 DGCEI, Chennai/Kochi has reported that the said goods were sold to the said consignees not by the BFCL/GFA, but by some Traders/manufacture of Jharkhand and those Consignees have made payment for the value of the goods (including duties etc.) to the said Consignors, through proper banking channels. It is also reported by DGCEI, Chennai/Kochi that the Appellants herein were no way concerned with the manufacture, delivery, dispatch of the goods or receipts of the payment from the said consignees. Further, enquiries conducted with Traders in Jharkhand does not bring home the charge as out of five trading firms, summonses issued to only two traders i.e. M/s Kanak Ispat Udyog, Bokaro and M/s Sai Trading Company could not be served while no enquiry is conducted with M/s H.P.Enterprises and no investigations were carried out with M/s Ispat India and M/s Mahamaya Ispat even though the said traders acknowledged summon

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served on them. In these circumstances, the department has failed to conclusively prove that the said traders were bogus. We find considerable force in the contentions of the Ld. Advocate for the Appellants that the levy under the Central Excise Act, 1944, is on manufacture of excisable goods and in the instant case there is no evidence of manufacture of the impugned goods. Rather, in the investigation by DGCEI, Chennai, Kochi the consigner/buyer have categorically stated that they have purchased impugned goods from Sri Pankaj who is Director of M/s Puja TMT Plant P.Ltd., which is engaged in manufacture of TMT Bars. Further, in the show cause, it is observed that the impugned goods were manufactured on Job Work by M/s ASTL and were of M/s Samridhi TMT make. The Ld. Advocate for the Appellants relied on *Ujagar Prints Vs. UOI cited supra* to contend that as per investigation the goods were manufactured by M/s ASTL on job work, hence, the liability to pay duty rests on the Job Worker and for goods manufactured by M/s Samridhi TMT, no liability can be fastened on the Appellants. For reasons as stated above, the investigation has failed to cull out evidence of manufacture of impugned goods by the Appellants. We have perused the writing pad (Doc.No.32/DGCEI/JRU/BFCL/F/08) and extracts prepared by DGCEI on its basis and find that there is no evidence of flow back of funds to the Appellants. We also find that in the instant case there is no allegation/evidence of extra consumption of electricity more particularly, when the process of manufacture of MS Ingots/Silico Manganese are power intensive. Further, there is no evidence of extra use of labour/payment of any extra wages, shortage/excess of raw materials or finished goods. The excess stock of finished goods stood explained and accepted by the department. The allegation/findings on purchase of raw materials is not specific and there is no quantification of raw materials purchased out of accounts based on Purchase Register. It is well settled that charge of clandestine removal is a serious charge and must be proved by adducing tangible, cogent and affirmative evidence which are completely lacking in the instant case.

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Rather the investigations conducted by DGCEI, Chennai, Kochi, Jaipur, Kolkata instead of bolstering department's case, supports the contentions of the Appellants.

19. We find that the defence of the Appellant is fortified by the decisions in the case of Balashree Metals P.Ltd., Vs. UOI as reported in 2017 (345) ELT 187 (Jhar.) where in it is held that -

"5. Having heard counsels for both the sides and looking to the facts and circumstances of the case, we, hereby, quash and set aside the Order-in-Original dated 3-3-2016 (Annexure-14 to the memo of this writ petition) mainly for the following facts and reasons :

*X x x
X x x*

vi. Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like -

- (a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.*
- (b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.*
- (c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.*
- (d) Quantity of the packing material used.*
- (e) The total number of the employees employed and the payment made to them.*

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations, in cash or kind have been paid by the noticee, such statements are must.

- (f) Ostensible discrepancy in the stock of raw materials and the finished product.*
- (g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.*
- (h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-posts, different types of forms which are supplied by the Commercial Tax*

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Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc.

These documents ought to have been collected by the respondent-department, if at all, they are interested in collection of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. All these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive.

- (i) The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal."*

20. The case of the Appellants is also supported by the decision in the course of Continental Cement Co. Vs. UOI reported in 2014 (309) ELT 411 (All.) wherein it is held that -

"12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions."*

21. In the case of UOI Vs. M.S.S. Foods Products Ltd., reported in 2011 (264) ELT 165 it is held as under -

Para-12. *Under the Excise Act, the excise duty is leviable on manufactured or production of excisable goods, therefore, for levying the excise duty, it is necessary to establish that the excisable goods was produced or manufactured by the assessee concerned and for attracting Section 11-A, it is necessary to establish that the excisable goods was clandestinely removed without payment of excise*

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duty, which the revenue in the present case has failed to establish. The excise duty cannot be levied merely on the basis of assumption or presumption.

- 22.** In the case of Hi-Tech Abrasive Ltd. Vs. CCE *cited supra* it is held that –

Para-12.2. *We have gone through the detailed order passed by the adjudicating authority and we find that so far as the demand of challenge in the present case is concerned it rested only on two materials. One was the so called statement of the Director which the adjudicating authority and the Customs, Excise and Service Tax Appellate Tribunal received in advance as admission of clandestine removal by the Director of the appellant/Company and the other was the notebook which contained certain entries, which according to the adjudicating authority constitute relevant material to draw inference of clandestine removal by the avoidance of payment of duty. Once we have held that the statement of the Director could not be admitted as relevant piece of evidence, there is no question of there being any admission on the statement of the Director of the company. Then the only other material left is unverified private document in the form of certain entries made in the note book, seized during search operations. In view of what has been held by the Delhi High Court, with which we are in complete agreement and that the Tribunal has also taken a consistent view in this respect that without recording the statement of the author, the contents of private document would not constitute material, we are left with no legally admissible evidence on record to draw inference of clandestine removal. The inference regarding clandestine removal ought to be outcome of a detailed investigation and consideration of other relevant incriminating material which could be based on the stock of raw material, finished products, use of consumption of electricity, employment of labour and many other relevant material as noticed in the decisions reported in 2014 (309) E.L.T. 411 and 2017 (345) E.L.T. 187 rendered by the High Court of Allahabad and High Court of Jharkhand, respectively.*

X xx xx x x xx

12.3 *therefore, coming to the conclusion that without there being clinching evidence much less relevant admissible evidence on record, the adjudicating authority drew an inference of clandestine removal which cannot be sustained in law. We accordingly decide the fifth substantial question of law in the manner that the Tribunal committed perversity in law in coming to the conclusion that there existed relevant and material evidence to draw inference of*

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clandestine removal. We accordingly answer the said question of law as above.

23. In the case of Sharma Chemicals Vs. CCE reported in 2001 (130) ELT 271 (Tri.-Kol.) this Tribunal has held that the noting in private records may raise suspicion but for confirming charge of clandestine removal, there must be corroborative evidence in the form of installed capacity, raw materials, utilization, labour employed, power consumed, goods actually manufactured and packed etc. The relevant portion of the said judgment is set out below-

"14. *the relevant case laws on the point. In the case of Gurpreet Before we part, we Rubber Industries v. Collector of Central Excise reported in would like to discuss some of 1996 (82) E.L.T. 347 (Tri.) = 1996 (12) RLT 569, the Tribunal has set aside the demand of duty based upon the entries in a private note-book (diary) of an honorary worker in the appellant firm holding that except the said diary, there was no other evidence such as installed capacity of the factory, raw materials, utilisation, labour employed, power consumed, goods actually manufactured and packed etc., to prove the alleged clandestine production of the goods and removal of the same from the factory. Subsequently, the Tribunal in the case of Kothari Products v. C.C. Ex. reported in 1999 (31) RLT 67, observed that it cannot be concluded that the note-book is an authenticated private record of production so as to raise a demand based on the figures indicated therein. At the most, it may raise a doubt, but that cannot take the place of proof. Even though there may be certain element of truth in the prosecution story, but between 'may be true' and 'must be true', there is a long distance to travel and the whole of the distance must be covered by a legal and unimpeachable evidence before a person can be convicted. Similarly, we find that in the case of Biria Tyres reported in 2000 (126) E.L.T. 1079 (Tri.) = 1999 (33) RLT 52, demands of duties raised solely on the entries made in the Curing Register, were held not to be sustainable in the absence of independent evidence corroborating the same. Further, in the case of C.C. Ex. v. Mira Steel Mills reported in 1999 (112) E.L.T. 934, it was observed that some entries made in the private note-book seized from the factory premises tallying with the entries in RG-I, may raise suspicion that those entries in the note-book relate to the goods clandestinely removed in the past without payment of duty, but the charge of clandestine removal cannot be sustained on such suspicion.*

As in the instant case, apart from the fact that the appellants have denied Shri Singh to be their employee, we

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also find that the Revenue's case is entirely based upon the entries made in the note-book recovered from the possession of Shri Singh. There is no other evidence corroborating the charge of clandestine manufacture and removal. As such, applying the ratio of the above decisions, the demand against the appellants cannot be sustained."

- 24.** Further, We also find that reliance on the data contained in laptop computer and print out taken for that has to be in conformity with the conditions laid down under Section 36 B of Central Excise Act. The investigation reveals that no such complained has ever been made by the Revenue. Accordingly, the entire investigation which is based on the computer printout is not admissible as the evidence. Therefore the data relied upon based on the print out obtained from laptop is not admissible and has to be discarded. Placing reliance in case Popular Paints and Chemicals Vs. Commissioner of Central Excise and Customs Raipur. The paragraphs which are relevant are as under:-

14. We hold that computer printouts cannot be held to be an admissible evidence unless the conditions as laid in the provisions of Section 36B of the Central Excise Act are fully complied with. A perusal of section 36B would indicate that the Act has prescribed very stringent conditions for computer printouts to be a piece of admissible evidence. The Ld. Counsel for the appellants has invited our attention particular to provisions of Section 36B(2) and (4) of the Central Excise Act. For the better appreciation of facts, it is relevant to cite Section 36B of Central Excise Act is as below: -

36B. Admissibility of microfilms, facsimile copies of documents and computer print outs as documents and as evidence

- (1) Notwithstanding anything contained in any other law for the time being in force,
- (a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (whether enlarged or not); or
 - (b) a facsimile copy of a document; or
 - (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"), if the conditions mentioned in sub-section (2) and the other provisions

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contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings there under, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

- (2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely:—
- (a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
 - (b) during the said period, there was regular supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of period was not such as to affect the production of the document or the accuracy of the contents; and
 - (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—
- (a) by a combination of computers operating over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) by different combinations of computers operating in succession over that period; or
 - (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a

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single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made there under where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. —For the purposes of this section, —

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

14.1. In our considered view the computer printouts in the facts at hand do not fulfill the mandatory provisions of Section 36B-

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(2) & (4) of the Central Excise Act, in so far as there are serious irregularities about the manner of sealing of the computers as pointed out hereinabove and one computer not sealed at all. The provisions of Section 36B(4) have also not been fully complied with. The Ld. Counsel has strongly relied upon the law laid down on the admissibility of electronics records by the Supreme Court in the case of Anwar P.V. Vs. P.K. Basheer reported in MANU/S/0834/2014 wherein in paragraphs 13 to 17 it has been held as under:-

"13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
- (iv) The information contained in the record should be a reproduction or

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derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

- 15.2. Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act. It has

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been clearly laid down in para 15 of this judgment that all the safeguards as prescribed in Section 65B (2) & (4), to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are *pari materia*.

- 15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is admissible for want of cross examination of, Sh. Vipul Saxena, who has done cloning of the data from the computer system. We, therefore, hold that the computer printouts cannot held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand.
- 15.4. It is an admitted position that the computer printouts were produced in the Office of M/s Omnicorp, N.Delhi behind the back of the appellants. The appellants were never associated with the retrieval of the computer printouts. This Tribunal in the case of Modern Laboratories Vs CCE Indore reported in 2017 (358) ELT 1179 (Tri) = 2017-TIOL-1827-CESTAT-DEL has held that when computer printouts were taken in the absence of appellants and when panchas were not allowed for cross- examination the data retrieved from the CD is not an admissible evidence. We hold that the law laid down in this judgement is fully applicable to the facts of the present case and thus the same is to be discarded as a piece of evidence.
- 15.5. That similar law has been laid down by the Gujarat High Court and this Tribunal in the following cases.
 - (i) Ambica Organics V/S CCE Surat 2016 (334) ELT 97 (T) = 2015-TIOL-745-CESTAT-AHM which has been upheld by the Gujarat High Court as reported in 2016 (334) ELT A 67 ()
 - (ii) Premier Instruments & Controls Ltd V/S CCE Coimbatore - 2005 (183) ELT 65 (T) = 2005-TIOL-61-CESTAT-MAD
 - (iii) Jay shree Vypasa Ltd. Vs. CCE Rajkote-2015(327) ELT 380 (T)
 - (iv) Agarvanshi Aluminium Ltd Vs CCE NhavaSheva- 2014 (299) ELT 83 (T) = 2013-TIOL-1332-CESTAT-MUM

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(v)Final Order No A/ 70518-12/2018- Ex (DB) dated 07.03.2018 in the case of Trela Footwear & Others Vs CCE Agra = 2018-TIOL-3004-CESTAT-ALL

In all these judgements it has been held in clear terms that if the data retrieved from the computer is not in accordance with the provisions of Section 36B (2) & (4), the same cannot be held to be an admissible evidence.

25. In view of the above discussions, we set aside the impugned Order and allow the appeals filed by the Appellants with consequential reliefs.

(Order pronounced in the open court on 09/08/2019)

**Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)**

**Sd/-
(BIJAY KUMAR)
MEMBER (TECHNICAL)**

Pooja