

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH

Excise Appeal No. 677 of 2012

(Arising out of Order-in-Original No. CCE/BBSR-I/06/2012 dated 30.07.2012 passed by the Commissioner of Central Excise, Customs and Service Tax, Orissa)

M/s. Shiv Shakti Sponge Iron Limited
P.O. Pandersil, VIII- Sukuruli, Dist Mayurbhanj, Orissa

...Appellant

VERSUS

Commissioner of Central Excise, Bhubaneshwar
Bhubaneshwar-I Commissionerate,
Rajaswa Vihar, Bhubaneshwar, Orissa

.....Respondent

With

Excise Appeal No. 678 of 2012

(Arising out of Order-in-Original No. CCE/BBSR-I/06/2012 dated 30.07.2012 passed by the Commissioner of Central Excise, Customs and Service Tax, Orissa)

M/s. Bharat Bhushan Sachdeva
(Former Director) (Noticee No. 2)
c/o. Shiv Shakti Sponge Iron Ltd.
P.O.-Pandersil, VIII- Sukuruli, Dist Mayurbhanj, Orissa

...Appellant

VERSUS

Commissioner of Central Excise, Bhubaneshwar
Bhubaneshwar-I Commissionerate,
Rajaswa Vihar, Bhubaneshwar, Orissa

.....Respondent

APPEARANCE

Shri S Bagaria, Advocate for the Appellant (s)

Shri T Mondal, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO: 76980-76981/2019

**DATE OF HEARING: 07.08.2019
DATE OF DECISION: 17.12.2019**

BIJAY KUMAR :

1. These two appeals seeks to assail order dated 30.07.2012 passed by the Commissioner of Central Excise Customs and Service Tax Bhubaneswar by which the following order has been passed;
 - (i) Demand of Central Excise duty amounting to Rs. 1,02,75,737/- (Rs. One Crore Two Lakhs Seventy Five Thousand Seven Hundred and Thirty Seven only) under the provisions of Section 11A of the Central Excise Act 1994 ('the Act' for short) and recovery thereof under Section 11A (2) of the Act.
 - (ii) The amount of Rs. 20 lakhs deposited by the Appellant, M/s Shiv Shakati Sponge Iron Limited, towards the amount of duty confirmed and recovery of interest under the provisions of Section 11AB of the Act and the imposition of Rs. 1,02,75,737/- (Rs. One crore two lakhs seventy five thousand seven hundred and thirty seven only) under the provisions of Section 11AC of the Act. However, the benefit was given penalty as per law if the amount so confirmed is deposited within thirty days from the communication of the order.
2. The Adjudicating Authority imposed penalty of Rs. 20 lakhs on Shri Bharat Bhushan Sachdeva, Director of M/s Shiv Shakti Iron (for short SSIL) Sponge Limited under Rule 26 of the Central Excise Rules 2002 (for short 'the Rules'). Being aggrieved by the above order the Appellant Company along with Director of the Company are in appeal by the two separate appeals.
3. Brief facts of the case are that M/s Shiv Shakti Sponge and Iron Limited, Mayurbhanj, Orissa (hereinafter for short 'SSIL') is registered with the Department and is engaged in the manufacture of Sponge

Iron (in short 'the impugned goods') falling under Chapter heading 72 of the Central Excise Tariff Act, 1985 (in short 'CETA') and have contravened various provisions of Central Excise Act and Rules as stated above by way of clandestine production and removal of excisable goods without payment of Central Excise Duty as per the impugned order. The demand was confirmed in pursuance of Show Cause Notice dated 25.03.2011 for the period from 1st March, 2006 to 25th September, 2007.

4. Shri Bharat Bhushan Sachdeva, the other Appellant happened to be the Director of the SSIL and three other factories, namely, M/s Atlanta Commodities P. Ltd., Mayurbhanji, Orissa (in short 'ATL') , the Union Enterprises (in short 'Union') situated at Industrial area, Adityapur and M/s Sachdeva Engineering Works Pvt Ltd. (for short the 'SEWPL'). Acting on the intelligence Regional Unit (for short 'DGCEIRU') carried out search operations on the various factory premises of units, SEWPL on 26.09.2007. During the search operation in the premises of units various incriminating documents were found which were seized under Panchanama which annexed as annexure-1 to the Show Cause Notice dated 25.03.2011 during search on the premises of SEWPL resulted in recovery of documents pertaining to SSIL Unit and ATL which were also seized under Panchanama dated 26.09.2007. In addition to other document a **pen drive** containing some vital data was recovered from the possession of Shri Bharat Bhushan Sachdeva. On scrutiny of the contents of the pen drive the officers found that the data in the pen drive was stored in Telly-9 software with folders name as 'OMM' and 'ATL'. The officers obtained hard copies of these filed in presence of Shri Sachdeva. Data folder 'OMM' relates to 'Union' for the Financial

Year 2007-08 and the data under folder 'ATL' related to 'ATL'. Shri Sachdeva explained in his statement dated 26.09.2009 the investigation relied upon the data contained in the pen drive in the following folders;

- Folder No. 1 - 61/DGCEI/JRU/SEWPL(F)/07,
- Folder No. 2 - 62/DGCEI/JRU/SEWPL(F)/07
- Folder No. 3 - 64/DGCEI/JRU/SEWPL(F)/07
- Folder No. 4 - 65/DGCEI/JRU/SEWPL(F)/07

Which as per the Department indicated the clandestine removal of the goods by SSIL.

5. In his statement Shri Bharat Bhushan Sachdeva recorded under Section 14 of the Act has accepted authenticity of the data mentioned in the aforesaid pen drive. This led to the issuance of the aforesaid Show Cause Notice dated 25.3.2011.

6. Learned Advocate reiterated the grounds contained under the appeal memorandum and also submitted as under;

- (i) The documents contained in the pen drive for which print outs were taken, the document 61 was purchase ledger of Union, document 62 ledger again of Union, document 64 of ATL and document 65 was purchase ledger of ATL. The Entire demand appeared to have been calculation based on the comparison of the data contained in the pen drive/ printouts with the statutory recorded maintained by the Appellant under the provisions of Central Excise Act and Rules.
- (ii) No search or investigation were conducted in the premises of the Appellant and; no cash was found; no excess raw material found; no stock discrepancies; no evidence/ statement of transporters; electricity consumption, capacity to manufacture.

- (iii) The entire demand has been raised on the basis of a pen drive/print outs record obtained from the premises of the third party and also the private records of the third party which were compared with the Appellant's statutory records.
- (iv) The confession statement of Shri Bharat Bhushan Sachdeva who were the common Director of all the four companies were obtained under duress which in any case under the capacity as the Director/ proprietor of other companies.
- (v) Learned Advocate also submitted that entire case is against all Appellants is made out on the basis of computer printouts and document retrieved from the pen drive. Following the mandate of Section 36B of the Act which is not sustainable in view of following case laws.;

a. Premier Instruments	[183 ELT 65 (T)]
b. Ambica Organics	[334 ELT 97 (T)]
c. Ambica Organics	[334 ELT A67 (Guj)]
d. Shivam Steel Corporation	[339 ELT 310 (T)]
e. Modern Laboratories	[357 ELT 724 (T)]

- 7. The investigation report which were relied upon in the impugned order was neither supplied to the Appellant not those were relied upon documents (RUD) in the impugned Show Cause Notice.
- 8. The charge against the Appellant is regarding the clandestine removal of goods from their factory which is a serious charge and cannot be based on the presumption and assumption without any positive and cogent evidence for which reliance was placed on the following decisions;

- (i) Sakeen Alloys – [296 ELT 392 (T)]**
- (ii) Sakeen Alloys – [308 ELT 655 (Guj)]**
- (iii) Sakeen Alloys – [319 ELT A117 (SC)]**

- 9. Learned Authorised Representative appearing on behalf of the Revenue, however, supported the impugned order and states that the

Director of the Company, Shri Bharat Bhushan Sachdeva in his statement dated 26.09.2009 has accepted the clandestine removal, and therefore, there is no infirmity in the impugned order.

10. We have considered the statements made by Shri S Bagaria, learned Advocate and Shri T Mondal learned Authorised Representative of the Department and also carefully perused the appeal records.
11. The issue before us is to decide as to whether the charge of clandestine removal can be made against the Appellant on the basis of documents obtained during the search conducted at the two other companies for which Shri Bharat Bhushan Sachdeva is common Director. During the search the pen drive was recovered which allegedly contained the data regarding the clandestine removal of the goods without any search being conducted on the Appellant's premises. The data retrieved from the pen drive was compared with data contained regarding the manufacture production and clearance of the goods. It is on record that the Department has solely relied upon the data in the pen drive without any further corroboration by the independent investigation conducted for the activity by the Appellant. Although the statement of Shri Sachdeva dated 26.09.2009 was retracted and the existence of data in the pen drive from where the various files were extracted is not disputed. But any data contained in the pen drive/printouts has to be as per the provisions of Section 36B of the Act which has definitely not been followed by the Adjudicating Authority. We find that the issue stand settled by the various decisions which has been quoted by the Appellant to this effect, however, we reproduce only a few of them in case of **Premium Instrument (supra)** which is held as under;

"9. On the demand of duty on waste and scrap, again the appellants have made out a strong case on merits. The demand covering the period November 1993 to September 1998 is based on certain computer print-out relating to the period February, 1996 to September, 1998. These print-outs were generated from a personal computer of Shri G. Sampath Kumar, a junior officer of the Company, whose statements were also recorded by the department. Admittedly, whatever facts were stated by Shri Sampath Kumar, in his statements, were based on the entries contained in the computer print-outs. The statements of others, recorded in this case, did not disclose any additional fact.. Therefore, apparently, what is contained in the computer print-out is the only basis of the demand of duty on waste scrap. The question now arises as to whether these print-outs are admissible as evidence in this case. Ld. Sr. Counsel has pointed out that the computer print-outs did not satisfy the statutory conditions. He has referred to the relevant provisions of Section 36 B of the Central Excise Act which deals with admissibility of computer print-outs etc. as evidence and says that the statement contained in a computer print-out shall be deemed to be a document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. Sub-section (2) reads as under :-

"2. The conditions referred to in sub-section (1) in respect of the computer print-out shall be the following, namely:-

(e) the computer print-out 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;

(f) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of the kind from which the information so contained is derived;

(g) 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 that period was not such as to affect the production of the document or the accuracy of the contents; and

(h) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities."

Ld. Sr. Counsel has argued that the above conditions were not fulfilled in respect of the computer print-out taken from the personal computer of Shri Sampath Kumar. It appears from the statement of Shri Sampath Kumar and the averments in the memorandum of appeal that it is an admitted fact that Shri Sampath Kumar was the person having lawful control over the use of the computer. The computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the company. It was also not shown that information of the kind contained in the computer print-out was regularly supplied by the Company to the personal computer of Shri Sampathkumar in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party who wants to rely on the computer print-out, to show that the information contained in the print-out had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. We have considered the Tribunal's decision in [International Computer Ribbon Corporation v. CCE, Chennai](#) (supra). In that case, as in the instant case, computer print-outs were relied on by the adjudicating authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that the print-outs were neither authenticated nor recovered under Mahazar. It was also found that the assessee in that case had disowned the print-outs and was not even confronted with what was contained therein. The Tribunal rejected the print-outs and the Revenue's finding of clandestine manufacture and clearance. We find a strong parallel between the instant case and the cited case. Nothing contained in the print-outs generated by Sampathkumar's PC can be admitted into evidence for non-fulfilment of the statutory conditions. It is also noteworthy that the computer print-outs pertained to the period February, 1996 to September, 1998 only but the information contained therein was used for a finding of clandestine removal of waste and scrap for earlier period also, which, in any case, was not permissible in law. In the result, we hold that the entire demand of duty on waste and scrap is liable to be set aside."

12. In case of **Ambica Organics(supra)** which is held in paragraphs as under;

"7. After hearing both the sides and on perusal of the records, I find that the Central Excise officers while visiting the factory of the appellant, recovered a USB drive in the appellant's premises. The USB drive was connected with computer and a printout was taken by the computer expert accompanied with the Central Excise officers. The printout gives the details of the certain sales (date-wise) commencing from 1-4-2005. The delivery challans for various chemicals for the month of December, 2005 and January, 2006 were found and seized during the search. The appellants disowned the contents of the printout and stated that it has manipulated the data base with motive, to take revenge from the partner and the firm for the refusal of the loan of Rs. 1 lakh sought by the Computer Operator. The appellant filed an affidavit disclosing this fact on 13-2-2006 i.e. immediately after the raid and a copy of the affidavit was also given to the investigating officer. The Central Excise officers attempted to corroborate the contents of the printout with the statements of 30 persons viz. buyers, transporters etc. The appellants requested for cross-examination of 30 persons which was rejected by the Adjudicating authority. The appellants contended that the statements are pre-drafted computer statements and it cannot be voluntary nature. After considering the submissions of the appellant, the Commissioner (Appeals) allowed the cross-examination of 4 persons randomly selected. Three of them stated that they were made to sign the pre-drafted statements on a promise that no action shall be taken against them.

8. For the purpose of proper appreciation of the case, the relevant portion of the findings of the Commissioner (Appeals) is reproduced below : -

"4.5 Another contention of the appellant is that department has brought artificial evidence in the form of 30 statements from the buyer parties. The appellant stand is that the statements of the 30 parties are pre-drafted computer statements and involuntary. Four of the buyers (randomly selected) deposed before me. Three of them stated before me that they were made to sign a pre-drafted statement on a promise that no action shall be taken against them. One of them stated that his statement was voluntary. In the statements it has been recorded that these person stated that they received the textile auxiliary chemicals without invoice and against cash payments. Statement of these 30 persons (most of them Processors) are against their own interest as it makes them liable for penal action for purchasing dutiable goods on which duty was not paid. However, no show cause notice is given to these persons who have admitted to have received the impugned goods without bills. This fact gives credence to the allegations made by the appellant that the statements were not voluntary. It is apparent that the thirty statements have been recorded under a promise that no action

shall be taken against them. Under these facts and circumstances, the evidentiary value of these thirty statements is considerably weakened. However, the solid evidence in the form of electronic records (USB Drive) and the computer printout from the same are sufficient to nail the appellant."

9. The Commissioner (Appeals) observed that the evidence in the form of electronic record (USB drive) the computer printout are strong evidence to establish the clandestine removal of the goods. It is seen that the said printout of the data in the USB drive contained the details of raw material and finished goods along with the names and addresses of the suppliers and the purchasers of the finished goods. It is seen that the statements were recorded to corroborate the contents of the printout and the Commissioner (Appeals) had held that the said statements has no strong evidentiary value. Shri Anil Gupta, Partner of the appellant firm had stated that he was not aware of the details contained in the USB drive.

10. Learned Advocate submitted that the clandestine manufacture and removal of the goods cannot be upheld based on the printout of the data contained in the USB drive without following the requirement of condition of Section 36B of the Central Excise Act, 1944. Section 36B of the said Act provides admissibility of microfilms, facsimile copies of documents and computer printouts as documents and as evidence. Clause (c) of Section 36B(1) states that the statement contained in a document and included in a computer printout would be an evidence if the condition mentioned in the sub-section (2) and other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be the document for the purpose of this Act and the rules made thereunder and can be admissible in proceedings. Sub-section (2) of Section 35B provides the condition referred to in sub-section (1) in respect of the computer printout shall be the following viz.

"(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 regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operational properly or, if not, then any respect in which it was not operating properly or was out of operation

during that part of that 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 reproduced or is derived from information supplied, to the computer in the ordinary course of the said activities.”

Sub-section (4) of Section 36B requires issue a certificate in this behalf by a person occupying the responsible official position in relation to the operation of the relevant device or the management of the relevant activity (whichever is appropriate) shall be evidence in any matter stated in the certificate and for the purpose of the sub-section, which shall be sufficient for a matter to be stated to the best of the knowledge and the belief of the persons stating it. In the present case, the data was not stored in the computer. It is stated that the computer expert accompanied with the Central Excise officers had taken the printout from the USB drive by connecting to the computer. The officers had not obtained any certificate as required under Section 36B of the said Act. It is also noted that none of the conditions under Section 36B(2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the clandestine removal of the goods. It is noted that the requirement of certificate under Section 36B(4) is also to substantiate the veracity of truth in the operation of electronic media. In the case of *M/s. Premier Instrument & Controls Ltd.* (supra), the Tribunal has held that the printout of the personal computer of the company's officer, had not fulfilled the statutory condition laid down under Section 36B(2) of the Act and the demand is not sustainable. The relevant portion of the said decision is reproduced below : -

“9. On the demand of duty on waste and scrap, again the appellants have made out a strong case on merits. The demand covering the period November, 1993 to September, 1998 is based on certain computer printout relating to the period February, 1996 to September, 1998. These printouts were generated from a personal computer of Shri G. Sampath Kumar, a junior officer of the Company, whose statements were also recorded by the department. Admittedly, whatever facts were stated by Shri Sampath Kumar, in his statements, were based on the entries contained in the computer printouts. The statements of others, recorded in this case, did not disclose any additional fact. Therefore, apparently, what is contained in the computer printout is the only basis of the demand of duty on waste and scrap. The question now arises as to whether these printouts are admissible as evidence, in this case. Ld. Sr. Counsel has pointed out that the computer print-outs did not satisfy the statutory conditions. He has referred to the relevant provisions of Section 36B of the Central Excise Act which deals with admissibility of computer printouts etc. as evidence and says that the statement contained in a computer printout shall be deemed to be a

document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. Sub-section (2) reads as under : -

"2. The conditions referred to in sub-section (1) in respect of the 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 regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement of the kind from which the information so contained is derived;
- (c) throughout the material part of the said period, the computer was in operation properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that 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 reproduced or is derived from information supplied to the computer in the ordinary course of the said activities."

Ld. Sr. Counsel has argued that the above conditions were not fulfilled in respect of the computer printout taken from the personal computer of Shri Sampath Kumar. It appears from the statement of Shri Sampath Kumar and the averments in the memorandum of appeal that it is an admitted fact that Shri Sampath Kumar was the person having lawful control over the use of the computer. The computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the company. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the Company to the personal computer of Shri Sampath Kumar in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. We have considered the Tribunal's decision in

International Computer Ribbon Corporation v. CCE, Chennai (supra). In that case, as in the instant case, computer printouts were relied on by the adjudicating authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that the printouts were neither authenticated nor recovered under Mahazar. It was also found that the assessee in that case had disowned the printouts and was not even confronted with what was contained therein. The Tribunal rejected the printouts and the Revenue's finding of clandestine manufacture and clearance. We find a strong parallel between the instant case and the cited case. Nothing contained in the printouts generated by Sampath Kumar's PC can be admitted into evidence for non-fulfilment of the statutory conditions. It is also noteworthy that the computer printouts pertained to the period February, 1996 to September, 1998 only but the information contained therein was used for a finding of clandestine removal of waste and scrap for earlier period also, which, in any case, was not permissible in law. In the result, we hold that the entire demand of duty on waste and scrap is liable to be set aside."

11. Taking into consideration the overall facts and circumstances of the case, I find that the entire case was made out on the basis of statements of the buyers and the computer printout. Commissioner (Appeals) already held that the evidentiary value of the statements is weak. It is also noted that the statements of the 30 persons were mostly similarly pre-drafted. The investigating officers failed to comply with the conditions of Section 36B of the Act in respect of relying upon this computer printout. There is no adequate material available on record to establish the clandestine removal of goods. Therefore, the demand of duty solely on the basis of these materials cannot be sustained. Hence, as the clearance value was within the SSI exemption, the confiscation of the goods cannot be sustained. So, the imposition of penalties are not warranted".

13. We also find that the issue has been elaborately dealt in case of **M/s Popular Paints and Chemicals vs. Commissioner of Central Excise and Customs, Raipur [2019 (TIOL) 1239 (Cestat-Del)]**, wherein it is held that following the mandatory requirement as contained under Section 36B of the Act the reliance cannot be placed on the data contained in the electrical device. The relevant paragraph of the order is reproduced 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 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 thereunder, 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 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 thereunder 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-(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 derivation from the information fed into the computer in the ordinary course of the said activity.”

14. In view of above, there cannot be any reliance on the data contained in the pen drive, which has been taken as gospel truth in the case at hand.

15. We also find that the statement of Shri Bharat Bhushan Sachdeva can also not be relied upon for not following the prescription under Section 9D of the Act. Shri Sachdeva has not been examined by the Adjudicating Authority and also not cross examined by the Appellant. In the circumstances even the statement which has not been retracted cannot be taken as an admissible piece of evidence.

16. We also find that the demand has been passed on the third party documents recovered from the premises of the Union and SEWPL which cannot be relied upon in view of decision of this Tribunal in case of Rhino Rubber, Rama Shayama Papers, Bhandari Industries, Jai Mata Industries and Shri Sidhballi Ispat and **Shri Sidhballi Ispat(Supra)** is reproduced as under;

7.We have considered the submissions made at length by both sides and perused the records and also considered the case laws quoted by both sides.

8.The issue involved in these cases is whether the main appellant has indulged in clandestine manufacture and clearances of finished goods or otherwise; whether Revenue is able to make out a case of clandestine removal and whether penalties are to be imposed on the appellants.

9.Having heard both sides at length and after perusing the record, we are of the view that the investigations in this matter raise more questions than answer them. To say that the investigations have been slipshod in our view will only be an understatement. It appears that the vital and clinching evidence has not been brought on record for reasons beyond us. Some of the stark gaffes that we have noticed in the investigation are enumerated hereinbelow.

9.1The notice relies upon LRs of a transporter and claims that non-duty paid goods were transported under cover of the said LRs. Surprisingly, however, the testimony of none of the consignees has been brought on record even though the LRs mentions the names and addresses of the consignees. The testimony of the consignees backed by their records would have clearly nailed the appellant, had it actually resorted to clandestine removal under the said LRs.

9.2The Daily Account Book Register of M/s. Aishwarya Roadlines, one of the transporters, is one of the documents relied upon in the notice. It is an admitted position in the notice that the same was prepared and maintained by one Mr. Padmakar Wankhade, Supervisor. However, no statement of Mr. Wankhade has been

recorded nor is there any explanation in the notice as to why such a statement could not be recorded.

9.3 Even in respect of statements which were recorded, there seems to have been no follow up on the leads provided. For instance, Mr. Monu Pant, who is the proprietor of M/s. Aishwarya Roadlines, whose LR's/Daily Account Book Register were seized from the residential premises of his brother-in-law, had in his testimony clearly explained that his transport company was acting as a mere booking agent and did not own any truck of their own. Mr. Pant also gave names of some of the transporters who were engaged for the actual transportation. It is clear from this statement that M/s. Aishwarya Roadlines was not engaged in the actual transportation of the goods and that such transportation was being undertaken by various other transport companies. Surprisingly, despite this statement of Mr. Pant, the notice contains no reference to any investigation with the actual transporter. Neither any statements of such other transporters are on record, nor is there any explanation available as to why such statements could not be recorded.

9.4 Shortage of raw materials and finished goods during stock taking in the factory has been alleged on the basis of theoretical calculation of weight rather than actual physical weighing.

9.5 Documents said to have been obtained from the Octroi have been, are neither recovered under a panchnama nor is there any letter or document on record evidencing the same having been supplied/furnished by the Octroi Authorities.

9.6 Demands are based on documents which were recovered/seized not from the assessee's premises but from premises of third parties such as transporter's premises, premises of an employee who was residing with his brother-in-law of a key transporter in this case etc. Since these documents were not seized from the premises of the appellant, the burden of proving that the same pertain to the appellant lies upon the Revenue. The notice has however, without establishing how the said documents could be correlated with the appellant assumed the same to be correct and pertaining to the appellant.

9.7 Having summarised the lacunae and shortcomings in the investigation, we shall now deal with the broad evidence relied upon *qua* each of the demands confirmed in the impugned order and examine whether the evidence relied upon is sufficient to establish the case of clandestine removal.

9.8 The largest demand of Rs. 83.09 lakhs is based on LR's/Daily Account Book Register seized from the premises of Mr. K.K. Pandey, brother-in-law of Mr. Monu Pant - the proprietor of M/s. Aishwarya Roadlines. The evidence relied upon in support of this demand appears to be, vague and unreliable inasmuch as, except for copies of 136 LR's for the period 14-1-2008 to 30-5-2008 and daily account book register for the period of 14-12-2007 to 13-1-2008 and for the day of 2-4-2008, there is absolutely no other evidence that has been relied upon. Admittedly, as per the Revenue the LR's/the daily account book Register were prepared by Mr. Padmakar Wankhede, however there is no testimony of Mr. Padmakar Wankhede on record. There

does not appear to us any conceivable reason as to why the testimony of the author of the document has not been brought on record. Though such a testimony, by itself would not have been sufficient to nail the appellant. However, absence of the same is clearly unexplainable. Further, from the testimony of Shree Monu Pant it comes out that M/s. Aishwarya Roadlines was acting only as booking agents and did not undertake the actual job of transportation, which was undertaken by different transporters named by Mr. Pant within his testimony. No investigation seems to have been undertaken at the end of the actual transporter. There is also no investigation at the end of the consignees whose names appear on the LRs against which goods have supposedly been cleared clandestinely. There is also no evidence in the form of unaccounted procurement of raw materials, fuel, labour, receipts of unaccounted cash, etc. which are some of the basic parameters which have been laid down by Courts and Tribunals over a period of time for determining whether or not the allegation for clandestine removal is established. It may be worthwhile to quote the tests that have been laid down in the case of in *M/s. Nova Pharmaceuticals Pvt. Ltd. v. CCE - 2014-TIOL-15-CESTAT-AHM* = [2014 \(311\) E.L.T. 529](#) (Tribunal) which approved of by the Hon'ble Delhi High Court in *Flevel International v. CCE - 2015-TIOL-2230-HC-DEL-CX* = [2016 \(332\) E.L.T. 416](#) (Del.). The said tests are extracted hereinbelow :

- “(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;
- (ii) Evidence in support thereof should be of :
 - (a) raw materials, in excess of that contained as per the statutory records;
 - (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;
 - (c) discovery of such finished goods outside the factory;
 - (d) instances of sale of such goods to identified parties;
 - (e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;
 - (f) use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;
 - (g) statements of buyers with some details of illicit manufacture and clearance;
 - (h) proof of actual transportation of goods, cleared without payment of duty;
 - (i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.”

9.9The aforesaid ratio also finds support in the following judgments :

(a) *Vishwa Traders Pvt. Ltd. v. CCE*, [2012 \(278\) E.L.T. 362](#) (T), as affirmed by the Hon'ble Gujarat High Court in *CCE v. Vishwa Traders*, [2013 \(287\) E.L.T. 243](#) (Guj.),

(b) *Sakeen Alloys Pvt. Ltd. v. CCE*, [2013 \(296\) E.L.T. 392](#) (T), which has been affirmed by the Hon'ble Gujarat High Court in *CCE v. Sakeen Alloys*, [2014 \(308\) E.L.T. 655](#) (Guj.),

(c) *Mahesh Silk Mills v. CCE*, [2014 \(304\) E.L.T. 703](#) (T), as affirmed by the Hon'ble Gujarat High Court in *CCE v. Mahesh Silk Mills*, [2015 \(319\) E.L.T. A52](#) (Guj.)

(d) *CCE v. Air Carrying Corporation*, [2009 \(248\) E.L.T. 175](#) (Bom.).

9.10The only contrary evidence is statement of Shree Monu Pant which seeks to suggest that the goods were being clandestinely cleared by the appellant. The statement does not inspire any confidence in the absence of the same having not been examined on the touchstone of cross-examination. Further, the impugned order has recorded that the clandestine clearances reflected in the LR's were corroborated in a few cases by the rahadari/transit pass, details of which were specified in Annexure B to the SCN, no such details appear in Annexure B to the SCN nor have any details in respect of the same been furnished in the SCN. Considering the lack of evidence, it would serve no purpose to remand the matter back for seeking cross-examination of Shree Monu Pant, the gaps and the lacunae in the investigation cannot be undone by his cross-examination.

9.11The second largest demand of Rs. 60.85 lakhs is based on the photocopies of 276 parallel invoices which are claimed, by the Revenue, to have been obtained from the Octroi department. Here again, even though the names and addresses of the purchasers are available on the alleged parallel invoices, no statement has been recorded from any of the purchasers with regard to these invoices. The best evidence has thus not been collected. Surprisingly, the notice as well as the impugned order is totally silent on the reasons for not recording or not been able to record the statements of the buyers. The situation with regard to the next demand of Rs. 48.40 lakhs which is based on the photocopies of 123 LR's obtained from the Octroi department is the same. One of the most appalling aspect of the investigation is that the Revenue has not even placed on record the document under cover of which these photocopies of LR's and invoices were obtained from the Octroi department. Further the said documents are admittedly photocopies. It is settled law that photocopies are not credible evidence and it becomes necessary for any investigating authority to place on record authenticated copies of such photocopies in case the originals are not available. Here, not only there is lack of authentication from the Octroi department but there is not even a covering letter available on record to establish that these photocopies are obtained from the Octroi department. These photocopies are therefore rendered unreliable. Whatever little case that the Revenue could have, if at all made out, based on such

unauthenticated photocopies, does not survive in the instant case in the absence of any investigation with the consignees/purchasers shown in these invoices/LRs.

9.12 Further it is relevant to note here that with respect to the said 276 parallel invoices, statements of Mr. Pandey, Vice-President and Mr. D.D. Rathi, Manager (Commercial & Accounts) of the Appellant Company were recorded and both of them have, in their statements dated 18-9-2009 and 17-9-2009 respectively, denied the existence of such parallel invoices by the appellant. Insofar as the 123 LRs supposed to have been received from the Octroi department have been received, the investigating authority did not even deem it necessary to record statement of the appellant's personnel all the same.

9.13 The statement of the transporters which have been relied upon to corroborate the said records supposed to have been furnished by the Octroi authorities, also do not support the case of the Revenue inasmuch as a reading of their statements show that mostly all of them were commission agents who had only arranged for transportation and used to hand over blank LR copies to the actual transporters and did not maintain any records regarding actual transportation having been undertaken, as they were concerned only with the commission for arranging the transport. No testimony of the actual transporter, if any, has been recorded. The statements of the transporters in question are without reference to any documentary evidence/record maintained by them and are completely uncorroborated. The statement of the transporters clearly brings out the fact that they were handing over the blank copy of the LRs to the actual transporters. This factor by itself is sufficient to discard the testimony of the transporters as they had no knowledge whatsoever of whether or not goods had actually been carried under the cover of the LRs.

9.14 The statements of the transporters, though not relevant, the reasoning assigned by the respondent for rejecting the cross-examination of the transporters is completely untenable. The respondent has placed reliance on the decision of the Tribunal in the case of *Mayamahal Industries v. CCE* reported in [1995 \(80\) E.L.T. 118](#) in support of decision to reject cross-examination. In our view the Revenue alleged for denying cross-examination, on the sole ground that the transporters were co-noticees, is untenable. It is settled law that while a co-noticee has a right to refuse to be subjected to cross-examination, it is incumbent upon the part of the adjudicating authority to put it to the co-noticee whether he would be willing to subject himself to cross-examination. In any case the statements being unreliable no adverse inference can be drawn solely based on them.

9.15 The position with regard to the demand of Rs. 55.92 lakhs which is based on the copies of Truck Destination Register maintained by another transporter, namely M/s. Akola Goods Transporter, Chandrapur, is no different. Here again, no investigation seems to have been conducted at the end of the alleged consignees whose name appear in the said Truck Destination Register. The actual receipt of the goods by the consignees is thus not established. No investigation was undertaken to bring on record the author of the

said truck destination register. The said statement of Mr. Shakheel Khan shows that M/s. Akola Transport Co. was only acting as a commission agent and were merely arranging for transportation rather than actually transporting the goods themselves in their own trucks. No investigations have been conducted with the actual transporters engaged by M/s. Akola Transport Co. The Books of Account of M/s. Akola Transport Co. have also not been examined to find out the names of the actual transporters. In any case it is settled law laid down by the Hon'ble High Court of Patna in *CCE v. Brims Products*, [2011 \(271\) E.L.T. 184](#) (Pat.), that allegation of clandestine removal cannot be sustained based merely on transporters' records which are not corroborated by any other evidence."

17. We also find that the charge of clandestine removal thrust upon the Appellant based on the documents contained in the pen drive without any other corroboration and this is mere presumption and assumption. The demand cannot be sustained which is based on the presumption and assumption as held in case of **Sakeen Alloys(supra)**, wherein it is held as under;

"7.It is also observed from Para 14.4 of the show cause notice that names and address of M/s. Siddhi Industries Pvt. Limited and M/s. Mahavir Alloys, Dabhol, Nani Daman are manufactured who were alleged to have supplied the excess raw materials to the appellants from which clandestinely removed goods were manufactured. Their addresses were made available to the department but no enquiry was conducted at the supplier's end to establish that excess materials in fact were supplied to the appellants. Similarly, no investigation has been extended to the buyers of the finished goods whose names are in the records/pen-drive of M/s. Sunrise Enterprise. This part of the investigation was necessary to establish that clandestinely removed goods have reached to the buyers and they have confirmed to have received such goods. Appellants herein have filed affidavits from some of such buyers which the adjudicating authority has not accepted. It would have been in the interest of justice to call some of these purchasers for cross-examination so that true picture of the entire activities undertaken by the appellants was made clear. Appellants also requested for cross-examination of the Chartered Engineer who gave them the certificate regarding manufacturing capacity and consumption of electricity.

8.In the cases relating to clandestine removal of excisable goods, following are the indicators of clandestine removal activities by a manufacturer :-

- (i) Excess stock of raw materials found in the factory premises.
- (ii) Shortage of raw materials in the records of manufacturer.

- (iii) Excess/shortage of manufactured goods found in the factory premises.
- (iv) Excess consumption of electricity/power used in the manufacture of finished goods.
- (v) Any transit seizure of clandestinely removed goods made by the investigating authority.
- (vi) Any cash amounts seized from the factory premises or dealer's premises or residential premises searched during investigation.
- (vii) Confessionary statements of the persons concerned with the clandestine manufacture/removal of excisable goods.

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?"

10. Similarly, in the case of *CCE, Chandigarh-1 v. Shingar Lamps Pvt. Limited* [[2010 \(255\) E.L.T. 221](#) (P&H)], the Hon'ble High Court held that the private records which have been discovered during the raid may not be sufficient for holding clandestine production and removal but there should be some positive evidence suggesting clandestine production and removal. The Hon'ble Supreme Court in the case of *Shalimar Rubber Industries v. Collector of Central Excise, Cochin* [[2002 \(146\) E.L.T. 248](#) (S.C.)] has also held that once the statement is retracted and the assessee asked for cross-examination then if such cross-examination is denied, the department cannot make such statements as the basis for concluding that there was clandestine removal. It is further observed that the Hon'ble CESTAT in the

case of *Rama Shyama Papers Limited v. CCE, Lucknow* [2004 (160) E.L.T. 494 (Tri.-Del.)] came to the following conclusion in Paras 9 and 10 of the judgment which are reproduced below :-

We have considered the submissions of both the sides. The "9. Revenue has charged the Appellants with clandestine manufacture and removal of paper mainly on the basis of documents seized from the premises of Chitra Traders and Transporters and the various statements recorded from the Proprietor of Chitra Traders, transporters and labourers working in the factory of the Appellants and also the driver or cleaner of the Truck which was in the process of loading on 22-6-2001 when the Central Excise Officers visited their factory premises. The Appellants, on the other hand, have contended that most of the persons whose statements have been relied upon have not been produced for cross-examination and the documents seized from third parties' premises have not been corroborated by adducing evidence of any of the customers though the enquiries were conducted at different places as deposed by Shri Anurag Sharma, Inspector, in his cross-examination on 4-3-2002. Out of 19 consignments said to have been cleared by the Appellant No. 1 without payment of duty on the basis of five transporter, we observe that in respect of two consignments, it has been mentioned by the Revenue that the same may not pertain to the Appellants. Further, only one transporter Shri Sanjay Garg of M/s. Balaji Transporter Co. was produced for cross-examination which accounts for only two consignments out of 19 consignments in question. Shri Garg, it is observed from the record of cross-examination, has deposed that they generally work as commission agent and provide transport to Appellant No. 1; the payment is used to be received directly by the drivers after delivery of the goods at the consignee's end and in case the driver did not report back for the next 3-4 days, it was presumed that the goods had reached the consignees end. Further, the name of the Applicant No. 1 on one GR No. 34 had been written not by Shri Sanjay Garg, but by his brother, whose statement has not been recorded and on GR 187, there is no mention of the name of the Appellant No. 1 at all. No statement of the drivers concerned has been recorded by the Revenue to establish that the finished goods manufactured by the Appellants were removed without payment of duty. The other transporters have not been produced for the purpose of cross-examination nor the statements of drivers who might have actually carried the goods, had been recorded. Moreover no statement of any of the recipients of the goods had been brought on record. Thus the statements of the transporters have remained uncorroborated and also suffers from the shortcoming of being not being cross-examined by the Appellants. It has been the settled law that the liability cannot be fastened on an assessee on the strength of documents seized from the possession of third party. There should be some corroborative evidence/material. The Tribunal has in the case of *Emmtex Synthetics Ltd.*, supra, when the charge of clandestine removal was made against the Appellants therein out of yarn received from a third party based on the diary, loose documents and packing slips allegedly recovered from Shri B.M. Gupta, Vice President of the Supplier Company, held that "no presumption on the basis of uncorroborated, uncross-examined evidence of B.M. Gupta and the alleged entries made by him in the

private diary, loose sheets, charts, packing slips could be drawn about the receipt of polyester yarn by the Appellants from the company, M/s. HPL, in a clandestine manner during the period in question. Similarly, no inference could be legally drawn against the Appellants of having manufactured texturised yarn out of the said polyester yarn and the clearance thereof, in a clandestine manner without the payment of duty." The Tribunal had also referred to the decision in *Oudh Sugar Mills Ltd. v. Union of India*, 1978 (2) E.L.T. (J172) wherein "the Apex Court has observed that no show cause notice or an order can be based on assumptions and presumptions. The findings based on such assumptions and presumptions without any tangible evidence will be vitiated by an error of law". The Tribunal also took note of the decision in *Kamal Biri Factory and Shri Khushnuden Rehman Khan v. CCE, Meerut - 2003 (161) E.L.T. 1197* (T) = 1997 (23) RLT 609 (CEGAT) wherein view has been taken that the allegations of clandestine removal of the goods will not stand established when based on the entries made by the assessee's employee in a diary or on the basis of third party's record in the absence of any corroborative evidence. It has also been the consistent view of the Tribunal that the statements of the witnesses, without allowing the assessee to test the correctness of the same by cross-examining those witnesses; cannot be made the basis for holding the allegation against the assessee. (*Takshila Spinners v. CCE, supra*). Similar views have been expressed by the Tribunal in the case of *Haryana Petrochemicals Ltd., supra* wherein the Tribunal has held that reliance cannot be placed on the documents maintained by a third party "who did not have the courage to come forward for cross-examination in order to test the veracity and correctness of the private record maintained by him." It has also been held by the Tribunal in the case of *Kothari Synthetics Industries v. CCE, Jaipur - 2002 (141) E.L.T. 558* (T) that entries made in the transport Register of the transport company could not be accepted as a conclusive proof of clandestine receipt of goods from that transport company for want of corroboration from any tangible evidence. Following the ratio of these decision, the duty demand cannot be upheld solely on the basis of uncorroborated statements and records of transporter. The statements tendered by the labourers can also not be relied upon by the Revenue as these persons were not produced for being cross-examined. Moreover, there is no corroboration of their statements with regard to the Trucks by which the goods were allegedly removed or the persons who received the goods. The Truck driver Shri Shiv Bahadur Yadav has also not been cross-examined and cleaner Shri Rakesh Kumar had deposed that the Bills/Invoices are supposed to be with the Driver and he being cleaner had no knowledge.

The confirmation of duty in respect of 149 consignments is 10. also based on the records seized from the premises of M/s. Chitra Traders and not on the basis of any record seized from the premises of the Appellant-company. The Revenue has not been able to adduce any corroborative evidence to show the movement of goods from the premises of the Appellant-company to the premises of M/s. Chitra Traders or the Customers whom the goods were sent directly to as per the direction of Chitra Traders. No inquiry has also been made into these Customers who ultimately received the goods. There is no substance in the reasoning given

by the Commissioner in the impugned order to the effect that "as the party did not challenge the fact of their business association with M/s. Chitra Traders, Delhi, the enquiry further down the line was not considered necessary." The onus of proof that the goods were removed by the Appellants without payment of duty and without entering the same in their records is upon the Revenue which cannot be discharged merely on the strength of the entries made in the records of a third party without linking the removal of goods from the premises of the Appellant-company. The mere fact that the Appellant-company had business relation with Chitra Traders, does not mean that they will be liable to each and every entry made by Chitra Traders in their books of account. It is also noted that none of the transporters and none of the labourers whose statements have been relied upon by Revenue have mentioned that the goods in question were delivered to Chitra Traders from the premises of the Appellants. The material brought on record may at the most create a doubt only. But doubt cannot take the place of evidence. The Revenue has, thus, not proved its case against the Appellants in respect of 149 consignments. We, therefore, set aside the demand of duty and penalty imposed on Appellant-company and consequently the demand of interest."

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 whatsoever 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."

18. This decision has been approved by Hon'ble High Court and Supreme Court in **Commissioner vs. Sakeen Alloys [2015 (319) ELT A117(SC)]** and High Court as reported as **Commissioner vs. Sakeen Alloyes [2015 (319) ELT 665 (Guj)]**. In view of the aforestated discussion and precedent decisions of various judgments from the Supreme Court, High Court and Tribunal, we find any merit in the impugned order and therefore, the same is not sustainable.
19. Accordingly, we set aside the impugned order with consequential benefit as per law.
20. As the appeal main appellant SSWP is not sustainable there is no question of imposition of any penalty on the Director of the company, Shri Bharat Bhushan Sachdeva. The appeal is also allowed.

(Order pronounced in open court on 17.12.2019)

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

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