

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

REGIONAL BENCH - COURT NO.2

**Excise Appeal No.509 of 2010
And
Excise Cross Objection No.82 of 2010**

(Arising out of Order-in-Original No.CCE/BBSR-II/No.2/COMMISSIONER/2010 dated 26.03.2010 passed by Commissioner, Central Excise & Customs, Bhubaneswar-II.)

M/s. Scan Sponge Iron Limited

(Unit-I, Kumjharia, Bijabahal, Dist-Sundergarh, Orissa.)

...Appellant

VERSUS

Commissioner of Central Excise, Bhubaneswar-II

.....Respondent

(Rajaswa Vihar, C.R.Building, Bhubaneswar, Orissa.)

WITH

(i) Excise Appeal No.508 of 2010 & Excise Cross Objection No.81 of 2010 (Sri Sanjoy Gadodia); (ii) Excise Appeal No.577 of 2010 (Sri Praharaj Swain); (iii) Excise Appeal No.578 of 2010 (Sri Sanjib Mohapatra);

(Arising out of Order-in-Original No.CCE/BBSR-II/No.2/COMMISSIONER/2010 dated 26.03.2010 passed by Commissioner, Central Excise & Customs, Bhubaneswar-II.)

APPEARANCE

S/Shri N.K.Chowdhury, I. Banerjee, Tanay Agarwal, all Advocates for the Appellant (s)

Shri S.S.Chattopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75441-75444/2022

DATE OF HEARING : 15 June 2022
DATE OF DECISION : 08 August 2022

P.K.CHOUDHARY :

1. The present appeals are directed against an Order-In-Original dated March 26, 2010 passed by the Commissioner, Central Excise and Customs, Bhubaneshwar-II Commissionerate, whereunder, inter alia,

the demands of Central Excise Duty and Education Cess totalling to Rs.2,72,39,036/- were confirmed against the assessee-Company (hereinafter referred to as "Company") with interest and equivalent penalty under various provisions of the Central Excise Act, 1944 (hereinafter referred to as "Act") read with the Central Excise Rules, 2002 (hereinafter referred to as "Rules"). The said impugned order also directed for adjustment of the amount of Rs.30,00,000/- recovered from the Company during the course of investigations against the aforesaid demands and confirmed the imposition of personal penalties against Sri Sanjay Gadodia (Director of the Company), Sri Sanjib Mahapatra (Authorised Representative of the Company) and Sri Praharaj Swain (Despatch clerk of the Company).

2. Briefly stated, the facts of the case are as follows:-

- i. On November 3, 2008 a search and seizure operation was conducted by a team of Central Excise Officers at the Company's factory premises at Kumjharia, Bijabahal, District – Sundergarh, Odisha. During the course of the said search proceeding which continued upto November 5, 2008, the records pertaining to the Company's production and clearances were examined, joint stock verification was conducted under Panchnama and the statements of various personnel of the Company were also recorded. The Central Excise Officers detected huge shortage in stock of finished goods as compared to the stock recorded in the Company's Daily Stock Account register, which had purportedly been removed in a clandestine manner without payment of duty. Subsequently, amounts totalling to Rs.30,00,000/- were recovered from the Company towards its purported Central Excise liabilities.
- ii. After conclusion of investigations, a show cause notice dated October 8, 2009 was issued, alleging that the Company had clandestinely removed finished goods being 7541.420 MTs of MS Rods and 508.900 MTs of MS Angles in contravention of several provisions

of the Act and the Rules and whereon Central Excise duty totalling to Rs.2,72,39,036/- together with interest and equivalent penalty was payable. By relying on certain incriminating statements of Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid, the said show cause notice alleged, inter alia, that clandestine removal of short-found goods, as detected through joint stock taking, had been admitted. The said show cause notice also proposed imposition of personal penalties against the Company's personnel, namely, Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain.

- iii. The Company as well as the aforesaid Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain filed their respective replies and contested the aforesaid show cause proceedings.
- iv. By the impugned order, the Commissioner of Central Excise and Customs, Bhubaneshwar-II Commissionerate adjudicated the matter and confirmed all the proposed demands against the Company as well as the individual noticees.
- v. Aggrieved by the impugned adjudication order dated March 26, 2010, the Company as well as Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain filed their respective appeals together with stay applications before this Tribunal. The Revenue also filed cross objections.
- vi. By an order dated November 1, 2012 the aforesaid stay applications were disposed of by this Tribunal by directing the Company to deposit 25% of the duty in dispute minus Rs.30 Lakhs already deposited earlier. The Company duly complied with the said stay order dated November 1, 2012 by paying additional amounts totalling to Rs.38,09,760/-, which is already on record.

3. We have heard Sri N.K. Chowdhury, Ld. Advocate, on behalf of the appellants and Sri S.S.Chattopadhyay, Ld. Authorized Representative on behalf of the Revenue.

4. The appellants' main arguments are summarized below :-

- I. The Panchnama dated November 5, 2008 was inadmissible in law owing to non-compliance with Sections 12F and 18 of the Act read with Section 100 of the Code of Criminal Procedure, 1973. Section 100(4) of the Code of Criminal Procedure, 1973 laid down that search shall be made in the presence of two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality, if no such inhabitant of the said locality is available or is not willing to be a witness. In the present case, the two panchas were residents of Nagabazar, Rourkela and not of the locality of Kumjharia, Bijabahal where the Company's factory premises is situated. Nagabazar, Rourkela is located more than 44 km away from Kumjharia, Bijabahal and only 'interested' witnesses would have travelled to and from Nagabazar, Rourkela for three consecutive days. Moreover, the 'Full address' column in the Panchnama had been filled up with incomplete details, all of which cast a doubt upon the very legality of the Panchnama proceeding. In any case, since the Panchnama in question was a typed document, it ought to have borne a declaration that the contents thereof were in tune with what the panchas had seen, which was missing. A Panchnama drawn in contravention of the mandatory legal requirements is non-est, as laid down in the decisions of *Yaqub Abdul Razak Memon v. State of Maharashtra*, reported in 2013 (13) SCC 1 and *Raghuveer Ispat Pvt. Ltd. v. Commissioner of Central Excise & Service Tax*, reported in 2018 (360) ELT 535(T).

- II. Even otherwise, the Panchnama lacked true and complete details of the events that had taken place during the course of search operations on November 4, 2008 and November 5, 2008. The Panchnama had merely stated that, because verification work could not be completed on November 3, 2008 the panchas had been requested to come back and witness the verification work on the subsequent day i.e. November 4, 2008 and as such work, again, could not be completed on the said date, the panchas had been requested to remain present on November 5, 2008 also. The Panchnama only spoke about weighment of "few M.S. Rods", but there was no whisper about any weighment of M.S. Angles or M.S. Ingots or M.S. Scrap, although, the joint stock taking reports dated November 5, 2008 had been prepared in respect of all the said items. If the contents of the Panchnama were to be believed as true, then it automatically follows that neither M.S. Angles nor M. S. Ingots nor M. S. Scrap had been actually weighed. Otherwise, it had to be held that the Panchnama had omitted to state crucial details of the stock taking exercise and that the entire search proceeding had not been conducted in the presence of the panchas.
- III. Undisputedly, weighment of the finished goods had been done using the Weigh Bridge installed in the Company's factory. The said Weigh Bridge had been showing erratic readings and required repair work, as directed by the Orissa Legal Metrology Department on November 1, 2008 and, consequently, any weighment on the said Weigh Bridge on and from November 1, 2008 was bound to give inaccurate results. The Company had raised the said point in its show cause reply, which had not been properly dealt with by the adjudicating authority. Sri N. K. Chowdhury further stressed

that the purported stock verification reports stood vitiated due to the following errors, contradictions and deficiencies –

- (a) Weighment of general Scrap determined during physical stock taking had exactly tallied with the stock recorded in the Company's books, which was not only absurd but also a physical impossibility;
- (b) Recording in the joint stock taking report of M. S. Rods that physical stock taking had continued till "17.00 Hrs of 05.11.2008", whereas it had been noted in the Panchnama that the process of stock verification and seizure had been completed at "22.00 hrs on 5.11.2008";
- (c) Physical weighment of nearly 650 MT materials had been completed within 6-7 hours' time on November 5, 2008 which was totally impossible.
- (d) Without details of the physical stock taking process on record, it could not have been assumed that the purported stock verification had been carried out lawfully and scientifically. The Department had itself treated the records of physical stock taking and weighment details as non-relied upon documents. In fact, despite repeated requests by the Company, the Commissioner had failed to ensure that the said stock taking records and other details were provided to it.

- IV. The purported incriminating statements given by Sri Sanjay Godadia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid had been duly retracted and the said purported statements could not have been treated as admissible evidence. The said purported statements had been obtained by the Department under threat and coercion, when the deponents/co-appellants had been forced to accept the allegations of physical shortages and clandestine removal. In

particular, Sri Sanjay Godadia aforesaid, who had been suffering from ill health, had been threatened with arrest, as a result whereof he had been compelled to seek anticipatory bail from Court. It was also submitted that nothing turned on the Department's objection that the retractions in question had not been furnished to the adjudicating authority, inasmuch as the adjudicating authority had proceeded on the basis that the said retractions were before him and that the said retractions lacked credibility. None of the purported incriminating statements could have formed substantive basis of the alleged charge, in the absence of corroborative evidence and in any case, there could not have been any 'corroboration' of evidence which was itself deficient. In this behalf, reliance was placed on the following decisions-

- (i) *Vinod Solanki v. Union of India*, reported in 2009 (233) ELT 157 (SC);
- (ii) *Union of India v. Kisan Ratan Singh*, reported in 2020 (372) ELT 714 (Bom);
- (iii) *Mohtesham Mohd. Ismail v. Special Director*, reported in 2007 (220) ELT 3 (SC);
- (iv) *Kuber Tobacco v. Commissioner*, reported in 2013 (290) ELT 545 (T) – 2015 (317) ELT A159 (SC);
- (v) *Commissioner of Customs, Mumbai v. R. K. Tomar*, reported in 2008 (228) ELT 232 (T) – 2016 (335) ELT A163 (SC).

- V. Even assuming that the retractions by Sri Sanjay Godadia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid were of no effect, then also the adjudicating authority was duty bound to follow the provisions of Section 9D of the Act in order to admit the purported incriminating statements as evidence, which had not been done. To support the said submissions, the Ld. Advocate relied, inter alia, on the

decisions of *Jindal Drugs v. Union of India*, reported in 2016 (340) ELT 67 (P&H) and *HiTech Abrasives Ltd.v. Commissioner*, reported in 2018 (362) ELT 961 (Chattisgarh).

VI. The charge of clandestine removal requires to be proved with the help of tangible evidences which are conspicuously absent in the instant case. There was neither any seizure of offending goods sought to be cleared by the Company nor any statement from an identified buyer or evidence establishing flow back of funds to the Company. Further, no follow up investigation had been conducted at the end of the Company's regular transporters or major buyers and, surprisingly, no statement had been taken from Sri Sanjay Pandia, Company's staff who used to look after the loading and weighment of vehicles inside the factory or from Sri Prem Kumar Jha, Company's staff who was the overall in-charge and supervised loading after 8.00 p.m. In such circumstances, mere incriminating statements and shortage of finished goods determined on the basis of unreliable stock verification were highly insufficient to sustain the impugned demands. In this regard, reliance was placed on the following decisions:

- (i) *Commissioner v. Anand Founders and Engineers*, reported in 2016 (331) ELT 340 (P&H);
- (ii) *Commr. Of C. Ex, Haldia v. Shri Badrinarayan Alloys & Steel Ltd.*, reported in 2018 (8) GSTL 79 (T);
- (iii) *Jai Balaji Industries Ltd. v. Commr.*, reported in 2021 (378) ELT 674 (T);
- (iv) *Commr. of C. Ex. V. Nissan Thermoware P. Ltd.*, reported in 2011 (266) ELT 45 (Guj.);
- (v) *Raj Ratan Industries Ltd. v. Commissioner*, reported in 2013 (289) ELT 482 (T);

- (vi) *Shivalaya Ispat & Power v. Commissioner*, reported in 2017 (357) ELT 742 (T);
- (vii) *Super Smelters Ltd. v. Commissioner of Customs, Central Excise & Service Tax*, reported in 2020 (371) ELT 751 (T)

5. The Authorized Representative for the Revenue reiterated the findings in the impugned Order-In-Original. In particular, it was submitted that the charge of clandestine removal had been admitted by the Company's personnel, namely, Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid. Also, shortage in physical stock detected as a result of joint stock verification clearly proved that the Company had indulged in clandestine clearance of huge quantities of finished goods. In any case, the objections relating to invalidity of the Panchnama had never been urged before the adjudicating authority and, further, there was no such ground taken in the Company's appeal petition before the Tribunal. In the circumstances, no interference with the impugned Order-In-Original was warranted.

6. We have perused the entire appeal records carefully, including the Written Submissions and Compilation filed by the Appellant-Company and the written submission filed by the Authorized Representative for the department and noted the submissions urged on behalf of both sides.

7. We find that, as a preliminary point, the Company has made exhaustive submissions relating to the invalidity and/or inadmissibility of the Panchnama proceeding. However, we are not inclined to declare that the Panchnama dated November 5, 2008 was altogether inadmissible due to non-compliance with the provisions of Sections 12F and 18 of the Act read with Section 100 of the Code of Criminal Procedure, 1973. In our opinion, the decisions of *Yaqub Abdul Razak Memon*, supra and *Raghuveer Ispat Pvt. Ltd.*, supra cannot be read as

direct authorities for the proposition that a Panchnama prepared in contravention of the Code of Criminal Procedure, 1973 is non-est in the eyes of law. Nevertheless, we are mindful of the fact that there is a rather glaring and incurable defect in the Panchnama, which ought to have been considered and discussed by the adjudicating authority – the Panchnama is indeed silent about the weighment of three of the four items in question i.e. M. S. Angles, M. S. Ingots and M. S. Scrap. The Ld.Advocate had taken this Bench through each and every statement contained in the Panchnama, wherefrom it is evident that the Panchnama had recorded only weighment of “few M. S. Rods”. The argument elaborated in page No.4 of the Authorized Representative’s written submission that reference to “the weighment was started from 1730 hrs. on 03.11.2008 in the weighbridge of the factory by putting few MS rods batch by batch and weighment slips issued by the weighbridge were kept” should be understood as reference to the initiation of weighment procedure, does not appeal us. The absence of detailed description as regards the weighment of M. S. Angles, M. S. Ingots and M. S. Scrap in the Panchnama, although mentioned in the joint stock verification reports, does cast serious doubt upon the reliability and correctness of an otherwise valid Panchnama. It appears that the Commissioner had mistakenly proceeded on the assumption that “A Panchnama has been drawn enumerating the entire event...” Having gone through the show cause notice dated October 8, 2009 and the impugned adjudication order, we also find that the records of stock taking, weighment slips etc. have been treated as non-relied upon documents by the revenue, which is rather astonishing. In several decisions rendered by the Tribunal, as discussed in detailed in the subsequent paragraphs, it has been consistently held that stock taking has to be conducted in a proper manner, duly supported by materials such as weighment slips, counting slips etc., in the absence of which physical shortage of stock cannot be taken to have been established.

8. The Company had seriously questioned the manner and method of stock taking conducted by the Central Excise Officers in this case. We cannot agree with the submissions of the Ld. Authorized Representative in his written submission that the assessee had failed to raise objections against stock-taking process before the original authority. One may refer to Paragraph Nos. 2.10, 2.15, 2.18 and 2.19 of the Appellant company's reply to the show cause notice at page Nos. 137, 139 and 141 of the Appeal paper book in this regard. Such objections have also been raised by the Appellant in their grounds of appeal. The decisions relied on by the Authorized Representative for the department in his written submissions, namely G.P. Ispat Pvt. Ltd. [2019 (368) E.L.T. 76 (Chhatisgarh)] and Kishan Sahkari Chini Mills Ltd. [2017 (345) E.L.T. 613 (All.)] are clearly distinguishable since in those cases the assesses therein had not challenged the manner of stock-taking or seriously disputed the alleged shortages. Hence, the decisions of G.P. Ispat Pvt. Ltd. (supra) and Kishan Sahkari Chini Mills Ltd. (supra) are not applicable to the facts of the present case. It was expected of the Commissioner, who had adjudicated the matter, to call for the relevant records of physical stock taking and weighment details, verify the factual position and record his findings on the issue of shortages after dealing with the Company's objections, which he had failed to do. In paragraph nos. 8.0, 8.5, 8.16 and 8.17 at page nos. 13, 14, 17, 18, 24 and 25 of the impugned order, the Commissioner had merely observed that the shortages of M.S. Rods and M.S. Angles were physical fact, determined during joint stock taking conducted in the presence of independent witnesses as well as authorized representatives of the Company and, as such, it was not open to the Company to challenge the reliability and veracity of the stock taking reports. We are afraid that we cannot support the said findings of the adjudicating authority and we are compelled to hold that the stock taking in question had not been carried out in a lawful or reliable manner. This is more so, inasmuch as the Weigh Bridge inside the Company's factory used for weighment of the finished goods

in question had been malfunctioning, as declared by the Senior Inspector, Legal Metrology, Panposh vide his report dated November 1, 2008 appearing at pages 176A to 176C of the appeal Paper Book. Probably, owing to usage of a faulty Weigh Bridge, weighment of general Scrap during physical stock taking had exactly tallied with the stock recorded in the Company's Daily Stock Account. We find it rather difficult to believe that such physical weighment of general Scrap at any given point of time would have matched in toto with the Company's stock book. Even if the arguments of the Authorized Representative were to be accepted that the aforesaid report by the Senior Inspector, Orisha Legal Meteorology Department, had not been produced before the department at any point of time and the company should not be permitted to adduce any additional evidence before us, then also we would not have come to a different conclusion as to the accuracy and reliability of the stock verification of the goods. We also find that, according to the joint stock verification reports, nearly 650 MTs of materials had been physically weighed between 9.30 a.m. and 5.00 p.m. on November 5, 2008. This is despite the fact that the printer attached to the Weight Bridge had gone out-of-order on November 5, 2008 and hence, weighments had to be recorded manually for each load on the said date, as recorded in the Panchnama. We find considerable force in the arguments of the Ld. Advocate that proper physical weighment of about 650 MTs of M. S. Angles of assorted size, M. S. Rods of assorted size, M.S. Ingots and general Scrap could not have been carried out in a short span of 6 to 7 hours' time. The Ld. Authorized Representative for the Revenue had also found it quite difficult to justify that nearly 650 MTs of M.S. Angles, M.S. Rods and M.S. Ingots had been physically weighed in a proper manner in a span of 6 to 7 hours. The adjudicating authority had taken an erroneous view of the matter by observing that average weighment of stock arrived at by weighing a sample piece of M. S. Rod or M. S. Angle and then multiplying it with the total number of pieces in the standard lot, was sufficient to arrive at an accurate result. On a

fair consideration of the evidences on record, we find ourselves unable to agree with the contents of the joint stock verification reports dated November 5, 2008. Consequently, it must be observed that the revenue has not been able to establish a case of clandestine removal sought to be made out on the basis of alleged shortages of finished goods vis-à-vis stock recorded in the Daily Stock Account.

9. In *Anand Founders & Engineers*, supra, a case of clandestine removal was sought to be made out on the basis of shortage of inputs and finished products detected through physical stock verification conducted under Panchnama, which was purportedly admitted by the assessee's proprietor and an amount of Rs.16,00,306/- was voluntarily debited vide an RG 23A Part – II entry. The demands confirmed by the adjudicating authority were set aside by the Commissioner (Appeals) and the Tribunal upheld the said appellate order. In further appeal preferred by the Department before the Hon'ble Punjab and Haryana High Court, it was held that, inter alia, the assessee's proprietor had only accepted the fact of shortages and not clandestine removal and that there was no evidence to show clandestine activities as the Department had not conducted any further investigation to establish the identity of buyers or suppliers of raw materials. It was also held therein that mere shortages detected at the time of visit of the Central Excise officers cannot ipso facto lead to the allegations and findings of clandestine removal. In *Shree Badrinarayan Alloys & Steels Ltd.*, supra, a show cause notice alleging clandestine removal had been issued to the assessee based on physical shortage detected through stock verification conducted by the Central Excise officers at the assessee's factory premises. By the adjudication order, duty to the tune of Rs.80,323/- with interest and equivalent penalty had been confirmed while demand of duty as regards the goods found short in stock had been dropped, which part was appealed against by the Department before the Tribunal. The said appeal was dismissed by the Tribunal by holding, inter alia, as under :-

".... 7. On perusal of the grounds of appeal, I find that the Revenue had neither disclosed any material nor described the method of stock taking to counter the case. The only contention is that the small quantity was lying in the factory premises and therefore, the weighment was done easily. I am unable to accept the contention of the Revenue without any basis, such as, the details of the weighment etc.

8. The Tribunal consistently observed in various decisions that stock verification cannot be conducted by a rough estimation

9. Upon analysis of the above cases it is seen that the judicial view is that the stock taking would be conducted in a proper manner, which is obviously supported by some material such as, weighment slip, counting slip etc., as the case may be. It cannot be on the basis of eye estimation or otherwise. The Hon'ble Gujarat High Court observed that the mere statement of the representative of the assessee at the time of stock verification is not sufficient which was retracted subsequently. The confessional statement of an accused in criminal proceedings cannot be put on at par with a statement recorded during preventive checks. In the present case, I find that there was a huge stock as shown in DSA. The assessee claimed that the said materials were lying at their factory and informed the department subsequently and no enquiry was conducted thereon....."

10. *Jai Balaji Industries Ltd.*, supra is another recent decision rendered by this Bench of the Tribunal wherein it has been held that clandestine removal on the assessee's part cannot be established merely on the basis of shortage detected through stock verification and in the absence of any clinching evidence. It has also been held therein that the Department is bound to disclose as to how the weighments of the products were done. *Super Smelters Ltd.*, supra was again a case wherein the Department had alleged clandestine removal of finished goods by relying, inter alia, on shortage detected during search of the factory premises and on the basis of the statement of the assessee's employee. The purported demands

confirmed vide the adjudication orders were set aside by the Tribunal. The following observations from the said decision are relevant and are set out below :-

*"..... **19.** Relying on these judgments, we hold that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, employment of extra labour, seizure of cash, transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for clandestine manufacture of finished goods, manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, amount received by the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. All these material evidence are missing in the present case and the evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal.*

20. *The shortage which was detected by the officers is based on average weight method basis and, therefore, mere admission by the Directors, who deposited the duty for the shortage, is not enough to proof that the goods were clandestinely cleared from the appellant factory. We have also considered the judgment cited by the appellant in case of C. C. Ex., Lucknow v. M/s. Sigma Castings reported at [2012 \(282\) E.L.T. 414](#) (Tri.-Del.), M/s. Micro Forge (I) Pvt. Ltd. v. C. C. Ex., Rajkot reported in [2004 \(169\) E.L.T. 251](#) (Trib.-Mumbai), C.C.Ex. Indore v. M/s. Kapil Steel Ltd. 2006 (204) E.L.T. 411 (Tri.-Del.), C.C.Ex., Lucknow v. M/s. Kundan Casting (P) Ltd. reported at [2008 \(227\) E.L.T. 465](#) (Trib.-Del.), M/s. RHL Profiles v. C.C.Ex., Kanpur reported at [2013 \(290\) E.L.T. 247](#) (Trib.-Del.). In view of the findings contained in these judgments we hold that the*

shortage detected on average basis is not sustainable and, therefore, we set aside the demand.

21. *We have considered the submissions made by the other appellants as regard penalty imposed against them. We find that no material evidence was brought on record to prove the charges to attract penalty against them, except the statements which were relied upon by the department without following the mandate of Section 9-D of the Act. Under the circumstances we also set aside the duties and penalties imposed on the other appellants as well....."*

11. We fail to understand as to how the charge of clandestine removal could have been confirmed by the adjudicating authority in view of the following undisputed facts :-

- (a) There was neither any seizure of offending goods sought to be cleared in a clandestine manner nor any seizure of conveyance carrying offending goods;
- (b) There is no tangible evidence by way of any statement from an identified buyer or evidence establishing flow-back of funds to the tune of Rs.18,88,97,613/-;
- (c) No follow-up investigation had been conducted at the end of the Company's regular transporters or major buyers;
- (d) No statement had been taken from Sri Sanjay Pandia, Company's staff who generally used to look after loading and weighment of vehicles inside the Company's factory or from Sri Prem Kumar Jha, Company's staff who was the overall in-charge and supervised loading after 8pm.

12. We are conscious of the fact that apart from the joint stock verification reports dated November 5, 2008 and the purported incriminating statements of Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid (which, too, were retracted), there is really no evidence on record to support the revenue's case, much less any corroborative evidence. We find that the statements dated November 6, 2008, December 4, 2008 and January 23, 2009 given by

Sri Sanjib Mahapatra aforesaid had been retracted by way of affidavit dated January 25, 2009. Similarly, the purported statements given by Sri Praharaj Swain and Sri Sanjay Gadodia had been retracted by way of affidavits. However, the said affidavits could not be produced before the adjudicating authority by the co-appellants/noticees. Nevertheless, the adjudicating authority had proceeded with the matter as if the aforesaid affidavits had been furnished before him. In our view, the Commissioner had erred by holding that the retractions were belated, did not inspire confidence of bona fides and that the claim of retraction was after-thought under legal advice. The Commissioner had also erred by relying upon a host of judicial decisions without discussing their individual factual situations, as is apparent from a bare perusal of paragraph no. 8.4 at pages 15-17 of the impugned order, and the said findings in this behalf are liable to be held as untenable. On a query from this Bench, the Ld. Advocate submitted that necessary averments as to the retraction of the aforesaid purported statements had been made in the replies to the show cause notices and other communications of the appellants/noticees. In our view the adjudicating authority would not have reached a different conclusion in this regard, had the retractions been produced before him by the co-appellants/deponents concerned. In any case, the inherent contradictions and discrepancies in the statements given by each co-appellant/noticee, as elaborated in page nos. 11-13 of the Company's Written Submissions, militate against the evidentiary value attached to the purported incriminating statements, even if the original statements were to be held as admissible. Several decisions have been relied upon by the Ld. Authorized Representative for the department at pages 6-8 of his written submissions in support of his argument that the retractions were inadmissible and had been rightly discarded by the adjudicating authority. However, it has not been shown to us as to how the said decisions are applicable in the facts of the present case. Not a single decision had been specifically cited by the Ld. Authorized Representative during the course of hearing before us. In fact the

extract from the decision *KI Pavunny Vs. ACCE* [1997 (90) E.L.T. 241 (SC)] relied upon by the Ld. Authorized Representative expressly supports the Appellant's case and goes against the Ld. Authorized Representative's contentions. In the circumstances, we are of the considered opinion that no substantive reliance should have been placed on the said purported incriminating statements of Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Praharaj Swain aforesaid. In support of their argument that a retracted statement cannot form substantive basis of the charge, when there is no corroborative evidence available, The Ld. Advocate for the Appellant has referred to the following decisions :

- i. *Vinod Solanki v. Union of India*, reported in 2009 (233) ELT 157 (SC);
- ii. *Union of India V. KisanRatan Singh*, reported in 2020 (372) ELT 714 (Bom);
- iii. *MohteshamMohd. Ismail v. Special Director*, reported in 2007 (220) ELT 3 (SC);

13. Another issue which requires consideration is the failure on part of the adjudicating authority to adhere to prescriptions of Section 9D of the Act. Section 9D(1) of the Act sets out the circumstances in which a statement made and signed before a Gazetted Central Excise officer shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the truth of the facts contained in the statement made during the course of enquiry/investigations before a Gazetted Central Excise officer, has to be proved by evidence other than the statement itself. Consequently, any reliance on the statement recorded during investigations would stand vitiated in law, in absence of the circumstances specified in Section 9D(1) of the Act. A statement which does not suffer from the handicaps contemplated by clause (a) of the aforesaid Section 9D(1), must be admitted in evidence only in accordance with the procedure prescribed under clause (b) of Section 9D(1) of the Act. The said

propositions are duly supported by the decision of the Hon'ble Punjab and Haryana High Court in the case of *Jindal Drugs Pvt. Ltd.*, supra, cited by the appellants. To the same effect is the decision of the Hon'ble Chhattisgarh High Court in the case of *Hi Tech Abrasives Ltd.*, supra, cited by the appellants. Accordingly, we hold that the adjudicating authority could not have straightaway relied on the purported incriminating statements of Sri Sanjib Mahapatra, Sri Prahraj Swain and Sri Sanjay Gadodia aforesaid (assuming that the subsequent retractions were invalid) without legitimately invoking Section 9D(1)(a) of the Act. All the said purported statements, thus, have to be eschewed from consideration.

14. Taking an overall view of the matter, we are inclined to hold in favour of the Company and allow its appeal. As the principal demands against the Company have failed, the imposition of personal penalties against Sri Sanjay Gadodia, Sri Sanjib Mahapatra and Sri Prahraj Swain aforesaid cannot be sustained. In the result, the impugned Order-in-Original dated March 26, 2010 is set aside, the Department's Cross Objections are dismissed and all the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 08 August 2022.)

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

Sd/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)