

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

Excise Appeal Nos. 533-536 of 2010

(Arising out of Order-in-Original No. CCE/BBSR-I/10/2010 dated 26.02.2010 passed by Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I.)

- 1) M/s Prinik Steels (P) Ltd.,**
- 2) Sri Ghanshyam Das Agarwal,**
- 3) Shri Mukesh Agarwal,**
- 4) Sri Rajeev Agarwal,**

113/2258, Khandagiri Vihar, Khandagiri, Bhubaneswar-751030, Orissa.

...Appellant (s)

VERSUS

Commissioner of Central Excise, Customs & S. Tax, Bhubaneswar-I.
Central Revenue Building, Rajaswa Vihar, Bhubaneswar-751007.

..Respondent(s)

APPEARANCE :

Shri K. Kurmy, Shri Debayan Dutt & Ms. Ritika Kurky, all Advocates for the Appellant

Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....77518-77521/2023

DATE OF HEARING : 22.09.2023

DATE OF PRONOUNCEMENT: 23.11.2023

PER K. ANPAZHAKAN :

The instant Appeals are filed against the Order-in-Original dated 26-02-2010 passed by Ld. Commissioner, Central Excise, Bhubaneswar I Commissionerate. By the said Order Ld. Commissioner has confirmed Central Excise duty of Rs.9,27,69,569/-on the clandestinely removed M.S.Rods without payment of duty, during the periods 2004-2005, 2005-2006 (up to 02-03-2006) and 2006-2007 (up to 18-08-2006). Further, he imposed penalty Rs.9,27,69,569/- under Section 11AC of the Central Excise Act, on the Appellant Company. He also imposed

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personal penalty of Rs.50.00 Lakhs upon Shri Rajeev Kumar Agarwal, Managing Director, penalty of Rs.25.00 Lakhs on Shri Ghanshyam Das Agarwal, Share Holder & Constituent Attorney and penalty of Rs.10.00 Lakhs on Shri Mukesh Kumar Agarwal, Chief Accounts Officer of the Appellant Company, for abetment of the offence. Aggrieved against the impugned order, all the four Appellants filed the present appeals.

2. Brief facts of the case are that based on intelligence, the officers of DGCEI, Rourkela Regional Unit conducted simultaneous search at the factory and Registered office of the Appellant and another premises 'Aparna-2' Plot No.702/4(B), Rameshwar Patna, Bhubaneswar, on 22.08.06. During the course of search, documents related to procurement of unaccounted raw materials, suppression of production, clandestine removal of finished goods, receipt of sale proceeds from such clandestine clearances, invoices with under valuation, parallel invoices et. were recovered from Mr. Chittaranjan Bhukta and Manoj Kumar Sahoo, who were in charge of the office. Shri. Mukesh Kumar Agarwal, Chief Accountant in his statement dated 05.09.2007 admitted that both the above said persons were working for the Appellant. Shri. G.D. Agarwal, Constituent Attorney of the Appellant, in his statement dated 22.08.2006, admitted that the documents retrieved from the office relate to the company. Documents were also recovered from 'Aparna-2', Rameshwar Patna premises. Shri. G.D Agarwal admitted in his statement dated 22.08.2006 that, the documents recovered from the Rameshwar Patna premises belonged to the Appellant company.

3. In his statement dated 22.08.2006, Shri. Manoj Kumar Sahoo stated that the parallel invoices were destroyed from time to time as per the directions of Shri. G.D.Agarwal. He admitted that all the documents recovered from Rameshwar Patna premises are related to the Appellant Company, but the name of 'Jai Maa Bhawani' was given as a code for the company in the said documents. The Appellant has been maintaining two set of accounts in Tally 7.2 accounting package in their computer, one in Appellant's name for showing to all Government departments, which is called 'Pucca document' and the other account in the fake name of 'Jai Maa Bhawani', where they keep all unaccounted

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raw materials, production, sale and income which is known as 'Kachha account'.

4. The print out of sales register for 2006-07 was taken, which shows date wise details of rod supply and the sale value of such unaccounted sale amounting to Rs.11,31,98,571/-. The details contained in the sales register was compared with the sales register for 2006-07 (upto 16.08.2006), seized from the registered office. A comparison of both the sales registers revealed that the sales register maintained at Tally in the name of 'Jai Maa Bhawani' was only for the clandestine sale of the goods without payment of duty. The sales register contained the entire clandestine sale made by the Appellant during the period 2006-07(upto 18.08.2006), 2005-06(upto 02.03.2006) and 2004-05, having sale value of Rs.11,31,98,571/-, Rs,25,46,98,780/=-, and Rs. 29,15,47,637/- respectively. The duty involved for such clandestine clearance for the above said period was worked out as Rs.9,27,69,569/- along with Education Cess.

5. On the basis of the data recovered during investigation, a show cause notice dated 23.05.2008 was issued to the Appellant demanding central excise duty of Rs. 9,27,69,569/- including Education Cess, along with interest and penalty. The Notice was adjudicated by the Commissioner vide Order-in-Original dated 26.02.2010, wherein the duty demanded in the Notice was confirmed along with interest and equal amount of duty was also imposed as penalty under Section 11AC of the Central Excise Act. Penalties were also imposed on Shri Rajiv Kumar Agarwal, Managing Director, Shri Ghanshyam Das Agarwal, Share Holder & Constituent Attorney and Shri Mukesh Kumar Agarwal, Chief Accounts Officer of the Appellant Company, for abetment of the offence. Aggrieved against the impugned order, all the four Appellants filed the present appeals.

6. In their grounds of appeal the Appellants made the following submissions:

(i) The entire demand in the Notice has been made based on Sales Register (Computer Printouts) without satisfying conditions of Section

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36B(2)/36B(4) of the Central Excise Act, 1944. Shri G.D. Agarwal, Constituent Attorney has disowned the computer printouts.

(ii) Under Section 36B, Computer printouts are not admissible in evidence as conditions under section 36B(2)/36B(4) are not satisfied. Under Section 36B Computer Printout is **"deemed document"** admissible in evidence only if condition there under are satisfied. In the present case, no Certificate under section 36B(4) from person occupying responsible position in relation to operation of the device is obtained. As per the impugned order the entry in computer was done by Shri Chittaranjan Bhukta or Sri Rajeev Agarwal or Sri Manoj Kumar Sahoo, however, no certificate was obtained from any of them. In this regard, the Appellants relied on the decision of the Tribunal in the case of ***CCE Vs. Shivam Steel Corporation.***

(iii) Srinivas Padhi, Telephone Operator attended printing of computer print out at DGCEI office. He was not holding any responsible official position in relation to the operation of relevant device or management of relevant activities. Certificate given by him will not satisfy the requirement as provided under Section 36B. The question of genuineness or otherwise of computer printout will arise only if conditions of Section 36B are satisfied. Any admission of clandestine removal as per computerised sale register not relevant unless condition of Section 36B are satisfied. Provisions of Section 36B are mandatory in nature. Computer printout/electronic record cannot be proved by oral evidences.

(iv) The Owners of Computers are not known. The department has assumed that the Appellant was the owner of all the computers, from where some documents were retrieved.

(v) Statement of person/witness relied on in the Notice are not examined in chief and not allowed Cross Examination in accordance with Section 9D. Hence, such statement cannot be relevant piece of material. In support of this contention, the Appellants relied on the following decisions:-

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- (i) *Hitech Abrasives P. Ltd. Vs. CCE (2018) 362 ELT 96 (CHH.)*
[Para 2 (last 4 lines), Para 9.1, 9.4, 9.5];
 - (ii) *Ambica International Vs. UOI 2016-TIOL-1238-HC-P & H.CX*
[Para 25-27];
 - (iii) *Andaman Timber Industries Vs. CCE 2017 (50) STR 93 SC*
[Para 6];
- (vi) Entire Demand is based on Private Records. There is no corroborative evidence available to substantiate the allegations of clandestine clearances.
- (i) No evidence of manufacture of finished goods. Quantity of finished goods manufactured not known;
 - (ii) There is no evidence of clandestine removal of finished goods. Quantity of finished goods removed not known;
 - (iii) Documents prepared by seven production contractors relied in support of production but none of them were examined;
 - (iv) Maker of Weighment Slips, Delivery Order etc. not examined;
 - (v) Raw Material suppliers, Transporters, Production Staffs, Dispatch Staffs not examined;
 - (vi) No excess/shortage of Raw material& finished goods;
 - (vii) No excess consumption of Electricity;
 - (viii) No excess use of Labours or payment of wages;
 - (ix) No evidence of flow back of funds Rs.65,94,44,987.50;
 - (x) Some Invoice cancelled as no goods removed. No contra material brought on record to prove clandestine removal. Buyer mentioned on those invoices not verified.
- (vii) Out of 25 suppliers of Raw material, one supplier M/s Auro Ispat (P) Ltd. was examined who purportedly supplied **605.640 MT** of raw material. Cross Examination of Director of M/s AuroIspat (P) Ltd. was demanded but not allowed.
- (viii) Only one buyer M/s Anand Enterprises was examined for sale of **9.500 MT**. Shri Krishna Chandra Pati of M/s Anand Enterprises was examined & allowed to be Cross Examined. Computerized

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Sales Register of M/s Anand Enterprises has been relied upon without satisfying condition of Section 36B.

- (ix) No tax can be demanded on matching of some entries in private records with statutory records/Book of Accounts. The Appellant relied on following decisions, in support of this contention:

(i) *Sharma Chemicals Vs. CCE (2001) 130 ELT 271 (Tri. Kol.)*[Para 14];

(ii) *Suzuki Synthetics P. Ltd. Vs. CCE (2015) 318 ELT 487 (Tri. Ahmd.)*[Para 31].

- (x) The Appellant relied on following decisions, in support of their contention that clandestine removals cannot be established based on assumptions and presumptions.

(i) *ShivamSteel Corp.Vs.CCE (2016) 339 ELT 310(Tri.Kol)*[Para 8.4];

(ii) *K.RajgopalVs CCE (2002) 142 ELT 128(Tri.Che)*[Para 6];

(iii) *AMKAMP Marketing P.Ltd Vs. CCE 2019-VIL-18-CESTAT-ALH-CE*[Para 5];

(iv) *Arya Fibres Pvt.LtdVs.CCE 2014(311) E.L.T 529(Tri.Ahmd)*[Para 40];

(v) *T.G.L. Poshak Corp. Vs. CCE (2002) 140 ELT 187 (Tri.)*[Para 6];

(vi) *Continental Cement Co. V. UOI (2014) 309 ELT 411 (All.)*[Para 12];

(vii) *Balashri Metals P. Ltd. Vs. CCE (2017) 345 ELT 187 (Jhr.)*[Para 5(vi)];

(viii) *Jindal Cable Vs. CCE (2022)-VIL-183-CESTAT-DEL-CE*[Para 58];

(ix) *CCE Vs. Vishnu & Co. P. Ltd. (2016) 332 ELT 793 (Del.)* [Para 50];

(x) *HitechAbrasivesP. Ltd. Vs. CCE (2018) 362 ELT 96 (CHH.)* [Para 12].

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7. In view of the above submissions, the Appellant contended that the demands confirmed in the impugned order is not sustainable and prayed for setting aside the same.

8. The Ld. A.R. submitted that computer printouts were taken from the seized computer in the presence of Shri. Padhi. The details available in the sales ledger were found to be tallying with particulars of sales ledger in all respects. This, indicates the various documents seized from Rameshwar Parna office belonged to Appellants company only. The documents were accepted by Shri. Manoj Kumar Sahoo, who was working as office assistant of the Appellant company and doing the data entry work in the computer. In his statement dated 22.08.2006, he admitted that the data belonged to the Appellant. The Appellant has never disowned the data. Regarding cross examination of persons whose statements are relied upon in the impugned order, he stated that summons to these four persons were issued to all of them. But, they have not appeared for cross examination. Later, during the time of Personal Hearing, the Appellants have foregone the cross examination of four persons. On 11.11.09, Shri Krishna Chandra Padhi was cross examined. Efforts were made to serve the summons on the remaining two witnesses, but could not be done as their whereabouts are not known. This indicates that the department has made all efforts to allow cross examination of all witnesses as sought by the appellants. Thus, they contended that their statements can be relied upon to substantiate the allegations in the Notice. Accordingly, they prayed for upholding the impugned order.

9. Heard both sides and perused the appeal records.

10. We observe that searches were conducted at the Factory and Registered office of the Appellant and another premises 'Aparna-2' Plot No.702/4(B), Rameshwar Patna, Bhubaneswar, on 22.08.06. During the course of search, documents related to procurement of unaccounted raw materials, suppression of production, clandestine removal of finished goods, receipt of sale proceeds from such clandestine clearances, invoices with under valuation, parallel invoices etc. were recovered from the above said premises. On the basis of these

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documents, a show cause notice dated 23.05.2008 was issued to the Appellants demanding central excise duty of Rs. 9,27,69,569/- including Education Cess, along with interest and penalty. The Notice was adjudicated by the Commissioner vide Order-in-Original dated 26.02.2010, wherein the duty demanded in the Notice was confirmed along with interest and penalty. Thus, we observe that the demands confirmed in the impugned order has relied mainly on the documents recovered from various premises and the statements recorded during the course of investigation. The Appellants contended that the entire demand has been confirmed in the impugned order based on Private Records and the statements. It is their contention that there is no corroborative evidence available to substantiate the allegations of clandestine clearances. The impugned order has relied upon the Sales Register (Computer Printouts) and other documents recovered from another premises 'Aparna-2' Plot No.702/4(B), Rameshwar Patna, Bhubaneswar, the without satisfying conditions of Section 36B(2)/36B(4) of the Central Excise Act, 1944. The Appellants also contended that statements recorded from various persons were relied upon in the impugned order to confirm the demand, but they were not examined in chief and not allowed Cross Examination in accordance with Section 9D. Hence, such statements cannot be relevant piece of material that can be relied upon to confirm the demands.

11. Thus, we observe that the issues to be decided in these appeals are as under:

- (i) Whether the data retrieved from various premises belonged to the Appellant's company and the data can be relied upon as evidence to demand duty?
- (ii) Whether the conditions mentioned in Section 36B has been followed in this case or not, to rely upon the data retrieved through computer printouts as evidence?
- (iii) Whether the procedure as set out in Section 9D of the Central Excise Act, 1944 was followed in this case or not? If not followed, then

whether the statements recorded under Section 14 of the Central Excise Act, 1944 can be relied upon to demand duty ?

(iv) Whether the allegations of clandestine clearance of finished goods by the Appellants are substantiated with corroborative evidence?

(v) Whether the demands confirmed in the impugned order on clandestine clearance of finished goods is sustainable in the absence of any evidence of procurement of the major raw materials for manufacture of the finished goods M.S.Rods, without invoices?

(vi) Whether penalty is imposable on the Appellant company and it's Director and Chief Accountant on the basis of the evidences available on record?

12.(i) Whether the data retrieved from various premises belonged to the Appellant's company and the data can be relied upon as evidence to demand duty?

(ii) Whether the conditions mentioned in Section 36B has been followed in this case or not, to rely upon the computer printouts as evidence?

12.1. We observe that various documents were seized from the Factory and Registered office under a Panchanama on 22.08.06. The Panchanama/Seizure Memo has been signed by the witnesses and the authorized signatory of the Appellants company. The documents were also recovered from the premises 'Aparna-2' Plot No.702/4(B), Rameshwar Patna, Bhubaneswar, in the presence of Shri. G.D. Agarwal. The seized documents from the Rameshwar Patna office contains details such as payments made to contractors, party ledger, trial balance etc. Computer print outs of these documents were taken in the presence of Shri. Srinivas Padhi who was authorized by the Appellant to witness the retrieval of data from the seized computer. The

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Appellant contended that Shri. Srinivas Padhi, was a Telephone Operator attended printing of computer print out at DGCEI office. He was not holding any responsible official position in relation to the operation of relevant device or management of relevant activities. Accordingly, it is their contention that the Certificate given by him will not satisfy the requirement as provided under Section 36B. We agree with the contention of the Appellant. The documents retrieved must be certified by the person who operates the computer or the person who is responsible in the company and aware of their day today activities. Authorizing the computer print outs by a Telephone operator who has nothing to do with the data entry would not satisfy the requirement of Section 36B. The question of genuineness or otherwise of computer printout will arise only if conditions of Section 36B are satisfied.

12.2. Regarding relying upon the data recovered from the computers, one of the main objection of the Appellants is that the computer printouts are not admissible in evidence as conditions under section 36B(2)/36B(4) are not satisfied. It is the contention of the Appellants that the computer print outs taken from the seized computers are not accompanied with Certificate as mandated under section 36B(4) containing the following details:

- (a) describing the manner in which the data retrieved from the computer(electronic record) was produced
- (b) the certificate must furnish the particulars of the device involved in the production of that record(the computer used for production of electronic record. Any admission of clandestine removal as per computerised sale register not relevant unless condition of Section 36B are satisfied. Provisions of Section 36B are mandatory in nature. Computer printout/electronic record cannot be proved by oral evidences.

12.3. The Appellant has relied on the decision of this Tribunal in the case of *M/s Jai Balaji Industries Ltd. Vs. CGST reported in 2023-VIL-771-CESTAT-KOL-CE* to drive home the point that the data recovered from computer print outs/pen drive is not a reliable evidence to raise demand of duty, when the person who entered the data is not identified. The relevant part of the said decision is reproduced below:

“12.4. Section 36B (4) mandates that any computer printout has to be signed by a person occupying a responsible official position in relation to the operation of the relevant device and a certificate is to be given to that effect. This is required to establish the ownership of the data recovered from the computer device. In the present case, we observe that neither the mandatory conditions of Section 36B(2) have been complied with nor there is any certificate on record as mandated under Section 36B(4). During the course of panchnama dated 17-07-2014 drawn at the premises of JBIL-III, Shri Sushil Kumar Roy was found working on the computer located in the dispatch section and the device on which the data was being stored was the 8 GB pen drive. The other pen drive was also recovered from the pocket of Shri Sushil Kumar Roy. We observe that the adjudicating authority has wrongly presumed that the computer in which Shri Sushil Kumar Roy was working was the source of all data and the requirement of Section 36B (4) stand satisfied . A pen drive is a floating device. It cannot be assumed that the company's data was not being stored in the company's computer hard-drive but was being stored in a pen drive. In his statement dated 17.07.2014, Shri Sushil Kumar Roy categorically stated that Shri. Gautam Banerjee, the other Associate of the company also makes entry in the computer, but no statement was recorded from him. There is no statement from any Director either of JBIL-III or JBIL-IV accepting the authenticity of the said data. Even on the date of search Shri Gaurav

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Jajodia, Director of JBIL-III was present whose signature was obtained on the panchnama but his statement was never recorded.

12.5 We observe that JBIL-III and JBIL-IV have vehemently denied ownership of these two pen drives and the authenticity of the data therein. Only two statements of Shri Sushil Kumar Roy, Associate (Commercial) of JBIL-III and one statement of Shri Kanhaiya Agarwal, weighbridge in-charge of JBIL-III were recorded. The statement of Shri Sushil Kumar Roy regarding clandestine clearances in respect of entries in the computer printouts was not categorical. He had stated that in the computer printouts, when tax invoice number was not given some of them 'might be' without bill despatches because in some of such cases bills might have been issued from JBIL IV but entries were made in the pen drives only to keep account. In his statement, Shri. Sushil Kumar Roy only says that the entries without tax invoice number might be meant for despatches without bill. There was no categorical admission by him. He also says that in respect of some of such cases bills might have been issued from JBIL IV, but entries were made in the pen drives only to keep account. This statement was given on the date of search on 17.07.2017. However, we observe that this averment of Shri Sushil Kumar Roy was not probed further.

12.6. In support of their contention that the computer printouts resumed from the pen drives is not an admissible evidence, unless the mandatory procedure prescribed in Section 36 B is followed, the Appellants cited various decisions. In the case of **Ambica**

Organics Vs Commissioner of C.Ex& Cus, Surat-I reported in 2016(334)ELT 97(tri-Ahmd), It has been held 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 : -*

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“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.*

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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

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(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,

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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

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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

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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

12.7. In the case of *Anvar P.V. Vs. P.K. Basheer* reported at 2017 (352) ELT 416 (SC), The Hon'ble Supreme Court has 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,

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

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

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

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

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

12.5. Section 65B of Evidence Act is parimateria with Section 36B of the Central Excise Act, 1944. From the above observation of the Hon'ble Apex Court, we find that unless the conditions of Section 65B(2) of the Evidence Act, which is parimateria with Section 36B(4) of the Central Excise Act are complied with, no reliance can be placed on any computer printouts . Admittedly, the procedure set out in Section 36B has not been followed in this case. Thus, following the judgement of the Hon'ble Apex Court and the other decisions cited above, we hold that the data resumed from the computer print out alone cannot be relied upon to demand duty, without any corroborating evidence. "

12.6. We observe that in the present case the author of entry of data has not been identified. As per the impugned order the entry in computer was done by Shri Chittaranjan Bhukta or Sri Rajeev Agarwal or Sri Manoj Kumar Sahoo. However, no certificate was obtained from any of them. Thus, we hold that the material evidence available on record do not establish that the documents recovered from all the Factory, Registered office and the premises at Rameshwar Patna are all belonged to the Appellant Company and the data cannot be relied upon to demand duty. Accordingly, by relying on the decisions cited above, we answer to the questions (i) and (ii) raised at Para 11 supra in the negative.

13. (iii) Whether the procedure as set out in Section 9D of the Central Excise Act, 1944 was followed in this case or not? If not followed, then whether the statements recorded under Section 14 of the Central Excise Act, 1944 can be relied upon to demand duty ?

13.1. The Appellant contended that Statements recorded during the course of investigation cannot be relevant without testing the same under Section 9D. The provisions of Section 9D of the Act is mandatory and unless the prescriptions of Section 9D are complied, the testimony of witness cannot be treated as relevant piece of material as mandated under Section 9D. The Appellant contended that the statements of person/witness relied on in the impugned order are not examined in chief and not allowed Cross Examination in accordance with Section 9D. Hence, such statement cannot be relevant piece of material.

13.2. . Regarding admission of cross examination, he stated that the Appellants have requested for cross examination of seven persons Viz, Manoj Kumar Sahoo, Chittaranjan Bhukta, Chittaranjan Nayak, Krishna Charan Padhi, Prasanta Kumar Das, Prasanna Kumar Majhi, and R.C. Samantray, whose statements have been relied upon in the Notice. among the seven, cross examination was conducted only on Shri. Krishna Chandra Padhi

13.3 The Appellant has pointed out some glaring errors in the drawal of panchanama, seizure documents and the statements recorded during the course of investigation:

(i) According to Shri. G.D. Agarwal, the search was conducted on 22.08.06. The list of documents shown to him on the date of search at Rameshwar Patna office was not the same as the list attached with the seizure memo.

(ii) Shri. G.D. Agarwal vide his statement dated 07.12.07 retracted his averments made in his statement dated 22.08.06.

(iii) Shri. Manoj Kumar Sahoo has stated that on 22.08.06, documents seized under Sl. No.1 to 12 containing weighment slips were shown to him. But, under seizure memo the document attached was a 'Register'.

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The Appellant submits that the documents shown to Shri. Sahoo was not the same as the one attached with the seizure memo.

(iv) Regarding the documents recovered at Rameshwar Patna Office, Shri. Sahoo stated that they have been brought from the Appellant Company (Prink Steels), by Chittaranjan Bhukta. The documents were said to have been written by Shri. Chittaranjan Bhukta. This statement of Shri. Sahoo was not confirmed from Shri. Chittaranjan Bhukta who was the author of the entry of the data. In his statement Shri. Chittaranjan Bhukta has stated that the documents were received in the Rameshwar patna office for storage purposes. Shri. Bhukta was confronted with only two pages of the said documents recovered from Rameshwar Patna office.

13.4. We observe that when such glaring discrepancies were pointed out by the Appellant, it is all the more required to follow the provisions of Section 9D and bring out the truth, which has not been done in this case.

13.5. The Appellant relied on the decision of this Tribunal in the case of *M/s Jai Balaji Industries Ltd. Vs. CGST reported in 2023-VIL-771-CESTAT-KOL-CE* in support of their contention that the statements recorded in this case cannot be relied upon as the provisions of section 9D are not followed. In the case of *G-Tech Industries Vs Union Of India* reported in 2016(339) ELT 209 (P&H), the Hon'ble Punjab and Haryana High Court has given an elaborate findings regarding the procedure to be followed under Section 9D. The relevant Part of the judgement is reproduced below:

3. *The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ` 7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying*

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upon the statements recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.

4. *In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*

"9D. Relevancy of statements under certain circumstances. - (1) *A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."

5. *A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.*

6. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K. Cigarettes Ltd. v. CCE, [2009 \(242\) E.L.T. 189](#) (Del.) = [2011 \(22\) S.T.R. 225](#) (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

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7. *There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.*

8. *As already noticed herein above, sub-section (1) of Section 9D 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 statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).*

9. *The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

10. *Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.*

11. *Clause (a) of Section 9D(1) refers to the following circumstances :*

- (i) when the person who made the statement is dead,*
- (ii) when the person who made the statement cannot be found,*
- (iii) when the person who made the statement is incapable of giving evidence,*
- (iv) when the person who made the statement is kept out of the way by the adverse party, and*

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(v) *when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.*

12. *Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 21831/1994, dated 3-1-1995 [since reported in 1995 (75) E.L.T. A177 (S.C.)], wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.*

13. *If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(i) *the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and*

(ii) *the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*

14. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

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15. *The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.*

16. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.*

17. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

18. *It is only, therefore,-*

(i) *after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and*

(ii) *the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,*

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that the question of offering the witness to the assessee, for cross-examination, can arise.

19. *Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

20. *Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., [2010 \(260\) E.L.T. 514](#) (All.), which, too, unequivocally expound the law thus :*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

21. *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., [2007 \(216\) E.L.T. 659](#) (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v. C.C., [2001 \(137\) E.L.T. 637](#) (T).*

22. *It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.*

23. *The said Order-in-Original, dated 4-4-2016, passed by Respondent No. 2 is, therefore, clearly liable to be set aside.*

24. *In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No. 2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No. 2 for adjudication de novo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial*

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Authorities in this regard including the principles of natural justice in the following manner :-

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

*(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in *Arya Abhushan Bhandar v. U.O.I.*, [2002 \(143\) E.L.T. 25](#) (S.C.) and *Swadeshi Polytex v. Collector*, [2000 \(122\) E.L.T. 641](#) (S.C.).*

25. *The writ petition is allowed in the aforesaid terms.*

13.6. Had the adjudicating authority followed the provisions of Section 9D and examined the witnesses who have given the statements, the

truth in this statement could have come out. Thus, we hold that the statements recorded in this case has lost its evidentiary value by not following the provisions of Section 9D. Thus, we find that Procedure set out in Section 9D has not been followed in this case. Accordingly, we answer to the question (iii) at Para 11 supra in the negative.

14.(iv) Whether the allegations of clandestine clearance of finished goods by the Appellants are substantiated with corroborative evidence?

(v) Whether the demands confirmed in the impugned order on clandestine clearance of finished goods is sustainable in the absence of any evidence of procurement of the major raw materials for manufacture of the finished goods M.S. Rods, without invoices?

14.1. The Appellant contented that the entire Demand is based on Private Records. There is no corroborative evidence available to substantiate the allegations of clandestine clearances. In this case, we observe that,

- (i) There is no evidence of manufacture of finished goods. Quantity of finished goods manufactured not known;
- (ii) There is no evidence of clandestine removal of finished goods. Quantity of finished goods removed not known;
- (iii) Documents prepared by seven production contractors relied in support of production but none of them were examined;
- (iv) Maker of Weighment Slips, Delivery Order etc. not examined;
- (v) Raw Material suppliers, Transporters, Production Staffs, Dispatch Staffs not examined;
- (vi) No excess/shortage of Raw material & finished goods;

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- (vi) No excess consumption of Electricity;
 - (vii) No excess use of Labours or payment of wages;
 - (viii) No evidence of flow back of funds Rs.65,94,44,987.50;
 - (ix) Some Invoice cancelled as no goods removed. No contra material brought on record to prove clandestine removal. Buyer mentioned on those invoices not verified.
 - (x) Out of 25 suppliers of Raw material, one supplier M/s Auro Ispat (P) Ltd. was examined who purportedly supplied **605.640 MT** of raw material. Cross Examination of Director of M/s Auro Ispat (P) Ltd. was demanded but not allowed.
 - (xi) Only one buyer M/s Anand Enterprises was examined for sale of **9.500 MT**. Shri Krishna Chandra Pati of M/s Anand Enterprises was examined & allowed to be Cross Examined. Computerized Sales Register of M/s Anand Enterprises has been relied upon without satisfying condition of Section 36B.
- 14.2. In the absence of any corroborative evidence to substantiate the allegation of clandestine removal, the demand is not sustainable.
- 14.3 This view has been held in the case of Kumar Cotton Mills (P) Ltd. Vs Commissioner of Central Excise, Ahmedabad, reported in 2008(229) ELT 273 (Tri-Ahmd), it has been held that demand of duty cannot be held merely on the basis of some entries available in the private registers. Positive, tangible evidences are required to confirmed demands on clandestine removal. The demands cannot be made on assumptions and presumptions. The relevant portion of the decision is as under:

“6. After considering the submissions made by both sides and after going through the impugned order, we find that the demand stand confirmed against the appellant on the basis of entries made in the so-called lot register read with statement of the Director, though the appellants have denied that such lot register belong to them, in as much as they used the letter ‘K’ for allotting lot number and the word ‘W’ was never used by

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them, we find that said lot register, in any case, is a private document. We have seen the said lot register giving details of the clearances along with the name and address of the buyer. Surprisingly enough, neither of the buyers, whose names and addresses were available in the said register, stand contacted by the Revenue and no efforts have been made by them to find out and ascertain the correct position from the said buyers, by investigating them and by recording their statements. This failure on the part of the officers definitely act as fatal to the Revenue's case, in as much as it is well settled law that the entries in the private record cannot be made the sole basis for upholding the allegations of clandestine removal unless there is a corroborative independent evidence on record. Similarly, statement made by the Director does not stand corroborated in any material particular from any other independent source. The gist of all the decisions relied upon by the learned advocate is to the effect that the allegations of clandestine removal are required to be established beyond doubt, by production of positive, tangible and independent corroborative evidence and such findings should not be arrived at on the basis of assumptions and presumptions. As we have already observed that inspite of the availability of names and addresses of the buyers, the officers have not bothered to conduct investigations at their end, so as to establish the Revenue's case, we are of the view that the sufficient evidence does not exist in the present case, so as to uphold the findings of clandestine activity against the appellant."

- (i) the appellant has relied upon the decision *CCE Vs. R.A. Casting P. Ltd.* reported in 2012 (26) STR 262 (All.)

22. The clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to :

- (i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;
- (ii) Utilization of such raw material for clandestine manufacture of finished goods;
- (iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock

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of raw materials and final products;

(iv) Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

(v) Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

In the instant case, no such evidences to the above effect have been brought on record.

14.4. In the instant case we find that the investigation has not brought in any corroborative evidence to substantiate the allegation of clandestine removal. In view of the above findings, we hold that the investigation has failed to establish the alleged clandestine clearance of goods by the Appellants and hence the demands confirmed in the impugned order are not sustainable. Accordingly, answer to the Question (iv) and (v) in Para 11 supra is in the negative.

15. (vi) Whether penalty is imposable on the Appellant company and it's Director and Chief Accountant on the basis of the evidences available on record?

15.1. We find that in the impugned order personal penalty of Rs.50.00 Lakhs has been imposed on Shri Rajeev Kumar Agarwal, Managing Director, penalty of Rs.25.00 Lakhs has been imposed on Shri Ghanshyam Das Agarwal, Share Holder & Constituent Attorney and penalty of Rs.10.00 Lakhs has been imposed on Shri Mukesh Kumar Agarwal, Chief Accounts Officer of the Appellant Company, for abetment of the offence. In the impugned order, the adjudicating authority has concluded that Shri. G.D Agarwal is behind the entire clandestine activities. The MD of the company was in the direct knowledge of the entire clandestine operations in the company. The Chief Accountant was involved in the preparation of documents. Accordingly, penalty has been imposed on them. However, we find that evidences brought on record has not established that they are involved in clandestine manufacture

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and clearance of the goods. As the evidence available on record does not establish the clandestine manufacture and clearance, we hold that the penalty imposed on the above said persons is not sustainable. Accordingly, we set aside the same. Accordingly, the answer to question No (vi) in Para 11 is in the negative.

16. From the above discussions, we find that answer to all the questions raised in Para 11 supra are in the negative. Accordingly, the demand of duty confirmed in the impugned order are liable to be set aside. When the duty demand itself is not sustained, the question of demanding interest and imposing penalty does not arise.

17. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellants

(Pronounced in the open court on...23.11.2023...)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar