

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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 385 of 2012

(Arising out of Order-in-Original No. CCE/BBSR-I/03/2012 dated 29.02.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

M/s. Virajaa Steel & Power Limited : **Appellant**
AT-Sunia Muhan, P.O. – Mancheswar,
Via-Chasapara, District: Cuttack, PIN – 754 027 (Odisha)

VERSUS

Commissioner of Central Excise : **Respondent**
Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar,
Bhubaneswar – 751 007

AND

Excise Appeal No. 386 of 2012

(Arising out of Order-in-Original No. CCE/BBSR-I/03/2012 dated 29.02.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007)

Shri Digambar Nandi, Managing Director, : **Appellant**
M/s. Virajaa Steel & Power Limited
AT-Sunia Muhan, P.O. – Mancheswar,
Via-Chasapara, District: Cuttack, PIN – 754 027 (Odisha)

VERSUS

Commissioner of Central Excise : **Respondent**
Bhubaneswar-I Commissionerate, C.R. Building, Rajaswa Vihar,
Bhubaneswar – 751 007

APPEARANCE:

Shri Bibhuti Bhusan Panda and Shri Umesh Ch. Bera, Advocates
for the Appellant(s)

Shri P.K. Ghosh, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 76249-76250 / 2024

DATE OF HEARING: 26.06.2024

DATE OF DECISION: 09.07.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

These two appeals are filed against the impugned Order-in-Original No. CCE/BBSR-I/03/2012 dated 29.02.2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar-I, wherein the Ld. Commissioner has confirmed the demand of Central Excise Duty amounting to Rs.1,67,57,630/- along with interest and also imposed equal amount of duty as penalty. The Ld. Commissioner ordered appropriation of Rs.10,00,000/- already paid by the appellant during the course of investigation towards the duty liability confirmed and also ordered confiscation of 18,156.96 MT of Sponge Iron alleged to be cleared without payment of duty and imposed a fine of Rs.10,00,000/- in lieu of confiscation. A penalty of Rs.10,00,000/- was imposed on Shri Digambar Nandi, Managing Director of VSPL. Aggrieved against the demands confirmed, both the appellant company and its Managing Director has filed these two appeals.

2. The facts of the case are that the appellant, M/s. Virajaa Steel & Power Limited, AT-Sunia Muhan, P.O. – Mancheswar, Via-Chasapara, District: Cuttack, PIN – 754 027, Odisha (hereinafter referred to as 'VSPL') is engaged in the manufacture of Sponge Iron falling under Tariff Item No. 7203 1000 of the Central Excise Tariff Act, 1985. On 30.06.2009, the Officers of the Preventive Unit of Bhubaneswar-I Central Excise Commissionerate searched the factory premises and office of VSPL. The Officers also searched the office of M/s. Deepak Computer Public Weigh Bridge (hereinafter referred to as 'DCPWB') at Jagatpur, Cuttack (Odisha) and transport office of M/s. Hanuman Road Carrier (hereinafter referred to as

'HRC') at Bajarangballi Building, Near Manguli Chowk, NH-5, Cuttack (Odisha). DCPWB is a proprietorship concern and does not belong to the appellant-company.

2.1 During the course of search, the Officers seized certain documents from the premises of DCPWB under Panchnama. The seized documents contained:

- (i) Two small Notebooks; and
- (ii) Loose documents of 73 numbers of sheets.

2.2. The officers verified the entries available in both the Note books and the loose sheets recovered from the premises of DCPWB and correlated the same with the invoices issued by the appellant company and the Sales Register maintained by them. The correlation, revealed the following:-

- (a) Each page of the Note Books was for one party like 'BAPL', 'I.P.I. Steel', "SREE Chatan (*Shree Chaitanya*), 'Mahesh Ferro', '7 Hiles' (Seven Hills), 'Prime Steels', etc.
- (b) Each page (where entries are there) gives a date wise clearance of Sponge Iron with indications of vehicle numbers, quantities of clearances and the rates.
- (c) Some of the entries correspond to the invoices i.e. for regular clearances, while some do not. It was also seen that the entries with indication of 'T' correspond to those with invoice and 'W' correspond to those without invoice, though this was not general in nature.

(d) The page of respective party contains two rates, one 'Bill rate' (which tallies with the invoice rate) and another higher rate (which is the actual rate).

(e) For the Note Book entries (clearances) which correspond to invoices, the differential value i.e. the difference between the Actual rate and the Bill rate is calculated in some of the pages indicating the amount to be received from the party. This indicates even where goods have been cleared under invoice, there is also under valuation.

(f) Where there are no corresponding invoices those clearances appear to have been made clandestinely without any invoice.

(g) In certain pages there are indication of payments received and adjusted in cash which appear to support the modus operandi of undervaluation and also the clearances made without invoice.

(h) Analysis of the details available in the loose sheets reveal that they also contain the same details as above. The only difference is that the Note sheet contained three columns and the loose sheets contain only two columns and the second column containing the details of vehicle number was missing in the loose sheets.

2.3. The officers found that DCPWB was owned by Smt. Chunia Nandi, wife of Shri Digambar Nandi, who is the Managing Director of VSPL and accordingly took the view that the premises of DCPWB was used by the

appellant-company as an illegal outlet for clearance of Sponge Iron without payment/short payment of duty.

3. The statements of Shri Digambar Nandi, Managing Director of VSPL was recorded on 30.06.2009, 26.02.1010, 14.09.2010, 15.09.2010 and on 28.12.2010, wherein he admitted that the particulars mentioned in the documents seized from DCPWB relates to clearances made by VSPL. He also clarified that the entries marked as 'W' relates to removals without payment of duty and the entries marked as 'I' relates to clearances made on payment of duty or cleared on under valuation.

3.1. Shri Gopabandhu Pradhan and Shri Bhabani Sankar Mohanty, Assistant Accountant have in their statements dated 30.06.2009 (Ref. Q. No. 10 & 11 of statement of Shri Pradhan and Ref. Q. No. 10 of the statement of Shri Mohanty recorded under Section 14 of the Act have respectively stated that Shri Nandi, as Managing Director, was responsible for procurement of raw materials, valuation of Sponge Iron and Clearance of Sponge Iron from the factory of VSPL.

3.2. Based on the aforesaid seized records and statements recorded from Shri Digambar Nandi (Appellant No. 2 herein) and other persons mentioned above, the Department alleged that M/s. VSPL has cleared the dutiable goods manufactured by them without payment of duty, without invoice and by undervaluation, which renders such goods liable for confiscation under Rule 25 of the Central Excise Rules. Accordingly, a Show Cause Notice dated 09.02.2011 was issued to the appellant-company and to Shri Digambar Nandi, Managing Director of the appellant-company. The Notice demanded Central

Excise Duty amounting to Rs.1,67,57,630/- along with interest and proposed penalty under Section 11AC of the Central Excise Act and confiscation of the goods said to have been cleared clandestinely. The Notice also proposed penalty on Shri Digambar Nandi. After due process, the Notice was adjudicated by the Ld. Commissioner of Central Excise, Bhubaneswar-I Commissionerate and passed the impugned order, which is the subject matter of the present appeal.

4. The appellants submits that the impugned order has alleged clandestine manufacture and clearance of Sponge Iron without payment of Central Excise Duty and undervaluation of Sponge Iron removed during the period from January 2006 to June 2009, without any evidence available on record; the entire demand has been raised based on the entries available in two Notebooks and some loose papers seized from the premises of DCPWB, belonging to a third party and the same cannot be relied upon to demand duty from the appellant-company. They further submit that the Department has failed to identify the person who has made these entries in the notebooks and hence the details contained in the said notebooks and loose sheets cannot be relied upon to demand duty from the appellant. It is also submitted that most entries in the seized Notebooks were undated and no year has been mentioned; there were no details such as particulars of dispatch or delivery or mode of receipt of payment available in the said Notebooks.

4.1. It is also submitted by the appellants that the Department has not brought in any evidence on record to substantiate its allegation of clandestine removal without payment of duty; there is not even a single instance of delivery to a third-party by any

mode of transport or receipt of party, in the impugned order. They submit that the Department has not collected any evidence or recorded any statement from the said third-parties to whom the appellant was alleged to have made clearance of the goods clandestinely; *mere entries of some figures* in some Notebooks would not amount to delivery of goods without payment of duty by the appellant.

4.2. The appellants relied on the following decisions in support of their arguments: -

- *Forward Resources Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax, Surat-I [2023(69)G.S.T.L.76 (Tri. - Ahmd.)]*, wherein it has been held that Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned.
- *Krishna & Co. v. Collector of C.Ex., Jaipur [1998 (97) E.L.T. 74 (Tribunal)]*:
 - wherein it was held – demand based on note books without any other evidence of production and clandestine removal is not sustainable.
- *Metal Fitting (P) Ltd. v. Collector of C.Ex., Delhi [1997 (93) E.L.T. 747 (Tribunal)]*:
 - wherein it was held – entries in private diary and loose papers are not sufficient evidence to establish charge of shortages – burden is on the Department to prove shortages and clandestine removal.
- *Dulichand Silk Mills (P) Ltd. v. Commissioner of C.Ex., Hyderabad [2001 (133) E.L.T. 468 (Tribunal - Chennai)]*:
 - wherein – clandestine removal – evidence – statement of manager of assessee was held as not sufficient – charge without verification of goods by the Department was set aside

- *State of Orissa v. Chandrakanta Moda [33 STC (1974) (573 – Orissa)]*:
 - Wherein it was held – undated entries in seized books account – whether relate to particular period – burden of proof lies on the Department.

4.3. The appellant further submits that Shri Nandi has retracted his statements by way of writing letters to the jurisdictional Commissioner and sworn in affidavit before the Notary Public. In this regard, it is their submission that the provisions of Section 9D of the Central Excise Act, 1944 have not been followed by the Id. adjudicating authority and hence the statements recorded in this case cannot be relied upon. In support of this contention, the appellant relied upon the decision of the Hon'ble Punjab and Haryana High Court in the case of *G-Tech Industries Vs. Union of India reported in 2016(339) ELT 209 (P&H)*.

4.4. Regarding the imposition of penalty on the Managing Director of the appellant-firm viz. Shri Digambar Nandi, it is submitted that he was in no way connected to the day-to-day manufacturing activities of the company; there is no evidence available on the record to implicate that he was involved in the clandestine manufacture and clearance of the said goods; he has retracted his statements by way of writing letters to the jurisdictional Commissioner and sworn in affidavit before the Notary Public. Hence it is argued that his statements cannot be relied upon to implicate him in the commission of the offence. Accordingly, the Appellant No.2 submits that the penalty imposed on him is not sustainable.

5. The Ld. Authorized Representative appearing for the Revenue submits that the entire demand has been calculated on the basis of the documents seized from the premises which are owned by Smt. Chunia Nandi, wife of the Appellant No. 2 herein viz. Shri Digambar Nandi; Shri Digambar Nandi, Managing Director, has admitted the manufacture and clandestine clearance of the goods in his statement dated 30.06.2009 and subsequently on 26.02.2010, 14.09.2010, 15.09.2010 and 28.12.2010. Accordingly, he supported the impugned order confirming the demands and imposing penalty on the appellants.

6. Heard both sides and perused the appeal documents.

7. We observe that the Officers of the Central Excise Preventive Unit, Bhubaneswar-I Commissionerate searched the factory premises and office of VSPL along with the office of DCPWB, which is a proprietorship concern owned by Smt. Chunia Nandi, wife of Shri Digambar Nandi (Appellant No. 2). During the course of search, two small Notebooks and some loose sheets were recovered from the premises of DCPWB. We observe that the charge of clandestine removal has been made and the entire demand in the impugned order has been arrived at on the basis of the entries available in the two notebooks and loose sheets seized from the premises of DCPWB on 30.06.2009. The Id. adjudicating authority has considered the above Notebooks and loose papers as the rough accounts of the appellant-company in the impugned order. The appellant submitted that the premises of DCPWB, from where the relied upon documents were recovered, belongs to the Smt.

Chunia Nandi, wife of Shri Digambar Nandi, and that the said concern is an independent proprietorship concern and not a part of the appellant's factory. The Department has not identified the person who has made the entries in the said seized documents. The said note books/loose papers written mostly in pencil by unknown and unidentified persons, cannot be presumed to be documents relating to the appellant company. The author(s) of the seized documents have not been ascertained/identified by the Department and their relationship with the appellant company has not been established.

7.1. We observe that the impugned order has considered the documents seized from the premises of DCPWB as documents maintained by VSPL, on the basis of the statements recorded from the Managing Director on various dates. It is also alleged that some of the entries available in the seized documents tally with the invoices raised by the appellant for their actual transactions. Accordingly, the Id. adjudicating authority concluded that since Smt. Chunia Nandi is one of the Directors of VSPL and also the Proprietor of DCPWB, Shri D. Nandi has kept these documents in the premises of DCPWB and he has control over these documents. The Id. adjudicating authority cited the provisions of Section 36A of the Central Excise Act, 1944 and observed that these documents can be admitted as evidence and duty can be demanded based on the entries available in these documents. For ready reference the provisions of Section 36A are reproduced below:

“Section 36A. - Presumption as to documents in certain cases. - Where any document is produced by any person or has been seized from the custody or control of any person,

in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -

(a) unless the contrary is proved by such person, presume -

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.”

7.2. A perusal of the provisions of Section 36A reveals that the documents seized from another premises can be admitted as evidence provided the author of the entries made in the documents has been identified. Once the identity of the person in whose handwriting the documents are written is established and his statement is taken admitting that it is his handwriting, then the documents can be admitted as evidence. However, in this case, we observe that the entries in the note books/loose papers, written mostly in pencil, by unknown and unidentified persons. Shri Nandi has not identified the person who has written those entries. Accordingly, we hold that the requirements as provided under Section 36A are not fulfilled in this case and hence the seized documents cannot be presumed to be documents relating to the appellant company and relied upon to demand Central Excise Duty from the appellant-company.

7.3. In support of the above contention, the appellant relied upon the decision of the Tribunal Ahmedabad in the case *Forward Resources Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax, Surat-I [2023(69) G.S.T.L.76 (Tri. -Ahmd.)]*, wherein it has been held as under:

"5.2 We find that in the present matter it is on record that during the search at the premises of the Appellants, no invoices/debit notes etc., raised to their customers were found. The department in the present matter recovered the said alleged debit notes/invoices from the customers. The Business Premises of M/s. Consumer Marketing (India) Pvt. Ltd. was searched and documents/records were seized. Shri Rajesh Ramchandra Satve, Authorized Signatory of service recipient of M/s. Consumer Marketing (India) Ltd., in his statement admitted the receipts of taxable services from Appellant. We also noticed that presumption of documents in certain cases under Section 36A of the Central Excise Act is available only when the documents are produced by or seized from the custody or control of the person concerned, we also take into consideration the provisions of Section 36A of the Central Excise Act, 1944 for the sake of convenience and ready reference the same are reproduced below :-

In view of above Section 36A of Central Excise Act, 1944 it is only when such document is tendered in evidence against the person who produced the same or from whose custody or control it was seized that the presumption under Section 36A is available. In the present case admittedly none of the alleged invoices/documents was produced by the Appellant or seized from the Appellant's premises or control. In view of the above, when the presumption under Section 36A is not available, the burden of proof is squarely on the Department to prove that the source documents related to the Appellants' and that any taxable services under the source documents were actually provided by the Appellant. This burden has not at all been discharged in the present case. The department could not have simply accepted the customers documents provided by them on its face value and the same need strict corroboration which is completely absent in the present case."

7.4. In the case of *Metal Fitting (P) Ltd. v. Collector of C.Ex., Delhi* [1997 (93) E.L.T. 747 (Tribunal)], it has been held that entries in private diary and loose papers are not sufficient evidence to establish charge of shortages and the burden is on the Department to prove shortages and clandestine removal. The relevant paragraphs of the said decision are reproduced below:

"6.1 Regarding the second issue, the findings of the Collector are contained in paragraphs 30 to 36. The findings on the 3rd issue are contained in paragraphs 37 to 53 of the impugned orders. The allegation in the show cause notice is that one of the two diaries contains entries of purchase and sale for M/s. Surendra Alloys and that the loose papers seized on 13-1-1989 pertains to the transaction of M/s. Surendra Alloys and M/s. Metal Fittings. It is not the case of the appellants that the diary of Shri L.N. Garg does not contain any entries of transactions of Surendra Alloys; on the other hand, it is their contention that although the diary contains entries to the extent of 40% of the transactions entered in Form IV raw material account of M/s. Surendra Alloys, it is also contains entries of his personal transactions. Shri L.N. Garg has deposed that the pocket ledgers seized by the Department contains entries regarding sales and purchase done by him on commission basis in which he acted as a Commission Agent and received commission. The details of MS scrap purchased by Surendra Alloys but not accounted for in their Form IV register for the period 1-10-1988 to 13-1-1989 are contained in Annexure-XVI to the show cause notice (page 155 of the paper book). The annexure is reproduced below (at page No.11). At page 186 of the paper book is a list of purchases of MS scrap made by the notices and entered in Form-IV register for which there is no reference in the diaries of Shri L.N. Garg. This list is reproduced below (at page No. 12 and 13). The statement of purchase of scrap monthwise for the disputed period is set out at page 188 from which it will be seen that the details of scrap and

transactions not covered by the diaries is to the extent of 55.5% to 60.6%. The statement is reproduced below (at page 14). The appellants submit that if the diary is taken to represent only the accounts of M/s. Surendra Alloys then the stock of scrap should have been around 1000 MTs i.e. alleged purchases (details of which are found at page 155) less production (details at page 156) i.e. 3187 MTs - 2276 MTs while only 100 tonnes of scrap was actually found. A reference to some of the entries indicates that the scrap was not purchased by M/s. Surendra Alloys for example the transaction relating to M/s. Kumar Steels at page 211 wherein the partner of M/s. Kumar Steels has certified that M/s. Kumar Steels had imported MS scrap from USA through Metal Scrap Trading Corporation Ltd., Calcutta and the scrap was shipped by the seller to Kandla Port from where it was transported by road to Jagadhri and owing to dispute with the Transport Company, intervention of Shri L.N. Garg of M/s. Metal Fittings was requested and the matter was settled. The lorry transport documents for the Kumar Steels transactions are contained from pages 212 to 219. The appellants have also filed a statement of account from M/s. Uma Shankar Khandewal & Co. from whom the Department alleged that M/s. Surendra Alloys purchased 8.810 MTs of M.S. scrap vide Sl. No. 1 of Annexure XVI at page 155). Even though during the investigation, M/s. Uma Shankar Khandelwal & Co. indicated 5 transactions with M/s. Surendra Alloys they later confirmed that they had entered into six transactions which were properly entered in the Form IV Register of M/s. Surendra Alloys. The certificate of M/s. Uma Shankar Khandelwal Company is available at page 189-190 of the paper book. The Department has not conducted any investigation with any other supplier or purchaser to corroborate the evidence of transactions between them and M/s. Surendra Alloys which transactions were not reflected in the accounts of M/s. Surendra Alloys. The appellants had furnished statements of purchase of scrap from M/s. Rama Industries and M/s. K.L. Rathi Steels Ltd. which (sic.) certain transactions presumed to be those of M/s. Surendra Alloys and M/s. Metal Fittings are not their transactions. But the Department has not made any

enquiries to confirm the fact as to whether M/s. Surendra Alloys had purchased scrap from them as set out in Annexure XVI out of which they are alleged to have manufactured ingots and removed them clandestinely to purchasers listed in XVII.

6.2 We find that Shri L.N. Garg has confirmed during the personal hearing that the diaries and loose papers include his personal accounts and also show his commission and this is confirmed by M/s. Cege& Forging P.Ltd. and Shri S.N. Agarwal. Shri Garg also clarified that the entries in the diaries and loose papers are reflected in quintals and in kgs. and not in Metric Tonnes and consequently the entries at page 156 are to be construed as 18 quintals and 94 kgs. and 1.2 quintals and 1 kgs. One of the basic submission of the appellants before the adjudicating authority was that the consumption of electricity required for manufacturing the alleged disputed quantity was very high and that the consumption for the alleged quantity comes to only 200 Units per metric tonne whereas the minimum requirement under ideal condition is around 600 units per metric tonne and this ratio was corroborated by a certificate from an expert on Induction Furnace (Certificate dated 10-10-1990 from M/s. S.K. Consultants at page 194). This submission has been rejected by holding that there is mis-use of electricity by Induction Furnace owners which cannot be ignored. We agree with the appellants that this cannot be a ground for rejecting the appellant's submission on this point, particularly noting that during the relevant period, there is no such charge of electricity theft against the appellants by DESU and no demand therefrom. The adjudicating authority has taken into account whatever has been entered independently in the statutory records inspite of these transactions not being entered in the diaries in addition to the diary transactions. If the clearances are taken as reflected in the diaries then the diary entries should alone form the basis for duty and from the quantity so alleged on the basis of the diaries, the quantity reflected in the statutory records should first have been deducted before demanding duty on the balance. However, the Department has demanded on all the

clearances reflected in the diary without deducting the quantity of clearances reflected in the statutory records. Further the demand has been confirmed on a quantity of 2276 MTs without allowing for the quantity of ingots and runners and risers already accounted and cleared (about 825 MTs) on payment of duty.

7. In light of the above discussion, we are of the view that it is not possible to conclude satisfactorily that the pocket ledgers and loose papers seized on 13-1-1989, pertain entirely to M/s. Surendra Alloys and do not contain any account of personal transactions of Shri L.N. Garg. We are, therefore, of the view that the Department has not discharged the burden cast upon it to establish the charge of shortages and the serious charge of clandestine removal. In such a situation we extend the benefit of doubt to the assessee and set aside the duty demand and penalty on M/s. Surendra Alloys and Metal Fittings. The penalty on Shri S.K. Garg and Shri L.N. Garg is required to be set aside, since no notice was issued to them calling upon them to show cause against imposition of penalty and it is well settled proposition of law that penal liability cannot be fastened without notice therefor."

7.5. In the case of *Dulichand Silk Mills (P) Ltd. v. Commissioner of C.Ex., Hyderabad [2001 (133) E.L.T. 468 (Tribunal - Chennai)]*, it has been held that to establish the allegation of clandestine removal, the statement of manager of the assessee alone not sufficient. The relevant part of the said decision is furnished below:

"4. On consideration of the submissions, we find that there is lot of force in the submissions of the learned Consultant. As can be seen from the records, the case proceeds on the basis of presumption and assumption. The figure was given by the manager of the appellants in the factory. The Commissioner had clearly held that this cannot be the basis for clandestine removals, yet he concluded that presumption can be drawn on the basis of the statement of the manager. This finding is not in consonance with the judgment of the Apex Court

judgment in the case of Oudh Sugar Mills (supra) wherein it has been clearly laid down that burden of clandestine removal is required to be discharged by the department and mere assumption or presumption cannot be the basis for raising demand. Although in the present case Manager has given some figure the department had chosen to measure some quantity and found the same to be in order and dropped the proceedings. When it was convenient for the department to do physical verification for some portion of the goods, they should have done the same exercise for the other portion also. Merely because eye estimation was given it does not absolve of the department's responsibility to carry out physical verification of the goods and confirm demand duty on that basis. In view of the clear cut law laid down by the cited judgments, the appellants prayer is required to be accepted by setting aside the impugned order and allowing the appeal. Ordered accordingly.

7.6. In the present case, we observe that the author(s) of the seized documents have not been ascertained/identified by the Department and their relationship with the appellant company has not been established. We observe that no statement has been recorded either from the owner of the premises or from the person who was in possession of the seized documents at the time of seizure. Regarding the admission statement recorded from Shri Nandi, we observe that he has retracted his statements by writing a letter to the jurisdictional Commissioner and by filing a sworn in affidavit before the Notary Public and contented that on 30.06.2009; his statement was taken late in the night, when he was under custody, under coercion, threat and duress, at Bhubaneswar Headquarters. We observe that an admission statement taken under such situation alone cannot form the basis for inferring clandestine removal. Thus, by relying on the decisions cited above, we hold that the entries available in the seized note books and loose sheets alone are not sufficient to allege clandestine clearance against the appellant.

8. Regarding the other evidences relied upon by the Id. adjudicating authority to confirm the demand, we observe that the statements of Shri Digambar Nandi, Managing Director of VSPL and his staff recorded on various dates, are the evidences based on which the demands have been confirmed. In his statements, Shri Nandi admitted that the particulars mentioned in the documents seized from DCPWB relates to clearances made by VSPL. Shri Sankar Mohanty, Assistant Accountant and Shri Pradhan in their respective statements stated that Shri Nandi, as Managing Director, was responsible for procurement of raw materials, valuation of Sponge Iron and Clearance of Sponge Iron from the factory of VSPL. Thus, we observe that the statement of Shri Nandi is the main evidence based on which the demand has been confirmed. We observe that Shri Nandi has retracted his statements by way of writing letters to the jurisdictional Commissioner and sworn in affidavit before Notary Public. We observe that the first statement of Shri Nandi was recorded on the date of search on 30.06.2009. In his letter dated 02.07.2009, Shri Nandi alleged that his interrogation and recording of statement continued throughout night and he was released only at 2 p.m. on 01.07.2009. In the letter, he alleged that he has been harassed and compelled to sign blank papers and deposit the amount through undated cheques. Thus, it is his contention that the statement recorded under coercion, threat and duress cannot be relied upon to confirm the demands against the appellant company.

8.1. We observe that the Id. adjudicating authority has simply brushed aside the retractions as mere afterthoughts. When the statements recorded are

retracted, its evidentiary value comes down. In such circumstances, further corroborative evidences required to substantiate the allegations of clandestine removal. We observe that other than the entries in the note books and loose sheets and the statements recorded, there is no other corroborative evidence available in this case.

8.2. In support of their contention, the appellant relied on the decision in the case of *Krishna & Co. v. Collector of C.Ex., Jaipur* [1998 (97) E.L.T. 74 (Tribunal)], wherein it has been held that demand based on note books without any other evidence of production and clandestine removal is not sustainable. The relevant paragraphs of the said decision are reproduced below:

"8. On a careful consideration of the matter, I am satisfied that the submissions made by the learned Advocate has got force. The learned Collector has not taken pains to verify the contents of the diary and to scrutinise each and every entry with that of the statutory registers. After recording the case of the appellants and the respondents, he has confirmed the demands on the ground that there has been admission in the case. It has been reiterated by the Tribunal time and again that in case of clandestine removal, the department ought to produce corroborative evidence. Even if there are statements admitting the existence of private registers, even then the party has to be given an opportunity to explain each and every entry. In this particular case, the department has accepted few of the entries on the basis of the statements of one Shri Arun Goenka, General Manager of M/s. Krishna & Co. The department in this case has not shown to whom the other 301.510 MT of M.S. Ingots has been sold from the private diary. Obviously, there should have been sale to some parties and it was for the department to have culled out from the diary itself about that purchasers of these goods and thereafter, statements ought to have been recorded to corroborate the statement made by Shri R.B. Singh. Although initially the General Manager, Shri Arun Goenka is said to have admitted about the presence of private diary. However, the same has been disputed on a later time. Therefore, in a circumstances, where the assessee has put forth various pleas in reply to the show cause

notice and has asked for re-authentication of the stocks as well as the contents of the diary, therefore, the department could not have brushed aside these defence, however, they might be insufficient. The learned Collector ought to have examined all the aspects of the matter and a detailed finding should have been given to arrive at, as to how much quantity was cleared clandestinely, then merely accepting the statements that there has been a clearance of 301.510 MT of M.S. Ingots. The learned Counsel has relied on the judgments noted above and the extracts. From the extract of the judgment, it is clearly held that the department should not base the case solely on the private diary but there has to be sufficient corroboration and such corroboration can also be obtained from the seized record itself with verification from the statutory registers and also from the details of electricity consumed and input registers maintained by them. The learned Counsel submits that all these registers are still available and the department are at liberty to carry out a second verification for which the assessee does not have any objection. The learned Counsel further submits that there has been no clandestine removal in the case as alleged but the statements were given in hurry and out of fear and although same was not resiled. He points out that a detailed reply to the show cause notice was given which has not been considered at all. It is also his submission that there is no cause to indulge in clandestine removal as the appellants had started the factory newly and they were in the business only for 5 months. Therefore, taking into consideration all these factors into account and the fact that the order is not a speaking order, it is but proper that the impugned order is set aside and the matter remanded to the original authority with a direction that the original authorities shall grant the appellants an opportunity of hearing and to defend their case. The original authorities shall carry out de novo proceedings in the light of law laid down by the Tribunal in the above noted judgments."

9. The appellant further submits that the provisions of Section 9D of the Central Excise Act, 1944 have not been followed by the Id. adjudicating authority and hence the statements recorded in this case cannot be relied upon.

9.1. A perusal of Section 9D of the Central Excise Act, 1944 clearly establishes that unless a person who has made the statement is examined as a witness

before the adjudicating authority, no reliance can be placed on any statement recorded under section 14 of the Central Excise Act. Any statement recorded under Section 14 of the Central Excise Act could be admitted in evidence only after the process of examination and cross examination is completed under Section 9D. We observe that the procedure set out under Section 9D is a mandatory procedure and without following this procedure, no reliance can be placed on any statement recorded under Section 14 of the Central Excise Act, 1944.

9.2. In the case of *G-Tech Industries Vs Union of India [2016 (339) E.L.T. 209 (P&H)]*, the Hon'ble High Court has given an elaborate finding regarding the procedure to be followed under Section 9D. The relevant part of the above judgement is reproduced below: -

"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.*

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*
- (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.

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,

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 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 AbhushanBhandar 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."

9.3. In the present case, we observe that the provisions of Section 9D of the Central Excise Act, 1944 have not been followed by the Id. adjudicating authority and hence the statements recorded in this case cannot be relied upon, as held by the Hon'ble Punjab and Haryana High Court in the case of *G-Tech Industries v. Union of India* [2016(339) E.L.T. 209 (P&H)] (mentioned supra). Further, it has come on

record that the statements recorded from the Managing Director viz. Shri Nandi is not of voluntary nature but were recorded after putting undue pressure on him and thus his statements could not have been admitted as evidence by the adjudicating authority. The same clearly lost its evidentiary value. Once the Statement of Shri Nandi is excluded in this case, we find that the other evidences do not substantiate the allegation of clandestine clearance without payment of duty.

10. We observe that the investigating officers who conducted a thorough search of the factory premises of the appellant-company did not record any finding or observation regarding any discrepancy/variation between the stock of finished goods physically available in the factory and those reflected in the statutory records such as, the Daily Stock Accounts maintained under Rule 10 of the Rules. No discrepancy was found in the stock records maintained for accounting of raw materials, etc. We also observe that no verification was made by the officers with the buyers or transporters in support of clandestine removal of sponge iron and no examination of bank accounts in support of excess realization towards sale proceeds of goods clandestinely removed. Thus, we observe that the Department has not brought in any other evidence other than the statements to substantiate the allegation of clandestine removal without payment of duty.

10.1. We observe that the allegation of clandestine clearance cannot be sustained on the basis of statements alone. There must be some positive evidences like purchase and consumption of

unaccounted raw materials, discrepancy between recorded stock and physical stock, seizure of any goods *en route*, consumption of excess electricity, actual clandestine removal of finished goods without payment of duty, mode of removal, evidence of transporters and buyers of the clandestinely removed goods and flow back of funds pertaining to clandestine removals. We observe that the demands confirmed on account of clandestine removal in the impugned order without any of the above mentioned evidences are not sustainable.

10.2. This view has been held in the case of *Continental Cement Company v. Union of India* reported in 2014(309) E.L.T. 411 (All.). The relevant paragraphs of the said decision are reproduced below:-

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

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*

(v) *To find out finished product receipt details from regular dealers/buyers.*

(vi) *To find out the excess power consumptions.*

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department."

11. Thus, by relying on the above decisions, we hold that the demand of central excise duty confirmed on account of clandestine clearance in this case is not sustainable and accordingly, we set aside the same.

12. We observe that the allegation of undervaluation has been made in the Notice on the basis of the entries available in the two Note books and the loose sheets seized from the premises of DCPWB and the statements recorded from the Managing Director viz. Shri Nandi. We have already held that the entries in these documents and the statements which are retracted alone cannot be sufficient to demand duty. Charge of undervaluation cannot be presumed without verification of contemporaneous market price of sponge iron, which is a widely fluctuating market. The un-authenticated scribbings on loose papers by unidentified persons cannot be the basis for arriving at a conclusion of undervaluation. Accordingly, we hold that the demand of duty on account of undervaluation in the impugned order is not sustainable.

13. Since the demands of duty on account of clandestine removal and undervaluation is not sustained and set aside, the question of demanding interest and imposing penalty on the appellant company does not arise.

13. Regarding the penalty imposed on Appellant No. 2, the Managing Director, Shri Digambar Nandi, we observe that penalty has been imposed on him for his alleged role in the clandestine clearance and under valuation. The Department alleged that Shri Nandi, being the Managing Director of the company, was solely responsible to the business of the company and the alleged acts / commissions were made by him or at his instance and with his full knowledge; Personnel of VSPL viz. Shri Gopabandhu Pradhan and Shri Bhabani Sankar Mohanty, Assistant Accountant have in their statements dated 30.06.2009 (Ref. Q. No. 10 & 11 of statement of Shri Pradhan and Ref. Q. No. 10 of the statement of Shri Mohanty recorded under Section 14 of the Act have respectively stated that Shri Nandi, as Managing Director, was responsible for procurement of raw materials, valuation of Sponge Iron and Clearance of Sponge Iron from the factory of VSPL. It was alleged that he had kept the private records containing real sale details away from the factory at another location where he sits so as to avoid detection and has also admitted to the evasion of duty and maintenance of these records. However, in view of the discussions and findings in the foregoing paragraphs, it has been held that the demands of duty on account of clandestine removal and undervaluation is not sustained and set aside. Thus, we hold that the alleged role of Appellant No. 2 in commission of the offence is not established. Accordingly, we set aside the penalty imposed on the Appellant No. 2 viz. Shri. Nandi, Managing Director of the appellant-company.

14. Regarding the order for confiscation of 18,156.96 MT of Sponge Iron alleged to have been cleared without payment of duty and imposition of fine of Rs.10,00,000/- in lieu of confiscation, we observe that the allegation of clandestine removal and undervaluation is not sustained and set aside and hence, the question of confiscation of the goods alleged to have been cleared clandestinely without payment of duty does not arise. Accordingly, we set aside the order for confiscation and imposition of redemption fine in the impugned order.

15. In view of the above discussions, we set aside the impugned order and allow the appeals filed by the appellants with consequential relief, if any, as per law.

(Order pronounced in the open court on **09.07.2024**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd