

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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 70222 of 2013

(Arising out of Order-in-Original No. 69/Commissioner/CE/Haldia/Adjn/2012 dated 28.12.2012 passed by the Commissioner of Central Excise, Haldia)

M/s. Premier Power Products (CAL) Pvt. Ltd.

(Jalan Industrial Estate, Biprannapara, Jangalpur, Domjur, Howrah-711411)

Appellant

VERSUS

Commr. of Central Excise, Haldia Commissionerate

(25, Princep Street, 3rd Floor, Kolkata-700072)

Respondent

With

Excise Appeal No. 70223 of 2013

(Arising out of Order-in-Original No. 69/Commissioner/CE/Haldia/Adjn/2012 dated 28.12.2012 passed by the Commissioner of Central Excise, Haldia)

M/s. Neha Power Tech (I) Pvt. Ltd.

(Jalan Industrial Estate, Biprannapara, Jangalpur, Domjur, Howrah-711411)

Appellant

VERSUS

Commr. of Central Excise, Haldia Commissionerate

(25, Princep Street, 3rd Floor, Kolkata-700072)

Respondent

And

Excise Appeal No. 70224 of 2013

(Arising out of Order-in-Original No. 69/Commissioner/CE/Haldia/Adjn/2012 dated 28.12.2012 passed by the Commissioner of Central Excise, Haldia)

Dharmendra Kumar Daga, Director

(Jalan Industrial Estate, Biprannapara, Jangalpur, Domjur, Howrah-711411)

Appellant

VERSUS

Commr. of Central Excise, Haldia Commissionerate

(25, Princep Street, 3rd Floor, Kolkata-700072)

Respondent

APPEARANCE :

Mr. Indranil Banerjee, Advocate for the Appellant

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

CORAM:**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)****HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)****FINAL ORDER NO.76811-76813/2024**Date of Hearing : 07 August 2024Date of Decision: 04/09/2024**PER R. MURALIDHAR:**

The appellants are engaged in the manufacture of Cable Trays and parts and accessories falling under Chapter 85 of the CET, clearing the same to buyers like BHEL, Thermax, Jindal Steel & Power etc. The DGCEI officials visited the office, factory and residential premises of the appellants on 18.07.2008. They seized one diary in the premises of M/s Neha Power Tech (I) Pvt. Ltd. [the appellant number 2 herein]. This diary maintained for January, 2008 to July, 2008 contained therein name of the parties, registration number of vehicle, description and quantities of the goods etc. One writing pad with written pages from 1 to 48, was recovered from the factory premises of M/s Neha Galvaniser (India) Pvt. Ltd., which was found to contain entries similar to those in the aforesaid seized dairy. Some of the entries in the said purported writing pad tallied with the appellant's Central Excise invoices. The Revenue relied on these documents to allege clandestine removal. On physical verification of stock, it was also found that there were shortage of finished goods like Perforated Cable Tray, Ladder Type Cable Tray and G. I. Flat to the extent of 204.5 Mtr, 232.5 Mtr and 30.88 Mt respectively. Similar shortages were also detected in respect of the Second Appellant also. Statements were recorded from the Director Sri Daga on 18.07.2008, 04.01.2011 and 12.01.2011. A common show cause notice was issued on 28.03.2011 upon all the assessee-notices, alleging that they have indulged in suppression of material facts by clandestinely removing finished goods from 01.01.2008 to 15.07.2008. In respect of the first appellant demand of Rs.93,22,667/- was made on account of clandestine removal and another Rs. 2,19,448/- was demanded towards the shortage of stock. In respect of the second appellant, demands of Rs.

Rs.13,18,216 and of Rs.27,196 on these counts. Against the Director Sri Dharmendra Kumar Daga Penalty was also proposed under Rule 26 of CER 2002. After due process the Adjudicating authority confirmed the demands. Being aggrieved, the appellants are before the Tribunal.

2. The Learned Counsel appearing on behalf of the appellants submits that there was no evidence on record to establish actual clandestine clearance or any attempted clandestine clearance. No discrepancy could be found as regards consumption of unaccounted inputs or excess electricity vis-a-vis statutory records, for utilization in clandestine manufacture. There was neither any seizure of offending goods sought to be cleared nor any seizure of conveyance carrying purported offending goods. There was no evidence in the form of any recorded statement from an identified buyer, transporters or any other evidence to establish flow-back of funds towards the alleged clandestine clearances. The authors of the seized diary and the seized notepad were never identified nor were they put to any examination. This diary was in fact recovered from the premises of the sister concern Neha Galvanizer (I) Pvt Ltd.

3. In short, other than recording one statement of the Director on 18.07.2008, no investigation was carried with the purported buyers, transporters, nor any other statements were recorded to corroborate the allegations. Similarly no evidence has been brought in towards clandestine purchase of raw materials, usage of excess electricity so as to carry out the manufacture of the alleged clandestine manufacture of the goods.

4. He submits that the allegation of clandestine removal cannot sustain on the strength of private records, in the absence of corroborative evidence, and relies on the following case laws:

- a) Gautam Ferro Alloys v. Commissioner of Central Excise, Ranchi, reported in 2021(377) ELT 776 (T), since affirmed by the Hon'ble Apex Court in Commissioner of Central Excise, Ranchi v. Gautam Ferro Alloys reported in 2022 (380) ELT 385 (SC)
- b) Ambica Iron and Steel Pvt. Ltd. v. Commissioner of C.Ex., Cus.

& ST, reported in 2022 (380) ELT 351 (T)

- c) Hon'ble Tribunal vide Final Order No. 75556-75557/2024 dated 21.03.2024 in Mis Narsingh Ispat Ltd. v. Commissioner,
- d) Super Smelters Ltd. v. Commissioner of Customs, Excise & Service Tax, reported in 2020 (371) ELT 751 (1).

5. In respect of the alleged shortages found during the stock verification, he points out the following errors, making them legally not sustainable:

- (i) Stock taking report did not bear the signature of any witness, which is in total violation of Sections 12F and 18 of the Central Excise Act read with Section 100 of the Code of Criminal Procedure, 1973;
- (ii) More than 1000 Mtrs of various types of Cable Tray had been weighed within a span of few hours on 18.07.2008, which was a physical impossibility.

6. The relevant records of physical stocks is not backed up by any proper backing like procedure adopted for stock verification like weighment slip, quantification process etc. Even during the Adjudication process, the Adjudicating authority did not seek the documentary evidence from the Revenue for their allegations towards the shortages. Therefore, the physical shortage of stock has not been properly established. He relies on the following case laws:

- i. Scan Sponge Iron Ltd. v. Commissioner of Central Excise, Bhubaneswar-II - 2022-TIOL-817-CESTAT-KOL
- ii. Jai Balaji Industries Ltd. v. Commissioner - 2021 (378) ELT 674 (T)
- iii. Commissioner v. Anand Founders and Engineers - 2016 (331) ELT 340 (P&H)

7. He further submits that the only statement recorded of the Director Sri Daga also cannot be taken as having any evidentiary value. The first statement was recorded on 18.07.2008, wherein he has clearly stated that *'tonight it is very late and I am not feeling well'*, which goes on to show that this statement was recorded under extreme pressure and the statement was given because of coercion and is not out of free-will by a normal healthy person. After this, the next statement was recorded after more than 2 years 4 months on 4.01.2011, wherein he has stated that *"he could not vouch for the truth or reliability the earlier statement taken on 18.07.2008"*. This shows that he has practically retracted his earlier statement. In his next statement recorded on 12.01.2011 also, there is no admission of any clandestine removal. A combined reading of all these Statements would make it clear that his first statement recorded on 18.07.2008 cannot be relied upon by the Revenue since it has no evidentiary value.

8. Further it is submitted that the Adjudicating authority is in error in admitting the recorded statements of Sri Daga without following the procedure specified under Section 9(D) of the CEA 1944. He relies on the decisions of this Hon'ble Tribunal in Narsingh Ispat Ltd. vs. Commissioner, cited supra and Ambika International v. UOI-2018 (361) ELT 90 (P & H). In these cases, it has been held that unless the person recording the statement reiterates before the Adjudicating Authority, as the statement having been made out of free will without any coercion or pressure, the same cannot be admitted as evidence directly by the Revenue to confirm the demands.

9. In view of the above submissions, he learned counsel prays that the appeals may be allowed on merits.

10. Without prejudice to the above submissions, he submits that the Show Cause Notice issued on 28.03.2011 for the search and investigation conducted in July 2008, is time barred for the following reasons:

- After the search was conducted in July 2008 and the Statement was recorded by the Director, no further investigation process was taken up during the next more than 2 years.
- The subsequent statements of the Director recorded on 4.1.2011 and 12.01.2011 were done only so as to justify the delay in issuing the Show Cause Notice.
- No new fact in view of any investigation / verification during the period July 2008 to March 2011 has been cited in the SCN so as to issue the same on 28.3.2011.
- When all the details including the alleged shortage was already available on the date of physical verification and subsequent collating of the data, there is absolutely no justification to invoke the extended period provisions, to fasten the present demand on the appellant.

11. Accordingly, he prays that the appeal may be allowed even on account the confirmed demands being barred by time.

12. He submits that since the facts are same/similar in respect of the both the appellants, the above arguments may be taken as common for both the appeals and prays that the appeals may be allowed on merits and on account of limitation.

13. In respect of the penalty imposed on the Director, it is submitted that no specifics have been brought in to show that any clandestine removal has taken place. Hence, the penalty is sought to be set aside.

14. The AR appearing for the Revenue, reiterates the findings of the lower authority. He submits that the DGCEI officials visited the

office and factory premises of the appellant and conducted thorough verification of the document and stocks. Only after finding shortages in the physical verification and recovering incriminating documents, the investigation was taken in a bigger detail. The Director has recorded his statement, where he has admitted to wrong doings and also has voluntarily deposited Rs.50 lakhs. Hence, it is a clear admission of shortage of stocks and clandestine removals. Accordingly, the AR justifies the confirmed demands and prays that the appeals may be dismissed.

15. Heard both the sides. Perused the Appeal papers and further submissions made along with the cited case laws.

16. On going through the SCN, it is seen that the Dept. officials visited the premises of the appellants on 18.07.2008 and they have recorded the statement of Sri Dharmendra Kumar Daga on the same day. It is also an admitted fact that a diary and some other notes have been recovered in the premises connected with the operations of the present appellants. While it is alleged that the Diary and Notes record the details of various buyers with Invoice and quantity details, no statements have been recorded with any of such buyers to corroborate the allegations. In such cases, investigation should have been carried out at the end of the purported buyers, who could have been questioned of such transactions and their recorded statements would be vital to prove that the goods have been cleared in clandestine manner so as to evade payment of Excise Duty. It is surprising that when the diary and note sheets have specified the details of such buyers, still the Revenue did not make any attempt to contact anyone of them when the investigation was taken up against the appellant. There is no allegation that any private records were recovered towards the receipt of the clandestine proceeds by way of cash. Apart from this, the clandestine clearance would entail not only dispatch, but purchase of raw materials, excess consumption of electricity [which is not accounted for in the normal course], inward

movement of raw materials and consumables and finally outward movement of the clandestinely removed goods. No details in these areas have been gathered by the Revenue. The bare minimum requirement would be to verify the outward movement details by questioning the truck owners/transporters, when the vehicle numbers are purportedly been shown in the recovered diary/note sheets. Thus, the Revenue with the sole evidence coming in the form of the recorded Statements of the Director Mr Daga on three occasions. The first statement was recorded on 18.07.2008 and the next two statements have been recorded after more than two years from this date. This itself goes on to show that there was hardly any proper follow up investigation in the intervening period. Thus, we find that overall the Revenue has not discharged its onus to prove the clandestine manufacture and dispatch of the goods in question with proper corroborative evidence.

17. On the issue of allegation and demands under clandestine clearance, the following case laws cited by the appellant would be relevant :

**2020 (371) E.L.T. 751 (Tri. - Kolkata)
SUPER SMELTERS LTD. Vs CCE ST DURGAPUR**

The statement of Shri Ravi Bhushan Lal was obtained only after the Panchanama proceedings were over, and therefore, the officers recorded his statement during his detention in the office that too in night. To test the veracity of the search proceedings the cross-examination of the Pancha witness was necessary, which was not allowed to the appellant and, therefore, we are left with no option; but agree to the contention of the Learned Advocate that the veracity of the panchanama is doubtful.

Relying on these judgments, we hold that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, employment of extra labour, seizure of cash, transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be

proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for clandestinely manufacture of finished goods, manufactured of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, amount received by the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal. All these material evidence are missing in the present case and the evidences brought into the record by the department are incomplete, inconsistent and not a reliable piece of evidence to prove charges of clandestine removal.

[Emphasis supplied]

**2021 (377) E.L.T. 776 (Tri. – Kolkata)
GAUTAM FERRO ALLOYS Vs CCE RANCHI**

We find that in the Impugned Order, the Ld. Commissioner has confirmed duty demand of Rs. 13,36,476/- under Para 60 on the basis of 40 entries in the private diary as per which the appellant assessee supplied goods to buyers Bal Mukund, Ganesh Foundry, Mongia, etc. who were never identified or examined to cull out evidence. Under Para 61, statement of Sri A.K. Sheel, Authorised Signatory of M/s. K. Steel and Sri Shankar Baksh Singh Chouhan, Authorised Signatory of M/s. Stan Commodities is relied upon by Ld. Commissioner. We have gone through the statements of the said two buyers. In their statements they have nowhere accepted payment of any amount over and above the invoice price to the assessee. In the case of *Hunsur Plywood Works Pvt. Ltd. v. CCE* cited supra, the Tribunal has held that in absence of flow back of additional consideration, the allegation of clearance of goods of higher value in the guise of lower value is not sustainable. In the case of *Sharma Chemicals v. CCE* cited supra, the Tribunal under Para 14 has held that entries in the private notebook may give rise to suspicion but that is not sufficient to uphold the allegations in absence of independent corroborative evidence. In the case of *K. Rajagopal v. CCE* cited supra, it is held that entries in the private notebook is not a conclusive evidence to prove clandestine transactions in absence of other corroborative evidences. In the case of *Good Kare Medico Pvt. Ltd. v. CCE* cited supra, it is held that order based on rough entries made in two sheets recovered from Director's residence in his own handwriting, when there is no other corroborative evidence, hence merely on the basis of such rough entries without corroborative evidence, clandestine activities cannot be alleged. Since in the instant case the duty demand of Rs. 13,36,476/- is upheld by Ld. Commissioner merely on the basis of entries in the private diary maintained by

the Managing Director who never confessed the guilt and whose statement is not tested in accordance with Section 9D of the Central Excise Act, 1944. We accordingly set aside the said demand of Rs. 13,36,476/-.

Affirmed by Supreme Court

2022 (380) E.L.T. 385 (S.C.)

CCE RANCHI Vs GAUTAM FERRO ALLOYS

Delay condoned. Heard Counsel for the parties.

2. We decline to interfere in this appeal being devoid of merits. The appeal is accordingly dismissed.

2022 (380) E.L.T. 351 (Tri. – Kolkata)

AMBICA IRON & STEEL PVT. LTD. Vs CCE & ST ROURKELA

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-accounted 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 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. Whereas, in the instant case, no such clinching or corroborative evidences to the above effect have been brought on record.

In the instant case, the entire case of the Revenue is based on the Kaccha Chithas seized from the residence of the Director. The manner in which the said Kaccha Chithas is seized has been strongly agitated by the Appellant. We find that the said Kaccha Chithas/documents should have been seized in the presence of the Director. There is considerable force in the contention of the Appellant that the Kacha Chithas relied upon by the Revenue cannot be a basis to uphold the serious charge of clandestine clearance. It is settled legal position that charge of

clandestine clearance is a serious charge and the onus to prove the same is on the Revenue by adducing concrete and cogent evidence. In the absence of corroborative evidence, the issue of fact *i.e.* in the present case “the charge of clandestine clearance” cannot be leveled against the assessee.

We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods has been procured to manufacture goods for clandestine clearance. No efforts have been made by the investigating agencies to establish the existence of any unaccounted manufacturing activity in the form of unaccounted raw material, shortage of stock, shortage of raw material/finished goods, excess consumption of electricity, unaccounted labour payments, interrogation of buyers/transporters or any incriminating record/document to suggest any flow back of cash etc. The Revenue authorities in this case have failed to discharge the burden of proving the serious charge of clandestine clearance or undervaluation with cogent and clinching evidence. It has been consistently held that no demand of clandestine manufacture and clearance can be confirmed purely on assumptions and presumptions and the same is required to be proved by the Revenue by direct, affirmative and incontrovertible evidence.

[Emphasis supplied]

2022 (380) E.L.T. 151 (Mad.)
A.R. SHANMUGHASUNDARAM Vs CESTAT CHENNAI

37. Further, the Tribunal faulted the Adjudicating Authority for having computed the quantity and value purely on mathematical formula and worked out the total quantity of Acid Slurry by adopting the ratio of raw materials, LAB and Oleum without being supported with any evidence. Further, the Tribunal noted that there is no link between the payments made to three employees of SWC with that of the supply of LAB to the assessee-firm and mere statements that those three persons are related and controlled by the assessee-firm is not enough to hold the assessee-firm guilty of having received LAB. Further, the Tribunal also noted that if the assessee had to manufacture such huge quantity of Acid Slurry, it would require huge storage capacity of not only the raw materials, but also the finished products and the spent acid, which is a by-product, which is released during the manufacturing process and the same cannot be thrown out without clearance. Therefore, the Tribunal held that based on statements and private records, the demand of excise duty of clandestine removal cannot be sustained without corroborative evidence. The Tribunal took note of a decision in the case of *Nova Petrochemicals v. CCE, Ahmedabad-II* [Final Order Nos. A/11207-11219/2013, dated 26-9-2013] [2014 (311) E.L.T. 529 (Tribunal)] wherein, the Tribunal listed out

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

40. In the decision of this Court in the case of *Commissioner of Central Excise, Salem v. CESTAT, Chennai* (supra), the Court held that the burden of proof, in a case of clandestine removal, is undoubtedly on the Department. However, at times, in such cases of clandestine removal, clinching documents will be available and if the Department is able to *prima facie* establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent.

43. It has been consistently held in various decisions some of which have been referred to by the Learned Counsel for the assessee in the case of *Gopi Synthetics Pvt. Ltd.* (supra), *Mahesh Silk Mills* (supra) and *R.A. Castings Pvt. Ltd.* (supra) that when the Tribunal came to the conclusion that the Department did not have sufficient evidence to establish clandestine removal and the Tribunal having considered the evidence on record and come to the factual findings, no question of law would arise for consideration in a tax appeal.

44. As already observed, the onus was on the Department to prove that there was clandestine manufacture and removal by the assessee-firm and this having not been established to the extent required, we find no error or perversity in the approach of the Tribunal warranting interference.

45. For the above reasons, we hold that there is no substantial question of law arises for consideration in the appeals filed by the Revenue in C.M.A. Nos. 2714 and 2715 of 2016 and accordingly, the same are dismissed.[Emphasis supplied]

18. In the above case, it has been held that based on statements and private records alone, the demand of excise duty of clandestine removal cannot be sustained without corroborative evidence such as :

- (i) there should be tangible evidence of clandestine manufacture and clearance and not merely based on inferences or unwarranted assumptions;
- (ii) evidence in support thereof should be of raw materials, in excess of that contained as per the statutory records;
- (iii) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;
- (iv) discovery of such finished goods outside the factory;
- (v) instances of sales of such goods to identified parties;
- (vi) receipt of sale proceeds, whether by cheque or by cash of such goods by the manufacturers or persons authorized by him;
- (vii) use of electricity for in excess of what is necessary for manufacture of goods otherwise manufactured and validity cleared on payment of duty;
- (viii) statements of buyers with some details of illicit manufacture and clearance;
- (ix) proof of actual transportation of goods, cleared without payment of duty; and
- (x) links between the document recovered during the search

and activities being carried on in the factory of production, etc.

19. Since in this case, none of the above corroborative evidences have been placed in the present proceedings, we hold that the demands confirmed on account clandestine removal cannot survive.

20. Coming the allegation on shortages found during the stock verification, we find that the verification report is not corroborated by way of supporting documents like weighing slip, quantification method adopted etc. As the appellant has submitted, in some case, the stock taking process could not have been completed in the short time said to have been taken to arrive at the actual quantity of stocks. We do not subscribe to the appellant's arguments that the stock taking should have been taken in the presence of the Panchas. It would be sufficient if the same taken in the presence of the officials of the appellant, which has been done in this case. However, the details of the method adopted to quantify the stocks is not to be seen from the Revenue's investigation.

21. In respect of the shortages found in the course of stock-taking the Tribunals have held as under :

2021 (378) E.L.T. 674 (Tri. - Kolkata)
JAI BALAJI INDUSTRIES LTD. Vs CCE&ST DURGAPUR

10. At best, therefore, this is simply a case of shortages detected during stock-taking. The next issue to be determined is whether the shortages detected were real or only notional. The appellants have doubted the manner of stock taking itself as it was not done in the presence of any panchas and no panchnama was drawn. There is no mention as to how the weighments of the products were done, individually or by loading on trucks, etc.

11. The appellants have been saying right from the investigation stage itself that the shortages were because of minor weighment errors which had accumulated over the years since no stocktaking had been done right from the date of production of those items. The shortage, when compared to the total production over the years, comes to a very nominal percentage as indicated in para 6.3 above. This has not been contested by the department. Such nominal

percentage differences are to be expected while weighing, keeping the nature of the products in mind which are not amenable to precise weighment. We are, therefore, of the view that the shortages noticed are not actual but only notional and, hence, no differential duty is payable.

**2020 (371) E.L.T. 751 (Tri. - Kolkata)
SUPER SMELTERS LTD. Vs CCE ST DURGAPUR**

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

**2022 (380) E.L.T. 351 (Tri. - Kolkata)
AMBICA IRON & STEEL PVT. LTD. Vs CCE & ST
ROURKELA**

17. We further find that the Revenue had neither disclosed any material nor described the method of stock taking to counter the case. We are unable to accept the contention of the Revenue without any basis, such as, the details of the weighment slip, counting slip etc., as the case may be. It cannot be on the basis of eye estimation or otherwise.

22. The ratio laid down in the above decisions is squarely applicable to the facts of the present case. Accordingly, we hold that the confirmed demands towards the shortage found during the stock taking is legally not sustainable.

23. In view of the foregoing, we set aside the demands and allow the Appeals on merits.

24. Now coming the issue of time bar raised by the appellants, we find force in the same. Admittedly, the officials visited in July 2008, completed the stock taking. They recorded the statement of the Director on the same date. After this, there was no further action taken during the next more than 2 years. Nothing stopped the Dept. to issue the SCN in respect of the shortages, since no further investigation would be required. In respect of clandestine removal, there is nothing coming on record to the effect that attempts were made to record the statements of purported buyers or the transporters or any other corroborative evidence was being gathered. As submitted by the appellant, the second and third statements recorded by the Director of the company, looks more like an attempt to show that some more investigation / verification was in progress during the intervening period, which actually was not as has been discussed in detail in the above paragraphs.

25. We find from the records that without doubt, the private dairy was recovered and notings there on were taken on record. Some of the entries could be explained by the appellant but some of them could not be explained. Therefore, this is case where some material was found for further investigation. Therefore, suppression on the part of the appellant cannot be ruled out. But we find that the officials did not take up the further investigation properly and were shoddy at their best. As noted earlier, no statements were recorded from the purported buyers inspite of having their details from the diary / notes. They have waited for next 2 years to take further statement from the Director. In case of shortages, they could have issued the SCN immediately, but even this was delayed, on account of unexplained reasons. All these point out to the extreme negligence of the officials when dealing with the case of this size. Therefore, irrespective of the above observations, we are also forced to consider the pleadings of the appellant on account of limitation.

26. The following decision would be relevant to the facts of the present case :

2006 (195) E.L.T. 90 (Tri. - Bang.)
LOVELY FOOD INDUSTRIES Vs CCE COCHIN

4. We have carefully considered the submissions and have perused the citations. The Show Cause Notice was issued after a lapse of 3 years. The department gathered all the information on their visit to the factory on 5-11-1999. The records were seized and statements were recorded on that day. The department took its own time to issue the Show Cause Notice on 25-7-2002. Therefore, the appellants are seeking the benefit of time bar. The citations referred to are not directly on the point. xxxxxxxxxxxxxxxxxxxxxxxx But the main question that is to be decided in the present case is as to whether the benefit can be given to a person solely on the ground that the department took about three years to issue the Show Cause Notice. In this regard, the Tribunal, in the case of *Indian Petrochem. Corpn. Ltd. v. CCE, Vadodara* - [2000 \(125\) E.L.T. 1048](#) (Tribunal) held that where there is delayed issue of Show Cause Notice, then the benefit of time bar has to be extended to the appellant. In view of this judgment and in the light of the fact that the department took 3 years time to issue the Show Cause Notice, the appeals are allowed by grant of benefit of time bar, with consequential relief, if any.

27. Following the ratio of the above case law, we hold that the Revenue had no case to invoke the extended period to confirm the demand, when the issue has come to their knowledge in July 2008. Therefore, we set aside the impugned order even on account of limitation.

28. All the appeals are allowed both on merits and on account of limitation. The appellants would eligible for, consequential relief, if any as per law.

(Pronounced in the open court on [04/09/2024](#))

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)