

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76782 of 2016

(Arising out of Order-in-Original No.04/CCE/CEX/RKL/2016-17 dated 22.07.2016 passed by Commissioner, Central Excise, Customs & Service Tax, Rourkela Commissionerate, Rourkela.)

M/s. Vinayak Agro Industries

(At: Ratankhandi, PO: Bisra, Dist.-Sundergarh, Odisha.)

...Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Rourkela**

.....Respondent

(KK-42, Civil Township, Rourkela, Dist.-Sundergarh, Odisha-769004.)

WITH

Excise Appeal No.76783 of 2016

(Arising out of Order-in-Original No.04/CCE/CEX/RKL/2016-17 dated 22.07.2016 passed by Commissioner, Central Excise, Customs & Service Tax, Rourkela Commissionerate, Rourkela.)

Sri Rajesh Kumar Rajuka

(Ex. Managing Partner)

M/s. Vinayak Agro Industries

(At: Ratankhandi, PO: Bisra, Dist.-Sundergarh, Odisha.)

...Appellant

VERSUS

**Commissioner of Central Excise, Customs & Service Tax,
Rourkela**

.....Respondent

(KK-42, Civil Township, Rourkela, Dist.-Sundergarh, Odisha-769004.)

APPEARANCE

Shri Rahul Dhanuka, Advocate for the Appellant (s)

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

CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI P.ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75026-75027/2021

DATE OF HEARING : 15 October 2020

DATE OF DECISION : 19 January 2021

P.K.CHOUDHARY :

Excise Appeal Nos. E/76782/2016 and E/76783/2016 are directed against a common adjudication Order dated 22-07-2016 passed by the Commissioner of Central Excise, Rourkela Commissionerate. Excise Appeal No. E/76782/2016 has been filed by a Partnership Firm, M/s. Vinayak Agro Industries (Appellant No. 1) against confirmation of excise duty demand of Rs.1,81,57,357/- along with equivalent penalty and interest. Excise Appeal No. E/76783/2016 has been filed by Mr.Rajesh Kumar Rajuka (Appellant No. 2), one of the Partners of the Appellant No. 1 against imposition of penalty under Rule 26 of the Central Excise Rules.

2. The facts of the case in brief are that the Appellant No. 1 is engaged in the manufacture and sale of laminated spring leaves classifiable under Chapter 73 of the Central Excise Tariff Act from its factory-cum-office premises situated at Ratakhandi, Odisha. The Appellant No. 2 besides being a Partner of the Appellant No. 1 is also a Proprietor of M/s. Radhagopi Auto Industries and a Director in M/s. Maa Bhagwati Rerolling Mills Pvt. Ltd. On 3-08-2012, Officers of DGCEI conducted simultaneous search operations at the factory-cum-office premises of Appellant No.1, residence of Appellant No. 2 and the offices of the other business concerns related to Appellant No. 2. Pursuant to the search proceedings, DGCEI officials seized 1 Laptop and 4 Pen drives from the residence of Appellant No. 2 in presence of wife and nephew of the Appellant No. 2. The Appellant No. 2 was thereafter, summoned to appear at the factory premises of the Appellant No. 1 wherein Panchnama proceedings were concluded at 6 P.M. on the same day. The data available on 4 Pen drives was partly

printed before conclusion of search proceedings and the signature of the Appellant No. 2 was obtained on the 35 pages so printed. The officials returned in the mid-night of 03-08-2012 to obtain signature of the Appellant No. 2 on the balance printouts running into more than 400 pages and recorded the statement of Appellant No. 2 followed by recording of further statements on 2 July 2013 and 1 October 2013 eventually culminating into a Show-cause Notice ('SCN') dated 10 October 2013. The 'SCN' alleges clandestine removal and under valuation by Appellant No. 1 on the premise that the printouts from the seized Pen drives contains the Sales Ledger for the period 20 March 2009 to 1 August 2012 of the Appellant No. 1 wherein date-wise, party-wise, voucher type, voucher number and amount-wise sales are maintained. The case of the department in the 'SCN' is that the difference in the sales value as appearing in the alleged Sales Ledger obtained from the seized Pen drives vis-à-vis the available Central Excise Invoices for the relevant period represents clandestine clearances by the Appellant No. 1. The demand proposed in the 'SCN' came to be confirmed in the adjudication proceedings.

3. The learned Advocate, Shri Rahul Dhanuka appearing for both the Appellants has assailed the order dated 22 July 2016 on the following grounds:

A. The charge of clandestine manufacture and clearance is a serious charge, which is required to be established with positive/affirmative/tangible evidence and the burden of establishing the said charge lies heavily upon the revenue and that no demand of clandestine manufacture and clearance can be confirmed purely on conjectures, surmises, assumptions and presumptions. Reference in this regard, has been invited to the following decisions:

(1) Bihar Foundary & Castings Ltd. vs. CCE, Ranchi [2019 (8) TMI 527 – CESTAT Kolkata] – Para 18;

- (2) Continental Cement Company vs Union of India [2014 (309) E.L.T. 411 (All.)] – para 12;
- (3) Balashree Metals Pvt. Ltd. vs. UOI [2017 (345) ELT 187 (Jhar.)] – Para 5 vi
- (4) CCE., Meerut-I vs R.A. Castings Pvt. Ltd. [2012 (26) S.T.R. 262 (All.)] – para
- (5) M/s Popular Paints and Chemicals vs CCE.,& Customs Raipur [2018 (8) TMI 473 (Tri. – Delhi)] – para 17;
- (6) M/s AmitMetaliks Ltd. vs CCE. & ST., Durgapur [2019 (4) TMI 638 (Tri. – Kolkata)] – para 11;
- (7) Principal Commissioner of CGST & Central Excise vs. Shah Foils Ltd. [2020 (372) ELT 632 (Guj.)] – para 8

However, in the instant case, the department has proceeded to confirm the charge of clandestine manufacture and clearance purely on the basis of pen drive printouts and statements of Appellant No. 2 (which were retracted subsequently) without conducting any independent investigation and/or adducing any clinching evidence in support of the said charge.

B. Computer Print outs relied upon in the order dated 22 July 2016 are not admissible as an evidence in as much as,

(i) the requirements of Section 36B(2) & (4) of Central Excise Act, 1944 were not complied with. Reference in this regard has been placed on the following decisions:

- Bihar Foundary& Castings Ltd. vs. CCE, Ranchi [2019 (8) TMI 527 – CESTAT Kolkata] – Para 24;
- Popular Paints and Chemicals vs. CCE, Raipur [2018 (8) TMI 473 – CESTAT New Delhi] – Para 15.2
- Premium Packaging Pvt. Ltd. vs. CCE, Kanpur [2005 (184) ELT 165 (Tri. – Del.)] – Para 5

(ii) The computer printouts save and except 35 pages were

taken after conclusion of panchnama proceedings. In majority of the printouts the time is after 6 p.m. i.e. after conclusion of panchnama proceedings. Reference in this regard has been invited to the judgment of the Tribunal in the case of Modern Laboratories vs. CCE, Indore [2017 (358) ELT 1179 (Tri. – Del.)] – Para 16.

C. Alleged Sales Ledger could not have been relied upon by the learned Commissioner because of the following reasons:

(i) None of the entries in the Sales Ledger were matching with the Central Excise Sales Invoices. It is only in few stray instances that only the date of sales and name of buyer were matching, which proves nothing (para 3.5 of the SCN). In the absence of any link between the sales ledger and central excise invoices effected by the Appellant, any attempt to allege that the sales in the sales ledger were pertaining to is unwarranted.

(ii) When the Appellant No. 2 has categorically stated that sales ledger printed from the pen drives based on which the charges have been framed are not true and correct, the same could not be relied upon in the absence of any other cogent evidence to allege clandestine removal. Besides, from Q 23 of statement dated 02-07-2013, it is clear that there are certain central excise invoices which are not featuring in the sales ledger and therefore, to come to the conclusion that sales ledger is a comprehensive document containing details of all clearances by the Appellant No. 1, is completely fallacious.

D. The entire process of search, seizure and recording of statements are vitiated by errors of law on account of the following reasons;

i) The laptop and pen drives were neither sealed nor any signature of the wife and nephew of Appellant No. 2 were obtained from whom the said items were seized. There is no mention of any sealing in the panchnama dated 03-08-2012 drawn at the residence of Appellant No. 1. Reference is invited to Circular bearing F. No. 394/97/2015-Cus (AS) dated 01st December 2015 issued u/s 110 of Customs Act, 1962 made applicable to Central Excise Act, 1944 (vide Section 12 of Central Excise Act, 1944 read with Notification No. 68/63 – CE dated 04-05-1963) which clearly provides that packing and sealing shall be done in the presence of the person from whom the valuables are seized/ detained and two independent witnesses and the paper seal/sticker shall have the signatures of the person from whom the valuables are seized, the independent witnesses and the seizing officer.

ii) Search in the factory of the Appellant No. 1 was carried out in the absence of panchas and were called only subsequently to sign the panchnama. Request for cross Examination of Panchas was also not allowed to prove the same. Reference is invited to the panchnama dated 03-08-2012 drawn at the factory of the Appellant 2 wherein it has been mentioned that the panchas arrived at 5:00 p.m. whereas the search began at 3:00 p.m. Reference in this regard is invited to the Tribunal's decision in the case of Modern Laboratories vs. CCE, Indore [2017 (358) ELT 1179 (Tri. – Del.)] – Para 16 and Para 19;

E. Statement of Appellant No.2 could not be relied upon for the following reasons,

(i) the same stood retracted vide affidavit dt. 11-01-2016. It is a trite law that delay in retraction cannot be a ground for disregarding the same. Reliance in this regard is placed on

the decision of Parle Beverages Pvt. Ltd. vs. CCE, Bombay [1998 (98) E.L.T. 585 (S.C.)] – Para 1, wherein it has been held that delay in filing of affidavit cannot be a ground for completely brushing aside the same.

(ii) The statements of Appellant No.2 was contradictory which stands acknowledged in para 3.3 of SCN itself.

(iii) The statements of Appellant No.2 has not been admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1) of Central Excise Act, 1944. Reliance in this regard is placed on the following judgments:

- Ambika International v. Union of India [2018 (361) E.L.T. 90 (P&H.)] – Para 25;
- G-Tech Industries v. Union of India [2016 (339) E.L.T. 209 (P&H.)] – Para 16
- M/s. Amco Sales &Anr. v. CCE, Delhi – I [2018-TIOL-819-CESTAT-DEL]

(iv) The Statements of Appellant No.2 was not voluntary and taken under the influence of sleep since the proceedings continued upto 1:30 am on 04-08-2012.

F. The Learned Commissioner has conveniently accepted a part of the statement of the Appellant No.2 which suits the revenue but ignores the part of the statement wherein it states that the sales ledger is not true and correct. It is a well settled law that a statement has to be accepted/rejected in its entirety and part of the same cannot be held to be incorrect and another part is acceptable. Pan Parag India Limited Vs. CCE – 2013 (291) ELT 81 (Tri. Del.) (para 39).

G. Imposition of penalty upon Appellant No. 2 under Rule 26 of Central Excise Rules, 2002 is unsustainable. Refer – Wilson Paper Mills P Ltd. vs. CCE & ST, Rajkot [2020 (9) TMI 645 – CESTAT Ahmedabad] (para 34)

4. The learned Authorized Representative appearing on behalf of the revenue supports the order dated 22-07-2016 and reiterates the findings therein.

5. Heard both sides through video conferencing and perused the appeal records.

6. The main issue for our consideration in these appeals is whether Appellant No. 1 was involved in clandestine clearance/under valuation of laminated spring leaves. The entire case of the revenue is based on the data retrieved from the Pen drives seized from the residence of the Appellant No. 2, alleged to be the Sales Ledger of the Appellant No. 1. The manner in which the Pen drives were seized and the retrieval of data (printouts) from the Pen drives along with its evidentiary value has been strongly agitated by the Appellants. We find that the seized Pen drives were not sealed with paper seal or otherwise as evident from the Panchnama dated 3 August 2012 drawn at the residence of the Appellant No. 1. Such sealing should have been done in the presence of the persons before whom the pen drives were sealed and signatures should have been obtained on the paper seal/sticker as provided in the Circular dated 1st December 2015 so as to allay any possibilities of tampering. It is also forthcoming from the case records that most of the printouts from the Pen drives were taken after conclusion of Panchnama proceedings. There is considerable force in the contention of the Appellants that the computer printouts relied upon to uphold the charge of clandestine clearance were not obtained in conformity with the mandatory conditions and safeguards laid down in Section 36B(2) & (4) of the Central Excise Act, as these were not produced by a computer which was being used regularly to store or process the information during the period in dispute and Certificate referred to Section 36B(4) of the Central Excise Act was also not obtained. The decision of the Tribunal in the case of Popular Paints reported (supra) fully supports the

contentions of the Appellants on this point and the relevant paras 14 to 15.5 of the said decision have been extracted below.

“14. We hold that computer printouts cannot be held to be admissible evidence unless the conditions as laid in the provisions of Section 36B of the Central Excise Act are fully complied with. A perusal of section 36B would indicate that the Act has prescribed very stringent conditions for computer printouts to be a piece of admissible evidence. The Ld. Counsel for the appellants has invited our attention particular to provisions of Section 36B(2) and (4) of the Central Excise Act. For the better appreciation of facts, it is relevant to cite Section 36B of Central Excise Act is as below: -

36B. Admissibility of microfilms, facsimile copies of documents and computer print outs as documents and as evidence

(1) Notwithstanding anything contained in any other law for the time being in force,

(a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (whether enlarged or not); or

(b) a facsimile copy of a document; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a “computer printout”), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof

or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely:-

(a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

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

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of period was not such as to affect the production of the document or the accuracy of the contents; and (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. -For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

14.1 In our considered view the computer printouts in the facts at hand do not fulfill the mandatory provisions of Section 36B-(2) & (4) of the Central Excise Act, in so far as there are serious irregularities about the manner of sealing of the computers as pointed out hereinabove and one computer not sealed at all. The provisions of Section 36B(4) have also not been fully complied

with. The learned Counsel has strongly relied upon the law laid down on the admissibility of electronics records by the Supreme Court in the case of Anwar P.V. Vs. P.K. Basheer reported in MANU/S/0834/2014 wherein in paragraphs 13 to 17 it has been held as under:-

“13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

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

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks

pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

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

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

15.2 Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same is produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act. It has been clearly laid down in para 15 of this judgment that all the safeguards as prescribed in Section 65B (2) & (4), to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are parimateria.

15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is admissible for want of cross examination of Shri Vipul Saxena, who has done cloning of the data from the computer

system. We, therefore, hold that the computer printouts cannot held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand.

15.4 It is an admitted position that the computer printouts were produced in the Office of M/s Omnicorp, New Delhi behind the back of the appellants. The appellants were never associated with the retrieval of the computer printouts. This Tribunal in the case of *Modern Laboratories Vs CCE Indore* reported in 2017 (358) ELT 1179 (Tri) has held that when computer printouts were taken in the absence of appellants and when panchas were not allowed for cross- examination the data retrieved from the CD is not an admissible evidence. We hold that the law laid down in this judgement is fully applicable to the facts of the present case and thus the same is to be discarded as a piece of evidence.

15.5 That similar law has been laid down by the Gujarat High Court and this Tribunal in the following cases.

(i) *Ambica Organics V/S CCE Surat* 2016 (334) ELT 97 (T) which has been upheld by the Gujarat High Court as reported in 2016 (334) ELT A 67 ()

(ii) *Premier Instruments & Controls Ltd V/S CCE Coimbatore* – 2005 (183) ELT 65 (T)

(iii) *Jayshree Vypasa Ltd. Vs. CCE Rajkote-2015(327) ELT 380 (T)*

(iv) *AgarvanshiAluminium Ltd Vs CCE NhavaSheva- 2014 (2909) ELT 83 (T)*

(v)*Final Order No A/ 70518-12/2018- Ex (DB) dated 07.03.2018 in the case of Trela Footwear & Others Vs CCE Agra."*

Even the statement of Appellant No. 2 could not be admitted as evidence being not in accordance with the procedure prescribed under clause (b) of section 9D(1) of the Central Excise Act. This contention of the Appellant is duly supported by the decision of the Punjab and Haryana High Court in the Ambika International Case (supra).

7. We also find from the case records that the printouts from the Pen drives are neither co-relatable with the central excise invoices raised by the Appellant during the relevant period nor corroborated by any independent evidence establishing clandestine manufacture or 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, in the following cases:

- Bihar Foundary & Castings Ltd. vs. CCE, Ranchi [2019 (8) TMI 527 – CESTAT Kolkata] – Para 18
- Continental Cement Company vs Union of India [2014 (309) E.L.T. 411 (All.)] – para 12;
- Balashree Metals Pvt. Ltd. vs. UOI [2017 (345) ELT 187 (Jhar.)] – Para 5 vi
- CCE., Meerut-I vs R.A. Castings Pvt. Ltd. [2012 (26) S.T.R. 262 (All.)] – para
- M/s Popular Paints and Chemicals vs CCE., & Customs Raipur [2018 (8) TMI 473 (Tri. – Delhi)] – para 17;

- M/s AmitMetaliks Ltd. vs CCE. & ST., Durgapur [2019 (4) TMI 638 (Tri. – Kolkata)] – para 11;
- Principal Commissioner of CGST & Central Excise vs. Shah Foils Ltd. [2020 (372) ELT 632 (Guj.)] – para 8

The learned Commissioner has asserted in the impugned order that the demand based on Pen drive data is sustainable and that the department is not required to find further details about production, clearance, cash flow back, transportation or purchase of unaccounted raw material at para 4.9 of the 'O-I-O' which is clearly contrary to the decision of the Hon'ble Gujrat High Court in Shah Foils case (supra) and the other judicial precedents cited supra.

8. By respectfully following the ratio of the above decisions, we are inclined to take a view that the charge of clandestine removal/undervaluation cannot sustain on the basis of the Pen drive data alone more so when the printouts have not been obtained in compliance with the mandatory conditions of Section 36(2) & (4) of the Central Excise Act.

In the result the impugned order is set aside and both the appeals are allowed with consequential relief, if any.

(Order pronounced in the open court on 19 January 2021.)

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

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