

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

REGIONAL BENCH - COURT NO.1

Excise Appeal No.70253 of 2013

(Arising out of Order-in-Original No.04/Commr./Denovo/CE/Kol-V/Adjn/2013 dated 12.02.2013 passed by Commissioner of Central Excise, Kolkata-V.)

M/s. Sai Sulphonates Pvt.Ltd.

(21, Princep Street, Kolkata-700072.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V

.....Respondent

(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

WITH

(i) Excise Appeal No.70254 of 2013 (Shri Subrata Banerjee vs. Commissioner of Central Excise, Kolkata-V); (ii) Excise Appeal No.70255 of 2013 (Shri Debashish Ghosh vs. Commissioner of Central Excise, Kolkata-V); (iii) Excise Appeal No.70256 of 2013 (Shri Sandeep Fogla vs. Commissioner of Central Excise, Kolkata-V);

(Arising out of Order-in-Original No.04/Commr./Denovo/CE/Kol-V/Adjn/2013 dated 12.02.2013 passed by Commissioner of Central Excise, Kolkata-V.)

APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)

Shri S.Dey, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)

HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75283-75286/2025

DATE OF HEARING : 12.12.2024

DATE OF DECISION : 11.02.2025

Per : ASHOK JINDAL :

This is second round of litigation.

2. In earlier round of litigation, the matter vide Order No.A/127/KOL/2012 dated 01.03.2012 was remanded to adjudicating authority for deciding afresh. It was made clear that all the issues are kept open. Both sides were at liberty to produce documents in their support. Needless to say that a reasonable opportunity of hearing may be granted to the appellant.

3. In remand proceedings the following order has been passed by the adjudicating authority.:-

ORDER

In view of the facts and circumstances stated above, I pass the following order :

- (i) I confirm the demand of duty of Rs.2,44,04,352.00 (16,73,666.00 + 19,36,394.00 + 3,05,640.00 + 3,99,312.00 + 2,53,260.00 + 4,45,786.00 + 1,93,90,294.00) (Rupees two crores forty four lakhs four thousand three hundred fifty two only) under proviso to Section 11A of Central Excise Act, 1944. I also impose a penalty of Rs. 2,44,04,352.00 (Rupees two crores forty four lakhs four thousand three hundred fifty two only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Section 11AC of the Central Excise Act, 1944.
- (ii) I also confirm the demand of Rs.2,77,850.00 (Rupees two lakhs seventy seven thousand eight hundred fifty only) under proviso to Sec.11A of Central Excise Act, 1944. I also impose a penalty of Rs.2,77,850.00 (Rupees two lakhs seventy seven thousand eight hundred fifty only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Section 11AC of the Central Excise Act, 1944.
- (iii) I disallow the modvat credit wrongly availed and utilized to the extent of Rs.1,38,040.00 (Rupees one lakh thirty eight thousand forty only) and confirm the demand under Sec.11A of Central Excise Act, 1944 read with Rule 57-I of Central Excise Rules, 1944. I also impose a penalty of Rs. 1,38,040.00 (Rupees one lakh thirty eight thousand forty only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Rule 57I of the Central Excise Rules, 1944 read with Sec. 11AC of the Central Excise Act, 1944.
- (iv) I confirm the demand of Rs.40,707.00 (Rupees forty thousand seven hundred seven only) which has already been paid under Sec.11A of Central Excise Act, 1944 and the same may be appropriated. I also impose a penalty of Rs.40,707.00 (Rupees forty thousand seven hundred seven only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Section 11AC of the Central Excise Act, 1944.
- (v) I confirm the demand of Central Excise duty amounting to Rs.79,675.00 (Rupees seventy nine thousand six hundred seventy five only) under proviso to Sec.11A of Central Excise Act, 1944. I also impose a penalty of Rs.79,675.00 (Rupees seventy nine thousand six hundred seventy five only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Section 11AC of the Central Excise Act, 1944.

- (vi) I also confirm the demand of Central Excise duty amounting to Rs.60,719.00 (Rupees sixty thousand seven hundred nineteen only) under proviso to Section 11A of Central Excise Act, 1944. I also impose a penalty of Rs.60,719.00 (Rupees sixty thousand seven hundred nineteen only) on M/s Sai Sulphonate Pvt. Ltd., 19, Sarsuna Main Road, Kolkata-61, under Section 11AC of the Central Excise Act, 1944.
- (vii) I order payment of interest on the amounts as in Sl. Nos (i), (ii), (iv), (v) and (vi) above, under Section 11AB of Central Excise Act 1944.
- (viii) I order payment of interest on the amount as shown in Sl. No. (iii) above, as per provision of Rule 57-I of the Central Excise Rules, 1944.
- (ix) I also impose penalty of Rs. 10,00,000.00 (Rupees Ten lakh only) on Sri Sandip Fogla, Director, Rs. 10,00,000.00 (Rupees Ten lakh only) on Sri Subrata Banerjee, Director and Rs10,00,000.00 (Rupees Ten lakh only) on Sri Debashis Ghosh, Commercial Executive under Rule 209A of Central Excise Rules, 1944 and Rule 26 of Central Excise (No 2) Rules, 2001.

4. The facts of the case are that the appellants were engaged in manufacturing of Linear Alkyl Benzene Sulphonic Acid (LABSA) which is known as Acid Slurry and is a major raw material for all Laundry Detergent. The main input for the manufacture of LABSA was LAB and Sulphuric Acid. The LAB was being procured from M/s. Reliance Industries Ltd. at Patalganga, Maharashtra, Indian Petrochemical Corporation Ltd. at Boroda, Gujarat and Tamilnadu Petro Products Ltd. at Chennai, Tamilnadu. The Sulphuric Acid was produced mainly from Jahshree Chemical and Fertilizer, Khardah, West Bengal and The Phosphate Co. Ltd., Rishra West Bengal.

5. On 29.09.1998 a search was conducted by the department and seized almost all the documents of the company, but the department did not proceed against the company after about 3 ½ years more. On 22.11.2001, the department again searched the office of the factory of the appellant and the records were seized. Thereafter, on 30.10.2002 a show cause notice was issued alleging the following :-

- The first allegation was suppression of production of Acid Slurry. Such allegation has been made stating that the appellant had shown less production in their RG-1 Register based on the ratio of 1:1.45 (LAB is to LABSA) when the actual should have been at the ratio of 1:1.475 and thus, the differential quantity of 2,80,944.22 kgs. of Acid Slurry being the differential quantity of

assumed production as mentioned in the RG-1 Register and the demand of Rs.16,73,666.75 was made.

- The Ld.Counsel for the appellant submits that as the said ratio of production has been arrived at taking the purity @88% when the appellant was supplying the goods to their only customer M/s. Hindusthan Lever Limited with 90% purity, which is the equivalent to the ratio of production as 1:1.45. The department relied on the theoretical calculation and the statement of Shri K.S. Parasuram and without any chemical test inferred that the conversion ratio of LAB and Acid Slurry with 1:1.475. To support this contention he relied on the decision of Shree Durga Cables Pvt.Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar-I [2020 (374) E.L.T. 459 (Tri.-Del.)], Commissioner of Customs, Central Excise & Service Tax, Gaziabad v. Auto Gollon Industries (P) Ltd. [2018 (368) E.L.T. 29 (Tri.-All.)].
- The second allegation has been raised against the appellant alleging suppression of batch charges for production. The show cause notice proceeded on the basis that the appellant had suppressed production of 3,47,024 kgs. involving duty of Rs.19,36,934/-. The department has assumed the production of Acid Slurry per batch as 943 kgs. taking into consideration the batch number of LAB charge for production and production of Acid Slurry during the period 1997-98. The department has assumed the production of Acid Slurry of 943 kgs.. Against each batch chage. The department has taken the number of batches charges during the period from October 1997 to December 1997 and January, 1998 and calculated theoretically the quantum of Acid Slurry would have been produced and thereafter, compared the same with the total production reflected in RG-1 Register and differential amount has been considered as unrecorded production and demand has been made accordingly.

- Regarding suppression of batch charges for production, the appellant has submitted number of batch charge has been taken into consideration without taking note of the fact that after completion of charging one batch, the batch in reactors the digested mass are placed into the separator and stored there for separation for a part period of time by adopting the process of layer separation, which is must in relation to the mixtures of two or more liquid material of different specific gravity and drained out by bottom discharge basis through which Spent Acid recovered first followed by mixed Spent Acid with LABSA. The mixed quantity required further operation for separation and temporarily stored in the dedicated storage tank and subsequently processing take place, the re-processed batch again placed in a separator like normal batches recovered LABSA and Spent Acid as per norms. Thus, as per arithmetical calculation number of batches charges have been taken and assumed the total production which is erroneous and cannot be maintainable in law. To support this contention, Ld.Counsel relied on the decision Commissioner of Customs, Central Excise & Service Tax, Gaziabad v. Auto Gollon Industries (P) Ltd. (supra).
- The demand of Rs.14,03,998/- has been alleged on account of suppression of production and clandestine removal as evidenced from computer print outs. The department calculated the clearance of 2,06,405 kgs. of Acid Slurry on which Central Excise duty of Rs.14,03,998/- was demanded.
- The Ld.Counsel submits that whenever any Acid Slurry was cleared, those were cleared against Central Excise invoices on payment of duty. No invoice was prepared against refused water generated out of plant waste and other related activities considering the same as non-excisable and non-dutiable. The vehicles were used by the appellant and their associated unit, M/s. A.R. Stenchem (P) Ltd. and the tanker movement was

maintained in the computer referring invoice number. The data in the computer print outs are nothing but movement chart of the respective hired tanker and against which it cannot at all to be proved that the activities were for clandestine removal of Acid Slurry without cover of Central Excise documents. The demand in this regard cannot be maintainable. It is his submission that on the basis of computer print outs it cannot be made inferring clandestine removal of goods and the computer print outs are not admissible evidence without following the provisions of section 36B of Central Excise Act, therefore, the said documents cannot be relied upon. To support this contention he relied upon the decision of *Super Smelters Ltd. vs. Commissioner of Customs, Central Excise & Service Tax, Durgapur* [2020 (371) E.L.T. 751 (Tri.-Kolkata)].

- The next allegation is suppression evidenced by diary notes. During the course investigation, a diary was seized, which was containing some entries which were assumed by the department as the said entries were relating to manufacture of Acid Slurry, making the theoretical calculation suppressed production of Acid Slurry had been inferred in comparison to the Acid Slurry recorded in the RG-1 Register during the period from 01.01.2001 to 22.11.2001 involving duty of Rs.1,93,90,293/-. Without making any reference of corroborative evidence and on theoretical basis such allegations have been made for raising the said amount of demand.
- The submission of the appellant with regard to the said diary notes is that the private diary maintained by their employee, Shri Debasis Ghosh in his personal note book has no relation to their business affairs. The alleged clearances reflected in the show cause notice would require the huge quantity of LAB was ever procured from any supplier or used in the manufacture of LABSA. It has been amply explained that entries in the note book without any corroborative evidence cannot lead to infer the

clandestine removal of goods. The demand on this account also cannot be maintainable in law. To support this contention, the Ld.Counsel relied on the decision of Gupta Synthetics Ltd. vs. Commissioner of C.Ex., Ahmedabad-II [2014 (312) E.L.T. 225 (Tri.-Ahmd.)], K. Rajagopal vs. Commissioner of Central Excise, Madurai [2002 (142) E.L.T. 128 (Tri.-Chen.)], Commissioner of Central Excise, Jaipur-I vs. Nirmal Bhandari [2013 (289) E.L.T. 418 (Raj.)], Triveni Engineering and Industries vs. Commissioner of Central Excise, Allahabad [2016 (334) E.L.T. 595 (All.)].

- Another demand of Rs.2,27,850.62 has been demanded under the show cause notice on account of clandestine removal of Spent Acid of 25,23,658.40 kgs. This allegation has been made on the basis that Spent Acid is generated during the course of production of LABSA and no evidence has been given in the show cause notice to show that the disproportionate quantity of LABSA was produced during the period from October 1997 to 22.11.2001.
- In reply to the said allegation, the appellant submits that the said allegation is not only hollow and baseless, but also not practicable. The clearance of Spent Acid depends all the production of LABSA. There is no evidence in the show cause notice to support the allegation. There is no evidence also in respect of disproportionate procurement of LAB/Sulphuric Acid illegally by the appellant and there is no corroborative evidence also in this regard. In support of this contention, he relied on the decision of Continental Cement Company vs. Union of India [2014 (309) E.L.T. 411 (All.)], Commissioner of Central Excise, Meerut-I vs. R.A. Castings [2011 (269) E.L.T. 337 (All.)], Arya Fibers Pvt.Ltd. vs. Commissioner of Central Excise, Ahmedabad [2014 (311) E.L.T. 529 (Tri.-Ahmd.)].
- There is a proposal for denial of Cenvat Credit of Rs.1,38,040/- as same is irregular avilment of credit on the goods on the basis of same invoices which were not received in the factory.

- The contention of the appellant is that the credit was rightly taken on receiving the goods. The documents were produced to show that two consignments were actually received by the appellant against which, credit was taken. The question of payment of credit in this account does not arise.
- Next demand has been raised alleging that there is a shortage of Acid Slurry found on 22.11.2001 involving duty of Rs.79,675.20 inspite of the fact that there was no actual verification of stock undertaken by the department.
- It is his submission that the stock-taking was done not on actual basis, it was done only on eye estimation basis as the department did not take into account the stock position of tank No.1 & 2 and the same has been shown as Acid Slurry under process. The appellant was maintaining continue operation system in the manufacture of their final products and automatic filling system is available in all their storage tanks. If all those operational quantities are taken into consideration then there would be no shortage of goods.
- Another allegation is made for shortage of LAB and Sulphuric Acid found on 22.11.2001. With regard to this, it is his submission that storages and gaps were gauged based on eye estimation with the help of calibration, charts without taking actual dip of the contents of individual tanks physically and therefore, the figures arrived at are erroneous since there was no actual estimation of quantities.
- The demand of Rs.3,27,046/- has been alleged as short payment of Central excise on account of sale through consignment agent, on the value at which the goods were sold from the consignment agent's place.
- Regarding this, the appellant explained that the excess realization mentioned by the department was not correctly reflected by the appellant. The total realization was Rs.2,68,582/- and as cum-duty price out of which Rs.40,707.05

is payable as Central Excise duty and not Rs.3,26,046/- as claimed by the department. The said amount of Rs.40,707/- as accepted by the department has been paid through Cenvat Credit.

- The Ld.Counsel for the appellant further submitted that the entire period of search, there were only three suppliers of LAB i.e. Reliance, IOCL and TPPL. The department could not produce even a single document in support of their assumptions and presumptions to prove that excess purchase had been made than as per actual record of the appellant. The department could not produce the evidence of excess electricity consumption for production of such a huge quantity of LABSA and Spent Acid, therefore, the entire demand of the department is based only on assumptions and presumptions, which is not sustainable.
- He further submitted that the demand is barred by limitation as all the facts were known to the department since 29.01.1998 when the first search was conducted. The appellant was issued with Spot Memo, which was duly replied to by the appellant vide their letter dated 05.06.2000. The department remains silent for about 3 ½ years or more and it may be reasonably construed that nothing was found by the department for issuing any show cause notice. Thereafter on 22.11.2001 the officers of the department searched the factory again and records were seized and ultimately demand was raised on 30.10.2002 for the period from October 1997 to November 2001, as all the facts were known to the department. Therefore, extended period of limitation is not invocable. To support his contention, he relied on the decision of *Perfect Boxes Pvt.Ltd. vs. Commissioner of Central Excise & Service Tax, Indore* [2017 (348) E.L.T. 297 (Tri.-Del.)], *Collector of Central Excise vs. Chemphar Drugs and Liniments, Hyderabad* [1989 (40) E.L.T. 276 (S.C.)].
- He also submitted that in the facts and circumstances, no penalties is imposable on the appellants.

6. The Ld.AR for the department reiterated the findings in the impugned order and submits that after thorough investigation, the show cause notice has been issued and appellant has not come out with any supporting evidence in their favour, therefore, the demands are to be confirmed.

7. Heard the parties, considered the submissions.

8. We have gone through the records placed before us and as multiple issues are dealt by the adjudicating authority in the impugned order, therefore, are all dealt separately.

9. A demand of Rs.16,73,666.75 was sought to be confirmed alleging that for production of LABSA, the ratio is to be 1:1.475 whereas the appellant has shown 1:1.45. Therefore, the appellant has suppressed their production. Consequently, the demands sought to be confirmed against the appellant.

10. We find that the said allegation has been made out on the basis of theoretical method as stated by Shri K.S. Parasuram, but no chemical examination was done to know how much LAB is required to manufacture LABSA.

11. In that circumstances, the said demand is not sustainable as held by this Tribunal in the case of Shree Durga Cables Pvt. Ltd. vs. Commissioner of Central Excise & Customs, Bhubaneswar-I, cited supra, wherein the Tribunal has held as under:-

"7. We find that the issue to be decided in this case is whether the appellant has clandestinely removed the goods on which the duty demand has been made. We find that in the entire proceedings, no evidence, much less corroborative evidence, has been adduced to show that input goods have been procured to manufacture goods for clandestine clearance. No evidence for extra production or unaccounted cash or statement of buyers or transporters has been obtained. It is a 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 some evidence. The Tribunal has taken consistent view that in absence of corroborative evidence, the charge

of clandestine clearance cannot be levelled against the assessee. Some of the decisions are as below :

- Ghodavat Pan Masala Products Ltd. v. CCE - [2004 \(175\) E.L.T. 182](#) (Tri.-Mumbai)
- CCE v. Supreme Fire Works Factory - [2004 \(163\) E.L.T. 510](#) (Tri.-Chennai)
- CCE v. Suvidha Limited - [2009 \(236\) E.L.T. 675](#) (Tri.-Del.)

8. We further find that the whole basis of applying the input-output ratio of 1:1 to arrive at the quantity of final products alleged to be clandestinely cleared by the appellant is solely based on the production pattern of other assessee in the same Commissionerate. We are of the view that the Learned Commissioner made a fundamental error in making such assumption to raise demand on the allegation of clandestine clearance. In the case of R.A. Castings Pvt. Ltd. v. CCE, Meerut - [2009 \(237\) E.L.T. 674](#) (Tri.-Del.), the Tribunal held that demand raised on the basis of electricity consumption as per technical Report given by Dr. Batra was not sufficient to hold that excess goods might have been manufactured by the assessee which could have been clandestinely removed without payment of duty. The important findings made by the Tribunal is reproduced below :-

"20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates [widely] depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and

credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. The reasons for high consumption of electricity in the case of the appellants' factories have not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr. Batra's report has been blindly applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. In the following case laws, it has been held that the consumption of the electricity alone is not sufficient to determine the production :

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

(i) Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;

(ii) Utilization of such raw material for clandestine manufacture of finished goods;

(iii) Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;

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

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

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

22.1 For want of evidence relating to the above points, clandestine removal cannot be sustained merely on the basis of the technical opinion report of Mr. Batra. In this connection, the following case laws are relied :

(i) Emmtex Synthetics Ltd. v. Commissioner of Central Excise, New Delhi reported in [2003 \(151\) E.L.T. 170](#) (Tri.-Del.);

(ii) *Commr. of Central Excise, Chennai v. Dhanavilas (Madras) Snuff Co.* reported in [2003 \(153\) E.L.T. 437](#) (Tri.-Chennai);

(iii) *Commissioner of Central Excise, Madurai v. Madras Suspensions Ltd.* reported in [2003 \(156\) E.L.T. 807](#) (Tri.-Chennai);

(iv) *Commissioner of Central Excise, Coimbatore v. Sangamitra Cotton Mills (P) Ltd.* reported in [2004 \(163\) E.L.T. 472](#) (Tri.-Chennai);

(v) *Commissioner of Central Excise, Coimbatore v. Velavan Spinning Mills* reported in [2004 \(167\) E.L.T. 91](#) (Tri.-Chennai);

(vi) *M. Veerabadhran & Others v. Commissioner of Central Excise, Chennai-II* reported in [2005 \(182\) E.L.T. 389](#) (T) = 2005 (98) ECC 790 (T).

23. *The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.*

24. *The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what it alleges with positive and concrete evidence. In the absence of*

any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained.

25. The law does not entitle the Revenue to disregard all the statutory excise records as well as audited financial accounts and records of the assessee-company, which have been duly verified and accepted by the competent authorities from time to time not only for central excise but also for purposes of income-tax, etc.

26. The Central Excise authorities cannot ignore the facts, records, documents and transactions actually carried out and reflected in the books of accounts and records duly assessed, audited and accepted by other revenue authorities.

27. Since the incriminating statements of the share brokers etc. have been relied upon in the proceedings, it was incumbent upon the Revenue to produce them as well as the investigating officer for cross-examination by the appellants, as was repeatedly requested by them. In the absence of the same, the statements of the share brokers etc. cannot be relied upon. Even if, for the sake of argument, it is accepted that the income shown in the balance sheets is not the income derived from the sources declared by the appellants, there is nothing on record to link it with the so called clandestine removal of the goods and that cannot be made the basis to establish a case of clandestine removal. In any case, the Commissioner has not determined the duty liability on the basis of the profit shown in the balance sheets. He has used this only as corroboration and not the primary basis for determining the quantum of production of steel ingots. Once the main evidence itself is found to be unreliable, such figures of profits etc. in the balance sheets cannot form a basis for rejecting the quantum of production appearing in the records of the appellants.

.....

It may be emphasised that the instant case has been booked only on the basis of theoretical conclusions drawn on the basis of the 'technical opinion report' of Shri N.K. Batra, Professor of I.I.T., Kanpur and no evidence relating to clandestine manufacture and removal of goods is on record.

29. In the light of the above discussions, we hold that the demands of duty are not sustainable. The same are set aside."

9. *We have perused the decision of the Hon'ble Allahabad High Court in the case of Bajrang Petro Chemicals (supra) as relied by the Learned Authorized Representative for the Revenue. We are of the view that the said decision is clearly distinguishable inasmuch as in that case, demand was raised on the ground that final products were physically found to be short pursuant to verification of stock undertaken by the Departmental officers in presence of the assessee, the reasons of which could not be explained by the assessee. The Hon'ble High Court in para 10 of the order specifically noted that there was a huge shortage of finished goods for which no explanation was offered by the assessee which meant that the assessee had admitted the shortage and paid the duty accordingly. Based on the said finding, the High Court observed that the method of clandestine removal of the goods is not required to be explained. Therefore, the said decision has no application to the facts of the present case. In fact, in the instant case, no shortages of goods were ever found which fact is on record and not in dispute. In any case, since we have already noted hereinabove, that the whole basis of allegation of clandestine removal is the production pattern of other assessees, which has no legal or scientific basis, the impugned duty demand cannot be sustained."*

12. Therefore, we hold that the demand of Rs.16,73,666.75 is not sustainable.

13. A demand of Rs.19,36,934/- was sought to be confirmed against the appellant on the basis of suppression of batch charges for production. The appellant in reply to the show cause notice has given the explanation with regard to that and submitted that number of

batch charges have been taken into consideration without taking note of the fact that after charging one batch, the batch in reactors the digested mass are placed into the separator and stored there for separation for a part period of time by adopting the process of layer separation, which is must in relation to the mixtures of two or more liquid material of different specific gravity and drained out by bottom discharge basis through which Spent Acid recovered first followed by mixed Spent Acid with LABSA. The mixed quantity required further operation for separation and temporarily stored in the dedicated storage tank and subsequently processing take place, the re-processed batch again placed in a separator like normal batches recovered LABSA and Spent Acid as per norms. The explanation given by the appellant has not been verified or has not been taken up at the time of investigation, same had to be done to know how the batch charge has taken place then it will be clear. Without any concrete evidence the charge of clandestine removal on the basis of batch charges cannot be confirmed held by this Tribunal in the case of Commr. of Cus., C.E. & S.T., Ghaziabad vs. Auto Gollon Industries P.Ltd. (supra) has observed as under:-

"15. The Tribunal records that I agree with the contentions of the Ld. Advocate that the allegations of clandestine removal are serious allegations and are required to be established beyond doubt by production of sufficient and positive evidence. The doubts, however, strong cannot be converted into evidence so as to confirm the demand. There is no inculpatory statement by any of the representative of the manufacturers; no enquiry as regards the buyers of the said starter motors so as to establish their identity; no enquiry as regards procurement of various raw-materials required for manufacture of final products; no enquiry as regards the transportation of the goods; no enquiry as regards the receipt of consideration of the said clandestinely removed final product. It is well-settled law that shortage of one of the raw-materials cannot lead to the inevitable conclusion of clandestine manufacture and removal. Further, it also stands held by various courts that the confirmation of

demand of duty cannot be on theoretical basis of input output ratio. The appellants' 95% production is being sold to the manufacturers of three wheeled motors, who will admittedly not accept clandestinely removed goods as unaccounted for goods."

14. The adjudicating authority sought to allege clandestine removal on arithmetical calculation of the number of batches charges which is not sustainable under law. Accordingly, the demand of Rs.19,36,934/- is dropped.

15. Further a demand of Rs.14,03,998/- sought to be confirmed alleging suppression of production and clandestine removal as evidenced from computer print outs. In response to that the Ld.Counsel has submitted that whenever any Acid Slurry was cleared, those were cleared against Central Excise invoices on payment of duty. No invoice was prepared against refused water generated out of plant waste and other related activities considering the same as non-excisable and non-dutiable. The vehicles were used by the appellant and their associated unit, M/s. A.R. Stenchem (P) Ltd. and the tanker movement was maintained in the computer referring invoice number. The data in the computer print outs are nothing but movement chart of the respective hired tanker. On the basis of this, the Revenue sought to allege that there is clandestine removal of goods. The computer print outs as explained by the appellant have not been verified by the adjudicating authority from M/s. A.R. Stenchem (P) Ltd. also and it is only on the basis of these print outs, it is alleged that there is a clandestine manufacture and removal of goods. But the said computer print outs are not admissible evidence without following the provisions of Section 36B of the Central Excise Act, 1944, therefore, the said computer print outs cannot be relied upon. The Tribunal in the case of Super Smelters Ltd. vs. Commissioner of Customs, Central Excise & Service Tax, Durgapur (supra) has held as under :-

"17. *Before going into merits of the case, we have to consider as to whether the search and seizure operation were made according to the*

provisions of Section 100 of the Cr. P.C. read with Section 18 of the Act or not. It is seen that the panch witnesses at the time, when the panchanama dated 30-3-2011 was drawn at the residence of Shri Ravi Bhushan Lal, were Shri Ratan Das and Shri Ashok Haidar. However, when other panchanama was drawn in the office of DGCEI the panch witnesses were Srikant Manna and Subhas Giri. According to the panchnama drawn at the residence of Shri Ravi Bhushan Lal the search proceedings started at 11:30 am when the said electronic devices were sealed with a paper seal but no such paper seal has been mentioned by the department. Also, it is not clear as if such seal existed and whether it was signed by the panch witnesses and counter by Shri Ravi Bhushan Lal. Second panchanama proceedings for retrieval of data contained in hard disc and laptop computer which was in the office of DGCEI at around 8 p.m. and the print outs were obtained without mentioning the computer which was used for such data retrieval, either from the Laptop or from the external storage Device. It is apparent that the statement of Shri Ravi Bhushan Lal was obtained by the officer after obtaining the printouts from the alleged storage device and the panchanama proceedings started late at about 8:00 p.m. 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. We have also considered the judgments cited by the Learned Advocate and hold that search and seizure proceedings are made in violation of Section 100 of Cr PC read with Section 18 of the Act, for the reason that department has failed to follow the provisions of Section 36B of the Act. We also agree with the contention of the Learned Advocate that at the time of sealing and desealing of the external data storage device as well as the time of obtaining printouts therefrom, a certificate should have been obtained as per the provision of Section 36B of the Act. No such certificate has been brought on record without which the evidentiary value of these

printout get vitiated. As no certificate from the responsible person of the Appellant was obtained by the department, the credibility of the computer printout gets vitiated. Hon'ble Apex Court in case of M/s. Anwar P.V. v. P.K. Basheer reported at [2017 \(352\) E.L.T. 416](#) has held that the computer printout can be admitted as evidence only if the same are produced in accordance with the provisions of Section 65B(2) of the Evidence Act. A certificate is also required to accompany the computer printouts as prescribed under Section 65B(4) of Evidence Act, 1972. It has been clearly laid down in Para 15 of this judgment that all the safeguards, as prescribed in Section 65B(2) & (4), of the Act, is required to be met so as to ensure the source and authenticity, 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. The provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act, 1944 of the Act are parimateria. It is evident from the panchanama, and the record of cross-examination that the investigating officer had failed to follow the safeguard as mandated under Section 36B of the Act. We have also considered the judgment of M/s. Popular Paints & Chemicals v. C.C.Ex. & Cus., Raipur, wherein this Tribunal vide Final Order Nos. 52716-52718/2018, dated 6-8-2018 under similar facts and circumstances has set aside the demand based on such unauthenticated data. In view of the above we hold that charges of clandestine removal based on such unauthenticated data is not sustainable and hence are set aside.

18. *It is evident from the panchnama dated 30-3-2011 that the shortage was detected on the basis of eye estimation and also on average weight without physical weighment. The department failed to gather any of documents from the factory of the appellant or elsewhere. Further, the loose documents which were recovered from the residence of Shri Ravi Bhushan Lal were not put to test for ascertaining to the authorship of these documents. Moreover, these documents could not be proved with the corroborative evidences. The investigating authority failed to elucidate the system adopted for the preparation of the relied upon documents which were allegedly based*

on these documents. The details contained on the loose sheets and third party documents are actually not comprehensible and, therefore, cannot be accepted as admissible piece of evidence. Moreover, none of the 12 persons on whose statement reliance was placed by the department were cross-examined. In *C.C.E. v. Kuber Tobacco Product Ltd.* [2016 (339) E.L.T. A-130] the Hon'ble Delhi High Court has held that without any corroborative evidence, loose papers, documents cannot be a sufficient to prove charges of clandestine removal. The Hon'ble Delhi High Court in case of *C.C.Ex. v. Vishnu & Co. Pvt. Ltd.* [2015-TIOL-2792-HC-DEL-CX = [2016 \(332\) E.L.T. 793](#) (Del.)] has also held that merely on the basis of statement made by the third party including transporter, agents and employees are not sufficient to prove the charges of clandestine removal in absence of independent corroborative evidence. The Hon'ble P & H High Court in case of *M/s. G-Tech Industries Ltd. v. Union of India* [[2016 \(339\) E.L.T. 209](#) P&H] has held that Section 9D of the Act has to be construed strictly, as mandatory and not merely directory. We have seen that the learned Commissioner denied the request of cross-examination on the ground that it would further complicate the issue. We have also considered the following judgements cited by the appellant :-

- (i) *M/s. Sakeen Alloys Pvt. Ltd. v. C.C.Ex.* [2013 \(296\) E.L.T. 392](#) (Tri.) which was upheld by the Gujarat High Court [[2014 \(308\) E.L.T. 655](#) (Guj.)] and subsequently by the Supreme Court reported at [2015 (319) E.L.T. A-117 (S.C.)].
- (ii) *M/s. R.A. Casting Pvt. Ltd. v. C.C. Ex,* [2009 \(237\) E.L.T. 674](#) (Trib). This judgement was firstly upheld by the Allahabad High Court reported at [[2011 \(269\) E.L.T. 337](#) (All)] and thereafter by the Supreme Court reported at [2011 (269) E.L.T. A-108]
- (iii) *M/s. Triveni Engineering & Industries Ltd. v. C.C.Ex.* [2016 \(334\) E.L.T. 595](#) (All).

19. Relying on these judgments, we hold that the charges of clandestine removal of the goods cannot be upheld merely on assumptions and presumptions, but has to be proved with positive evidence such as purchase of excess raw materials, consumption of excess electricity, employment of extra labour, seizure of cash,

transportation of clandestinely removed goods etc. It has also been held that onus of proof of bringing clinching evidence is on the Revenue. It has been held that the clandestine manufacturing and removal of excisable goods is to be proved by tangible, direct affirmative and incontrovertible evidence relating to receipts of raw materials inside the factory premises, and non-accountal thereof in the statutory records, utilization of such raw materials for 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.

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.*

21. *We have considered the submissions made by the other appellants as regard penalty imposed against them. We find that no material evidence was brought on record to prove the charges to attract penalty against them, except the statements which were relied upon by the department without following the mandate of Section 9-D*

of the Act. Under the circumstances we also set aside the duties and penalties imposed on the other appellants as well."

In view of the above, the demand of Rs.14,03,998/- is not sustainable, hence dropped.

16. The demand of Rs.1,93,90,293/- was sought to be confirmed on the basis of diary notes recovered from a diary seized during the course of investigation containing some entries which the department assumed that they are relating to manufacture of Acid Slurry, making the theoretical calculation suppressed production of Acid Slurry had been inferred in comparison to the Acid Slurry recorded in the RG-1 Register during the period from 01.01.2001 to 22.11.2001 involving duty of Rs.1,93,90,293/-. But private diary belongs to their employee Shri Debasis Ghosh, who was maintaining the same in his personal capacity and it is the contention of the appellant that to manufacture such a huge quantity of LABSA, it requires a huge quantity of LAB and Acid Slurry, but no corroborative evidence is brought on record by the Revenue that the appellant has purchased so much of raw material to manufacture the said goods and the said allegation remains without any corroborative evidence. We find that in the case of Gupta Synthetic Ltd. vs. Commissioner of C.Ex., Ahmedabad-II (supra), the Tribunal has examined the issue and has observed as under:-

"14. *After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*

- (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 sale 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 far in excess of what is necessary for manufacture of goods otherwise manufactured and validly 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;*
- (i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.*

*Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case law on the subject in *Centurian Laboratories v. CCE, Vadodara, 2013 (293) E.L.T. 689*. It would appear that the decision, though*

rendered on 3-5-2013, was reported in the issue of the E.L.T. dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. In yet another decision of a co-ordinate Bench of the Tribunal [*Pan Parag India v. CCE, 2013 (291) E.L.T. 81*], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal.

15. We may now proceed to deal with the two demands of duty in the present case :

It is the contention of GSL that the demand of Rs. 32,07,422/- was wholly illegal and without any justification because no evidence has been produced to the effect that GSL had actually manufactured the quantity of 91929.140 Kgs of DT Yarn, which is alleged to be cleared clandestinely without payment of duty. It was further submitted that as per Annexure A(1) of the show cause notice it is clear that the figures of the alleged clandestine manufacture and removal has been arrived at on the presumption that GSL had achieved during the period 1-7-2002 to 15-8-2002 an optimum production of 1867 Kgs of DT Yarn. However, there was no evidence showing that GSL had achieved optimum production of 1867 Kgs of DT Yarn during the period of 45 days. There was also no evidence or justification for showing how and why the optimum production was achieved by GSL only for a period of

45 days and not at any other point of time. It was further submitted on behalf of GSL that the figure of optimum production of 1867 Kgs of DT Yarn per day was taken from Register A-21 but in reality no such details were found in the said Register. No clarification has been sought by the investigating officer regarding the expressions appearing in the Register titled as 'A-21'. There was no corroborative material to suggest that GSL had manufactured and cleared such a huge quantity of DT Yarn without payment of duty. It is the further submission of GSL that the case made out by the Revenue that GSL had achieved optimum production fails even on the basis of seized document titled as A-21. This document itself indicates that the machine stopped on each day for several hours. It was further submitted that the details compiled in Annexure A(1) to the show cause notice clarifies that the demand of Rs. 32,07,422/- was based only on Register titled as A-21 and not based on any documents namely A-19 and A-20. The expression used in the document titled as A-21, like "A.P total", "A.P Production total", "A.P", etc. was never clarified by V.N. Parab as no such question has been put forth to him for clarification of the expression mentioned in the entries during the course of recording of the statement. The entries made on each page of the document titled as A-21 i.e. details of machine stop time on a particular day and machine stop time total was also written which indicated that the machine was not operated and was stopped on a particular day for how many hours and what was the total and which machine was not operative. Despite this evidence being available on record, the demand has been worked out in the show cause notice on the basis of optimum production of 1876 Kgs of DT Yarn. It was further submitted that even the statement of Mohan Lal Gupta does not substantiate the case of the Revenue that A-21 was a register maintained for recording the actual production. Neither Mohan Lal Gupta's statement nor any evidence indicated that the details appearing in A-21 were in conformity with the details recorded in the Register titled as A-19. It is the contention of GSL that they had established during the adjudication proceedings that A-21 and A-19 did not correlate to another and thus, the details shown in A-19 being corroboration to the case made out by the Revenue on the basis of A-21 was totally illegal

and incorrect. Even the document titled as A-20 did not support the case of the Revenue as the loose papers found in this file were never examined by the Revenue.

In reply to the submission made on behalf of GSL it was submitted by the learned Special Counsel, Mr P.R.V. Ramanan that the Adjudicating Authority has confirmed that the duty demand of Rs. 32,07,422/- on the basis of records recovered from the premises of the GSL. Mohan Lal Gupta, Director of GSL on 3-9-2003 has deposed that there are 156 positions on each Crill and on an average 10 Kgs of POY was loaded for processing each day. Thus, total average weight for each Crill were worked out to 1560 Kgs per day. Further, Mohan Lal Gupta had stated that there was Crill change every day and the factory was running in two shifts. From the statement of Gupta the only inference that could be drawn was that on an average 1560 Kgs of DT yarn was being manufactured by GSL each day. It was also submitted that the Adjudicating Authority has also relied upon the seized records titled as A-19, A-20, A-21, A-22 and A-23, the statement of V.N. Parab and comparing the same with the entries made in the A-19, it becomes clear that the figure of 1867 Kgs appearing in all the pages of A-19 register has been mentioned as optimum production for the day and is arrived after considering the aforesaid figure and the time taken for the machine idle.

We have considered the submissions of both parties. We find that no evidence has been produced by the Revenue to show that GSL has effected sale of such huge quantities of 91929.140 Kgs of DT Polyester Yarn. There is no tangible evidence of GSL having actually produced all the DTY or Twisted Yarn from out of non-duty paid POY supplied by Nova. No transporters' documents have been seized or produced by the Department to show transport and sale of such huge quantities of POY from Nova to GSL or, even for that matter, from GSL to the buyers of DTY produced by GSL. No evidence has been forthcoming of purchase of raw materials by Nova for production of POY in such huge quantities, or of payments effected by GSL to Nova for the excess quantities of POY, clandestinely manufactured and cleared by Nova and sold to GSL, or even of payments made by the buyers of DTY from

GSL made out of quantities alleged to have been purchased by GSL from Nova. The only basis of the demand is the figures contained in A/19 and A/21, seized from GSL premises, of which V.N. Parab is the author. Even if the figures in the seized documents tally (which is disputed by GSL, since V.N. Parab has not, when he was being examined during the investigation, stated that they tally), that by itself/cannot prove clandestine manufacture and clearance, the tests for which have been adequately explained by this Tribunal in the decisions cited earlier, amongst several others. Submission made by Id. Senior Advocate, who had addressed arguments, on behalf of Nova also supports the case of GSL that where the demand is based on clandestine production, clearance and sale of excisable goods, mere entries in note books or diaries cannot establish the same. Proof of actual production, whether by direct evidence or corroborative evidence is a 'must', and the probative value of such evidence has to be established, especially when such a finding would lead to penal consequences.

In our view, therefore, the present demand of Rs. 32,07,422/-, which has been confirmed against Nova by the impugned order, is not based on evidence which, as this Tribunal has repeatedly emphasized in cases of clandestine manufacture and clearance, would justify a finding against the appellant (GSL). Unless there is conclusive evidence that Nova did actually manufacture DTY and clandestinely clear them without payment of duty, liability cannot be placed on GSL on the basis of conjectures and surmises, as the Hon'ble Supreme Court emphatically declared in the Oudh Sugar Mills case (supra). We are of the view that there is no tangible evidence produced by the department to establish that GSL has clandestinely manufactured and cleared DTY on which the present demand has been made. We, therefore, set aside the demand of Rs. 32,07,422/- as being illegal and unjustified.

16. *As regards the demand of Rs. 73,00,168/-, it is the contention of GSL that the said demand has been made on the basis of seized records i.e. document titled as A-23. It was further submitted that the said demand was purely based on assumptions and presumptions as it*

has not been established by the Revenue as to who had written the details in A-23. The purpose for making such an entry in the register was also not clear. The Revenue has placed their own interpretation of various words and nomenclature found in the entries in the said register. It was further submitted that the entire basis of demand of Rs. 73,00,168/- was the Note Book containing 83 pages which was seized from the factory and the said Note Book contained details of samples drawn from various position of spindles on DT Machine. On the basis that the average production of DT Yarn was 1560 Kgs, per day, huge quantity has been worked out for the period from 1-4-2001 to 30-6-2002, alleging that POY of 115.68 deniers was processed on the DT machines during the aforesaid period because reports of drawal of samples were shown in documents titled as A-23. It is the submission of GSL that the author of the said report has not been identified by the Revenue. The purpose for making such entries is also not clear. The entries made in the said register have not been established by the officers during interrogation of any person. It is the further contention of GSL that no admission has been made by Mohan Lal Gupta or by V.N. Parab as regards the optimum production having been achieved on all days in the factory or average production having been achieved for all days. It was further submitted that the drawing of samples would not necessarily mean that the machine was operating on that very particular day and average production of 1560 Kgs was achieved on the said day when the sample was drawn.

In reply to the submission made on behalf of GSL, it was submitted by the learned Special Counsel Mr P.R.V. Ramanan that the Adjudicating Authority has carefully considered the relevancy of the documents titled as A-23 and the statement of Mohan Lal Gupta, Director of GSL. In paras 90 to 92 of the impugned order, the Commissioner has discussed as to how the seized records marked as A-23 containing 83 pages substantiates the case of the Revenue. Further, in the said paras, the Adjudicating Authority has carefully considered the statement of Mohan Lal Gupta. It is further submitted that the Adjudicating Authority has rightly concluded that on a combined reading of the statement of Mohan Lal Gupta and the Note Book marked as A-23, it can be concluded that the details of drawing of

samples reflected in the Note Book marked as A-23 is an unimpeccable evidence to support the contention that the yarn was produced on DT machine on which random samples were shown to have been drawn. The Adjudicating Authority has rightly concluded that the private records maintained by the assessee are sufficient for arriving at the figures of production and clearance of GSL as the records A-19, A-20 were either maintained or duly signed by the Supervisor In-charge of the DT machine which means that the said records reflected the true and correct working on the DT machine.

We have considered the submissions of both parties. We find that no evidence has been produced by the Revenue to show that GSL has effected sale of such huge quantities of DTY weighing 214.685 mtrs. There is no tangible evidence of GSL having actually produced all the DTY or Twisted Yarn from out of non-duty paid POY supplied by Nova or by another company. No transporters' documents have been seized or produced by the Department to show transport and sale of such huge quantities of POY from Nova or any other company to GSL or, even for that matter, from GSL to the buyers of DTY produced by GSL. No evidence has been forthcoming of purchase of raw materials by Nova or any other company for production of POY in such huge quantities, or of payments effected by GSL to Nova or any other company for the excess quantities of POY, clandestinely manufactured and cleared by Nova or any other company and sold to GSL, or even of payments made by the buyers of DTY from GSL made out of quantities alleged to have been purchased by GSL from Nova or any other company. We also find force in the submission made on behalf of GSL that no efforts have been made by the Revenue to establish the words or expressions used in the document titled as A-23. The meaning of the words and expressions used in the document could have been easily ascertained by asking a question to this effect to any of the responsible person working with GSL. Actual production achieved by GSL ought to have been established by the Revenue by concrete evidence. Statements by itself cannot be made the basis of concluding the production achieved by GSL. We are constrained to reiterate that it is one thing to make out the content of entries made in a document, it is totally a different thing to assess the probative value of the contents

of the document. As repeated by this Tribunal, clandestine manufacture and clearance cannot be readily inferred from documents and statements. They have to be established on evidence, relatable to or linked with actual manufacturing operations. As far as the present demand is concerned, there is no such evidence forthcoming in the record before us. Mere reliance on note books or statements cannot justify a finding of clandestine manufacture and/or clearance. Investigation into the sources of supply of raw material would have revealed the actual facts. Apparently, no efforts seem to have been made in this behalf by the investigating authorities. Of equal importance would have been investigations into the transportation of the raw materials (in huge quantities, as alleged) to GSL and of DTY allegedly manufactured from the factory of GSL to its buyers, and payments for such raw materials and for the clandestinely cleared DTY. In the absence of all such evidence, a finding that excisable goods have been clandestinely manufactured and cleared by GSL cannot justifiably be arrived at. The probative value of the entries needs to be established by independent corroboration, which is lacking in the present case. The long line of decisions referred to and relied upon by the Id. Senior advocate, appearing for Nova have laid down the parameters for a charge of clandestine manufacture and clearance to be established, which have not been satisfied in the present case. The present demand of Rs. 73,00,168/- is, therefore, unjustified and deserves to be set aside. Accordingly, we do so.

17. As Revenue has failed to produce any corroborative evidence to allege clandestine removal of goods and same has been alleged only on the basis of diary notes made by their employee Shri Debasis Ghosh, therefore, the said demand is not sustainable in the eyes of law.

18. Further, in the case of K. Rajagopal vs. Commissioner of Central Excise, Madurai (supra), Commissioner of Central Excise, Jaipur-I vs. Nirmal Bhandari (supra) and Triveni Engineering and Industries vs. Commissioner of Central Excise, Allahabad (supra), this Tribunal and Hon'ble High Court Courts have taken the same view. Therefore, the

demand of Rs.1,93,90,293/- sought to be confirmed on the basis of diary notes is not sustainable, accordingly, dropped.

19. Another demand of Rs.2,27,850.62 has been confirmed on account of clandestine removal of Spent Acid. The said allegation is made on the basis that Spent Acid is generated during the course of production of LABSA, therefore, appellant has suppressed the clearance of Spent Acid. The reply made by the appellant is that the said clearance of Spent Acid depends on production of LABSA and there is no evidence in the show cause notice to support the said allegation and there is no evidence in respect of disproportionate procurement of LAB/Sulphuric Acid illegally by the appellant and no corroborative evidence has been produced.

20. We find that the said issue has been examined by this Tribunal in the case of Arya Fibers Pvt.Ltd. vs. Commissioner of Central Excise, Ahmedabad (supra), wherein this Tribunal after considering the fact that to allege clandestine manufacture and removal clearance test has been laid down to be followed to confirm the demand. The Tribunal has held as follows:

"40. *After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*

(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 sale 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 far in excess of what is necessary for manufacture of goods otherwise manufactured and validly 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;*
- (i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.*

*Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in *Centurian Laboratories v. CCE, Vadodara* [[2013 \(293\) E.L.T. 689](#)]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that*

decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [Hindustan Machines v. CCE [\[2013 \(294\) E.L.T. 43\]](#). Members of Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, [2013 \(291\) E.L.T. 81](#)], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal."

21. As no such effort has been made by the Revenue and brought in any evidence in support of their allegation and the demand is raised on assumption and presumption only, therefore, demand of Rs.2,27,850.62 is not sustainable. Accordingly the same is set aside.

22. The Cenvat credit of Rs.1,38,040/- was denied on irregular availment of credit on the goods on the basis of some invoices which

were not received in their factory. But the contention of the Ld.Counsel for the appellant is that the appellant has received the goods containing those invoices which has been used in the manufacture of the final product which ultimately suffered the duty. The said fact has not been denied by the Revenue, in that circumstances, the demand of Rs.1,38,040/- is also not sustainable for denial of Cenvat credit and dropped.

23. A demand has been alleged on account of shortage of Acid Slurry of Rs.79,675.20 found on 22.11.2001. the measurement of the said Acid Slurry was done only on eye estimation basis. No actual stock taking was taken, in that circumstances, the shortage cannot be alleged against the appellant on the basis of eye estimation, therefore, the said demand of Rs.79,675.20 is also not sustainable hence dropped.

24. The demand of Rs.3,27,046/- has been alleged as short payment of Central excise on account of sale through consignment agent, on the value at which the goods were sold from the consignment agent's place. The appellant has submitted that the total realization was Rs.2,68,582/- and as cum-duty price of which Rs.40,707.05 for which Central Excise duty is payable and which has already been paid by the appellant and accepted by the department. To find out how much is short payment on account of Central Excise duty on account of sale through consignment agent is required to be verified. For that purpose we remand the matter back to the adjudicating authority only to verify how much duty is payable by the appellant on account of sale through consignment agent. If the appellant has paid duty correctly of Rs.40,707/-, no demand is sustainable against the appellant.

25. We further find that in this case it is a fact on record that the appellant received LAB from three suppliers namely Reliance, IOCL and TPPL and no other supplier has supplied the said goods to the appellant and Revenue has not brought in any evidence to support

that the said raw materials have been received by the appellant from other sources.

26. In that circumstances, the case made against the appellant by the Revenue is only on the basis of assumption and presumption, therefore, in such cases without bringing any evidence on record of procurement of raw material from other sources demands are not sustainable.

27. Moreover, the appellant has contested that the investigation was conducted on 29.08.1998 and all the records were taken, spot memo was issued, the same was replied by the appellant on 05.06.2000 and no investigation further took place. Thereafter, all on a sudden on 22.11.2001, the department again searched and on 31.10.2002, a show cause notice was issued.

28. We find that in such cases extended period of limitation is not invocable as the allegation made in the show cause notice for reasons already known to the investigating authority and spot memo was issued which was clarified by the appellant, therefore, extended period of limitation is not invocable as held by this Tribunal in the case of Perfect Boxes Pvt.Ltd. vs. Commissioner of Central Excise & Service Tax, Indore, cited supra. Relevant para of the said order is reproduced as under:-

"11. Now I turn to the assessee's claim of the demand being hit by time-bar. A perusal of the show cause notice reveals that the demand has been raised by mechanically invoking the proviso to Section 11A of the Act. I find no discussion or even a murmur of any evidence or allegation that the respondent has indulged in the act of suppression of facts or wilful misstatement, contravention to the provision of the said Rule. In the absence of any of the ingredients, there can be no justification to invoke the extended period of time for issuing demand. Respondent has relied on many case laws including the decision of the Hon'ble Supreme Court in the case of CCE v. Chemphar Drugs & Liniments [[1989 \(40\) E.L.T. 276](#) (S.C.)]. In the said decision Hon'ble

Supreme Court categorically held that conscious or deliberate withholding of information by manufacturer is necessary to invoke larger limitation of five years. In the present case, the Department has acquired full knowledge about the facts of the case at the time of visit of the factory by the officers on 17-3-2006. Consequently, the show cause notice, if any, ought to have been issued within a period of one year from that date. The show cause notice stands issued on 9-3-2009."

29. Therefore, we hold that extended period of limitation is not invocable to the facts of the present case also.

30. In view of this, we pass the following order:-

- Except the demand of Rs.3,27,046/-, the whole of the demand is dropped and for Rs.3,27,046/- the matter is remanded to the adjudicating authority to ascertain the fact that how much duty is payable by the appellant on account of sale through consignment agents.
- For that purpose, we are remanding matter back to the adjudicating authority.
- In the facts and circumstances of the case no penalty is imposable on the appellants. Accordingly, penalties imposed on the appellant and co-appellants are set aside.

With these terms the appeals are disposed of.

(Order pronounced in the open court on 11.02.2025.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)