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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 75100 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Rashmi Cement Limited - Unit I & II : Appellant
Vill/AT-Boria, Garh Salboni, Jhargram,
District: Midnapore (West), West Bengal – 721 507

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 75101 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Rashmi Metaliks Limited – Unit II : Appellant
Tata Metaliks Road, Gokulpur,
District: Midnapore (West), West Bengal – 721 304

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 75102 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Rashmi Metaliks Limited – Unit I : Appellant
Gokulpur, Shyamraipur,
District: Midnapore (West), West Bengal – 721 301

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 75103 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

M/s. Rashmi Cement Limited – Unit III : Appellant
Vill.: Jitusole, Garh Salboni,
District: Midnapore (West), West Bengal – 721 518

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 76065 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjay Patwari, : Appellant
Erstwhile or present Director of:
i. **M/s. Rashmi Metaliks Limited – Unit I**
Gokulpur, Shyamraipur,
District: Midnapore (West), West Bengal – 721 301

ii. **M/s. Rashmi Metaliks Limited – Unit II**
Tata Metaliks Road, Gokulpur,
District: Midnapore (West), West Bengal – 721 304

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 76067 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjib Kumar Patwari : Appellant
Erstwhile Director of:
i. **M/s. Rashmi Cement Limited - Unit I & II**
Vill/AT-Boria, Garh Salboni, Jhargram,
District: Midnapore (West), West Bengal – 721 507

ii. **M/s. Rashmi Cement Limited – Unit III**
Vill.: Jitusole, Garh Salboni,
District: Midnapore (West), West Bengal – 721 518

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 76068 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sajjan Patwari : Appellant
Erstwhile or present Director of:
i. **M/s. Rashmi Metaliks Limited – Unit I**
Gokulpur, Shyamraipur,
District: Midnapore (West), West Bengal – 721 301

ii. **M/s. Rashmi Metaliks Limited – Unit II**
Tata Metaliks Road, Gokulpur, Nimpura,
District: Midnapore (West), West Bengal – 721 304

iii. **M/s. Rashmi Cement Limited - Unit I & II**
Vill/AT-Boria, Garh Salboni, Jhargram,
District: Midnapore (West), West Bengal – 721 507

iv. **M/s. Rashmi Cement Limited – Unit III**
Vill.: Jitusole, Garh Salboni,
District: Midnapore (West), West Bengal – 721 518

VERSUS

Commissioner of Central Tax : Respondent
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

WITH

Excise Appeal No. 76070 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Subhendu Biswas, : Appellant
Erstwhile or present Director of:
i. **M/s. Rashmi Cement Limited - Unit I & II**
Vill/AT-Boria, Garh Salboni, Jhargram,
District: Midnapore (West), West Bengal – 721 507

ii. **M/s. Rashmi Cement Limited – Unit III**
Vill.: Jitusole, Garh Salboni,
District: Midnapore (West), West Bengal – 721 518

VERSUS

Commissioner of Central Tax **: Respondent**
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

AND

Excise Appeal No. 76072 of 2025

(Arising out of Order-in-Original No. 01/COMMR/CGST & CE/Haldia/Adjn/2024 dated 31.05.2024 passed by the Commissioner of Central Tax, Haldia C.G.S.T. & C.X., 7th Floor, M.S. Building, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Salil Roy, **: Appellant**
Present Director of:
i. **M/s. Rashmi Metaliks Limited – Unit I**
Gokulpur, Shyamraipur,
District: Midnapore (West), West Bengal – 721 301

ii. **M/s. Rashmi Metaliks Limited – Unit II**
Tata Metaliks Road, Gokulpur, Nimpura,
District: Midnapore (West), West Bengal – 721 304

VERSUS

Commissioner of Central Tax **: Respondent**
Haldia C.G.S.T. and C.X. Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata, West Bengal – 700 001

APPEARANCE:

Shri Rahul Dhanuka, Advocate,
Shri Niraj Baheti, Advocate,
For the Appellant(s)

Smt. K. Kalpana, Authorized Representative,
Shri S.K. Jha, Authorized Representative,
For the Respondent

CORAM:

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

FINAL ORDER NOs. 77290-77298 / 2025

DATE OF HEARING: 18.08.2025

DATE OF DECISION: 20.08.2025

ORDER: [PER SHRI ASHOK JINDAL]

The appellant-companies are in appeal against the impugned order wherein central excise duty totally amounting to Rs.67,28,17,794/- has been demanded under Section 11A(10) of the Central Excise Act,1944, along with interest and penalty thereon, for the period from 2011-12 to 2012-13. The other appellants, acting in the capacity of directors of the appellant-companies during the relevant period (hereinafter referred to as "co-appellants"), have also filed appeals against the penalties imposed on them under Rule 26(1) of the Central Excise Rules, 2002 by the ld. adjudicating authority in the impugned order.

1.1. A common issue being involved in all these appeals, they are taken up for disposal by way of a common order.

1.2. The details of the present appeals are as provided in the tables given below: -

Sl. No.	**Appeal No.**	**Name of the Appellant**	**Amount of central excise duty involved (in Rs.)**
1.	E/75100/2025	Rashmi Cements Ltd. (RCL), Units-I & II	4,85,80,126/-
2.	E/75101/2025	Rashmi Metaliks Ltd. (RML), Unit-II	10,93,71,399/-
3.	E/75102/2025	Rashmi Metaliks Ltd. (RML), Unit-I	33,75,07,475/-
4.	E/75103/2025	Rashmi Cements Ltd. (RCL), Unit-III	17,73,58,794/-

Sl. No.	**Appeal No.**	**Name of the Appellant**	**Amount of penalty imposed (in Rs.)**
1.	E/76065/2025	Mr. Sanjay Patwari	Rs.8,00,00,000/-
2.	E/76067/2025	Mr. Sanjib Kumar Patwari	Rs.4,00,00,000/-
3.	E/76068/2025	Mr. Sajjan Patwari	Rs.12,00,00,000/-
4.	E/76070/2025	Mr. Subhendu Biswas	Rs.75,00,000/-
5.	E/76072/2025	Mr. Salil Roy	Rs.1,50,00,000/-

2. The facts of the case are that on the basis of specific information received and developed about evasion of central excise duty by way of suppression of material facts pertaining to the production and removal of finished excisable goods and wilful undervaluation of the same by the Rashmi Group of Companies, viz. M/s. Rashmi Metaliks Limited, Unit-I (hereinafter referred to as "RML-1"), M/s. Rashmi Metaliks Limited, Unit-II (hereinafter referred to as "RML-2"), M/s. Rashmi Cements Limited, Units-I & II (hereinafter collectively referred to as "RCL-1") and M/s. Rashmi Cements Ltd., Unit-III (hereinafter referred to as "RCL-2"), collectively referred to as the "appellant-companies", the Officials of the Directorate General of Central Excise Intelligence ('DGCEI') conducted search proceedings during the period 17.01.2013 to 20.01.2013 at the following premises and the documents recovered are as under:

Sl. No.	**Document Mark**	**Description**	**Seized from**
1.	06/RML/Office (GDN)/13	Sale Bill Register – For the period July 2012 to September 2012	<u>3rd Party Premise -</u> House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
2.	02/RML/Office (GDN)/13	Sale Bill Register – For the period October 2012 to January 2013	<u>3rd Party Premise -</u> House No. 528/1, Jafla Road, owned by

			Smt. Dipti Singha
3.	01/RML/Godown/13 (01,02,04,09 & 11/11)	Despatch Note Book – Period – February to June 2012 – Despatch of Wire Rod from RML-1	3rd Party Premise - Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
4.	01/RML/Godown/13 (03,08 & 10/2011)	Despatch and transaction amount received by RML-1 for Wire Rods during the period July, August & September 2012	3rd Party Premise - Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
5.	03/RML/Godown/13	Despatch and sale of Wire Rods by RML-1, Period – May & June 2012	3rd Party Premise - Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
6.	33/RML/MESS/13 & 40/RML/MESS/13	Despatch and sale of Wire Rods by RML-1, Period – November 2011	3rd Party Premise - House adjacent to 'Hardik

		to September 2012	Bhawan', Kharagpur
7.	01/RML/Office (GDN)/ 13(2/16)	Despatch details of TMT during December 2012 to 14.01.2013	3rd Party Premise - House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
8.	01/RML/Office (GDN)/ 13(3/16)	Despatch of Wire Rods during the period December 2012 to January 2013	3rd Party Premise - House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
9.	01/RML/Office (GDN)/ 13(5/16)	Despatch/sale details of TMT Bars & Billets of RML-1 on 7/8 January 2013	3rd Party Premise - House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
10.	08/RML/Office (GDN)/ 13	Production/dispatch details of Billets by RML-1 during October to December 2012	3rd Party Premise - House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
11.	07/RML/Godown/ 13 (2,4,5, & 9/9)	Despatch of Wire Rods & TMT during August to	3rd Party Premise -

		November 2012 by RML-1	Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
12.	07/RML/Godown/ 13 (1 & 7/9)	Despatch details of Pig Iron during the period September to October 2012	<u>3rd Party Premise -</u> Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
13.	01/RML/Office (GDN)/13 (4 & 7/16)	Despatch details of Pig Iron during the period December 2012 to 14.01.2013 – RML-1	<u>3rd Party Premise -</u> House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
14.	01/RML/Office (GDN)/13 (8/16)	Computerized Weighment Slip pertaining to dispatch of excisable goods during December 2012 to January 2013	<u>3rd Party Premise -</u> House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
15.	05/RML/Office (GDN)/13	Despatch details of Sponge Iron, Billets & TMT	<u>3rd Party Premise -</u>

		during the period October 2012 to 16.01.2013	House No. 528/1, Jafla Road, owned by Smt. Dipti Singha
16.	01 to 4/ RML/MESS/13	Despatch and transaction amount of Wire Rods during the period October, November, December 2012 & January 2013.	3rd Party Premise - Godown adjacent to the House of Smt. Dipti Singha at 528/1, Jafla Road
17.	05 to 8/ RML/MESS/13	Despatch details of Sponge iron during the period August, September, December 2012 & January 2013 respectively of RML-2 & RCL-2	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
18.	12/RML/MESS/13	Despatch details of Pig Iron & Billets in January 2013 – RML-1	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
19.	14/RML/MESS/13	Despatch of Wire Rods during the period July 2012 to January 2013	3rd Party Premise - House adjacent to 'Hardik

			Bhawan', Kharagpur
20.	26/RML/MESS/13	Despatch and payment received for Wire Rods during the period November 2011to January 2013	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
21.	34/RML/MESS/13	Despatch details of Pig Iron during the period September 2012 to January 2013 – RML-1	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
22.	35/RML/MESS/13	Despatch/sale details of Billets during July 2012 to January 2013- RML-1	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
23.	36/RML/MESS/13	Despatch details of TMT during the period November 2012 to January 2013- RML-1	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
24.	37/RML/MESS/13 (1,2 & 3/3)	Despatch/sale details of Sponge Iron of RML-2 & RCL-2 during October 2011 to January 2013	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur

25.	41/RML/MESS/13	Despatch/sale details of Pig Iron & Billets during April 2011 to March 2012 – RML-1	3rd Party Premise - House adjacent to 'Hardik Bhawan', Kharagpur
26.	01/OFF/KGP/RM/13	Printout from Pen Drive – Despatch/sale details of TMT by RML-1 during the period December 2011 to July 2012, October 2011 to May 2012 and May 2012 to July 2012 respectively.	Office of Rashmi Group of Companies, Kharagpur
27.	02 to 08/ OFF/KGP/RM/13	Note Pad, Misc. Documents, Pen Drive, Printout of Pen Drive and Hard Disc.	Office of Rashmi Group of Companies, Kharagpur
28.	01/SQ/RGI/13 (1, 2, 4, 5 & 7/7)	Despatch details of Pig Iron & Billets during August to December 2012 – RML-1	3rd Party Premise - House at Jibananan da Sarani used by employee of Rashmi Group
29.	01/SQ/RGI/13 (3 & 6/7)	Despatch details of Sponge Iron during October &	3rd Party Premise - House at

		November 2012 by RML-1 & RCL-2 respectively	Jibananan da Sarani used by employee of Rashmi Group
30.	02/SQ/RGI/13 (1/5)	Despatch & sale details of Billets and Sponge Iron by RML-1 & RML-2 during September 2012	3rd Party Premise - House at Jibananan da Sarani used by employee of Rashmi Group
31.	06/SQ/RGI/13 (1, 2, 3, 4, 5 & 6/6)	Weighment Slip of dispatch of Sponge Iron mfd. By RML-2 & RCL-2 during July to December 2012	3rd Party Premise - House at Jibananan da Sarani used by employee of Rashmi Group

3. During the course of search operations, physical stock taking of finished goods lying in the factory premises of the appellants was done. Further, statements of the Directors/erstwhile Directors (namely Shri Sajjan Patwari, Shri Sanjay Patwari, Shri Surendra Jha, Shri Salil Roy and Shri Subhendu Biswas), employees (including ex-employees) namely Shri Ashok Ghosh, Shri Bimal Seal, Shri Gopal Shah, Shri Jaydeep Chakraborty, Shri Mukul Dana, Shri Prashanta Dey, Shri Pulak Chakraborty, Shri Rajesh Singh, Shri Ashish Roy Karan, etc.) and various

customers and vehicle owners were recorded by the Investigating Officers.

3.1. From scrutiny of the seized records/documents and the statements recorded from various personnel and other related entities, it appeared to the Revenue that: -

(a) The 'Rashmi Group' of companies, comprise M/s. Rashmi Metaliks Ltd. (in short, RML) and M/s. Rashmi Cement Ltd. (in short, RCL), both of which are engaged in manufacturing of excisable goods. While Shri Sanjay Kumar Patwari, Shri Surendra Jha and Shri Salil Roy were the three Directors of RML as on the day of search, i.e., 17.01.2013, the present Directors are Shri Surendra Jha, Shri Salil Roy, Shri Abhijit Chowdhury, Shri Subhasis Bosu and Kirti Sanghavi. Similarly, while Shri Sanjib Kumar Patwari, Shri Sunil Patwari, Shri Subhendu Biswas and Shri Dipanjan Mohata were the four Directors of RCL as on the day of search, the present Board comprises Shri Subhendu Biswas, Shri Dipanjan Mohata, Shri Subhasis Bosu, Shri Sisir Kumar Bhunia & Kirti Sanghavi. The above facts are not only apparent from the documents obtained by the DGCEI from the 'Registrar of Companies (in short, RoC)', but have been corroborated by several persons associated with either or both of the above companies in their respective statements during the course of investigation.

(b) Among the above two companies, RML has their manufacturing facilities at the following locations: (i) M/s. Rashmi Metaliks Ltd., Unit-1 (referred to as 'RML-1'), having Central Excise Registration No. AACCR7183EXM001 at Gokulpur, P.O. Shyamraipur, Kharagpur, Dist. Midnapore (West), West Bengal, PIN -721301, primarily engaged in the manufacture of 'Pig Iron, MS Billets, TMT Bars, MS Wire Rods etc.' falling under Chapter 72 of the Ist Schedule to the CETA; and (ii) M/s. Rashmi Metaliks Ltd., Unit-II (referred to as 'RML-2'), having Central Excise Registration No. AACCR7183EXM002 at Tata Metaliks Road, Gokulpur, Nimpura, Dist. Midnapore (West), West Bengal PIN -721 304, engaged in the manufacture of 'Sponge Iron' falling under Chapter 72 of the 1st Schedule to the CETA. On the other hand, RCL has their manufacturing facilities at the following locations: (i) M/s. Rashmi Cement Ltd., Units I & II (collectively referred to as 'RCL-1'), having Central Excise Registration No. AABCR4343RXM001, at Vill. Boria, Garh Salboni, Jhargram, Dist. Midnapore (West), West Bengal, PIN 721 507, engaged in the manufacture of 'Portland Cement' classifiable under Chapter 25 of the Ist Schedule to the CETA; and (ii)M/s. Rashmi Cement Ltd., Unit-III (hereinafter referred to as 'RCL-2'), having Central Excise Registration No. AABCR4343RXM002, at Vill. Boria, Garh Salboni Jhargram, Dist. Midnapore (West), West Bengal PIN - 721 507, engaged in the manufacture of 'Sponge Iron' falling under Chapter 72 of the 1st Schedule to the CETA. The above facts are apparent from all statutory Central Excise records maintained by RML-1 & RML-2 (in the form of their respective Registration

Certificates, ER-1 returns, invoices etc.) and have also been corroborated in the statements obtained under summons.

(c) In the course of search operations conducted by the DGCEI during the period 17.01.2013 to 19.01.2013 covering the factory premises of RML-1 & RML-2 and other related premises as above, records/documents, primarily in the form of dispatch documents relating to removal of manufactured excisable goods, were recovered and seized. Such manufactured excisable goods included, inter alia, (i) MS wire-rods, MS billets, TMT bars/ rods & pig iron manufactured by RML-1; (ii) sponge iron manufactured by RML-2; (iii) portland cement manufactured by RCL-1 and (iv) sponge iron manufactured by RCL-2. It appeared that seized records/documents comprised not only documents revealing dispatch of manufactured goods but also receipt of amounts against such sale, either in cash or in cheque.

(d) It further appeared that the various seized records/documents contained dispatch related information, including, inter alia, the date (of removal), bill/ challan no., product description & code, name of customer, quantity, rate, amount, vehicle no. etc., indicating that such pages contained information relating to dispatch of manufactured goods.

(e) It appeared to the Revenue that RML-1, RML-2, RCL-1 and RCL-2 had removed and manufactured excisable goods from their factory premises but had neither discharged their central excise duty liability against some of such dispatches nor had adhered to related central excise procedures relating to such removals, as apparent from the various statements recorded during the course of investigation.

4. On the basis of such private records recovered from the third-party premises purportedly from possession of employees and ex-employees, including handwritten pages and print outs generated from electronic media, and the statements recorded in the course of investigation, a Show Cause Notice bearing DGCEI F. No.23 / KZU / KOL / Gr.B /13/2016/5319 dated 21.09.2016 was issued against RML-1, RML-2, RCL-1 and RCL-2 along with 14 other co-noticees, on the following allegations: -

(i) The noticees namely, RML-1, RML-2, RCL-1 and RCL-2, had deliberately suppressed the material facts relating to clandestine removal of finished excisable goods which were removed from their respective factory premises without discharging proper Central Excise duty liability leviable thereon, without entering such details in their Daily Stock Account and without issuing any Central Excise invoice against the same and that the same was apparent from the seized records as well as from the statements recorded under summons from various persons.

(ii) It was also alleged that RML-1, RML-2I & RCL-2 had suppressed the value of 'sponge iron and MS Billet' in their Central Excise invoices issued during the material period; moreover, that RCL-1 had not only dispatched cement without payment of Central Excise duty or issuance of invoices but had also misrepresented such cement as 'fly-ash' in their private records in order to evade payment of applicable duties.

(iii) Moreover, the noticees/appellants did not co-operate with the DGCEI during the course of investigation and had also furnished false information. Their intent to evade payment of Central Excise duty was also apparent from the seized records/ documents evidencing clandestine clearance of manufactured goods as well as undervalued consignments of sponge iron and MS Billet as discussed above. It further appeared that they had contravened the provisions of the Rules on various counts with intent to evade payment of Central Excise duty. Thus, it was alleged that but for the detection and detailed investigation conducted by the DGCEI, the gamut of closely guarded activities of the noticees would not have come to surface and would have remained unnoticed resulting in revenue loss to the Government.

(iv) Thus, by way of their deliberate acts and omissions, the noticees appeared to have wilfully perpetuated fraud and suppressed material facts to gain unlawful monetary benefits by evading Central Excise duty payable to the Government, and hence, the extended period of limitation as envisaged under Section 11A(4) of the Central Excise Act, 1944 appears to be invocable in the instant case as the noticees willfully suppressed the material facts pertaining to their clandestine/ undervalued removals of finished excisable goods with intent to evade payment of Central Excise duty leviable thereupon.

4.1. Accordingly, the Show Cause Notice proposed recovery of central excise duty from the appellant-companies, totally amounting to Rs. 67,28,17,794/- (including cenvat duty, Education Cess and Secondary and Higher Education Cess thereon) under Section 11A(4) of the Central Excise Act, 1944, along with interest under Section 11AA of the Act, and imposition of penalties under Section 11AC(1)(c) of the said Act read with Rule 25 of the said Rules, covering the period from 2011-2012 and 2012-13. The said Notice also proposed personal penalties on the co-appellants, amongst others, under Rule 26 ibid.

4.2. In the first round of proceedings, an Order-in-Original No. 32/Commissioner/CE/Haldia/Adjn/2017 dated 28.11.2017 was passed by the ld. adjudicating authority, whereby the demands proposed in the impugned Show Cause Notice were confirmed, without supplying the appellant-companies and the co-appellants with the various documents that were relied upon by the Department, in gross violation of principles of natural justice.

4.3. The appellants challenged this non-furnishing of documents before this Tribunal by way of Excise Appeal(s) bearing Nos. 75909 to 75918 of 2018. Thereafter, vide Final Order No. 75015-75024/2021 dated 19.01.2021 the Tribunal allowed the appeals by way of remand to the adjudicating authority for de novo consideration after observance of the principles of natural justice, with a direction to the concerned authorities directed to make available the relevant documents/copies.

5. In compliance with the aforesaid direction of this Tribunal, *de novo* adjudication of the Show Cause Notice was taken up by the Ld. Commissioner wherein the Ld. Commissioner of Central Tax, Haldia C.G.S.T. and C.X. Commissionerate, who, vide the Order-in-Original No. 01/COMMR/ CGST & CE / Haldia /Adjn/2024, dated 31.05.2024 (hereinafter referred to as the "impugned order") has confirmed the demands, along with interest and penalties thereon, as proposed in the Show Cause Notice.

5.1. Against the said order, the appellants are before us.

6. The Ld. Counsel appearing on behalf of the appellants herein have made various submissions in support of his contentions, which can be broadly summarized as under: -

A. The entire proceedings are based on assumptions and presumptions and allegations of clandestine removal of goods cannot be alleged without providing any corroborative evidence:

(i) It is a settled principle of law that the charge of clandestine 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. It has been consistently held by Courts/Tribunal that clinching evidence relating to the following is required to be adduced to establish the said charge beyond a reasonable doubt.

(ii) In the facts of the present case, there is no allegation much less any finding that the appellants had engaged in any unaccounted production of finished goods. Further, there is no corroborative evidence in the form of discrepancies in the stock of raw material or final product were detected by the Investigating Authority. There is no evidence as regards procurement of such a huge quantity of raw material by appellants so as to manufacture the goods clandestinely and remove the same without payment of duty. Further, no record showing any extra payment to the labourers. No investigations as regards electricity consumption stand made by Investigating Authority. Further, there is no allegation nor any evidence of any unexplained cash being found at the premises of the appellants in connection with the allegation of clandestine removal. It is trite law that no demand of clandestine manufacture and clearance can be confirmed purely on conjectures, surmises, assumptions and presumptions. Reference in this regard, is invited to the following decisions:

- *Continental Cement Company v Union of India reported in 2014 (309) E.L.T. 411 (All.)*
- *Arya Fibre Pvt. Ltd. vs Commissioner of C.Ex, Ahmedabad reported in 2014 (311) ELT 529 (Tri-Ahm)*
- *CCE, Kolkata-III v. Sai Sulphonate Pvt. Ltd. reported in 2022 (380) E.L.T. 441 (Cal.)*
- *Ambica Iron & Steels Private Limited vs Commissioner of Central Excise, Customs & Service Tax reported in 2021 (12) TMI 958 – CESTAT Kolkata*

- *Commissioner of C. EX. & S.T., Udaipur v Mittal Pigment Pvt. Ltd. reported in 2018 (16) G.S.T.L. 41 (Raj.)*
- *Bihar Foundary & Castings Ltd. vs. CCE, Ranchi reported in 2019 (8) TMI 527 – CESTAT Kolkata*
- *Commissioner of Central Excise, Bhubaneswar-I v. Minakshi Steels reported in 2005 (190) E.L.T. 395 (Tri. - Kolkata)*

(iii) The Revenue's entire allegation is based on assumptions and presumptions derived from private records seized from third party premises which had no connection with the appellants' business and therefore, the same cannot be relied as evidence to allege clandestine removal. Reference in this regard is invited to the following case:

- *Aswani & Co. vs CCE, Delhi reported in 2015 (327) ELT 81 (Tri-Del)*
- *Rudra Ventures Pvt Ltd vs CCE reported in 2016 (344) ELT 472 (Tri-Chan)*
- *CCE vs PD Industries Pvt Ltd reported in 2016 (340) ELT 249 (Tri-Del)*

(iv) In fact, the Adjudicating Authority even acknowledges at Page 383 of the impugned Order that no agreement exists between the owner of premises and the appellants and in spite thereof goes on to confirm the demand merely because private records seized from the said premises were matching with the clearances made by the appellants.

(v) The Ld. Adjudicating Authority has arbitrarily assumed that:

a) Private records seized from the third-party premises pertain to the Appellant

b) Entries therein pertain to clearances effected by the Appellant

c) Entries which did not tally with the Invoice Statements presumed to be clandestine clearances

d) Amounts reflected therein are transaction amounts received by the appellants from the parties mentioned therein

However, the Ld. adjudicating authority failed to appreciate that:

a) Such private records could be a rough order book prepared by the employees for their own convenience

b) Such employees could have been associated with other companies and could have been maintaining a consolidated record

c) The details mentioned therein could pertain to orders which were cancelled subsequently.

(vi) Further, the contention of the appellants to this effect has been brushed aside by simply relying upon the principle of preponderance of probability. In this regard, the Adjudicating Authority has sought to rely upon the decision of Tribunal in the case of *Thermotech vs CCE, Delhi reported in 2014 (4) ECS (62) (Tri-Del)* which has been reversed by the Hon'ble Delhi High Court in the case of *Flevel International Vs. Commissioner of Central Excise reported in 2016 (332) E.L.T. 416 (Del.).*

(vii) Moreover, absence of any efforts to gather corroborative and concrete evidence to support the grave allegation of clandestine removal clearly demonstrates that the impugned order has been passed with a pre-conceived mind and is subject to conjectures or surmises. Therefore, it is submitted that merely on the basis of third-party evidence, that too not corroborated with any other evidence, case of clandestine removal cannot be established. In light of the same, the appellants submit that the Notice is bad in law, arbitrary, based on assumptions and presumptions, issued with a pre-conceived mind, perverse and liable to be set aside.

B. Allegation of clandestine removal of goods cannot be established on the basis of private records in the absence of corroborative evidence:

(i) Further, it is a well settled principle that allegations of clandestine removal of the goods will not stand established on the basis of private records in the absence of any corroborative concrete evidence. The judicial fora have time and again echoed the said principle. Reliance is placed on the following rulings:

- *Sharda Re-rollers Pvt Ltd & Ors vs Commissioner of Central Excise, Customs & Service Tax, Odhisha reported in 2025 (5) TMI 1281 – CESTAT Kolkata*
- *Gautam Ferro Alloys v. CCE, Ranchi reported in 2021 (377) E.L.T. 776 affirmed in the Hon'ble Supreme Court reported in 2022 (380) E.L.T. 385 (S.C.)*
- *K. Rajagopal vs Commissioner of Central Excise, Madurai reported in 2002 (142) ELT 128*

C. The Statements do not have evidentiary value if the mandatory procedure under Section 9D of the Central Excise Act are not complied with:

(ii) The impugned Order places heavy reliance on various statements recorded under Section 14 of the Central Excise Act, 1944 to allege clandestine removal of goods and to raise the impugned demand. The appellants submit that it is a settled legal position that the statement of witness recorded under Section 14 of Central Excise Act, 1944 before the gazetted Central Excise Officer during the course of investigation cannot be relied upon, unless procedure prescribed under Section 9D of the said Act is strictly followed.

(iii) A careful reading of Section 9D of the Central Excise Act, 1944 makes it abundantly clear that no reliance can be placed on any statement recorded under Section 14 of the said Act unless the person who made the statement is first examined as a witness before the adjudicating authority. Such a statement may be admitted in evidence only after the witness has been subjected to examination-in-chief and cross-examination, thereby affording both sides a fair opportunity to test the veracity and reliability of the statement. The use of the word "shall" in Section 9D (1), makes it clear that the procedural requirements under Section 9D are not merely directory but mandatory in nature. Compliance with this procedure is a precondition for the admissibility of any statement recorded during inquiry or investigation under Section 14 of the Act. Reliance in this regard is placed on:

- *G.Tech Industries Vs. Union of India reported in [2016 (339) ELT 209 (P&H)]*
- *Jai Balaji Industries Limited and Ors Vs. Commissioner of CGST & Central Excise, Bolpur Commissionerate reported in 2023 (8) TMI 989 - CESTAT KOLKATA*
- *Prinik Steels (P) Ltd. & Ors vs Commissioner of Central Excise, Customs & S. Tax, Bhubaneshwar reported in 2023 (12) TMI 299 - CESTAT KOLKATA*
- *Narsingh Ispat Limited & Ors Versus Commissioner, C.G.S.T. and Central Excise, Jamshedpur reported in 2024 (3) TMI 1037 - CESTAT KOLKATA*
- *Shree Krishna Laxami Steel Udyog Private Limited & Ors vs Commissioner of Central Excise & Service Tax, Jamshedpur reported in 2024 (12) TMI 738 – CESTAT Kolkata*
- *Vasundhara Metaliks (P) & Ors Limited vs Commissioner of Central Excise, Customs & S. Tax Audit Commissionerate, Bhubaneswar reported in 2025 (4) TMI 955 – CESTAT Kolkata*
- *JJ Extrusion Private Limited vs Commissioner of Central Excise & S. Tax reported in 2025-VIL-320-CESTAT-KOL-CE*
- *Virajaa Steel & Power Limited & Ors. v Commissioner of Central Excise reported in 2024 (7) TMI 1039*
- *Ambika International Vs. Union of India reported in 2018 (361) E.L.T. 90 (P&H)*

(iv) In light of the above, it is evident that the mandatory procedure under Section 9D cannot be circumvented by the adjudicating authority if it seeks to rely on statements recorded during investigation. In the absence of cross examination of the person, as required under Section 9D of the Central Excise Act such a statement does not constitute relevant or admissible evidence.

(v) In the facts of present case, the appellants, on multiple occasions, prayed for being allowed to cross examine the 20 persons whose statements were recorded during investigation and are relied upon in the present adjudication proceeding. However, the said request of the appellants was not acceded by the adjudicating authority. In the present case, the procedural requirements under Section 9D of the Central Excise Act has not been fulfilled. Thus, in light of this, the appellants submit that the impugned order should be set aside on this ground alone as the statements have no evidentiary value when they were not subjected to examination-in-chief before the adjudicating authority and also not produced for cross-examination as stipulated under Section 9D(1)(b) of Central Excise Act, 1944.

(vi) Further, it is submitted that if the statements recorded from the witnesses were not of voluntary nature but were recorded after putting undue pressure upon the witnesses the same could not be admitted in evidence by the Adjudicating Authority. The same clearly lost its evidentiary value. In the present case, statements of Mr. Surendra Jha, Mr. Ashok Ghosh, Mr. Mukul Jana and Mr. Rajesh Singh were retracted as the statements were taken by coercion and under threat of arrest by the investigation officials. Reference in this regard is invited to the decision of Hon'ble Delhi Court in the case of *CCE vs Vishnu and Co. Ltd reported in 2016 (332) ELT 793 (Del.).*

(vii) It is a settled 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.)],* wherein it has been held that delay in filing of affidavit cannot be a ground for completely bruising aside the same. Further, attention is also invited to the decision of Hon'ble Tribunal in the case of *Jeen Bhavani International vs CC, Nava Sheva reported in 2023 (6) CENTAX 11* and affirmed by Hon'ble Supreme Court in *2023 (6) CENTAX 14 (SC)* wherein it has been held that where statements were recorded several times in a span of three years, retraction made after two and half years of first statement and three and half months of last statement but within two months of issuance of show cause notice was to be considered to have been made within reasonable time and could not be considered to have been made with inordinate delay.

(viii) The impugned Order has sought to reject the request for cross-examination on three grounds:

a. The appellants failed to submit any proof that while recording the statement that the conditions made in the provisions of Section 9D of the Act has been violated by the Central Excise Officer.

b. At the time of seeking cross-examination, the Appellants could not establish that the persons had any bias/malice towards them.

c. The right to cross examination is not an absolute right

In this regard, it is submitted that the provisions as contained in Section 9D of the Act are mandatory even if the appellants has not been able to substantiate any bias/malice against the persons. Further, not offering the opportunity to cross examine is itself a violation of provisions of Section 9D of the Act.

D. Print outs relied upon by the Adjudicating Authority are not admissible as evidence for failure to comply with Section 36B of the Act which is mandatory in nature:

(i) The impugned order alleging clandestine removal of goods is primarily based on data and computer printouts retrieved from pen drives and hard disks. A pen drive/hard disk is a floating device and has no evidentiary value on its own and can be admitted as evidence only when it strictly fulfils the conditions specified in Section 36B of the Act.

(ii) Section 36B of the Act states that the statement contained in a computer printout shall be deemed to be a document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. The very admissibility of such a document, i.e., electronic record, depends on the satisfaction of the four conditions under Section 36B(2) which are :

I. The electronic record must have been generated by the computer during a period in which it was regularly used to store or process information for activities consistently carried out by a person having lawful control over its use.

II. The type of information contained in the electronic record, or the source from which it is derived, must have been regularly entered into the computer in the ordinary course of the said activity.

III. During the relevant period, the computer was functioning properly; and even if there were instances of malfunction, such interruptions did not affect either the electronic record itself or the accuracy of its contents.

IV. The information contained in the electronic record must be a reproduction of, or derived from, data that was entered into the computer in the ordinary course of the said activity.

(iii) Further, Section 36B(4) of the Act mandates that any computer printout sought to be relied upon as evidence must be accompanied by a certificate issued by a person occupying a responsible official position in relation to the operation of the relevant computer system. This certificate must attest to the authenticity and ownership of the data retrieved from the device.

(iv) In the present case, the requirements of Section 36B (2) & (4) of Central Excise Act, 1944 were not complied with. The printouts were obtained from pen drives and hard disks, which are merely storage devices and not original computers used by the appellants for maintaining business records. These pen drives/hard disks were neither proved to belong to the appellants nor were they demonstrated to contain authentic business records. Further, the Adjudicating Authority has not obtained any certificate as required under Section 36B of the said Act. It has been observed time and again that computer printouts resumed from the pen drives/hard disks are not admissible evidence, unless the mandatory procedure prescribed in Section 36B of the Central Excise Act s followed. Reliance in this regard is placed on:

- *Commissioner of Central Excise & Customs, Bhubaneshwar vs Shivam Steel Corporation reported in 2023 (2) CENTAX 259 (Ori)*

- *Jai Balaji Industries Limited and Ors vs Commissioner of CGST & Central Excise, Bolpur Commissionerate (supra)*
- *Prinik Steels (P) Ltd. & Ors vs Commissioner of Central Excise, Customs & S. Tax, Bhubaneshwar (supra)*
- *Vasundhara Metaliks (P) & Ors Limited vs Commissioner of Central Excise, Customs & S. Tax Audit Commissionerate, Bhubaneswar (supra)*
- *Narsingh Ispat Limited & Ors vs Commissioner, C.G.S.T. and Central Excise, Jamshedpur reported in 2024 (3) TMI 1037 (supra)*
- *Parijat Paper Mills Ltd. & Ors vs Commissioner of Central Excise & CGST, Meerut reported in 2025 (5) TMI 1529 - CESTAT ALLAHABAD*
- *JJ Extrusion Private Limited vs Commissioner of Central Excise & S. Tax (supra)*
- *Popular Paints and Chemicals vs. CCE, Raipur reported in 2018 (8) TMI 473 – CESTAT New Delhi*
- *Premium Packaging Pvt. Ltd. vs. CCE, Kanpur reported in 2005 (184) ELT 165 (Tri. – Del.)*

(v) Therefore, in the absence of compliance with the statutory prerequisites under Section 36B(2) and (4) of the Act, the reliance placed on the contents of these pen drives/hard disks is wholly unsustainable in law.

(vi) Further, impugned Order, at page 382, relies upon the decision of Hon’ble Supreme Court in the case of *Shafhi Mohammad vs The State of Himachal Pradesh* to state that requirement of producing statement under Section 65B(44) (which is para material with Section 36B of the Central Excise Act) is procedural and not always mandatory and thus the printouts of the electronic devices can be adduced as evidence.

(vii) In this regard, it is submitted that the said decision of Hon'ble Supreme Court in the case of *Shafhi Mohammad (supra)* has been overruled by the Hon'ble Supreme Court (Three Bench) in the case of *Arjun Panditrao Khotkar vs Kailash Khushanrao Gorantyal and Others reported in (2020) 7 SCC 1.*

E. Demand cannot be confirmed on the basis of stock shortage and more so, cannot be based on mere eye estimation as sought to be done in the instant case:

(i) It has been alleged that there has been shortage of finished goods lying in factory premises as compared to the statutory records maintained by the Appellant. The said physical stock taking was conducted during 6:00 am to 12:00 noon on 19.01.2013 and the quantity of finished goods physically found was about 7300 MT. It is submitted that the authorities must have determined such quantity based on eye estimation and not on actual weight, since it is practically not possible to actual weight of steel materials weighing around 7300 MT within a short span of 6 hrs only.

(ii) The said manner of investigation clearly shows that physical stock was done on the basis of rough estimation and assumptions, without any proper evidence and concrete basis.

F. Duty deposited during the course of investigation will be deemed as 'under protest' payment when the appellants contest the proceedings:

(i) It is a settled principle of law, as laid down in numerous judicial pronouncements, that any amount deposited during the pendency of investigation or adjudication proceedings is to be treated as a deposit under protest. It has been consistently held that such deposits do not amount to an admission of liability, nor do they extinguish or impair the legal rights of the Appellant. Importantly, when the duty or tax so deposited is consistently challenged from the inception of proceedings before the adjudicating authority and continued up to the appellate or Tribunal stage, such payment must be regarded as made under protest, even in the absence of an express written protest. Therefore, the amount deposited by the appellants retain the character of a payment made under protest and cannot be treated as a voluntary or conclusive discharge of liability. Reliance in this regard is placed on the following cases:

- *Commissioner Of C. Ex., Lucknow vs Eveready Industries India Ltd. reported in 2017 (357) E.L.T. 11 (All.)*
- *Surbhi Enterprise vs Commissioner of C. Ex., Ahmedabad reported in 2007 (210) E.L.T. 588 (Tri. - Ahmd.)*
- *Duggar Fibre Pvt. Ltd. vs Commissioner of C. Ex., Cus. & CGST, Delhi reported in 2021 (378) E.L.T. 293 (Tri. - Del.)*

- *G.S. Radiators Ltd. vs Commissioner of Central Excise, Ludhiana reported in 2005 (179) E.L.T. 222 (Tri. - Del.)*

(ii) In light of the foregoing, it is submitted that the amount deposited during the course of the investigation cannot be deemed a voluntary payment or construed as an admission of guilt on the part of the Appellant.

G. The impugned order has been passed in gross violation of principle of natural justice in as much as the right to cross-examination was not given:

(i) The appellants submit that the impugned order stands vitiated on account of a gross violation of the principles of natural justice in as much as the appellants were not afforded an opportunity to cross-examine the witness whose statement has been primarily relied upon to allege the charge of clandestine removal. It is a matter of record that the appellants all along prayed for being allowed to cross examine the 20 persons, whose statements were recorded during investigation and are relied upon in the present adjudication proceeding.

(ii) It is a settled position of law that where any adverse or inculpatory statement is relied upon by the adjudicating authority to fasten liability or sustain a demand, it becomes imperative, in keeping with the principles of natural justice, to offer the appellants a fair opportunity to cross-examine the person who made such a statement. In the course of the adjudication proceedings, the appellants specifically requested the opportunity to cross-examine the persons whose statements, recorded during investigation, have been relied upon. However, the Appellant's requested were denied in flagrant violation of principle of natural justice.

(iii) Reliance is placed on the following judicial precedents, wherein it has been held when a statement is used against the appellants in proceedings, the right to cross-examine the individual who made the statement is fundamental and an integral part of the principles of natural justice.

- *Andaman Timber Industries Vs. Commissioner of C. Ex., Kolkata-II reported in 2015 (324) E.L.T. 641 (S.C.)*
- *Arya Bhushan Bhandar vs Union of India reported in 2002 (143) ELT 25(SC)*
- *Flevel International Vs. Commissioner of Central Excise reported in 2016 (332) E.L.T. 416 (Del.)*

(iv) It is submitted that cross-examination is an indefeasible right of the Appellant, and an opportunity must be afforded in compliance with the principles of natural justice. That in the absence of providing opportunity of cross-examination, the entire proceedings are in gross violation of the principles of natural justice, illegal and bad in law.

H. Further and in any event, the computation suffers from infirmities:

(i) The entire demand has been computed on the basis of comparison between the data as per the statutory records maintained by the appellants vis a vis private records seized from the third-party premises. In this regard, it is submitted that in further and any event, the computation also suffers from the following infirmities:

(A) The applicable excise duty and VAT on the alleged clandestine clearance has not been taken into account while calculating the excise duty demand. The rate per unit which has been taken while computing the impugned demand amount includes is the market rate which includes excise duty and VAT. Therefore, the applicable excise duty and VAT amount ought to be excluded for the purposes of computation. On this ground alone, the impugned demand stands reduced by a sum of Rs. 7,56,23,397/-.

(B) The Ld. Adjudicating Authority while computing the demand has considered clearances which were duly reflected in the excise returns and on which duty stands paid. Thus, a sum of excise duty amounting to Rs. 63,77,823/- is sought to be recovered from the appellants which already stands discharged by the appellants in its statutory returns.

(C) The Ld. Adjudicating Authority in the computation has included alleged clandestine clearances of sponge iron to two different buyers vide the same vehicle on the same day, which is not possible. This itself clearly raises a strong doubt about the veracity of the allegations as also the computation.

(D) The Ld. Adjudicating Authority in the impugned Notice has not made any allegations with respect to unaccounted production of finished goods. Further, the Ld. Adjudicating Authority has alleged excess stock in statutory records as compared to physical stock verification for RML 1 and RML 2. Therefore, without prejudice to the above it is submitted that assuming that the said allegation is correct, the clandestine clearances by the appellants (by RML 1 and RML 2) could not have exceeded the said quantity allegedly found in excess in statutory records as compared to physical stock. The excise duty on such stock has been admittedly computed in the impugned SCN at Rs. 51,32,136/-. However, the impugned order incorrectly demands excise duty amounting to Rs.44,24,97,295/- on account of such clandestine clearances which is clearly contrary to their own stand.

6.1. With regard to the penalties imposed on the co-appellants, namely, Shri Sanjib Kumar Patwari, Shri Sajjan Patwari, Shri Sanjay Patwari, Shri Salil Roy and Shri Subhendu Biswas during the relevant period, under Rule 26 of the Central Excise Rules, the following submissions have been made by the Ld. Counsel appearing on their behalf: -

A. The essential elements for the invocation of Rule 26(1) of the Central Excise Act are conspicuously missing from the facts of the current case and as such penalty under the said provisions cannot be imposed:

(i) Rule 26(1) is only applicable in cases where any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation.

(ii) In the present case there is not even an allegation, far less any concrete evidence to that effect, that the co-appellants (erstwhile or present directors of the companies) ever acquired or was concerned with transporting, removing, depositing, keeping, concealing, selling or purchasing, and/or that they dealt with in any other manner, any excisable goods which he knew or had reason to believe that such goods are liable to confiscation under the Act. In the absence of any order for confiscation under Rule 25 and imposition of penalty thereunder on the appellant-companies, penalty under Section 26 on the co-appellants cannot be sustained. It has been consistently held that penalty under Rule 26(1) cannot be imposed if there is no order for confiscation.

(iii) Reliance in this regard is being placed on the following judgements:

- *Shri Kushal Raj Jain Vs. Commissioner, Central Excise, Jaipur reported in 2025 (7) TMI 411 (Tri. – Del.)*
- *M/s GR Ispat Udyog, M/s L.G. Steel Corporation, M/s R.G. Steel Products Versus CCE & ST-Chandigarh-ii reported in 2019 (8) TMI 1231 (Tri. – Chan.)*

B. No substantial evidence has been brought out against the Co-Appellants. Further, when the allegation of clandestine removal is itself not sustainable, there could be no question of imposition of penalty:

(i) In terms of the detailed submissions advanced in regard to the appellant-companies, it would be evident that the entire proceedings are based on assumptions and presumptions and there is no corroborative piece of evidence to prove the charges of clandestine removal of goods levelled against the appellant-Companies. When the charge of clandestine removal is itself not sustainable, the imposition of penalties on the directors are also not sustainable. Reliance in this regard is being placed on the judgement of the Tribunal, Kolkata in the case of *M/s. Seeta Integrated Steel & Energy Limited Vs. Commissioner of Central Excise, Customs and Service Tax, Rourkela, Odisha [2025 (5) TMI 1012].*

(ii) Reliance in this regard is also being placed on the judgement of the Tribunal in the case of *Shri Mahavir Ferro Alloys Pvt. Ltd. and Shri Vicky Jain Managing Director Versus Commissioner of CGST & C. Ex. [2025 (2) TMI 477]* whereby it was held that when the demand itself is not sustainable, then penalty cannot be imposed.

C. When penalty has been imposed on the appellant-Company, the same cannot be imposed on the Directors of the Company:

(i) It is submitted that it is settled law that when penalty has been imposed on a company, there is no question of imposing personal penalty on the employee/key managerial person of the said company as well. Reference in this regard is invited to the decision of the Tribunal in the case of *Neptune Spin Fab Pvt Ltd vs CCE [2009 (241) ELT 467].*

6.2. In view of these submissions, the Ld. Counsel for the appellants pray for setting aside the demands confirmed against the appellants in the impugned order, along with the demand of interest and imposition of penalties thereon and thereby for allowing the appeals, with consequential reliefs.

7. On the other hand, the Ld. Authorized Representatives of the Revenue appearing before us has supported the findings in the impugned order. They made the following submissions with regard to the grounds urged by the appellant-companies in their respective appeals: -

(a) Rashmi Metaliks Limited (Unit-I):

A: The Adjudicating Authority passed the order after going through the case records comprising of the impugned show cause cum Demand Notice, the reply to the Show Cause Notice, written submissions received by his office and the oral submission of the applicant during personal hearing along with the other documents as submitted by the assessee.

B: The detailed calculation in 11 working sheets regarding the stock taking report was received by the assessee and the same is acknowledged by them through their letter dated 06.09.2023 under Ref No. IDT-HO/KOL/CP/339. Further the relevant RUDs of the subject Show cause notice was voluminous and the same was provided to the assessee through a pen drive in a sealed cover as mentioned in the letter of the Deputy Director, DGGI, KZU under letter no. DGGFINV/MISC/260/2022-Gr-B-0/o Pr ADG-DGGI-Kolkata-Part(1)/7457 dated 09.10.2023.

C and D: As regards the denial of the appellant's prayer for cross examination of 20 witnesses as asked by the notices, and whether the said denial has caused any prejudice to the noticees, it is seen from the records that the entries made in the private records were corroborated by the employees either of the Noticee No -1, Noticee No-6, Noticee No-11 and Noticee No-15. Further from the records, it is seen that some buyers who purchased the finished goods from the noticees without payment of duty have also confirmed that they had received these goods without the cover of proper excise documentation and without payment of duty. Considering these evidences available in record, it is clear that the denial of cross — examination of the witnesses / authors of the private records has not caused any prejudice to the noticees. In such a scenario, when the fact is not disputed, cross examination of the witnesses, is not necessary. The Hon'ble Apex Court in the case of *Kanungo Company — 1983 (13) ELT 1486 (SC)]* and the Hon'ble High Court of Andhra Pradesh in the case of *Shalini Steels Pvt. Ltd.* have held that there is no absolute right for cross examination and if sufficient corroborative evidences exist, cross examination of the deponent of the statement is not necessary.

E: At the time of adjudication, the adjudicating authority held that all the statements disclosing the actual facts are all tangible, cogent and affirmative evidence to support the allegation of clandestine removal of finished goods. The case was made on the basis of documents and records which are tangible in nature and, therefore, it cannot be said that just because cross examination is not allowed, noticees were handicapped. Hence, asking for cross examining the witnesses is nothing but deliberate attempt on the part of the noticees for delaying the adjudication procedure.

F: The statements were given by the witnesses voluntarily without any pressure.

G: Refer to the decision of the Apex Court in the case of *State of West Bengal vs. Mir Mohammad Omar & Ors reported at [2000 (8) 5CC 382].* In this case while reversing the findings of a High Court and giving a higher punishment to the accused in a murder case the Court observed:

> *"In the case, when prosecution succeeded in establishing the afore narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on conditions such as this. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position."*

The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case. Accordingly, I opine that usage of the words "assume"/ "presume" by the noticees in their reply to SCN, in negative way, is blasphemous and disappointing attitude shown to the investigation conducted by DGCEI, KZU.

H: The fact of suppression of production and clandestine removal was evident from the private records maintained by the noticees. The Show Cause issuing authority has given a detailed finding in the impugned SCN examining the various entries made in the private note books and in Pen Drive/Hard Disc recovered from the possession of the employees and their corroboration which firmly proves that clandestine removal of finished products has been indulged by the notices. The detailed observation regarding clandestine removal of goods is already discussed by the adjudicating authority in paragraph no. 14.7 of the De-novo 0-1-0 No. 01/COMMR/CGST & CE/HALDIA/ADJN/2024 dated 31.05.2024.

I: Recovery of lawful information of the notices from private premises, being knocked by the noticees several times, is the tangible evidence that those five premises were secretly used by the noticees to suppress the clandestine removal of finished goods, even if there was no existence of agreement between the owners of the premises and the noticees. Therefore, documents recovered from such places can directly be related to manufacturing notices.

J: The investigating authority has given a detailed finding in the impugned Show Cause Notice examining the various entries made in the private documents/Pen Drive and their corroboration with the manufacture and clandestine removal of finished products. The various entries made in the private records seized from the noticees have been examined in detail in the impugned order. From the analysis made therein, it is clear that the entries made in the said record relates to the clandestine manufacture and supply of finished goods without payment of duty. These entries have been corroborated by the authors, that is the employees of the manufacturing notices. It is a settled position in law that admitted facts need not be proved as held by the Hon'ble High Court of Madras in *Govindaswamy Ragupathy case [1998 (98) ELT 50 (Mad)]*

K: The allegation of 'clandestine Removal' and attempted evasion of Central Excise duty on the part of manufacturing noticees i.e. Noticee No.1, Noticee No.6, Noticee No.11 and Noticee No.15 is an extremely serious allegation and such acts are very dangerous for any sovereign nation's economic health. At the outset it important to note that no assessee can shake off the responsibility from their shoulder for being an honest and just tax payer.

L: No comments. The matter has been discussed at para no. 19.9 of the De-novo OIO No. 01/COMMR/CGST & CE/HALDIA/AWN/2024 dated 31.05.2024. (Page no. 534)

M: The actual fact of clandestine removal of goods in question never disappears on account of mere omission of any activity on the part of any authority. Again, on the other hand, mere omission of any activity never conceals the existence of any truth i.e. crime never dies due to mere omission. Hon'ble Division Bench of Hon'ble Apex Court in the case of *Shafhi*

Mohammad vs The State Of Himachal Pradesh on 30 January, 2018 have held that the applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies. Accordingly, in the light of the above judgement it is evident that the requirement of producing a certificate under Section 65B(4) (which is pari materia with Section 36B of Central Excise Act 1944) is procedural and not always mandatory and thus the print outs of electronic devices recovered from the possession of the employees of the manufacturing noticees have evidencial value and can be adduced as evidence to the SCN.

N: In paragraph 2.4 of the Show Cause Notice it has been prudently proved that documents recovered from such five premises contains the data of removal of finished goods under cover of central excise invoices issued by the noticees with payment of central excise duty and that was confirmed from their statutory records like "Daily Stock Account" (DSA). Recovery of lawful information of the notices from private premises, being knocked by the noticees several times, is the tangible evidence that those five premises were secretly used by the noticees to suppress the clandestine removal of finished goods, even if there was no existence of agreement between the owners of the premises and the noticees. Accordingly, the documents recovered from such places can directly be related to manufacturing notices.

O: No comments.

P: No comments. The matter has been discussed at Para No. VI (Point No. 4.12) of the De-novo D¬ID No. 01/COMMRJCGST & CE/HALDIA/ADJN/2024 dated 31.05.2024 (Page No. 384)

Q: No comments. The matter has been discussed at Para No. VII (Point No. 4.16) of the De-novo 0-1-0 no. 01/COMMR/CGST & CE/HALD1A/ADJN/2024 date 31.05.2024 (Page no.401-403)

R and S: No comments. The matter has been discussed in Para No. VII (Point No. 4.13, 4.14, 4.15) of the De-novo 04-0 No. 01/COM1VERJCGST & CE/HALD1A/ADJN/2024 dated 31.05.2024 (Page No. 401-403).

<u>(b) M/s. Rashmi Metaliks Ltd. (Unit-II):</u>

A to C: As mentioned in respect of M/s. Rashmi Metaliks Ltd. (Unit-I)

D: No comments. The matter has been discussed at Para no 16 (Page no 449) and Para no 21.5 (Page No. 544) of the De-novo OIO No. 01/COMMR/CGST & CE/HALDIA/ADJN/2024 dated 31.05.2024

E and F: As mentioned in respect of M/s. Rashmi Metaliks Ltd. (Unit-I)

<u>(c) M/s. Rashmi Cement Ltd. (Unit-I, II and III):</u>

A to C: As mentioned in respect of M/s. Rashmi Metaliks Ltd. (Unit-1)

D. Going through the Show Cause Notice dated 21.09.2016 issued vide DGCEI F.No.23/KZU/KOL/Gr.B/13, it revealed that the investigation team visited the following premises:-

a) Office of the 'Rashmi Group of companies' located at Inda, near 'Ingit Club', Kharagpur, Dist. Midnapore (West), West Bengal, PIN - 721305;

b) The house, adjacent to 'Hardik Bhawan', located at Holding No.811/669, Ward No.1, Inda, Kharagpur,Dist. Midnapore (West), West Bengal,PIN - 721 305;

c) Staff-mess of the employees of the 'Rashmi Group of companies' located at Jibanananda Sarani, Inda, Kamla kabin, Kharagpur, Dist. Midnapore (West), West Bengal, PIN - 721 305;

d) Office of the 'Rashmi Group of companies', on the first floor of House No. 528/1,located at Jafala Road, Inda, Kamalkabin, Kharagpur,Dist. Midnapore (West), West Bengal, PIN - 721305, owned by Smt. Dipti Singha;

e) Godown adjacent to the house of Smt. Dipti Singha as referred to above; and

f) Ground Floor of the residential premise of Shri Jiban Maiti located at Ramkrishna Pally, Inda, Kamalkabin, Kharagpur, Dist. Midnapore (West), West Bengal, PIN - 721305, found to be under the occupation of his tenant, Shri Bimal Seal.

E to I: As mentioned in respect of M/s. Rashmi Metaliks Ltd. (Unit-I)

7.1. Additionally, the Ld. Authorized Representatives of the Revenue also made the following submissions in support of their contentions: -

(i) Investigation was started on the basis of specific intelligence regarding all the addresses mentioned at OIO Page 13 of 570. All the searches were conducted in the presence of independent Panchas and the representatives of M/s. Rashmi Group of Companies.

(ii) Documents recovered during searches include dispatch challan, sale bill, computer generated register, production sheet, purchase documents, sale invoice, payment particulars, bank transactions, party-ledgers, weighment slips, statement of exports, sauda-books, order for sale, etc. in relation to clandestine removal of wire rods, sponge irons, pellets, pig-iron, TMT, billet, etc.

(iii) Detailed calculation in 11 working-sheets regarding stock-taking report were prepared by the DGCEI officers in the presence of independent Panchas and the representatives of M/s Rashmi Group of Companies which were duly received by Shri Surendra Jha. This fact has been acknowledged by the Assessee vide their letter dt. 06.09.2023.

(iv) Statement of buyers who purchased the goods from the Assessee without payment of duty have also confirmed that they had received these goods without the cover of proper Excise documentation and without payment of duty [OIO Page – 373 of 570].

(v) There is ample corroborative evidence and hence, cross-examination is not absolutely necessary. [OIO Para – 14.6 of Page – 348-374 of 570]

(vi) Statement of erstwhile director, namely, Shri Surendra Jha, is undisputable as he died before the De-novo adjudication. His statement may please be taken as evidence, as per provisions of 9D (1) of Central Excise Act, 1944. [OIO Para – 14.7 (XI f) of Page – 429-431 of 570]

(vii) Case is mainly based on the documents recovered during searches at the premises of the Noticees. Statement is only corroborative evidence. So, genuinety of statement received based on the questions on recovered documents should be taken as evidence.

(viii) Case records clearly point out that investigation is not based on assumptions and presumptions but on documents and existence of certain facts.

(ix) 3rd party records are actually the records obtained from the active possession of Noticees of the case.

(x) There are multiple records found during searches w.r.t. handwritten documents of employees. Further, the documents which were printed from Pen-drive were in their active possession records under Panchnama.

8. Heard the parties and considered their submissions.

9. We find that this is the second round of litigation. In the earlier round of litigation, this Tribunal, vide Order passed on 19th January, 2021, had remanded the matter back to the adjudicating authority, with the following directions: -

> *"14. In view of the above, the appeals are allowed by way of remand to the adjudicating authority for de novo consideration after observing the principles of natural justice. The concerned authorities are directed to make available documents/copies, a request for which is already made, to the appellants, within 4 weeks of receipt of this order; all the appellants are directed to file their written reply within further 8 weeks of the receipt of documents; the adjudicating authority is directed to complete the adjudication proceedings within further 8 weeks of the receipt of reply from the appellants, as may be practicable. Needless to say that the appellants would cooperate with the Adjudicating Authority and would not seek documents which were not requested for earlier or would not seek unnecessary adjournments."*

9.1. In the remand proceedings, there was a request on behalf of the appellants to provide the relied upon / non-relied upon documents, which were supplied to the appellants on 09.10.2023, despite a direction that the said documents were to be provided to the appellants within a period of four weeks. The appellants filed a reply on 08.02.2024 and thereafter, the impugned order has been passed, wherein the ld. adjudicating authority has ordered as under: -

"30.1 I confirm the demand of Rs.33,75,07,475/- (Rupees thirty three crores seventy five lakh seven thousand four hundred and seventy five) only, (comprising Cenvat duty of Rs. 32,76,77,054/-, Education Cess of Rs.65,53,608/-and Secondary & Higher Education Cess of Rs. 32,76,813/-) and order recovery of the same from M/s. Rashmi Metaliks Ltd. Unit-I. (i.e. 'the Noticee No.1') in terms of Section 11A(10) of the Central Excise Act, 1944:

30.2 I order for recovery of appropriate interest under Section 11AA of the Central Excise Act, 1944, against confirmed demand amount at Para 30.1 above;

30.3 1 impose a penalty of Rs.33,75,07,475/- (Rupees thirty three crores seventy five lakh seven thousand four hundred and seventy five) only on M/s. Rashmi Metaliks Ltd. Unit-I, (i.e.'the Noticee No.1') in terms of Section 11AC(1)(c) read with Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002;

30.4 I order for appropriation of the amount of Rs. 4,50,00,000/-(Rupees Four Crores Fifty Lakh) only, already voluntarily deposited by M/s. Rashmi Metaliks Ltd. Unit-I. (i.c. the 'Noticee No.1') in c-payment mode on different dates such as on 21.01.2013, 07.03.2013, 21.03.2013, 30.03.2013, 21.05.2013 and 24.06.2013 against the demand confirmed above;

30.5 I impose a penalty of Rs. 6,00,00,000/- (Rupees Six Crores) only on Sajjan Patwari, (Noticce no.2), erstwhile or present Director of M/s. Rashmi Shri Metaliks Ltd. Unit-I (i.e. Noticee No.1') under Rule 26(1) of the Central Excise Rules, 2002.

30.6 I impose a penalty of Rs. 6,00,00,000/- (Rupees Six Crores) only on Shri Sanjay Kumar Patwari, (Noticee no.3), erstwhile or present Director of M/s. Rashmi Metaliks Ltd. Unit-I (i.e. 'Noticee No.1') under Rule 26(1) of the Central Excise Rules, 2002.

30.7 I impose a penalty of Rs.1,00,00,000/- (Rupees One Crore) only on Shri Salil Roy, (Noticee no. 4), erstwhile or present Director of M/s. Rashmi Metaliks Ltd. Unit-I (i.e. 'Noticee No.1') under Rule 26(1) of the Central Excise Rules, 2002.

30.8 I drop the proceedings against Shri Surendra Jha, (Noticee No.5), erstwhile Director of M/s Rashmi Metaliks Ltd. Unit-I (i.e. 'Noticee No.1') as he has expired.

31.1. I confirm the demand of Rs.10,93,71,399/- (Rupees Ten crores Ninety three lakh seventy one thousand three hundred and Ninety nine) only, (comprising Cenvat duty of Rs. 10,61,85,808/-, Education Cess of Rs.21,23,730/- and Secondary & Higher Education Cess of Rs. 10,61,861/) and order recovery of the same from M/s. Rashmi Metaliks Ltd. Unit-II, (i.e. "the Noticee No. 6") in terms of Section 11A(10) of the Central Excise Act, 1944;

31.2. I order for recovery of appropriate interest under Section 11AA of the Central Excise Act, 1944, against confirmed demand amount at Para 31.1 above;

31.3. I impose a penalty of Rs. 10,93,71,399/- (Rupees Ten crores Ninety three lakh seventy one thousand three hundred and Ninety nine) only on M/s. Rashmi Metaliks Ltd. Unit-II. (i.e, the 'Noticee No.6') in terms of Section 11AC (1) (c) read with Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002:

31.4 I impose a penalty of Rs.2,00,00,000/-(Rupees Two Crores) only on Shri Sajjan Patwari, (Noticee No.7), erstwhile or present Director of M/s. Rashmi Metaliks Ltd. Unit-II (i.e. Noticee No.6') under Rule 26 (1) of the Central Excise Rules, 2002.

31.5 I impose a penalty of Rs.2,00,00,000/- (Rupees Two Crores) only on Shri Sanjay Kumar Patwari, (Noticee No.8), erstwhile or present Director of M/s. Rashmi Metaliks Ltd. Unit-II (i.e.'Noticee No.6') under Rule 26 (1) of the Central Excise Rules, 2002.

31.6 I impose a penalty of Rs.50,00,000/- (Rupees Fifty Lakhs) only on Shri Salil Roy, (Noticee no. 9), erstwhile or present Director of M/s. Rashmi Metaliks Ltd. Unit-II (i.e. 'Noticee No.6') under Rule 26(1) of the Central Excise Rules, 2002.

31.7. I drop the proceedings against Shri Surendra Jha, (Noticee no. 10), erstwhile Director of M/s. Rashmi Metaliks Ltd. Unit-II (i.e. 'Noticee No.6') since he has expired.

32.1 I confirm the demand of Rs.4.85,80,126/- (Rupees four crores Eighty Five lakh Eighty thousand one hundred and twenty six) only, (comprising Cenvat duty of Rs.4,71,64,290/-, Education Cess of Rs. 9,43,503/- and Secondary & Higher Education Cess of Rs. 4,72,333/-) and order recovery of the same from M/s. Rashmi Cement Ltd. Units-I & II. (i.e. "the Noticee No.11") in terms of Section 11A(10) of the Central Excise Act, 1944;

32.2 I order for recovery of appropriate interest under Section 11AA of the Central Excise Act, 1944, against confirmed demand amount at Para 32.1 above;

32.3 I impose a penalty of Rs.4,85,80,126/- (Rupees four crores Eighty Five lakh Eighty thousand one hundred and twenty six) only on M/s. Rashmi Cement Ltd. Units I & II. (i.e. "the Noticee No. 11") in terms of Section 11AC(1)(c) read with erstwhile Section 1AC of the Central Excise Act. 1944 read with Rule 25 of the Central Excise Rules, 2002;

32.4. I impose a penalty of Rs.1,00,00,000/- (Rupees One Crore) only on Shri Sajjan Patwari, (Noticee No. 12), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units I & II (i.e. 'Noticee No.11') under Rule26 (1) of the Central Excise Rules, 2002.

32.5. I impose a penalty of Rs.1,00,00,000/- (Rupees One Crore) only on Shri Sanjib Kumar Patwari, (Noticee No.13), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units I & II (i.e. 'Noticee No.11') under Rule 26 (1) of the Central Excise Rules, 2002.

32.6 I impose a penalty of Rs.25,00,000/-(Rupees Twenty Five Lakhs) only on Shri Subhendu Biswas, (Noticee No. 14), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units I & II (i.e. 'Noticee No.11') under Rule 26 (1) of the Central Excise Rules, 2002.

33.1 1 confirm the demand of Rs. 17,73,58,794/- (Rupees seventeen crores seventy three lakh fifty eight thousand seven hundred and ninety four) only, (comprising Cenvat duty of Rs. 17,21,92,985/-, Education Cess of Rs.34.43,889/- and Secondary & Higher Education Cess of Rs.17,21,920/-) and order recovery of the same from M/s. Rashmi Cement Ltd.

Unit-III, (i.e. "the Noticee No.15") in terms of Section 11A(10) of the Central Excise Act, 1944:

33.2. I order for recovery of appropriate interest under Section 11AA of the Central Excise Act, 1944 against confirmed demand amount at Para 33.1 above;

33.3 I impose a penalty of Rs. 17,73,58,794/- (Rupees seventeen crores seventy three lakh fifty eight thousand seven hundred and ninety four) only on M/s. Rashmi Cement Id. Unit-III. (i.e. "the Noticee No.15") in terms of Section 11AC(1)(2) read with Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002:

33.4 I order for appropriation of the amount of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs) only, already paid by M/s. Rashmi Cement Ltd., Unit-III, (i.e. the 'Noticee No. 15') in e-payment mode on different dates such as on 21.01.2013, 07.03.2013, 21.03.2013, 30.04.2013, 21.05.2013 and 24.06.2013 against the demand confirmed above;

33.5 I impose a penalty of Rs. 3,00,00,000/- (Rupees Three Crores) only on Shri Sajjan Patwari, (Noticee No. 16), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units-III (i.e. 'Noticee No.15') under Rule 26(1) of the Central Excise Rules, 2002.

33.6 I impose a penalty of Rs.3,00,00,000/-(Rupees Three Crores) only on Shri Sanjib Kumar Patwari, (Noticee No. 17), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units-III (i.e. Noticee No.15') under Rule 26(1) of the Central Excise Rules, 2002.

33.7 I impose a penalty of Rs. 50,00,000/- (Rupees Fifty Lakhs) only on Shri Subhendu Biswas, (Noticee No. 18), erstwhile or present Director of M/s. Rashmi Cement Ltd. Units-III (i.e. 'Noticee No.15') under Rule 26(1) of the Central Excise Rules, 2002."

10. On the basis of the arguments advanced by both the sides, we find that the following issues emerge: -

(A) Whether the allegation of clandestine removal of goods can be based on assumptions and presumptions without providing any corroborative evidence, or not.

(B) Whether the allegation of clandestine removal can be established on the basis of private records in the absence of any corroborative evidence, or not.

(C) Whether the said statements have any evidentiary value without complying with the procedure laid down under Section 9D of the Central Excise Act, 1944, or not.

(D) Whether the print-outs taken from pendrives and other electronic equipment can be treated as admissible evidence without complying with the conditions prescribed under Section 36B of the Central Excise Act, 1944, or not.

(E) As to whether duty paid during the course of investigation can be treated as an 'admission' for confirmation of the impugned demands against the appellants, or not.

(F) Whether the demands can be confirmed against the appellants on the basis of documents recovered from third-party premises, without establishing that the appellants herein were having any relation with those premises, or not.

(G) Whether shortage of stock during the course of investigation can be the basis to allege clandestine removal of goods, or not.

(H) Whether, in the facts and circumstances of the case, penalties can be imposed on the appellants, or not.

Issue (A): Whether the allegation of clandestine removal of goods can be based on assumptions and presumptions without providing any corroborative evidence, or not.

11. In this case, the allegation of clandestine removal of finished goods has been made against the appellants on the basis of investigation conducted at several premises, of employees and ex-employees of the appellants, and two premises of the appellants, during the course of which certain print-outs from pendrives, along with note pads and miscellaneous documents, were recovered. Thereafter, statements of those employees / ex-employees / directors of the appellant-companies were recorded. On this basis, it has been concluded that the appellants were engaged in the activity of clandestine manufacture and clearance of goods without payment of duties.

11.1. To allege clandestine removal of goods, guidelines have been laid down by this Tribunal in the case of *M/s. Arya Fibres Pvt. Ltd. v. Commissioner of Central Excise, Ahmedabad [2014 (311) E.L.T. 529 (Tri. – Ahmd.)]* which are 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."*

11.2. As per the said guidelines framed by this Tribunal, there should be evidence in support of clandestine removal and raw materials found in excess of that contained as per statutory records. In this case, no effort has been made by the investigating team or the adjudicating authority, to find out the excess procurement of raw materials, if any, by the appellants. An inference has been drawn on the basis of the documents recovered from third party premises and documents found in the appellants' premises, recorded in their statutory records, and the difference has been treated to be arising due to clandestine removal of goods. However, no incidents of any actual removal of unaccounted finished goods have been found, to substantiate the allegation of clandestine removal of goods. It is only a presumption that the difference arising between the private records/documents recovered from third party premises and the statutory records of the appellants is on account of clandestine removal of goods. Buyers were also not identified, on the basis of those private records, to allege that the goods had been clandestinely removed. We also find that there is no evidence brought on record to prove the receipt of sale proceeds, whether by cash or by cheque, of the goods manufactured by the appellants or their authorized representatives.

11.3. Further, it is a fact that for clandestine removal of such a huge quantity of goods from their factory premises, excess electricity is required to be used, but no efforts have been made by the investigating team to ascertain the consumption of electricity in excess, if any, of what is necessary to manufacture the goods which are otherwise manufactured and validly cleared by the appellants on payment of duty. No efforts were also made to find out as to how much is the production capacity of the appellants' plants, as to how much quantity had been cleared by them on payment of duty or as to how much quantity had been manufactured in excess of such quantity.

11.4. No statements of buyers, to corroborate the alleged illicit manufacture and clearance of goods by the appellants, have been recorded. The alleged buyers are not the actual buyers as there is no direct transaction between the appellants and such buyers.

11.5. It is observed that the transportation of such a huge quantity of goods also could not be proved; only the statement of some owners of transportation companies have been recorded, who could not verify the clearance of the goods. In fact, statements of drivers have also not been recorded, to prove transportation of such goods.

11.6. In such circumstances, by relying upon the decision in the case of *M/s. Arya Fibres Pvt. Ltd. (supra),* we hold that the charge of clandestine removal has only been made on the basis of assumptions and presumptions, without any thorough investigation.

11.7. In this regard, we take note of the fact that the Revenue has heavily relied on the decision in the case of *M/s. Thermotech v. Commissioner of Central Excise, New Delhi [2013 (293) E.L.T. 712 (Tri. – Del.)],* to say that there was clandestine removal of goods by the appellants. We find that the said decision in *M/s. Thermotech (supra)* has been set aside by the Hon'ble Delhi High Court in the case of *Flevel International v. Commissioner of Central Excise [2016 (332) E.L.T. 416 (Del.)]* wherein the Hon'ble High Court has observed as under: -

> *"55. Mr. Hari Shanker, learned Senior counsel for the appellant, has also drawn the attention of the Court to a decision of the CESTAT in Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II - 2014 (311) E.L.T. 529 (Tri.-Ahmd.) where the entire law concerning clandestine removal has been discussed and the legal position has been summarised as under :*
>
> *"(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."*
>
> *56. In the present case, there is no attempt made by the Department to substantiate the allegation of manufacture of as many as 606 ACs by the appellant. No evidence has been produced to show that the basic raw materials required for manufacturing such a large number of ACs was procured by the appellant.*
>
> *57. For all of the aforementioned reasons, the Court is satisfied that the impugned majority order of the CESTAT on the issue of clandestine removal of 606 ACs by the appellant without payment of duty suffers from serious errors and, therefore, cannot be sustained in law."*

11.8. Further, in the case of *Commissioner of Central Excise, Kolkata-III v. M/s. Sai Sulphonate Pvt. Ltd. [2022 (380) E.L.T. 441 (Cal.)],* the Hon'ble High Court at Calcutta has observed as under: -

> *"6. In our considered view, the Tribunal rightly granted the relief to the assessee as allegation of clandestine removal is a very serious charge and the onus of establishing the same is first on the department and upon the onus being discharged in the manner common to law, then and then only the burden of proof shifts to the assessee. In the instant case, admittedly there was no material on record establishing the charge of clandestine removal and such charge was made against the assessee by way of an inference taking note of the ratio adopted in the manufacturing process."*

11.9. In view of the above, we answer the issue in favour of the appellants, that the allegation of clandestine removal of goods cannot be based on assumptions and presumptions without providing any corroborative evidence.

Issue (B): Whether the allegation of clandestine removal can be established on the basis of private records in the absence of any corroborative evidence, or not.

12. We find that in the present case, most of the documents, on the basis of which clandestine removal of goods has been alleged against the appellants, have been recovered from residential premises of employees / ex-employees of the appellant-companies and those premises were neither owned by the appellants nor owned by those employees / ex-employees. Thus, the said records have been recovered from third-party premises. In such circumstances, can it be held that the appellants were engaged in the activity of clandestine removal of goods on the basis of such records?

12.1. The said issue has been examined by this Tribunal in the case of *Sharda Re-Rollers Pvt. Ltd. & ors. v. Commissioner of C.Ex., Cus. & S.T., Odisha [2025 (5) TMI 1281 – CESTAT, Kolkata],* wherein it has been observed as under:

> *"8. Moreover, in the case of K.Rajagopal vrs. Commissioner of Central Excise, Madurai, 2002 (142) ELT 128 (Tri-Chennai) this Tribunal held as under:*
>
> > *"6. We have perused the order of the Commissioner which is extracted supra. On a careful reading of the said order, we have to observe that the said finding recorded is totally based on presumptions and assumptions. In all clandestine removals, it has been now well laid that the crux of the issue in respect of clandestine removal is that Revenue cannot proceed solely on the basis of a seized private notebook maintained by a worker unless the entries are corroborated by various other pieces of evidences in as much as that Revenue has to show that appellants have purchased the inputs from market and utilized the same and that the same has been sold to particular persons through invoices or otherwise and the money has flowed back as capital. In this particular case, admittedly the only piece of evidence is a notebook seized from the premises of the appellant. IT was brought to the notice of the seizing officers that it was maintained by the Accountant who was very much present during the time of investigation. It was the duty of the investigating officers to have sought explanation from the said Accountant with regard to the entries made therein. Non-examination of the Accountant has rendered the document inadmissible evidence. The findings recorded in para 16 that the Accountant is now not available and his whereabouts could not be traced is not acceptable for the reason that at the time of the raid and the seizure of the notebook, the said Accountant was very much present. Be that as it may, the Revenue is required to show that appellants have purchased raw*

materials valued more than Rs. 1.09 crores. It is the specific plea of the appellants that the inputs are supplied under licence under the Explosives Act and they are required to purchase only through governmental sources. This was explained by the Managing Partner when he was examined by the Investigating officers. Therefore, at the time of investigation, it was the duty of the said officers to have contacted the supplier of Governmental agency and examined them and should have seen through their records as to whether the appellants have purchased such huge quantities of inputs for manufacture of the fireworks. The said non-examination of the supplier of raw material which is controlled and a licensed commodity is fatal to this case and it can be easily concurred that Revenue has not proved the case with regard to the purchase of raw materials for manufacture of final product.

7. It is seen that the appellants have also brought to the notice of the Revenue that fireworks are required to be insured mandatorily while removing the same and various authorities are required to be informed and permission obtained Revenue has not examined this point in the correct perspective. The danger of removal and penal consequence of non-insurance is a serious matter and the Commissioner ought to have relied on same evidence to show as to how they could manufacture and remove such controlled explosive commodity without proper protection and insurance. Merely to give finding that such clandestine removal is done secretly and stealthily and they do not follow the law is not acceptable in the peculiar facts and circumstances of this case. There is no other corroborative evidence with regard to the sale and purchase by particular persons and there is no evidence of removal through any transporter and the transporters have not been examined and statements recorded. Each link in the aspect of production and clandestine removal is required to be proved and since this has not been done, the demands are required to be set aside for lack of evidence in the matter. It has been laid

> *down b the Tribunal, as in the case of Kashmir Vanaspati that a private notebook cannot be a conclusive piece of evidence to prove clandestine removal Large number of judgements have been rendered by this Bench and the matter has been analysed carefully and the Tribunal has laid down that proof is required to be produced by deals with each of the factors required to be proved and it has been laid down very conclusively in the cited judgements that the scribe of the notebook is required to be examined and details of the notebook is required to be proved as in the case of CCE v. Raman Ispat (P) Ltd CCE Mumbai v. Mira Silk Mills, CCE Patna v. Universal Polythene Industries CCE Chandigarh v. Indian Hume Pipes Co. Deepak Tandon v. CCE Bhubaneshwar. Shree Bhallabh Glass Works v. CCE Ahmedabad etc. (all supra)"*

And held that private notebooks are not conclusive piece of evidence to proof clandestine removal.

9. Further in the case of Commissioner of C.Ex. Chandigarh versus Laxmi Engineering recovered during raid and corroborated by some supportable evidence holding that there was an attempt of clandestine production and removal of goods then it is necessary to have some positive evidence of clandestine production and removal of the goods. Admittedly, no such evidence is produced by the Revenue therefore, demand against the appellant is not sustainable.

10. We further take note of the fact that in the case of Commissioner of Central Excise, Haldia versus Lord's Chemicals Ltd. 2010 (258) E.LT. 48 (Cal.) the Hon'ble High Court observed as under.

> *"2. Admittedly, a show cause notice was issued on the presumption that the entries, as recorded in the private note book maintained by the labour contractor, should be taken as the clearance figures of finished products from the factory. It is settled law that such presumption is not permissible. The presumption, on the basis of which the show*

> *cause notice was issued, was misplaced in the absence of any corroborating, reliable and independent evidence. Therefore, the Tribunal below was right in rejecting the contention of the revenue and in accepting the contention of the assessee. Therefore, the appeal is summarily dismissed.*

11. Therefore, on the basis of private documents recovered from the factory of the appellant cannot be the basis to allege clandestine removal of goods in the absence of satisfying the tests laid down in the case of Arya Fibres Pvt. Ltd. (Supra). Further, in the statements recorded during the course of investigation has been relied the same is not the admissible evidence in the light of the decision of the Hon'ble Chattisgarh High Court in the case of Hi Tech Abrasives Ltd. versus Commissioner of C.Excise & Customs, Raipur, 2018 (362) E.L.T. 961 (Chattisgarh) wherein the Hon'ble High Court observed as under.

> *"9.5. Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has tobe construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical dn fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of*

statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the adjudicating officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Pvt. Ltd. (Laws (SC) 2011 838)=2011 (270) E.L.T. 643 (S.C). That decision turned on its own facts. In para 19 of the judgement, it was concluded as below:

"19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation f threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing Director of the company of his own volition deposition the amount of Rs. 11 lakh towards excise duty and therefore in the facts

> *and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."*
>
> *Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that manner."*

> *12. In view of the above discussion and observations it is alleged that appellants were involved in clandestine removal of goods on the basis of private records during the course of investigation and statements recorded during the course of investigation which were not corrugated by the tests laid down in the case of Arya Fibres Pvt. Ltd. (Supra) the demand of Central Excise duty is not sustainable against the appellant. As demand of duty is not sustainable, consequently, no penalty can be imposed on the appellant. In these terms we drop the demand alongwith penalties imposed on the appellant."*

12.2 In view of the above, we hold that the charge of clandestine removal of goods cannot be proved on the basis of private records recovered during the course of investigation in the absence of any corroborative evidence in support. Therefore, the said issue also stands answered in favour of the appellants.

Issue (C): Whether the said statements have any evidentiary value without complying with the procedure laid down under Section 9D of the Central Excise Act, 1944, or not.

13. Regarding the issue as to evidentiary value of statements without complying with the procedure laid down under Section 9D of the Central Excise Act, the said issue has already been examined by this Tribunal in the case of *M/s. Jai Balaji Industries Limited & ors. v. Commissioner of C.G.S.T. and Central Excise, Bolpur [2023 (8) TMI 989 – CESTAT, Kolkata],* wherein this Tribunal observed as under: -

> *"13. The next evidence relied upon by the adjudicating authority to confirm the demands in the impugned order are the statements recorded on the date of search and subsequently during the course of investigation. The statements recorded and the contents therein are given below in brief:*
>
> *13.1 A statement of Shri Sushil Kumar Roy, Associate (Commercial) of JBIL-III was recorded in which he inter alia stated that data sheet retrieved from pen drives were the details of Billets sold 'on bills' as well as 'without bills'; that whenever tax invoice number is not given some of them 'might be' for without bill dispatches because in some of such cases, bills might have been issued from JBIL-IV but entries were made in the pen drives only to keep account. We find that this statement is not very categorical about the clandestine clearances.*
>
> *13.2 A statement of Shri Kanhaiya Agarwal, weighbridge in-charge of JBIL-III was recorded on 17.07.2014, wherein he inter alia stated that he used to make weighment of goods at the weigh bridge of all incoming raw material as well as of*

outgoing finished goods. On being asked to explain about the pink weighment slips and slip pad as recovered from JBIL-III, he stated that weight of the material which has to be cleared without invoices was being mentioned in these pink weighment slips which was later handed over to Shri Sushil Kumar Roy. This statement was later retracted y him during cross examination before the adjudicating authority.

13.3. On 17.07.2014, a search was also conducted at the Head Office of Jai Balaji Group in Kolkata. The officers took out printouts of some of the e-mails from company's mail –ID handled by Shri Diptendu Samui, who was working as Accounts officer. Two pen drives were recovered from the possession of Shri Anil Kumar Agarwal. The officers also resumed two laptops under a Panchnama.

13.4. A statement of Shri Diptendu Samui, Accounts Officer, was recorded wherein he was shown certain messages retrieved from his mobile phone. In the present proceedings, there were only two messages showing purchase of scrap of only 15 MT and 10 MT, totally 25 M.T of scrap purchased in cash. Shri Diptendu Samui in his cross examination had categorically stated that both the above entries of purchase of 25 M.T. of scrap was accounted for in their books of records.

13.5 A statement of Shri Raghunath Jhunjhunwala, weighbridge in-charge of JBIL IV was recorded, wherein he, inter alia, explained the procedure of weighment of raw materials and finished goods. He uses a pink slip for final weighment. He was shown pink slip Nos. 77, 79 both dated 18-08-2013 recovered from M/s. Baba Strips & Tubes Ltd on 3-04-2014 to which he stated that slip No. 77 & 78 was in his handwriting whereas slip No. 79 was in the handwriting of Rudra Tapas.

13.6 A statement of Shri Partho Sarkar, Associate Manager Excise of JBIL-IV was recorded wherein he stated that central excise duty was paid only on the invoices prepared and kept in statutory records. If invoice was not prepared for any consignment, no central excise duty was paid by JBIL-IV. No further investigation was conducted to substantiate this evidence.

13.7 A statement of Shri Anup Kumar Aggarwal, former Vice-President(Commercial) of Group Company was recorded wherein he, inter alia, stated that while working with Jai Balaji Group he was looking after procurement of raw materials; that while directing the dispatch plan as per the direction of Shri Rajiv Jajodia, Director, he used to interact with weighbridge supervisors namely Shri Kanhaiya at Unit-III; that whether a particular consignment was to be dispatched with bill or without bill was decided by the Directors only; and that the payment for such dispatches was received in JBIL group in cheque or cash respectively.

13.8 None of the persons who have given the statements as mentioned above have retracted their statements initially. The Appellants asked for cross examination of the witnesses whose statements have been relied upon to demand duty. The cross examination conducted by the adjudicating authority and the replies given by the witnesses during cross examination are furnished below:

13.9 The gist of cross-examination of various witnesses is as under:-

13.9.1 Sushil Kumar Roy in respect of statement 17-07-2014 *(i) The pen drive in question was provided to him by Mr Gautam Banerjee who was an associate like him in the company.*

(ii) All the entries, which were found in the pen drives, were not made by him.

(iii) These entries were made by other associates like Shri Gautam Banerjee, Shri Samiran Bose and Shri Krishanu Bhattacharya.

(iv) The data which was fed by him in the pen drives was fed on different computers.

(v) He was pressurized to make these statements.

(vi) He was told by the officers that if he did not make such statements, he would be arrested, but there would be no inconvenience if he stated as mentioned in the statements.

(vii) That despite the entries in the pen drives about clearance of any consignments there was possibility of like order getting cancelled, the vehicle developing breakdown etc.

(viii) Where some of the entries of duty payment had been left blank, he could not say with certainty that no duty was paid in cases of such goods as there was a possibility that duty had been paid on these goods later.

(ix) When he was confronted with 3 pink weighment slips no 65, 66 & 67 all dated 16-07-2014 and asked whether he had made entries in pen drives in respect of these weighment slips, to which he answered that the relevant entries were made by Shri Gautam Banerjee who was another Data Entry Operator.

(x) That inculpatory portions of his statements were recorded by the officers under pressure.

(xi) He had no idea whether the goods were cleared to Shri Girish Tikmani without payment of duty.

13.9.2Kanhaiya Aggarwal in respect of statement 17-07-2014

The pink slips were prepared in all cases where computer slips was generated.

(i) The question of clearances of goods without payment of duty on the strength of pink slips did not arise as his role was limited to weighment of the goods and issuance of weighment slips.

(ii) He categorically stated that he was asked to say that the goods were cleared without payment of duty.

(iii) In some cases the goods were not cleared after weighment due to various reasons such as breakdown of the vehicle.

(iv) Not responsible for the dispatch of the goods.

13.9.3. Raghu Nath Jhunjhunwala in respect of statement dated 17-11-2014

(i)That there were occasions when the vehicle broke down and when some orders were cancelled the goods did not leave the factory despite issuance of pink slips.

(i) Pink slip number 77 which was in his handwriting he was subsequently informed by Shri Partho Sarkar that the said goods were rejected.

(ii) Denied any practice that he used to write year 2003 instead of 2013.

(iii) The purport of his answer to question No.9 and stated that he had made the said averment on the basis of some documents of M/s. Baba Strips and he was forced to write accordingly.

13.9.4 Partho Sarkar in respect of statement 17-11-2014

(i) He was never asked by anyone to prepare the invoice without the pink coloured weighment slips. He also denied that he was asked by anyone not to record any production in the production records. He also denied having been asked by anyone not to record any raw material received in the factory.

(ii) That there were instances where pink slips were issued but no invoice was issued as due to break down of vehicle or order having been cancelled.

13.9.5 Shri Diptendu Samul in respect of statement dated 17-07-2014

Wherever some message of payment on cash was cited in the Show Cause Notice it was clarified by Shri Diptendu Samul that the said purchase was accounted for in their records.

13.9.6 Anup Kumar Agarwal in respect of statement 11-12-2014

(i) He was responsible only for procurements of raw materials. Hence he was not in a position to comment about dispatches.

(ii) Denied having dealt with the sale of finished goods by JBIL or any dispatches of the goods.

(iii) Stated that he had left JBIL at the time recording of his of the statement. He was advised by the DGCEI officials to tender the statement as

they desire so that he was free from further investigation.

(iv) Stated that his statement was dictated by DGCEI officials.

13.9.7 Girish Tikmani in respect of statement dated 29-02-2015

He used to receive Pig Iron from JBIL III on the basis of invoices and weighment slips and was making payments to them through RTGS and cheques.

(i) That he was never confronted with any computer printouts by the investigating officers while recording his statement dated 20-2-2015.

(ii) Denied having received any goods from JBIL III without any bill.

(iii) When confronted with the portion of the statement wherein he had stated having received the goods without bills from JBIL III he stated that he was surrounded by many officers and he was under great stress when he wrote his statement.

(iv) Informed that he had retracted from his statement on the very next day and brought on record notarized affidavit dated 21-2-2015.

13.10. From the above, we observe that during the course of cross examination, most of the persons who have given the statements retracted their statements. In the impugned order, the adjudicating authority has held that if the statements were recorded under threats and duress, it is not understood as to what prevented them from retracting their statements within a reasonable period of time. She further held that all the statements of the concerned persons were *supported by documentary evidences. Accordingly, she justified in demanding duty by relying upon these statements. However, a perusal of Section 9D of the Central Excise Act, 1944 clearly establishes that unless a person who has made the statement is examined as a witness before the Adjudicating Authority, no reliance can be placed on any statement recorded under section 14 of the Central Excise Act. Any statement recorded under Section 14 of the Central Excise Act could be admitted in evidence only after the process of examination and cross examination is completed under Section 9D. For undertaking this exercise, it is not necessary that a person should have retracted from his statement. If the argument of the Adjudicating Authority is accepted, then the provisions of Section 9D would become irrelevant. This cannot be the intention of the legislature. In this case, the adjudicating authority has allowed cross examination on selective basis. But, she has not taken into account the retractions made by them during cross examination.*

13.11. The Appellants stated that the procedure set out under Section 9D is a mandatory procedure and without following this procedure no reliance can be placed on any statement recorded under Section 14 of the Central Excise Act, 1944. We agree with the contention of the Appellants. In the case of G-Tech Industries Vs Union Of India reported in 2016(339) ELT 209 (P&H), the Hon'ble Punjab and Haryana High Court has given an elaborate findings regarding the procedure to be followed under Section 9D. The relevant Part of the judgement is reproduced below:

> *3. The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2*

has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ` 7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.

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

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

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

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of

opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

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

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

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

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

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

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

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

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

(i) when the person who made the statement is dead,

(ii) when the person who made the statement cannot be found,

(iii) when the person who made the statement is incapable of giving evidence,

(iv) when the person who made the statement is kept out of the way by the adverse party, and

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

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

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

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

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

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

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

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

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

18. It is only, therefore,-

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

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

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

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

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

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

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

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

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

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

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

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be

made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

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

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

> *Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).*
>
> *25. The writ petition is allowed in the aforesaid terms.*

13.12. Once it duly came on record that various statements recorded from the witnesses were not of voluntary nature but were recorded after putting undue pressure upon the witnesses the same could not be admitted in evidence by the Adjudicating Authority. The same clearly lost its evidentiary value. Once these statements are excluded from evidence no reliance could be placed on the computer printouts and other evidences. The law laid down in the Delhi High Court, in the case of C.C.E Vs. Vishnu and Co. Ltd reported in 2016 (332) ELT 793 (Del), is reproduced below:

> *41. What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard.*
>
> *42. The contention that it is the responsibility of the noticees to produce the witnesses for cross-examination is a strange one considering that they are witnesses of the*

> *Department and that their statements are being relied upon by the Department in support of the SCNs. Since it is relying on such statements, it is the responsibility of the Department to ensure their presence for cross-examination. As already mentioned, whenever such witnesses (i.e. six of them) were produced for cross-examination they resiled from their earlier statements.*
>
> *43. It is not a matter of mere coincidence that none of the witnesses who were cross-examined stood by their earlier statements. It is one thing to overlook this feature on the premise that all of them were under the pressure and control of the noticees. The other approach is to view this with some caution and ask what might be the case if the remaining witnesses were also produced for cross-examination? Importantly, what would be the prejudice caused to the noticees, in such circumstances, by their non-production for cross-examination? Thus a doubt is created in favour of the noticees when such witnesses do not turn up for cross-examination. It is the latter approach that has weighed with the CESTAT. That, in view of this Court, was a possible approach and does not render its order perverse on that score.*

13.13. In the case of Hi Tech Abrasives Ltd Vs Commissioner of C.Ex and Cus, Raipur, reported in 2018 (362) ELT 961 (Chattisharh), the Hon'ble High Court has held that unless the procedure laid down in Section 9D of the Central Excise Act, 1944 is followed in letter and spirit, no reliance can be placed on any statement recorded under Section 14 of the Central Excise Act, 1944. The relevant part of the judgement is reproduced below:

9. Findings on Substantial Questions of Law (i) & (ii) :

We shall decide the first two substantial questions of law as they are overlapping. The submission of counsel for the appellant has been that firstly, the Director's statement was not admissible and secondly it cannot be treated as admission because in reply to Show Cause Notice, the said statement was stated to have been obtained under duress. We shall first examine the legal position with regard to the admissibility of the statement of Director which admittedly was taken during search operations by the investigation officers.

9.1 At the outset, it needs to be clarified that during the course of argument, Learned Counsel for the parties agreed that second substantial question of law is with regard to legality of procedure adopted by the adjudicating authority and not the Tribunal as such because the Tribunal has only exercised appellate jurisdiction. This is quite obvious from orders passed by the Tribunal, the appellate authority and pleadings/ground in the appeal. There is no dispute that the adjudicating authority did not record the statement of the Director Mr. Narayan Prasad Tekriwal and the basis of the finding recorded by the adjudicating authority as well as Customs, Excise and Service Tax Appellate Tribunal, has been the statement of the Director as recorded by the investigation officer during investigation. Section 9D of the Central Excise Act of 1944 reads as under :

Section 9D - Relevancy of statements under certain circumstances. A statement made and

— (1) signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

When the person who made the statement is (a) dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

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

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

On scanning the anatomy of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed *would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. (her, the adjudicating authority).*

9.2 At this juncture, we need to notice the provision contained in Section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the court, as they apply in relation to proceeding before the Court. This provision when read in juxtaposition, the small clauses (a) and (b) under sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the adjudicating authority.

9.3 A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.

9.4 The legislative scheme, therefore, is to ensure that the statement of any person *which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.*

9.5 Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the *statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana.*

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Private Limited (Laws (SC) 2011

> *838) = 2011 (270) E.L.T. 643 (S.C.). That decision turned on its own facts. In para 19 of the judgment, it was concluded as below :*
>
> *We are of the considered opinion that it "19. is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing director of the Company of his own volition deposition the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."*
>
> *Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that mannert statements recorded without following the procedure as set out in Section 9D of the Central Excise Act, 1944 has no evidentiary value :-*

13.14. From the above discussion and the decisions cited above, we observe that the statements recorded cannot be relied upon to demand duty, unless the procedure set out in Section 9D are followed. None of the statements recorded in this case conclusively establish any clandestine *clearance. During cross examination all of them retracted their earlier statements. Hence, the evidentiary value of the statements have to be examined in the light of the decisions cited above."*

13.1. Further, in the case of *Commissioner of Central Excise, Delhi-I v. M/s. Kuber Tobacco India Ltd. [2016 (338) E.L.T. 113 (Tri. – Del.)],* the Tribunal at Delhi has dealt with the said issue and observed as under:-

> *"7. We have gone through the facts of the case wherein the certain machines were installed at Sandeep Poultry Farm Khasra No. 63/3, Village Khera Khurd, New Delhi-110082 found wherein 'Kanchan/Kanchann' brand gutka and 'wiz' brand pan masala manufactured clandestinely without declaring the said premises as registered premises for manufacture of the said gutka. The contention of M/s. Kuber is that they were not involved in the activity of manufacture of gutkhas and the said activity was illicit and misused of their brand name and goodwill of the appellant by certain elements who were manufacturing duplicate goods bearing M/s. Kuber brand names and clearing them in the market. The facts of the care are not in dispute, the appellants have raised the dispute that the statements recorded during the course of investigation cannot be relied upon as admissible evidence in terms of the provisions of Section 9D(2) of the Act. In that circumstance, it is better to extract the provisions of Section 9D which are reproduced as under :-*
>
> *"9D. Relevancy of statements under certain circumstances - (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or*

proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

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

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

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

8. The main contention of the appellant is that the deponents whose statements have been relied upon by the adjudicating authority were not put to examination-in-chief before providing an opportunity of cross-examination. A plain reading of sub-section (1) of Section 9D makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein. Therefore, there is no doubt about the legal position that the procedure prescribed in sub-section

(1) of Section 9D is required to be scrupulously followed, inasmuch as in adjudication proceedings as in criminal proceedings relating to prosecution. Therefore, sub-section (1) of Section 9D set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer shall be relevant, for the purpose of proving the truth of the facts contained therein. If the circumstances are absent, therefore, the statement, which has been made during the course of inquiry/investigation, before a gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the fact contained therein as observed by Hon'ble Delhi High Court in the case of J.K. Cigarettes (supra) wherein Hon'ble High Court has observed as under :-

> *12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazetted rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the*

> *Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal.*

9. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a gazetted Central Excise officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, in so far as proving the truth of the contents thereof is concerned, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1). Therefore, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1)(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and (ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. The same view has been taken by Hon'ble Allahabad High Court in the case of Parmarth Iron Pvt. Ltd. (supra) wherein the High Court has observed as under :-

> *16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements,*

> *then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.*

10. We further find that in the case of Smt. Sharadamma (supra), Hon'ble Karnataka High Court has observed as under :-

> *9. It is not the duty of the Court to direct the parties or compel the parties as to in what manner they should conduct their case before the Court or also what quality of evidence they should place before the Court. But the duty of the court is only to appreciate the case in the proper perspective and on the basis of what is placed before the Court. Even with regard to the prayer for permitting the applicant to cross-examine the plaintiff, the prayer is misconceived as the question of cross-examination arises only when a witness has tendered evidence in chief-examination. Under section 138 of the Indian Evidence Act, cross-examination follows chief-examination, but not without chief-examination. If there is no chief-examination, there is no cross-examination. It is only witness who is examined in chief who can be cross-examined. Therefore, a prayer for cross-examination of the plaintiff even when the plaintiff has not been examined in chief is ridiculous and not provided for under Section 138 of the Indian Evidence Act. The Trial Court has rightly rejected the application. No scope for interference with an order of this nature.*

11. We further find that in the case of Swiber Offshore Construction Pvt. Ltd. (supra), this Tribunal has further observed as under :

> *6. We therefore have no hesitation in holding that the impugned Order passed by the Commissioner as an adjudicating authority is appealable order in terms of Section 129A of the Act, even as per the ratio laid down in the above binding precedent. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section 138B without there being any objective formation of opinion based on any material on record to come to the conclusion that any specified circumstance mentioned in Section 138B(l)(a) exists. These circumstances mentioned in Section 138B(l)(a) are also contained in pari materia Section 9D(l)(a) and were recorded as follows in J.K. Cigarettes Ltd., 2009 (242) E.L.T. 189 (Del.).*
>
> *"25. Section 9D of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant. These are :-*
>
> *(a) when the person who had given the statement is dead;*
>
> *(b) when he cannot be found;*
>
> *(c) when he is incapable of giving evidence;*
>
> *(d) when he is kept out of the way by the adverse party; and*

(e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable."

These circumstances show that if witness cannot be examined for any of these five reasons, the statement previously recorded would be relevant. The adjudicating authority was therefore bound to follow the binding precedent and in absence of any specified circumstance to consider the statement relevant without examining the witnesses, erred in rejecting the request of the appellant to examine the witnesses and to offer them for cross-examination.

8. The appellant has also relied on the judgment of Hon'ble Apex Court in Sukhwant Singh v. State of Punjab, (1995) 3 SCC 367 to give emphasis on his submission that examination of witness is mandatory unless specified exceptional circumstances mentioned in clause (a) of Section 138B(1) exist. The Hon'ble Apex Court was pleased to hold that -

"8. It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :

"138. Order of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts

> *to which the witness testified on his examination-in-chief.*
>
> *Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*
>
> *10. We therefore find force in the submission of the ld. counsel for the appellant. We find no reason to justify rejection of request made by the appellant to the adjudicating authority in light of Section 138B of the Act, to summon witnesses for examination and to offer them for cross-examination if their statements were to be considered as relevant and admitted in evidence in the interest of justice.*

12. We further find in the case of Bussa Overseas Properties Ltd., this Tribunal again observed as under :-

> *24. The fact that in cases relating to smuggling or indeed any case civil or criminal cannot or need not been proved for degree of mathematical precision or that the department governed by strict rules of evidence is again no answer. The department is certainly bound by the contents of the Customs Act, 1962 and the general principles of evidence.*
>
> *which has been affirmed by the Apex Court.*

13. We further find that Hon'ble Punjab & Haryana High Court in the case of Sukhwant Singh, it has been observed as under :-

> *8. It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :*
>
> *"138. Order of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*
>
> *The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
>
> *Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*
>
> *9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross- examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of*

tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898.

14. ***In view of the above analysis, it is clear that during adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence. Thereafter, the witness is offered to be cross-examined. In the absence of examination-in-chief, allowing the cross-examination, is a futile exercise. We further find that the appellant have challenged the impugned order on the ground that the evidence in the form of statements gathered have no link of the appellant to the activities took at Sandeep Poultry Farm which is required to be examined on the basis of records available during the course of adjudication and the same has not been considered judicially.”***

(Emphasis supplied)

13.2. In terms of Section 9D of the Central Excise Act, for relying upon the statements recorded during the course of investigation, the adjudicating authority was required to examine the witnesses, in chief, and also to form the opinion that, having regard to the facts and circumstances of the case, the statements of the witnesses should be admissible as evidence. Thereafter, the witnesses were required to be offered for cross-examination. In the absence of examination-in-chief, cross-examination cannot be provided and the same would be a futile exercise.

13.3. Admittedly, in this case, the ld. adjudicating authority, in the impugned order, has observed as under: -

> *"e) I find that considering the statement recorded by the witnesses and acceptances of documents recovered and seized by them voluntarily brings the evidential value of the statements under Section 24 of the Evidence Act. Accordingly, I find that such statement recorded under Section 14 of the Act of 1944 can be relied upon by the adjudicating authority. I have no doubt that the statements of the witnesses recorded under Section 14 of the Act of 1944 can be relied upon and treated as a relevant piece of material in the instant case, without calling upon them to again depose as a witness before the adjudicating authority in terms of Section 9D (1) (b) read with Section 9D (2) of the Act of 1944. The moment the adjudicating authority relies upon the statement recorded under section 14 of the Central Excise Act, it is indicative of the fact that necessary scrutiny in terms of Section 24 of the Evidence Act has been done and no separate order is required to be passed to this effect. This is because the recording of evidence is permissible under Section 14 of the Act of 1944 by issuing summons by a Central Excise Officer duly empowered by the Central Government in this behalf and the person concerned is under statutory legal obligation to disclose the truth and there are penal consequences for giving false evidence and the recording of evidence under section 14 of the Act of 1944 is deemed*

to be a judicial proceeding under Section 193 and Section 228 of Indian Penal Code.

f) It does not hold that the evidence recorded under Section 14 of the Central Excise Act is of no use and cannot be considered unless a person is examined in terms of Section 9D(1)(b) of the Act of 1944. In fact, it holds that these provisions are based on the Doctrine of Necessity and it provides for relevancy of even the statements recorded under Section 14 of the Act dispensing with or without the opportunity for testing the truth of such evidence by cross-examination.

g) I will rely on the judgement of

(i) The Hon'ble Supreme Court in the case of Surjeet Singh Chhabra Vs. UOI-[1997 (89) ELT 646 (SC)], wherein it has been held that confessional statement recorded before the Customs Officer is admissible and binding since Customs Officers are not Police Officers.

(ii) I find that the Apex Court in a series of judgments - (a) Naresh 3. Sukhawani vs. Union of India reported in 1996 (83) E.L.T. 258 (S.C.) (b) Surjeet Singh Chhabra vs. Union of India reported in 1997 (89) E.L.T. 646 (S.C.) (c) K.I. Pavunny vs. Asstt. Collr. (HQ.), C. Ex. Collectorate, Cochin reported in 1997 (90) E.L.T. 241 (S.C.) (d) Asstt. Collr. Of C. Ex., Rajamundry vs. Duncan Agro Industries Ltd. reported in 2000 (120) E.L.T. 280 (S.C.), has held that statement recorded by a gazetted officer of Customs under Section 108 of Customs Act, 1962 (identical to the provisions

of Section 14 of the Central Excise Act, 1944) is not hit by the provisions of Section 25 of the Evidence Act and the same is admissible as evidence, if it has been made voluntarily and is not vitiated on account of any threat, inducement etc. envisaged in Section 24 of the Evidence Act. For invoking the provision of Section 24, there must be evidence from which it appears that the factor mentioned in it exist, without which, a bald retraction of the statement has to be rejected as an afterthought. I find that Applying the above criteria, the retraction of statements of witnesses must be dismissed as an afterthought and statements have to be treated as his true, correct and voluntary statement."

[Ref. – under (VIII) at pg. 402-403 of 570 of the O-I-O dt. 31.05.2024]

13.3.1. Finally, he has concluded as under: -

"…Even after such disclosure, how they claim for cross examine their own employees? After passing of nearly 7 years after Issuance of SCN on 21.09.2016, no one can dream of that the employees of the manufacturing noticees will sing in the same tune what they have deposed under Section 14 of Central Excise Act 1944 during the course of investigation"

(Emphasis supplied)

[Ref. – under (XI)(a) at pg. 426 of 570 of the O-I-O dt. 31.05.2024]

13.3.2. Although the ld. adjudicating authority has relied upon the statements recorded during the course of investigation, while allowing cross-examination, has observed that "no one can dream of that the employees of the manufacturing noticees will sing in the same tune what they have deposed under Section 14 of Central Excise Act 1944 during the course of investigation". The said observation of the ld. adjudicating authority itself casts a doubt on the statements recorded during the course of investigation. The said statements, recorded during the course of investigation, were to be tested as per the provisions laid down under Section 9D of the Central Excise Act, 1944, which the Revenue has failed to do.

13.4. In these circumstances, we hold that the statements recorded during the course of investigation do not have any evidentiary value for alleging clandestine removal of goods on the part of the appellants. Accordingly, the said issue has been answered in favour of the appellants.

Issue (D): Whether the print-outs taken from pendrives and other electronic equipment can be treated as admissible evidence without complying with the conditions prescribed under Section 36B of the Central Excise Act, 1944, or not.

14. Although the computer print-outs / print-outs taken from pendrives have not been examined in terms of Section 36B of the Central Excise Act, 1944, which is in *pari materia* with Section 65B(4) of the erstwhile Indian Evidence Act, 1872, the ld. adjudicating authority has observed that: -

> ***"…My humble presentation before the representative learned Advocate is that how come the data recovered from places, disowned by the notice no-1, accurately takes its place in the statutory records of the notices ? In my opinion, recovery of lawful information of the notices from private premises, being knocked by the noticees several times, is the tangible evidence that those five premises were secretly used by the Noticees to suppress the clandestine removal of finished goods, even if there was no existence of agreement between the owners of the premises and the noticees. Accordingly, I find that documents recovered from such places can directly be related to manufacturing notices."***

(Emphasis supplied)

[Ref. – under (V)(a) at pg. 382 of 570 of the O-I-O dt. 31.05.2024]

14.1. The ld. adjudicating authority has relied upon the decision in the case of *Shafhi Mohammed v. The State of Himachal Pradesh vide judgement dated 30th January, 2018.* However, we find that the said decision has been examined by the Larger Bench of the Hon'ble Apex Court in the case of *Arjun Panditrao Khotkar v. Kailash Khushanrao Gorantyal [(2020) 7 SCC 1],* wherein the Hon'ble Apex Court has observed as under: -

"45. Thus, it is clear that the major premise of Shafhi Mohammad [(2018) 2 SCC 801: (2018) 2 SCC 807] that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

46. Resultantly, the judgment dated 3-4-2018 of a Division Bench of this Court reported as Shafhi Mohd. v. State of H.P.[(2018) 5 SCC 311: (2018) 2 SCC (Cri) 704], in following the law incorrectly laid down in Shafhi Mohammad [(2018) 2 SCC 801: (2018) 2 SCC 807], must also be, and is hereby, overruled.

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61. We may reiterate, therefore, that the certificate required under Section 65-B (4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P. V.2, and incorrectly "clarified" in Shafhi Mohammad [(2018) 2 SCC 801: (2018) 2 SCC 807],. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor [(1875) LR 1 Ch D 426], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render b Section 65-B(4) otiose."

14.2. Therefore, we find that the reliance placed by the ld. adjudicating authority on the decision in *Shafhi Mohammad (supra),* for not following the procedure laid down under Section 36B of the Act, is not correct. A certificate is required under Section 36B ibid., as is the condition precedent for admissibility of evidence by way of electronic records.

14.3. The same view has been expressed by the Hon'ble Apex Court in the case of *Anwar P.V. v. P.K. Basheer [(2014) 10 SCC 473].*

14.4. This Tribunal had an occasion to examine as to whether, without obtaining a certificate under Section 36B of the Central Excise Act, print-outs generated from personal computers or pendrives could be admitted as evidence or not in the case of *M/s. Trikoot Iron & Steel Casting Ltd. v. Additional Director General (Adjn.), Directorate General of GST Intelligence (Adjudication Cell) [Final Order No. 58546 of 2024 dated 09.09.2024 in Excise Appeal No. 55779 of 2023 – CESTAT, New Delhi].* The relevant observations of the Tribunal in the aforesaid decision are reproduced below: -

> *"15. To examine the issues that have been raised, it would be necessary to first examine section 36B of the Central Excise Act. It is reproduced:*
>
> *"Section 36B- Admissibility of micro films, 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 documents; 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‖).

(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 information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer,

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement 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 that 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

(c) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination 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 be 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.

16. Section 3 of the Evidence Act defines "document" as follows:

> *"—Document. – "Document" means any matter expressed or described upon any substance by means of letter, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."*

17. "Evidence" in section 3 of the Evidence Act is defined as follows:

> *"Evidence." -- "Evidence" means and includes — (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;*
>
> *Such statements are called oral evidence;*
>
> *(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."*

18. Section 36B of the Central Excise Act deals with cases where any document is required to be produced as an evidence in proceedings under the Central Excise Act and the Rules framed thereunder. Such certificate should be signed by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities. In such a case it shall be evidence of any matter which is stated therein. It specifically mandates production of a certificate:

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

> *(ii) 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,*
>
> *(iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate.*

19. The Central Excise Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Central Excise Act.

20. In respect of section 65B of the Evidence Act, which is pari materia to the provisions of section 36B of the Central Excise Act, it would be relevant to refer to the observations made by the Supreme Court in Anvar P. V. The Supreme Court, held that evidence relating to electronic record shall not be admitted in evidence unless the requirement of section 65B of the Evidence Act is fulfilled. The relevant paragraphs of the said judgment are reproduced:

> *"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.

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

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

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

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

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

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

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

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

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

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22. xxxxxxxxxxx. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65A and 65B. to that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not laydown the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the *secondary evidence pertaining to that electronic record, is inadmissible.*

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24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Sections 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.‖ *(emphasis supplied)*

21. The aforesaid judgment of Supreme Court in Anvar P. V. was followed by the Supreme Court in Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & others [AIR 2020 SC 4908], though with *a slight modification. The Supreme Court held that if the original device is not produced, then electronic record can be produced in accordance with section 65B (1) of the Evidence Act together with the requisite certificate under section 65B (4). The relevant portions of the judgment of the Supreme Court are reproduced below:*

> *"18. Sections 65A and 65B occur in Chapter V of the Evidence Act which is entitled —Of Documentary Evidence‖. Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act is important, and states that secondary evidence may be given of —the existence, condition or contents of a document in the following cases…‖.*
>
> *19. Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved after a document becomes admissible in evidence. Section 65A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65B. Section 65B speaks of —admissibility‖ of electronic records which*

deals with 'existence' and 'contents' of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65A and 65B.

20. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that ―special provisions as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to ―admissibility of electronic records.

21. Section 65B(1) opens with a non-obstante clause, and makes it clear that any information that is 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, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that ―document‖ as defined by Section 3 of the Evidence Act does not include electronic records.

22. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in *the period in question. The conditions mentioned in sub-sections 2(a) to 2(d) must be satisfied cumulatively.*

23. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" – whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the —best of the knowledge and belief of the person stating it. Here, —doing any of the following things… must be read as doing all of the following things, it being well settled that the expression 'any' can mean 'all' given the context. xxxxxxx.

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30. Coming back to Section 65B of the Indian Evidence Act, subsection (1) needs to be analysed. The sub-section begins with a nonobstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a 'document'. This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the 'document' *shall then be admissible in any proceedings. The words —…without further proof or production of the original…‖ make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the —deemed document‖ now becomes admissible in evidence 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.*

31. The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document – which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom – the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by *stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where ―the computer‖, as defined, happens to be a part of a ―computer system‖ or ―computer network‖ (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "…if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act…". This may more appropriately be read without the words "under Section 62 of the Evidence Act,…". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.*

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72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported

as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

(b) The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as —.. if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...‖ is thus clarified; it is to be read without the words —under Section 62 of the Evidence Act,...‖ With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to revisited.

(c) The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for

> *compliance by telecom and internet service providers.*
>
> *(d) Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.*
>
> *(emphasis supplied)*

22. It transpires from the aforesaid two judgments of the Supreme Court in Anvar P. V. and Arjun Panditrao Khotkar that:

> *(i) Any documentary evidence by way of an electronic record under the Evidence Act can be proved only in accordance with the procedure prescribed under section 65B of the Evidence Act. The purpose of this provision is to sanctify secondary evidence in electronic form generated by a computer;*
>
> *(ii) 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) of section 65 of the Evidence Act are satisfied,*

> *without further proof or production of the original;*
>
> *(iii) In view of the provisions of section 65(4) of the Evidence Act, a certificate must accompany the electronic record like computer printout, compact disc, video compact disc or pen drive, pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence;*
>
> *(iv) Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, that the question of its genuineness would arise. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if the requirements of section 65B of the Evidence Act is not complied with;*
>
> *(v) An electronic record by way of secondary evidence shall not be admitted in evidence unless the the requirements of section 65B of the Evidence Act has satisfied; and*
>
> *(vi) This would not apply in a case where the appellant adduces primary evidence by making available in evidence the electronic records.*

23. A Bench of the Tribunal in Agarvanshi Aluminium Ltd. vs. Commissioner of Customs (I), Nhava Sheva [2014 (299) E.L.T. 83 (Tri. – Mum.)], where the issue was with respect to section 36B of the Central Excise Act, also observed:

> *"12. ...... it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section*

> *has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).*
>
> *13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfillment of statutory condition of Section 36B of the Central Excise Act, 1944."*
>
> *(emphasis supplied)*

24. In Popular Paints and Chemicals vs. Commissioner of Central Excise and Customs, Raipur [Excise Appeals No. 52738 of 2016 decided on 06.08.2018], the Tribunal observed:

> *"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 are 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 pari materia.*
>
> *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, Sh. 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."*
>
> *(emphasis supplied)*

25. In Global Extrusion Private Limited and Ors. vs. Commissioner of Central Excise & ST, Rajkot [Excise Appeal No. 11963 of 2016 decided on 15.01.2024], the Tribunal observed:

> *"19. Ongoing through the aforesaid provisions, we find that Section 36B(2) provides the conditions in respect of computer*

printouts. In the present matter the computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the appellants. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the appellant to the computer in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. In the present case, the data was not stored in the computer but the officers had taken the printout from the Hard Disk drive by connecting to the computer. The officers had not obtained any certificate as required under Section36B of the said Act. It is also noted that none of the conditions under Section 36B (2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the allegations of the revenue. It is noted that the requirement of certificate under Section 36B (4) is also to substantiate the veracity of truth in the operation of electronic media. We also agree with the contention of the appellants that at the time of sealing and de-sealing 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 Section36B 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 Appellants was obtained by the department, the credibility of the computer printout gets vitiated."*

(emphasis supplied)

26. The aforesaid decisions of the Tribunal, which are in the context of the provisions of section 36B of the Central Excise Act, hold that a printout generated from the personal computer that has been seized cannot be admitted in evidence unless the statutory conditions laid down in section 36B of the Central Excise Act are complied with. The decisions also hold that if the data is not stored in the computer but officers take out a printout from the hard disk drive by connecting it to the computer, then a certificate under section 36B of the Central Excise Act is mandatory.

27. The contentions advanced by learned counsel for the appellant and the learned authorized representative appearing for the department have to be examined in the light of the aforesaid observations.

28. What transpires from the two Panchnamas dated 04.07.2013 and 15.07.2013 is:-

(i) The officers found that Vaibhav Goel "removed a hard disc from his kitchen and tried to throw it away";

(ii) During the search, the officers found "three computer monitors installed in a room on the first floor of rear side of the house above the dog

house in which some documents and seven pen-drives were also found";

(iii) However, no CPU was found in the said room. On being asked, Mohit Vaish, Accountant informed that there is "one desktop computer connected with the CPU, which is installed in the kitchen of the said premises and these monitors are working as extension of the computer in the kitchen and connected through cable";

(iv) On searching the kitchen, the officers recovered "Computer (CPU, Monitor, Keyboard and Mouse) which was switched on and CPU was found without cover and without having any hard disc";

(v) The officers conducted a thorough search of the entire residential premises and found "one of the hard disc hidden in a corner lying near the dog house";

(vi) The officers also found two hard discs from the cupboard of the kitchen;

(vii) The officers asked Vaibhav Goel to connect the hard disc found in the corner near dog house with the CPU installed in the kitchen;

(viii) On the direction of Vaibhav Goel, Mohit Vaish started the CPU after connecting the said hard disc;

(ix) On being asked by the officers to take the printouts of data captured in the software, Vaibhav Goel informed that being a MS Dos based software, "printout cannot be taken without configuring printer Canon LBP 2900B (available in the residence) with site key and license key".

(x) On being asked how these keys can be taken, Vaibhav Goel stated that he would have to talk to an expert and on direction of Vaibhav Goel, Mohit Vaish

spoke to one Dua, who on mobile informed after some time that site key is 'EIGIDADEJTBO' and license key is 'HJHTVOGSVQ'.

(xi) Mohit Vaish configured the printer and started taking printouts of sale, purchase and cash data, which is stated to contain both accounted and unaccounted transaction;

(xii) Some printouts from one of the pen drive Toshiba 4GB that was recovered were also taken after connecting the same with the CPU;

(xiii) Since the whole process of taking of printouts of the data in the CPU and the pen-drive was taking time and printing stated mal-functioning, the officers discontinued the process of taking printout and seized the three Hard disks and seven pen drives properly. Details of the seized hard discs and pen drives were mentioned in Annexure-A to the Panchanama;

(xiv) Subsequently, on 15.07.2013 another Panchnama was drawn. The Panchnama records that the hard drive mentioned at serial no. 1 was attached with the CPU and printers resumed from the residence of Vaibhav Goel on 04.07.2013 and printouts of the data stored in the hard drive and Toshiba 4GB pen drive were taken;

(xv) The other hard drives and pen drives did not contain any relevant data and so printouts were not taken.

29. It is not in dispute that the hard disk from which the printouts were subsequently taken was not found installed in the CPU. The Panchnama drawn on 04.07.2013 records that the officers found that Vaibhav Goel had removed a hard disc from his kitchen and had tried to throw it away. The *panchnama does not mention that any officer had seen Vaibhav Goel actually remove the hard disc from the CPU. It only records that Vaibhav Goel had removed a hard disc from the kitchen and had tried to throw it away. At a different place, the panchnama records that the officers conducted a thorough search of the entire residential premises and found one hard disc hidden in a corner lying near the dog house. What needs to be noticed is that if Vaibhav Goel had thrown the hard disk, it would not have been found hidden in a corner of a room near the dog house. The seven pen drives were also recovered from a room on the first floor of the rear side of the house. In the said room three computer monitor were also installed without a CPU. The officers were informed that one desktop computer connected with the CPU is installed in the kitchen and these monitors are working as extension of the computer in the kitchen and were connected through a cable. Ultimately the officers recovered CPU, Monitor, Keyboard and Mouse in the room, but the CPU was found without cover and hard disk. The Panchnama does not record that Vaibhav Goel was seen removing the hard disk from the CPU and indeed it would not have been possible for Vaibhav Goel to remove this hard disk from the CPU in the presence of all the officers and throw it away. There is nothing on the record to link the hard disk to the CPU, nor is there anything to link that the hard disc and the pen drive stored information contained in the computer.*

30. A hard disk is a rigid magnetic disk that stores data. A pen drive is a data storage device that includes flash memory with an integrated USB interface.

31. The printouts, which are the sole basis for holding that the appellant had indulged in *clandestine removal, were taken both on 04.07.2013 and on 15.07.2013 by placing the recovered hard disc and pen drive in the CPU.*

32. It is, therefore, clear that the CPU did not contain the hard disk. The hard disk was in fact picked up from the corner of the room. No attempt was made by the department to admit the hard disk and the pen drive in evidence. The required certificate under section 36B (4) of the Central Excise Act was also not produced. Thus, no reliance can be placed on the printouts, in view of the two judgments of the Supreme Court in Anvar P. V. and Arjun Panditrao Khotkar and the three decisions of the Tribunal in Agarvanshi Aluminium, Popular Paints and Chemicals and Global Extrusion.

33. The adjudicating authority, on its own, examined the oral evidence on the points required to be stated in the certificate. This is not permissible in law. The confirmation of demand is based only on the printouts taken after connecting the hard disk and the pen drive to the computer.

34. It is, therefore, not possible to accept the contention advanced by the learned authorized representative appearing for the department that panchnama itself should be treated as a certificate or that the adjudicating authority was justified in itself examining whether the conditions set out in section 36B (4) of the Central Excise Act had been satisfied.

35. The impugned order dated 30.06.2021 passed by the adjudicating authority, therefore, cannot be sustained. It is, accordingly, set aside in so far as the appellant is concerned and the appeal is allowed."

14.5. On the basis of the above, we are of the view that a print-out generated from a personal computer or pendrive, seized during the course of investigation, cannot be treated as admissible evidence unless the statutory condition prescribed under Section 36B of the Central Excise Act is complied with. Admittedly, the said condition has not been complied with in this case. Hence, the said print-outs recovered during the course of investigation are not admissible evidence to corroborate the allegation of clandestine removal of goods against the appellants in the present case. Therefore, the said issue is answered in favour of the appellants.

Issue (E): As to whether duty paid during the course of investigation can be treated as an 'admission' for confirmation of the impugned demands against the appellants, or not.

15. We find that during the course of investigation, the appellants had paid amounts of Rs.4,50,00,000/- (Rupees Four Crore Fifty Lakh only) and Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh only). It is the contention of the Revenue that the above payments made by the appellants amount to admission of clandestine removal of goods by them.

15.1. It is well settled that any amount deposited during the course of pendency of investigation is only a deposit made under protest and the said deposit is not an 'admission' of clandestine removal of goods. The same view has been taken by this Tribunal in the case of *M/s. MSP Sponge Iron Ltd. v. Commissioner of C.G.S.T., C.Ex. & Customs, Rourkela [2020 (3) TMI 15 – CESTAT, Kolkata],* wherein it has been observed as under: -

> *"9. I further find that merely deposit of money at the time of investigation would not amount to acceptance of allegations of clandestine manufacture and removal as alleged by the department. It is well settled law that, payment of money at the time of investigation would be treated as a deposit under protest, which is held in following judgements:-*
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> > *i. Bayshore Glass Trading Pvt. Ltd. Vs CC, Kolkata, 2002 (148) ELT 1243 (Tri-Kol.)*
> >
> > *ii. CCE, Lucknow Vs Eveready Industries India Ltd., 2017 (357) ELT 11 (All.)*
> >
> > *iii. CC, New Delhi Vs Ganesh Trading Co., 2013 (297) ELT 547 (Tri)"*

15.2. Further, in the case of *Commissioner of C.Ex., Lucknow v. M/s. Eveready Industries India Ltd. [2017 (357) E.L.T. 11 (All.)],* a similar issue has been considered by the Hon'ble Allahabad High Court. The relevant portion of the above judgement passed by the Hon'ble High Court reads as under: -

> *"4. We find that in Commissioner of Central Excise, Coimbatore v. Pricol Ltd. - 2015 (39) S.T.R. 190 (Mad.) = 2015 (320) E.L.T. 703 (Mad.) a Division Bench of Madras High Court had an occasion to look into a similar dispute. Therein payment was made during investigation by assessee. Subsequently, show cause notice was issued and Assessing Officer passed order adjudicating liability of Central Excise and amount deposited by assessee was appropriated against such determined liability. Subsequently, in appeal, assessment order was set aside and question of refund arose. An argument was raised that unless assessee proves that he has not passed on incidence of duty to any other person, refund cannot be allowed. Court held, it is not a case of refund of duty but return of pre-deposit made by assessee at the time of investigation under protest. Court has said as under :*
>
> > *There are also very many judgments of various Courts, which have also reiterated the*

> *same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee."*

15.3. In view of the above observations, we hold that although the appellants had paid certain amount during the course of investigation, the same cannot take the colour of clandestine removal of goods. Therefore, on the said ground, the allegation of clandestine removal of goods cannot sustain.

Issue (F): Whether the demands can be confirmed against the appellants on the basis of documents recovered from third-party premises, without establishing that the appellants herein were having any relation with those premises, or not.

16. Admittedly, in the case on hand, no investigation has been conducted by the investigating team to ascertain as to whether the premises from which the said documents were recovered were owned by the appellants or whether the appellants have any link with the said premises at all, or not. Merely on the basis of recovery of documents from the said premises, which are the residences of their employees and ex-employees, without establishing that the said employees and ex-employees were having possession of such documents in a legal manner, the impugned demands cannot be confirmed against the appellants.

16.1. Further, we take note of the fact that the author(s) of the purported documents have also not been established in this case.

16.2. We also find that the documents recovered from the possession of third-parties i.e., employees or ex-employees who were alleged to be having secret documents of clandestine removal of goods by the appellants, were not made party to the Show Cause Notice. Therefore, such documents recovered are not admissible as evidence to allege clandestine removal of goods in this case.

16.3. In these set of facts, we are of the view that the allegation of clandestine removal of goods cannot be sustained on the basis of documents recovered from such third-party premises, for confirmation of the impugned demands against the appellants. Thus, the said issue is also answered in favour of the appellants.

Issue (G): Whether shortage of stock during the course of investigation can be the basis to allege clandestine removal of goods, or not.

17. We find that in this case, during the course of stock taking conducted from 6:00 a.m. to 12:00 noon on 19.01.2013, a quantity of around 7300 MT of finished goods was found short. Such a huge quantity cannot be weighed in such a short time period, of around five and a half hours, i.e., the shortage of stock has been determined only on the basis of eye estimation. Therefore, in the absence of any documentary evidence or weighment slips, we hold that the allegation of shortage of stock, on the basis of eye estimation, is not sustainable. Accordingly, the

same cannot be a ground to allege clandestine removal of excisable goods by the appellants. Thus, the said issue is also answered in favour of the appellants.

Issue (H): Whether, in the facts and circumstances of the case, penalties can be imposed on the appellants, or not.

18. We find that the main allegation against the appellants is that they were involved in the clandestine manufacture and removal of excisable goods without payment of applicable duties. As the said allegation itself has not been established and has been discarded by this Tribunal, as per the observations made in the preceding paragraphs, in these circumstances, we hold that no penalty is imposable on the appellants. Consequently, the penalties imposed on the appellants are set aside.

Conclusion:

19. In view of the detailed discussions above, we hold as under: -

(a) Based on private records recovered from third-party premises, without establishing the author thereof, the charge of clandestine removal of excisable goods is not sustainable.

(b) Electronic documents recovered from computers / pendrives, without obtaining a certificate as prescribed under Section 36B of the Central Excise Act, 1944, are not admissible as evidence to allege clandestine removal of excisable goods by the appellants.

(c) The statements recorded during the course of investigation, without following the procedure laid down under Section 9D of the Central Excise Act, 1944, cannot be considered as corroborative evidence against the appellants.

(d) Without following the guidelines laid down by this Tribunal in the case of *Arya Fibres Pvt. Ltd. (supra),* the charge of clandestine removal of goods is not sustainable against the appellants.

19.1. In view of this, it is evident that the Revenue has failed to discharge their onus of proving the charge of clandestine removal of goods by the appellants. We hold that the demand of central excise duty confirmed in the impugned order, along with interest, is not sustainable and accordingly, the same is set aside. As no demand is sustainable against the appellants, we hold that no penalty can be imposed on the appellant-companies as well as the co-appellants.

20. In these terms, the appeals are allowed.

(Order pronounced in the open court on **20.08.2025**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd