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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 76029 of 2025

(Arising out of Order-in-Appeal No. 13-14/HWH/CE/2025-26 dated 17.04.2025 passed by the Commissioner of CGST & Central Excise, Kolkata Appeals-II 3rd Floor & 4th Floor, Bamboo Villa, 169, A. J. C. Bose Road, Kolkata-700014)

M/s. Everest Aluminium Pvt. Ltd., **: Appellant**
J. L. No. 15, Vill.-Palarah, P.O. Bighati,
Delhi Road, Hooghly-712 124

VERSUS

Commissioner of CGST And Central Excise, **: Respondent**
Howrah CGST AND Central Excise Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata-700001

AND

Excise Appeal No. 76040 of 2025

(Arising out of Order-in-Appeal No. 13-14/HWH/CE/2025-26 dated 17.04.2025 passed by the Commissioner of CGST & Central Excise, Kolkata Appeals-II 3rd Floor & 4th Floor, Bamboo Villa, 169, A. J. C. Bose Road, Kolkata-700014)

Shri Proshant Agarwal, Director **: Appellant**
M/s. Everest Aluminium Pvt. Ltd.,
J. L. No. 15, Vill.-Palarah, P.O. Bighati,
Delhi Road, Hooghly-712 124

VERSUS

Commissioner of CGST And Central Excise, **: Respondent**
Howrah CGST AND Central Excise Commissionerate,
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata-700001

APPEARANCE:

Shri Indranil Banerjee, Advocate for the Appellant
Shri S. K. Dikshit, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs.77512-77513/ 2025

DATE OF HEARING: 24.09.2025

DATE OF PRONOUNCEMENT: 26.09.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The instant appeal has been filed by M/s. Everest Aluminium Pvt. Ltd., J.L. No. 15, Vill.-Palarah, P. O. Bihati, Delhi Road, Hooghly (herein after referred as the appellant) against the Order-in-Appeal No. 13-14/HWH/CE/2025-26 dated 17.04.2025 passed by the Commissioner of CGST and CX, Appeal-II Commissionerate, wherein the Ld. Commissioner (Appeals) has upheld the demands of Central Excise duty totally amounting to Rs. 1,75,50,937/- along with interest and equivalent penalty confirmed in the Order-inOriginal bearing No. 27/JC/CGST & CX/HWH/ADJN/2018 dated 30.01.2018.

2. The facts of the case are that the appellant is a private limited company, engaged in the business of manufacture and sale of aluminium circles of varying size and thickness falling under tariff entry 7606 9110 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant was duly registered under the provisions of the Central Excise Act and the Rules framed thereunder and were holding Central Excise Registration Certificate bearing No. 19AACCE2817Q1Z7. At its factory situate at J. L. No. 15, Vill.- Palarah, P. O. Behati, Delhi Road, District: Hooghly, the appellant manufactured aluminium articles. The appellant used to utilize, amongst others, aluminium ingots as a major input in the manufacturing process. The appellant availed CENVAT Credit on such inputs of aluminium ingots consumed in the course of manufacturing. The appellant used to sell the low-quality Aluminium

Dross, scrap and cuttings arising in the course of manufacturing, which they considered as non-dutiable. The appellant maintained its Central Excise records and books of accounts and discharged Central Excise duty on outward clearances of manufactured aluminium circles and filed periodic Central Excise returns, including for the period April, 2014 to January, 2015.

2.1. On 28.01.2015, the Anti-Evasion Unit of Kolkata-IV Central Excise Commissionerate conducted search at the aforesaid factory premises and verified the appellant's stock and also scrutinized other records. In course of search, joint stock taking was purportedly conducted and shortages of finished goods as well as raw materials were determined. Statements were also taken from the concerned persons including the appellant's erstwhile Director, Sri Anubhav Agarwal. Certain incriminating materials like writing pads, weighment slips and hand-written challans were seized.

2.2. After completion of investigations, a show cause notice dated 19.07.2016 was issued to the appellant demanding Central excise duties/Cenvat totally aggregating to Rs.1,75,70,937/- in the following manner :-

(i) Duty of Rs. 1,50,51,152/- on account of alleged clandestine removal on the ground of mismatch of statutory invoices and the entries allegedly being particulars of clandestine removal found in 2 writing pads recovered at the time of search (reference: Annexure C-5 to show cause notice);

(ii) Rs. 1,23,427/- being duty on goods allegedly cleared without payment of duty on the ground that

26 numbers of weighment slips recovered at the time of search did not have corresponding tax invoices (reference: Annexure C-4 to show cause notice);

(iii) Rs. 19,888/- being the duty calculated as payable on 8 hand-written challans, which did not have corresponding tax invoices (reference: Annexure C-3 to show cause notice);

(iv) Rs. 22,75,797/- being duty calculated on stock of finished goods found short upon stock taking on the day of search (reference: Annexure C-1 to show cause notice);

(v) Rs. 10,162/- being the duty calculated as payable on the stock of inputs found short on stock taking on the day of search (reference: Annexure C-2 to show cause notice);

(vi) Rs. 70,512/- being duty demanded on the alleged ground that inputs on which Cenvat had been availed were removed as such without payment of duty/reversal of cenvat (reference: Annexure C-6 to show cause notice).

The said show cause notice also proposed imposition of penalties against the appellant's Directors, namely, Sri Anubhav Agarwal (Noticee No. 2) and Sri Proshant Agarwal (Noticee No. 3).

2.3. The said Notice was adjudicated by the Joint Commissioner of Central Tax, CGST and CX Commissionerate, Howrah, who vide an Order-in-Original dated 30.01.2018, confirmed all the demands of Central Excise duty/cenvat credit aggregating to Rs. 1,75,50,937/- proposed in the notice along with interest and imposed equivalent amount of duty confirmed as penalty. The Ld.

adjudicating authority also imposed personal penalties upon the co-noticees, namely, Shri Anubhav Agarwal and Shri Proshant Agarwal. The adjudicating authority also ordered for appropriation of the amount of Rs. 22,85,985/- paid by the appellant during the course of investigations towards the confirmed demands.

2.4. On appeal, the Ld. Commissioner (Appeals) upheld the demands of duty, interest and penalties confirmed in the Order-in-Original. Aggrieved against the impugned order, the appellants have filed these appeals.

3. The appellants submits that the investigation has not gathered any evidence in support of the allegation of clandestine clearance of the goods manufactured by them. The charge of clandestine removal cannot be made without any cogent or affirmative evidence. The appellant stated that the alleged incriminating evidences recovered during the course of investigations were unauthenticated and the makers of purported private records had never been examined. The appellant also highlighted that there was no evidence of unaccounted procurement of 1023000 kg of raw materials that would have been required to manufacture the disputed quantity of finished goods; there was no evidence of use of extra labour or electricity or evidence that would have been available had 670009.300 kg. of finished goods been manufactured and removed; no buyer of the alleged clandestine clearance had been identified and that there was no evidence of flow back of funds proving receipt of unaccounted sale proceeds to the tune of Rs. 14.13 crores.

3.1. The appellant submits merely because certain private records relating to manufacture or clearance of goods had been recovered during search proceeding, clandestine manufacture and clearance of finished goods without payment of duty cannot be presumed automatically. The appellant also pointed out that Central Excise duty had been demanded on clearances of aluminium scrap and dross though the same were not excisable within the meaning of Section 2(d) of the Act. As far as the demand of duty for Rs. 1,50,51,152/- for alleged clandestine removal of aluminium circle and pallet was concerned, the appellant submitted that clearances involving duty of Rs. 56,97,764/- for export purpose had also been treated as unaccounted clearance, which was patently illegal and untrue.

3.2. The appellant also questioned the admissibility and reliability of details appearing in the hand-written note pads. The appellant submits that in the show cause notice, it has been alleged that there had been confession of guilt on part of the appellant's Director and its authorised signatory. In this regard, the appellant submits that the statements recorded from the Director and its authorised signatory cannot be relied upon as they have not been tested as mandated under the provisions of Section 9D of the Cental Excise Act. The appellant submits that they have requested for cross-examine Sri Anubhav Agarwal and Sri Sanjay Saraswat, who had given incriminating statements. However, their request for cross examination was not considered by the lower authorities. The appellant submits that they have also disputed the quantification of demand and pointed out that the show cause notice had considered one sample invoice whereas the same was not representative of the entire lot of disputed goods and that the Department should have considered the average weight/rate for determining duty liability, if at all.

3.3. The appellant also objected to the reliability and accuracy of the purported stock taking exercise which formed basis of the demands on shortage of finished goods and raw materials. In this regard, they wanted to cross-examine the 2 panchas who had witnessed the search operations, but the same was not accorded by the lower authorities.

3.4. The appellant also advanced submissions on the point of limitation.

4. The written submissions made by the appellant at the time of personal hearing are summarized as under:

<u>(A) There is no substantive evidence on record establishing clandestine removal</u>

In the present case there can be no dispute about the following position:

(a) The was no evidence to establish actual clandestine clearance or any attempted clandestine clearance;

(b) No discrepancy could be detected as regards consumption of inputs or excess electricity vis-à-vis statutory records, for utilization in clandestine manufacture;

(c) There was neither any seizure of offending goods sought to be cleared nor any seizure of conveyance carrying purported offending goods;

(d) There was no evidence by way of any statement from an identified buyer or evidence establishing flow-back of funds of undisclosed sale proceeds;

(e) No follow-up investigation had been conducted at the end of the Company’s regular transporters or buyers;

(f) The authors of the seized private records, all of which were suspect documents, had remained unknown and un-examined.

4.1. It is now well settled that the charge of clandestine removal being quasi-criminal in nature, it must be is proved with tangible evidences, which are conspicuously absent in the instant case. In support of this contention, the appellant relied on the deision of this Tribunal vide Final Order No. 75556-75557/2024 dated 21.03.2024 in *M/s Narsingh Ispat Ltd. v. Commissioner*, Excise Appeal No. 76044 of 2023.

<u>(B) Panchnama proceedings being in violation of the law, the entire stock taking stood vitiated</u>

4.2. The purported stock verification reports were void ab initio. Glaring errors in this behalf are apparent from the following:–

(i) There is no detailed statement in the Panchnama. As regards the search and seizure activities that had taken place, which is in violation of Sections 12F and 18 of the Act read with Section 100 of the Code of Criminal Procedure, 1973. For example, there is no mention of recovery of hand-written challans or the pre-printed weighment slips in the Details of Search;

(ii) The Annexure to Panchnama i.e. Annexure-1 to show cause notice states that the time of search was from 12.40 hrs to 20.00 hrs, whereas the Panchanama i.e. Annexure-2 to show cause notice states that the search operation started at 12.15 hours and concluded at 18.00 hours;

(iii) It has nowhere been stated that the entire factory premises had been searched or that stock of raw materials had not been found lying inside the furnace;

(iv) The Panchnama in question being a typed document ought to have borne a declaration that the contents thereof were in tune with what the Panchas had seen, which is missing.

(v) More than 39077 kgs of Aluminium Circle had been weighed within a span of few hours, which was a physical impossibility.

(C) Determination of shortages being ab-initio unsustainable deserves to be discarded

4.3. From a combined reading of the show cause notice dated 19.07.2016 and the impugned order, it is apparent that records of physical stock taking and weighment details are non-relied upon documents, which is astonishing. It was incumbent on the adjudicating authority/appellate authority to call for the relevant records of physical stock taking and weighment, verify the factual position and record his findings on the issue of shortages. Nothing turned on signature having been obtained from the Company's staff on the stock verification reports dated 28.01.2015. In the absence of records of physical stock taking and weighment details of purported stock verifications, determination of shortages deserved to be discarded, notwithstanding that signature of the appellant's staff and personnel had been obtained on the stock verification reports. In support of their contentions, the appellant relied on the following decisions

(i) *M/s Scan Sponge Iron Ltd. v. Commissioner of Central Excise, Bhubaneshwar-II*, reported in 2022-TIOL-817-CESTAT-KOL and

(ii) *Jai Balaji Industries Ltd. v. Commissioner*, reported in 2021 (378) ELT 674 (T);

(D) Hand-written challans, pre-printed weighment slips and writing pads are private records and, even otherwise, no demand can sustain in the absence of independent enquiry

1. The purported hand-written challans, weighments slips, and the writing pads were never seized from the control and possession of the Company and, in fact, their authors remained unknown. Both the adjudicating authority and the appellate authority erred by attaching overwhelming importance to the said suspect documents which were extraneous materials.

2. The purpose for maintaining the said private records was unclear and it is denied that the same were being maintained by the staff of Company or under instructions of its management. From a careful perusal of Annexure nos. 9 and 20 to show cause notice, it is evident that the exact nature of the material in dispute, allegedly removed without payment of duty, or excitability thereof cannot be established. Comparison of entries in such unreliable and suspect documents with the

Company's statutory records ought not be have been undertaken by the revenue.

3. None of the authors of the purported private records like seized challans, weighment slips and writing pads, which were all extraneous materials, had been identified. No case of clandestine removal can sustain on the strength of private records in the absence of corroborative evidence, as is the situation here.

4. In this regard reliance is placed on the following decisions :

(i) *Gautam Ferro Alloys v. Commissioner of Central Excise, Ranchi*, reported in 2021 (377) ELT 776 (T), since affirmed by the Hon'ble Apex Court in *Commissioner of Central Excise, Ranchi v. Gautam Ferro Alloys*, reported in 2022 (380) ELT 385 (SC)

(ii) *Ambica Iron and Steel Pvt. Ltd. v. Commissioner of C.Ex., Cus. & ST*, reported in 2022 (380) ELT 351 (T)**;**

(iii) *M/s Bharat Alloys Pvt. Ltd. v. Commissioner of CGST & CE*, reported in 2020-TIOL-1339-CESTAT-KOL

5. The appellant further submits that the demand has been confirmed in the impugned order on account of alleged mismatch of statutory invoices and the entries allegedly found in two writing pads recovered at the time of search. It is the submission of the appellant that the entries available in the hand written note pads cannot be relied upon as the

conditions as mandated under Section 36B(2)/36B(4) has not been satisfied.

5.1. In the present case, No Certificate U/s 36B(4) from person occupying responsible position in relation to operation of the device is obtained. In this regard the Appellants relied on the decision of the Tribunal in the case of ***CCE Vs. Shivam Steel Corporation.***

5.2. Statement of person/witness relied on in the Notice are not examined in chief and not be allowed Cross Examination in accordance with Section 9D. Hence, such statement cannot be relevant piece of material. In support of this contention, the Appellants relied on the following decisions:-

(i) Hitech Abrasives P. Ltd. Vs. CCE (2018) 362 ELT 96 (CHH.) [Para 2 (last 4 lines), Para 9.1, 9.4, 9.5];

(ii) Ambica International Vs. UOI 2016-TIOL-1238-HC-P & H.CX [Para 25-27];

(iii) Andaman Timber Industries Vs. CCE 2017 (50) STR 93 SC) [Para 6];

5.3. No tax can be demanded on matching of some entries in private records with statutory records/Book of Accounts. The Appellant relied on following decisions, in support of this contention:

(i) Sharma Chemicals Vs. CCE (2001) 130 ELT 271 (Tri. Kol.)[Para 14];

(ii) Suzuki Synthetics P. Ltd. Vs. CCE (2015) 318 ELT 487 (Tri. Ahmd.)[Para 31].

5.4. In the absence of substantive evidence on record the charge of clandestine removal and demands under Section 11A of the Act could not sustain. In the absence of corroborative evidence or proper follow up investigation, no case of clandestine removal can sustain.

5.5. The mandate prescribed under Section 9D has not been complied with and hence the statements recorded during investigations were liable to be declared as inadmissible evidences and irrelevant;

5.6. In any event, Sri Anubhav Agarwal, Director and Sri Sanjay Saraswat, Commercial Manager had not voluntarily accepted the charge of clandestine removal and there were inherent contradictions in the said statements, which the revenue mis-understood;

5.7. The longer period of limitation had been erroneously invoked and all the demands were barred by limitation.

5.8. In view of the above submissions, the appellant prayed for setting aside the demands of duty, interest and penalty confirmed in the impugned order and allow their appeal.

6. The Ld. Authorized Representative reiterated the findings in the impugned order. The Ld. Authorized Representative submits that the shortages during stock verification categorically reveals that the appellant has been indulging in clandestine clearances. The private records recovered from the appellant and various statements recorded during the course of investigation substantiate the allegations of clandestine clearances. Accordingly, he supported the demands of duty confirmed in the impugned order

7. Heard both sides and perused the appeal documents.

8. We observe that Central Excise Duty amounting to Rs. 1,50,51,152/- has been confirmed in the impugned order on account of alleged clandestine removal on the basis of mismatch between statutory invoices and the entries allegedly found in two writing pads recovered at the time of search. Duty demands of Rs. 1,23,427/-, Rs. 19,888/- and Rs. 22,75,797/- have also been made on account of the allegations of shortages found in finished goods during stock taking, which also ultimately resulted in the allegation of clandestine clearances. Demands of irregular availment of Cenvat credit amounting to Rs.10,162 and Rs. 70,512/- has also been alleged on account of clearances raw materials as such without reversal of the credit availed.

8.1. Regarding the demand of central excise duty on account of shortages in finished goods, we observe that the physical stock taking and weighment details are not relied upon in this proceedings. The appellant questioned the method of stock taking and contended that physical stock taking was not done. In this regard, we observe that when the document related to physical stock taking has not been relied upon, then it is incumbent upon the adjudicating authority/appellate authority to call for the relevant records of physical stock taking and weighment, and verify the factual position and record his findings on the issue of shortages, which has not been done in this case. We also observe that more than 39077 kgs of Aluminium Circle have been weighed within a short span of few hours, which was a physical impossibility. We also observe that the documents available on record does not indicate that actual weighment of all the stock of finished goods have been conducted to arrive at the shortages, if any. Thus, we find merit in the contentions of the appellant regarding the actual weighment of the stock. Also, we observe that the investigation has not brought in any evidence to conclude that to whom the shortages found were clandestinely cleared. Accordingly, we hold that demand of central excise duty cannot be confirmed on the basis of the stock verification, when the shortages alleged are not supported by any evidence.

8.2. Regarding the demand of Central Excise Duty amounting to Rs. 1,50,51,152/- confirmed in the impugned order on account of alleged clandestine removal on the ground of mismatch of statutory invoices and the entries allegedly found in two writing pads recovered at the time of search, we observe that the appellant has questioned the admissibility and reliability of details appearing in the hand-written note pads as the investigation has not identified the author of the entries made there in. In this regard, we agree with the submission of the appellant that merely because certain private records relating to manufacture or clearance of goods had been recovered during search proceeding, clandestine manufacture and clearance of finished goods without payment of duty cannot be presumed automatically.

8.3. Clandestine clearance is a serious allegation which needs to be established with cogent evidences corroborating the clandestine clearances. In the present case, we find that there is no corroborative evidence available to substantiate the allegations of clandestine clearances. In the present case, we observe that:

(i) No evidence of manufacture of finished goods. Quantity of finished goods manufactured not known;

(ii) There is no evidence of clandestine removal of finished goods. Quantity of finished goods removed not known;

(iii) Documents prepared by seven production contractors relied in support of production but none of them were examined;

(iv) Maker of Weighment Slips, Delivery Order etc. not examined;

(v) Raw Material suppliers, Transporters, Production Staffs, Dispatch Staffs not examined;

(vi) No excess/shortage of Raw material& finished goods;

(vii) No excess consumption of Electricity;

(viii) No excess use of Labours or payment of wages;

(ix) No evidence of flow back of funds established;

(x) Buyer mentioned on those invoices not verified.

8.4. We observe that no duty can be demanded on matching of some entries in private records with statutory records/Book of Accounts, without any corroborative evidence to substantiate the allegations. Further, we observe that the documents retrieved from the private records are admissible evidences only when the mandatory procedure prescribed in Section 36B is followed This view is supported by the observation of the Hon'ble Apex Court in the case of *Anvar P.V. Vs. P.K. Basheer reported at 2017 (352) ELT 416 (SC). Thus, w*e observe that unless the conditions of Section 65B (2) of the Evidence Act, which is parimateria with Section 36B (4) of the Central Excise Act are complied with, no reliance can be placed on any document recovered from the private records. Admittedly, the procedure set out in Section 36B has not been followed in this case. Thus, following the judgement of the Hon’ble Apex Court and the other decisions cited by the appellant supra, we hold that the data resumed from the private records alone cannot be relied upon to demand duty, without any corroborating evidence.

9. The Appellant contended that Statements recorded during the course of investigation cannot be relevant without testing the same under Section 9D. The provisions of Section 9D of the Act is mandatory and unless the prescriptions of Section 9D are complied, the testimony of witness cannot be treated as relevant piece of material as mandated under Section 9D. The Appellant contended that the statements of person/witness relied on in the impugned order are not examined in chief and not allowed Cross Examination in accordance with Section 9D. Had the adjudicating authority followed the provisions of Section 9D and examined the witnesses who have given the statements, the truth in this statement would have come out. We observe that the statements recorded in this case has lost its evidentiary value by not following the provisions of

Section 9D. Hence, such statement cannot be relevant piece of evidence to confirm the duty demand. This view has been supported by the decisions of various High Courts and Tribunals.

9.1. The issue has been examined by the Principal bench, CESTAT, New Delhi, in the case of Surya Wires Pvt. Ltd. Vs Principal Commissioner of CGST, wherein vide FINAL ORDER NO's. 50453-50454/2025 dated 01.04.2025, the Tribunal has observed as under:

> *22. It would now be appropriate to examine certain decisions interpretating section 9D of the Central Excise Act and section 138B of the Customs Act.*
>
> *23. In Ambika International vs. Union of India [2018 (361) E.L.T. 90 (P&H)] decided on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that ifnone of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a*

statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority. The relevant portions of the judgment are reproduced below:

> *15. 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.*
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> *16. Section 90 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.LT. 189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 90, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*
>
> *22. 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 lause (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.*
>
> *23. 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 90(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.

24. 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 adjudication authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

25. 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 ringour of this procedure is exempted only in a case in which ane or more of the handicaps referred to in dause (a) of Section 90(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 dause (b) of Section 90(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.*

26. In fact, Section 138 of the Indian Evidence Act, 1672, 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.

27. 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 that the a conclusion, for reasons to be recorded in writing, statement deserves to be admitted in evidence, that the question of offering the witness to the assessee, for cross-examination, can arise.

28. 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."

(emphasis supplied)

24. The Punjab and Haryana High Court in Jindal Drugs that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 1388(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.

25 In Hi Tech Abrasives Ltd. vs. Commissioner of C. Ex. &Cus., Raipur [2018 (362) E.LT. 961 (Chhattisgarh)] decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on thestatement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in Ambika International, the Chhattisgarh High Court held:

9.3 A conjoint reading of the provisions therefore reveals that 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 (Adjudicating Authority) forms an court that to opinion having regard 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 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 90 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 dearly 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 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."*

(emphasis supplied)

26. In Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd. [2021 (375) E.L.T. 545 (Del.)] decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 1388 of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 1388(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant. The relevant paragraphs of the judgment of the Delhi High Court are reproduced below:

> *"76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the Learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 1388 of the Act, thus:*

A Division Bench of this Court has, speaking through A.K. Sikri, J. (as he then was) held, in 3 & K Cigarettes Ltd. v. Collector of Central Excise [2009 (242) E.L.T. 189 (Del.)] that, by virtue of sub-section (2), Section 1388(1) of the Act would apply, with as much force, to adjudication proceedings, as to criminal proceedings.

We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act or, for that matter, Section 90 of the Central Excise Act, 1944,

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processuall filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the Learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019."

(emphasis supplied)

27. In DroliaElectrosteel decided on 30.10.2023, a Division Bench of the Tribunal examined the provisions of section 9D of the Central Excise Act and after placing reliance upon the decision of the Punjab and Haryana High Court in Jindal Drugs, observed that if the mandatory provisions of section 9D(1)(b) of the Central Excise Act are not followed, the statements cannot be used as evidence in proceedings under Central Excise Act. The relevant portions of the decision of the Tribunal are reproduced below:

14. Evidently, the statements will be relevant under certain circumstances and these are given in clauses (a) and (b) of subsection (1). There is no assertion by either side that the circumstances indicated, in (a) existed in the case. It leaves us with (b) which requires the court or the adjudicating authority to first examine the person who made the statement and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence. Of course, the party adversely affected by the statement will have to be given an opportunity to cross examine the person who made the statement but that comes only after the statement is, in the first place, after examination by the adjudicating authority, admitted in evidence. This has not been done in respect of any of the 35 statements. Therefore, all the statements are not relevant to the proceedings.

15. It has been held in a catena of judgments including Jindal Drugs Pvt. Ltd. versus Union Of India [2016 (340) E.L.T. 67 (P&H)] that section 9D is a mandatory provision and if the procedure prescribed therein is not followed, statements cannot be used as evidence in the proceedings under Central Excise Act.

16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible."

(emphasis supplied)

> *28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 1388(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 1388(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.*

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9.2. In this case, it is on record that the provisions of Section 9D has not been complied with. Thus, by relying on the decisions cited supra, we hold that the statements relied upon in this case are not admissible evidences in this proceedings.

10. In the present case, we observe that there is no other evidence other than the statements available on record to establish clandestine clearance or any attempted clandestine clearance. We also find that no discrepancy could be detected as regards consumption of inputs or excess electricity vis-à-vis statutory records, for utilization in clandestine manufacture. There is neither any seizure of offending goods sought to be cleared nor any seizure of conveyance carrying purported offending goods. There is no evidence by way of any statement from any identified buyers of the clandestinely cleared goods or evidence establishing flow-back of funds of undisclosed sale proceeds. We also observe that there was no follow-up investigation conducted at the end of the Company's regular transporters or buyers.

10.1. We observe that the authors of the seized private records have not been identified and all those suspect documents remained unknown and un-examined. It is a well settled law that the charge of clandestine removal being quasi-criminal in nature, must be is proved with tangible evidences, which are conspicuously absent in the instant case. Also there is no evidence of clandestine clearance of raw materials on which CENVAT Credit has been availed by the appellant and hence the demand of reversal of CENVAT Credit is also not sustainable. Accordingly, we hold that the demands of central excise duty confirmed in the impugned order is not sustainable.

10.2. As the demand of central excise duty is not sustained, the question of demanding interest or imposing penalty does not arise and hence we set aside the same.

11. The appellant submitted that during the course of investigation, they have paid an amount of Rs. 22,85,985/-, which has been appropriated by the adjudicating authority in the impugned order towards the duty liability confirmed in the impugned order. As the demand in this case is not sustained, we hold that the appellant would be eligible for the refund of the same, subject of verification of the issue of unjust enrichment.

12. Regarding the imposition of penalty on Shri Proshant Agarwal, we observe that penalty has been imposed on him under Rule 26 of the Central excise Rules, 2002 for his alleged role in the offence of clandestine clearance. As the offence of clandestine clearance is not sustained, we hold that the penalty imposed on the appellant Shri Proshant Agarwal, is not sustainable and hence we set aside the same.

13. In view of the above findings, we pass the following order:

(i) We set aside the demands of Central Excise duty/cenvat credit aggregating to Rs. 1,75,50,937/- confirmed in the impugned order along with interest.

(ii) The penalty imposed on the appellant company is set aside.

(iii) We set aside the penalty imposed on the appellant Shri Proshant Agarwal, under Rule 26 of the Central excise Rules, 2002.

(iv) The amount of Rs. 22,85,985/-, paid by the appellant during the course of investigation and appropriated by the adjudicating authority in the impugned order towards the duty liability, is liable to be refunded subject to verification of the issue of 'unjust enrichment'

(v) The appeal filed by the appellant is disposed of on the above terms.

(Order Pronounced in Open court on 26.09.2025)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP