

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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 75330 of 2018

(Arising out of Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Rd., Kolkata – 700 001)

M/s. Superb Plastic Thermo Forming Private Limited : Appellant
2, India Exchange Place,
Kolkata – 700 001

VERSUS

Commissioner of Central Tax : Respondent
G.S.T. Howrah Commissionerate [erstwhile Kolkata-II]
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

WITH

Excise Appeal No. 75331 of 2018

(Arising out of Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Rd., Kolkata – 700 001)

Bimal Kumar Khetwat : Appellant
5, Camac Street,
Kolkata – 700 017
[Corres: Harshad Ghelani, 6 & 10, Dover Road, Kolkata – 700 019]

VERSUS

Commissioner of Central Tax : Respondent
G.S.T. Howrah Commissionerate [erstwhile Kolkata-II]
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

WITH

Excise Appeal No. 75332 of 2018

(Arising out of Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Rd., Kolkata – 700 001)

Rajendra Kumar Goenka : Appellant
176, Sarat Bose Road,
Kolkata – 700 029

VERSUS

Commissioner of Central Tax : Respondent
G.S.T. Howrah Commissionerate [erstwhile Kolkata-II]
M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

Appeal No(s): E/75330-75334/2018-DB

WITH

Excise Appeal No. 75333 of 2018

(Arising out of Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Rd., Kolkata – 700 001)

G.C. Manipuria

: Appellant

2, India Exchange Place (Room No. 13),
Kolkata – 700 001

[Corres: Harshad Ghelani, 6 & 10, Dover Road, Kolkata – 700 019]

VERSUS

Commissioner of Central Tax

: Respondent

G.S.T. Howrah Commissionerate [erstwhile Kolkata-II]

M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

AND

Excise Appeal No. 75334 of 2018

(Arising out of Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 passed by the Commissioner of Central Tax, G.S.T. Howrah Commissionerate, M.S. Building, Custom House, 15/1, Strand Rd., Kolkata – 700 001)

Harshad Ghelani

: Appellant

6 and 10, Dover Road,
Kolkata – 700 019

VERSUS

Commissioner of Central Tax

: Respondent

G.S.T. Howrah Commissionerate [erstwhile Kolkata-II]

M.S. Building, Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Sudhir Mehta, Senior Advocate, for the Appellant(s)

Shri Subrata Debnath, Authorized Representative, for the Respondent

CORAM:

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

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

FINAL ORDER NOS. 77625-77629 / 2025

DATE OF HEARING: 16.10.2025

DATE OF DECISION: 31.10.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

The captioned appeals have been filed against the demands of Central Excise duty and penalties confirmed in the Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017.

2. The instant adjudication proceedings have been undertaken in respect of the Show Cause Cum Demand Notice issued vide C.No. V(12)20/CE/AE/KOL-11/2005/3386-3390-B dated 31.03.2005 issued against M/s. Superb Plastic Thermoforming Pvt. Ltd., 103/24/1, Foreshore Road, Shibpur, Howrah-711 102 and four other noticees (herein after referred as the appellants). The Show Cause Notice proposed recovery of Central Excise duty to the tune of Rs.2,55,37,838/- including Education Cess and S&HE Cess, for the period from 2000-01 to 2003-04, along with interest and imposition of penalty under Section 11AC of the Central Excise Act, 1944. The allegation against the appellants were removal of excisable goods from the factory under the cover of private challans and without payment of Duty.

2.1. The Show cause Notice was adjudicated by the Commissioner of Central Excise, Kolkata-II Commissionerate vide Order-in-Original No. 62/Commissioner/Ce/Kol-11/Adjn/2006(2005-06) dated 24.01.2006 confirming the demands raised in aforesaid Show Cause Notice, along with interest, and imposing an equal amount of penalty on the appellant-company, namely, M/s. Superb Plastic Thermo Forming Private Limited and imposing personal penalty of Rs. 10,00,000/- on each of the other appellants herein, namely, Shri Rajendra Kumar Goenka, Shri G.C. Manipuria, Shri Harshad Ghelani

and Shri Bimal Kumar Khetwat, being the Directors of the appellant-company.

2.2. On appeal, the Tribunal, Kolkata has passed order No.S-184-188/A-104-108/Kol/07 setting aside the Order-in-Original dated 24.01.2006 and remanding the matter to the original authority for fresh decision. The Tribunal also directed the department to allow inspection/copying of the relied upon documents. As directed by the Tribunal, the Ld. Adjudicating authority passed order No.10/De-Novo/Commr./CE/Kol-11/Adjn/ 2010-11 dated 31.08.10 confirming the Duty of Rs.2,55,37,838/-, along with interest, and imposed equal amount of duty as penalty on the appellant-company. He also imposed personal penalty of Rs. 5,00,000/- on each of the other appellants herein, being the Directors of the company.

2.3. On further appeal, the Tribunal passed Final Order No. A-71072-71076/2013 dated 12.09.2013 remanding the matter to the original adjudicating authority. In the said order, the CESTAT has observed that the Department had failed to supply the legible copies of some documents and directed that the appellants should file their reply on the basis of records/documents available and supplied to them and advance their submissions in respect of non-supply of those documents and the Department would complete the process of adjudication thereafter on the basis of the said reply.

2.4. The Ld. Commissioner has passed the instant Order-in-Original No. 16/COMMR/CGST & CE/HWH/Adjn/2017-18 dated 26.10.2017 (hereinafter referred to as the 'impugned order'), on the basis of the directions of the Tribunal in the order

dated 12.09.2013. In the impugned order, the Ld. Commissioner has confirmed the demands of central excise duty of Rs. Rs.2,55,37,838/-, along with interest and penalty, against the appellant-company. He also imposed penalties of Rs.10,00,000/- each on the other appellants herein, namely, Shri Rajendra Kumar Goenka, Shri G.C. Manipuria, Shri Harshad Ghelani and Shri Bimal Kumar Khetwat.

2.5. Aggrieved by the confirmation of central excise duty along with interest and imposition of penalties vide the impugned order, all the appellants have filed these appeals.

3. As all these appeals emanate from the same Order-in-Original, they are all taken up together for decision by a common order.

4. At the outset, the Ld. Sr. Counsel appearing on behalf of the appellants brought to our notice that in spite of repeated directions from the Tribunal, the Department has not furnished the relied upon documents. The appellant submits that the department has cited the following list of documents as relied upon documents in the show cause notice, although they have not supplied any of the said documents to the appellant: -

"a) Statement of Sri H. Ghelani, Director of M/s. Superb Plastic Thermoforming Pvt. Ltd. dated 07.03.05.

b) Statement of Sri R.P. Singh dated 09.03.05, authorized representative and authorized Central Excise signatory of M/s. Superb Plastic Thermoforming Pvt. Ltd

c) Statement of Sri Bimal kumar Khetwat dated 18.03.05, Director of M/s. Superb Plastic Thermoforming Pvt. Ltd.

- d) Statement of Sri Sandip Saha, dated 10.03.05 authorized representative of M/s. Raipur Kolakta Road Carriers, Kolkata.
- e) Statement of Sri Srinivas Agarwal dated 10.03.05, authorized representative of M/s. Ranilia Carrying Corporation, Kolkata.
- f) Statement of Sri Subir Kumar Mukherjee dated 10.03.05, authorized representative of M/s. Calcutta Agartala Roadways, Kolkata.
- g) Statement of Sri Santosh Kr. Biswas dated 15.03.05, authorized representative of M/s. Bengal Transport Agency, Kolkata.
- h) Statement of Sri Sisir Kumar Patra dated 16.03.05, authorized representative of M/s. New Maharaja Transport Company.
- i) Statement of Sri Subodh Kumar Maheswari dated 16.03.05, authorized representative of M/s. Maheswari Road Transport, Kolkata.
- j) Balance Sheets for the year 1999-2000, 2000-2001, 2001-2002 and 2002-2003
- k) Seizure list dated 22.10.2002 made by Bureau of Investigation, Commercial Taxes, Kolkata, in respect of M/s. Superb Plastic Thermoforming Pvt. Ltd.
- l) Computation sheets made by Bureau of Investigation, Commercial Taxes, Kolkata, showing clearances effected through Private Sales Register during the period 1999-2000, 2000-2001 and 2001-2002 in respect of M/s. Superb Plastic Thermoforming Pvt. Ltd.
- m) RT-12/ ER-I returns of M/s. Superb Plastic Thermoforming Pvt. Ltd. for the year 1999-2000, 2000-2001, 2001-2002, 2002-2003 and 2003-2004.
- n) Photocopies of private challans for the year 1999-2000, 2000-2001, 2001-2002 and 2002-2003 of M/s. Superb Plastic Thermoforming Pvt. Ltd.
- o) Photocopies of statutory sales 2001-2002 and 2002-2003. registers for the year 2000-2001,
- p) Statement of Shri SK Narula Partner of M/s Geeta Stores, 51, Canning St. Kolkata-700 001. dated-28.03.2005"

4.1. The appellants have submitted that a search was conducted by the Bureau of Investigation, Commercial Taxes, Kolkata on 22.10.2002 at their office at Foreshore road, Howrah but no incriminating document was seized; that photocopies of a few documents were forwarded to the Commercial Tax office anonymously by unknown person and the Bureau forwarded such documents to the Central Excise Department for verification; they denied and contested the authenticity of the photocopies before the Bureau. It was denied that the documents were seized at their office at 103, B.B.D Bag, Kolkata as the said office does not belong to them. He points out that the Commercial Tax officer conducted investigation, but could not prove a single document and the proceedings stood abandoned; there was no corroboration of these documents to show that actual sale/purchase had taken place; copies of the documents supplied to them were not legible and the documents ex facie showed that the said documents were only suspect documents and did not have any evidentiary value. It is also submitted by the appellants that such invoices were photocopies and it was mentioned on the reverse side of some documents that the same were only for quotation purpose.

4.2. The appellants further submit that they requested the adjudicating authority to produce the original and legible copies of the documents relied upon in the Notice; however, the department failed to produce original copies but passed the adjudication order which was set aside by the Tribunal with a direction to the Department to provide those to them, but the Department again passed the adjudication order on

26.10.2017, without providing the legible copies of the relied upon documents.

4.3. It is the appellants' contention that demands have been confirmed against them on the basis of some statements recorded from third parties, such as transporters and the suspected buyers of the goods from the appellant company. They argue that these statements have not been tested as mandated under Section 9D of the Central Excise Act and hence said statements have no evidentiary value and the same cannot be relied upon in the current proceedings against the appellant. In support of this claim, the appellants relied on the following decisions:

- i. The decision of the Hon'ble Punjab and Haryana High Court in the case of *G-Tech Industries Vs UOI [2016 (339) ELT 209 (P & H)]*
- ii. The decision of the Hon'ble Chattisgarh High Court in the case of *Hi Tech Abrasives Ltd. v. Commissioner of C.Ex. & Cus., Raipur [2018 (362) E.L.T. 961 (Chattisgarh)]*,

4.4. The appellants also submit that the Department has not brought in any evidence to corroborate the allegation of clandestine clearance of the goods without payment of central excise duty. It is their stand that clandestine clearance is a serious allegation which requires to be substantiated with cogent evidence. The allegation of clandestine clearance cannot be substantiated on the basis of mere assumptions and presumptions. In this regard, the appellants relied on the following decisions:

- i. The decision of the Hon'ble High Court of Allahabad in the case of *Continental Cement Company v. Union of India [2014 (309) E.L.T. 411 (All.)]*.

- ii. The decision of the Tribunal in *Arya Fibres Ltd. v Commissioner of C.Ex., Ahmedabad-II* [2014 (311) E.L.T. 529 (Tri. – Ahmd.)]

4.5. Regarding the penalties imposed on the Directors of the appellant-company, the submission made is that the Department has failed to bring in any evidence to establish their involvement in the alleged offence. Accordingly, it has been prayed that the penalty imposed on these appellants are liable to be set aside.

5. The Ld. Authorized Representative representing the Revenue has reiterated the findings in the impugned order. He submits that the demands have been confirmed by the Ld. adjudicating authority on the basis of the documentary evidences received from the Commercial Taxes Department; the statements recorded from the transporters and the buyers of the goods manufactured by the appellant-company conclusively establish clandestine clearance of the finished goods manufactured by the appellant-company. Accordingly, the Ld. Departmental Representative justified the demands of central excise duty confirmed against the appellant-company and the penalties imposed on the Directors of the appellant-company / co-appellants herein.

6. Heard the parties and perused the records.

7. We observe that the impugned order has been passed by the Ld. adjudicating authority on the basis of the directions given by this Tribunal vide order dated 12.09.2013. For ready reference, the relevant part of the Tribunal order is reproduced below:

"5. We find that in the earlier round, this Tribunal had observed that copies of the documents annexed at Pages 36 to 60 of the Appeal Memorandum, are not legible copies and accordingly, directed for supply of the same and remanded the case for fresh adjudication. Also while remanding the case, a time frame was fixed for re-adjudication and the said order was passed in the presence of Representative of the Appellant as well as the Revenue. The Revenue has unhesitatingly agreed to supply legible copy of the documents to the Appellants. We find that the Appellant had approached the Department on 5th/6th March, 2007 for Inspection/supply of the documents as per direction of this Tribunal. However, the documents were not made available to the Appellants either on the said date or thereafter, and the impugned order was passed ex-parte. Also, from the observations of the Id. Commissioner, we find that letters were only exchanged between the Revenue and the Appellants, but at the end the required copy of documents were not made available to the Appellants. We are constrained to note that no sincere efforts have been taken by the Department for implementation of the direction of this Tribunal and the litigation continued on frivolous reasons.

6. The Id. A.R. for the Department has now pleaded that the documents directed to be supplied are not legible in its original form. We are not impressed with the submission of the Id. A.R. for the Department now at this stage, that is, after a lapse of around six years from our order. We find that on the earlier round, Revenue has categorically accepted and agreed to supply legible copies of those documents. It has not been brought to the notice of the Tribunal at that time nor thereafter that even the original copy of the documents are not legible ones. However, now to bring an end to the

impasse, it would be prudent and appropriate that the Appellants should file their reply to the show-cause notice on the basis of records/documents available and supplied to them and advance their submissions in respect of non-supply of those documents. The id. Advocate for the Appellants has fairly accepted/agreed to this direction. We find that the matter has been pending for more than 10 years. Accordingly, we direct the Appellants to submit their reply on the basis of documents available on record within a period of four weeks from the communication of this order. After receiving the reply to the show-cause notice from the Appellants, the Department would take necessary steps to complete the process of adjudication within a period of six weeks thereafter. Both sides agreed to co-operate with adjudication proceeding. In the result, the impugned orders are set aside and the appeals are allowed by way of remand. Stay petitions are disposed off.”

7.1. We observe that in spite of specific directions by this Tribunal, the Department has failed to produce original copies of the documents to the appellants. However, we find that as directed by this Tribunal, the Ld. Adjudicating authority has decided the issue on the basis of available documents.

7.2. We find that the in the present case, the entire demand has been raised on the basis of certain private documents forwarded by the Commercial Tax office. We have perused the documents received from the Commercial Tax department. For ready reference, sample copy of one such document received from the Commercial Tax Department is reproduced below: -

Superb Plastic Thermoforming (P) Ltd.
S 1 no. 10 W

Period: 246

Part's name	Date	Challen no.	Amnt.	Remarks
13/2/2000			23,97,186/-	
Geeta Stone	15.2.00	15/2/00	54,000	
"	"	16/2/00	68,400	
"	"	17/2/00	33,000	
"	12.2.00	21/2/00	63,280	
"	4.3.00	10/3/00	33,920	
"	4.3.00	14/3/00	53,600	
"	8.3.00	16/3/00	64,800	
"	23.3.00	48/3/00	36,000	
"	24.3.00	47/3/00	30,100	
"	27.3.00	53/3/00	67,900	
"	29.3.00	56/3/00	31,850	
"	"	"	822	
8 Vinay Kumar Dokaria	3.1.2000	5/1/2000	33,250	
"	9.3.00	21/3/00	33,000	
9. Sankar Babu				
40 Benani Metal	19.2.00	3/1/00		
10 Shankhu Bhandu,				
Bokaro - Char.	4.1.2000	10/1/00	30,700	
"	20.1.00	72/1/00	30,800	
"	22.1.00	81/1/00	30,800	
11. Nirmal Kr.				
Agarwal - Rajakhera	7.1.00	21/1/00	32,625	
"	11.1.00	31/1/00	34,700	
"	15.1.00	51/1/00	32,480	
"	15.1.00	50/1/00	34,000	
"	27.1.00	99/1/00	32,080	
"	3.2.2000	6/2/00	34,005	
"	15.2.2000	25/2/00	33,535	
"	22.2.2000	40/2/00	31,250	
"	2.3.2000	4/3/00	31,880	
"	15.3.2000	35/3/00	34,500	
12. Pradeep Bhandu	5.1.00	14/1/2000	32,400	
Katru.				
13. Dilep Mitra	5.1.2000	13/1/00	33,625	
"	7.1.2000	20/1/00	34,670	
"	8.1.2000	23/1/00	34,670	
"	11.1.2000	30/1/2000	33,725	
"	12.1.2000	36/1/00	35,700	
Total			12,32,067/-	
Net			36,29,253/-	

me 20/05
6.5.2004

7.3. A perusal of the above document reveals that the said document does not indicate any clandestine clearance of goods by the appellant-company herein. It is apparent that the Ld. Adjudicating authority only inferred that the entries mentioned the said documents indicate clandestine clearance on the basis of certain statements recorded from the transporters and one of the purchasers. However, we observe that these statements have not been tested as mandated under Section 9D of the Central Excise Act and hence, the said statements have no evidentiary value and cannot be relied upon in the current proceedings against the appellants. This view stands supported by various decisions of the Hon'ble High Courts and Tribunals.

7.4. In this context, we refer to the decision of the Hon'ble Punjab and Haryana High Court in the case of *G-Tech Industries Vs. Union of India [2016 (339) ELT 209 (P & H)]*, wherein it has been held that the Adjudicating Authority should first examine the person whose statement is to be relied upon to form an opinion whether the statement is to be admitted as an evidence. After that if that statement is to be admitted, then an opportunity is to be given for cross examination. The relevant paragraphs of the decision cited above are 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."

7.5. In support of the above view, we also rely upon the decision of the Hon'ble Chattisgarh High Court in the case of *Hi Tech Abrasives Ltd. v. Commissioner of C.Ex. & Cus., Raipur* [2018 (362) E.L.T. 961

(Chattisgarh)], wherein the Hon'ble High Court has observed that unless the substantive provisions contained in Section 9D of the Act are complied with, a statement recorded during search and seizure operations cannot be treated as a relevant piece of evidence. The relevant paragraph of the aforesaid judgement is 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 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."

7.6. Thus, by relying on the decisions cited supra, we hold that the statements relied upon by the Id. adjudicating authority in this case have no evidentiary value without any further corroborative evidence.

8. It is well settled that central excise duty cannot be demanded on the basis of assumptions and presumptions or preponderance of probabilities and clandestine clearance is a serious allegation, which requires cogent corroborative evidences to substantiate the allegations, which are absent in this case.

8.1. The said issue has been examined by the Hon'ble High Court of Allahabad in the case of *Continental Cement Company v. Union of India* [2014 (309) E.L.T. 411 (All.)], wherein it has been held as under: -

"10. We have heard the learned counsel for the parties and gone through the material available on record, from which it appears that Shri Shubhashis Dev, Government Examiner of questioned documents, Shimla gave his written opinion dated 12-6-1998, wherein he has stated that "the documents of this case have been carefully and thoroughly examined. The enclosed writings and signatures stamped and marked were all written by one and the same persons".

11. From the above, it appears that all the documents were written by one and the same persons, though the dates and the name of the

parties are different. When it is so then the genuineness of the documents cannot be accepted.

12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :

- (i) To find out the excess production details.*
- (ii) To find out whether the excess raw materials have been purchased.*
- (iii) To find out the dispatch particulars from the regular transporters.*
- (iv) To find out the realization of sale proceeds.*
- (v) To find out finished product receipt details from regular dealers/buyers.*
- (vi) To find out the excess power consumptions.*

13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.

14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so called buyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out.

15. In view of the above, we are of the opinion that when there is no extra consumption of electricity, purchase of raw materials and transportation payment, then manufacturing of extra goods is not

possible. No purchase of raw material outside the books have been proved.

16. In the light of the above discussions and considering the totality of the case, we are satisfied that no case is made out for extra so called clandestine sale of the Portland Cement to the said parties. We are satisfied that the first appellate authority has rightly deleted the addition and cancel the penalties. Hence we hereby set aside the impugned order passed by the Tribunal and restore the order passed by the first appellate authority, along with the reasons mentioned herein.

17. In the result, all the appeals filed by the appellants are hereby allowed."

8.2. A similar issue has also been dealt with by the Tribunal at Ahmedabad in the case of *Arya Fibres Ltd. v Commissioner of C.Ex., Ahmedabad-II [2014 (311) E.L.T. 529 (Tri. – Ahmd.)]* wherein the Bench has categorically opined that the allegation of clandestine removal is to be corroborated by supporting evidences. The relevant observations of Tribunal in the said case are reproduced below for ease of reference: -

"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."

8.3. From a perusal of the records available before us, we find that there is no corroborative evidence available on record to substantiate the allegation of manufacture and clandestine clearance of the goods in this case. Accordingly, we hold that the allegation of clandestine clearance against the appellant-

company cannot be substantiated on the basis of mere assumptions and presumptions and hence we set aside the demands of central excise duty along with interest confirmed against the appellant in the impugned order.

9. Regarding imposition of penalties on the appellant-company as well as the Directors of the appellant-company (the other appellants before us), we find that the Department has not been able to adduce any evidence to establish their involvement in the alleged offence. As in view of the discussions in the preceding paragraphs, we have held the allegation of clandestine clearances against the appellant-company to be unsubstantiated, we hold that the penalty imposed on all the appellants herein are not sustainable and hence, we set aside the same.

10. In the result, we set aside the impugned order and allow the appeals filed by the appellants, with consequential relief, if any, as per law.

(Order pronounced in the open court on **31.10.2025**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd