

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 75485 of 2020

(Arising out of Order-in-Appeal No. 26/Bol-CE/2020-21 dated 01.07.2020 passed by
Commissioner of CGST & Central Excise (Appeals), Siliguri)

M/s. Amiya Steel Pvt. Ltd.

(Village Tarapur, Mejia, District-Bankura
Pin-722143 (West Bengal))

Appellant

VERSUS

Commissioner of CGST & Central Excise, Bolpur

(Nanoor, Chandidas Road, Sian, District- Birbhum, Bolpur-731204)

Respondent

With

Excise Appeal No. 76337 of 2024

(Arising out of Order-in-Appeal No. 26/Bol-CE/2020-21 dated 01.07.2020 passed by
Commissioner of CGST & Central Excise (Appeals), Siliguri)

Shri Pradip Goswamy, Accountant

M/s. Amiya Steel Pvt. Ltd.

(Village Tarapur, Mejia, District-Bankura
Pin-722143 (West Bengal))

Appellant

VERSUS

Commissioner of CGST & Central Excise, Bolpur

(Nanoor, Chandidas Road, Sian, District- Birbhum, Bolpur-731204)

Respondent

And

Excise Appeal No. 76338 of 2024

(Arising out of Order-in-Appeal No. 26/Bol-CE/2020-21 dated 01.07.2020 passed by
Commissioner of CGST & Central Excise (Appeals), Siliguri)

Shri Arindam Mondal, Director

M/s. Amiya Steel Pvt. Ltd.

(Village Tarapur, Mejia, District-Bankura
Pin-722143 (West Bengal))

Appellant

VERSUS

Commissioner of CGST & Central Excise, Bolpur

(Nanoor, Chandidas Road, Sian, District- Birbhum, Bolpur-731204)

Respondent**APPEARANCE :**

Mr. Nitin Kumar Pasani, Adv., Mr. Anand Kumar Pasani, Adv., Mr. Akshat Agarwal, Adv. & Ms. Doyel Dey, Advocate for the Appellant
Mr. P. Das, Authorized Representative for the Respondent

CORAM:**HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)****HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)****FINAL ORDER NO.77751-77753/2025**Date of Hearing : 12th November 2025Date of Pronouncement : 21.11.2025**PER R. MURALIDHAR**

The appellant Amiya Steel Pvt. Ltd. (Amiya) is a manufacturer of Sponge Iron. A search operation was conducted on 27/12/2012 on a steel factory named Shri Parashnath Re Rolling Mills Ltd (M/s. SPRML in short) who is the manufacturer of MS Billets, MS Wire Rods, TMT Bars, etc. Several documents were seized from the premises of that party for the transactions during the period 01.02.2012 to 25.12.2012. The officials seized external hard drives from SPRML. They recorded statements of their several employees. The statement of one Debashis Shasmal of SPRML was taken wherein he has stated that SPRML were buying Sponge Iron on cash basis without any Excise invoice from various parties. On the ground that from the records seized from SPRML, it was found that the appellant has supplied 1733.02MT of Sponge Iron without payment of duty, Excise Duty of Rs. 50,79,671/- was demand. It was alleged that this quantity of Sponge Iron was cleared by the appellant clandestinely without payment of Excise Duty. The appellants submitted their detailed reply and argued that based on the 3rd party records and the statement of the officials of the 3rd party, the demand cannot be made on presumptions and assumptions. They also sought Cross Examination of Debashis Shasmal and others whose statements were relied upon by the Show Cause Notice issuing authority. They submitted that no corroborative evidence has been gathered towards vehicle movement, cash transactions, etc. Neither

any stock taking was conducted at the end of the appellant nor any shortage was found. In view of the above submissions, they submitted that the proceedings may be dropped. However, the Adjudicating Authority had confirmed the demand along with interest and penalty. He also imposed penalties on the Director and the Accountant (the other two appellants herein). Being aggrieved, the appellants are before the Tribunal.

2. The Learned Advocate appearing on behalf of the appellants submits that the proceedings have been initiated solely based on the search conducted on a 3rd parties premises and based on the purported documents recovered at their end. The statement of Mr. Debashis Shasmal was recorded on five different occasions between 27/12/2012 to 13/11/2014. Only at the time of recording the 5th statement on 13/11/2014, Shri Debashis Shasmal has come out with the statement that they have been purchasing Sponge Iron on cash basis from various parties. He has not specified the name of the appellant. Only based on certain purported print-outs, the Department has alleged that the appellant had cleared 1733.02MT without payment of Excise Duty. He submits that the persons recording the statements under Section 14 were not put through to the procedure specified under the Section 9D. Therefore, the statements cannot be relied as an evidence by the Adjudicating Authority. As a matter of fact, the appellants have sought for the Cross Examination of Debashis Shasmal and others which was not granted by the Adjudicating Authority. He relies on the case law of **Ramgarh Sponge Iron Private Limited Vs. Principal Commissioner, CGST & CX, vide Final Order Nos. 76930-76932/2024 dated 05.09.2024**. He further submits that the computer printouts from the purported hard drives seized from the 3rd party cannot be used as an evidence for fastening any liability on the present appellant. Even here, the Revenue has failed to follow Section 36(B) of CEA, 1944. He submits that the ownership of the computer printouts and authenticity of the same has not been certified by the person responsible to maintain the computer hardware and software. Therefore, even the printouts purportedly taken out by the Revenue from the external hard drives seized from SPRML cannot be relied upon as an evidence. He

relies on the various case laws on this issue. He further submits that while alleging that the appellant has cleared 1733.02 MT of sponge iron without payment of Excise Duty, no corroborative evidence whatsoever has been brought in in respect of

- (a) movement of vehicles
- (b) extra manufacturing details
- (c) statement of the vehicle owners/drivers
- (d) no private records have been seized towards any cash transactions by the appellant
- (e) No stock taking was conducted and no shortage was ascertained in the absence of corroborative evidence.

The demand made on assumptions and presumptions cannot be legally sustained.

3. He relies on the various case laws cited by him before the Adjudicating authority and in the Grounds of Appeal.

4. In view of the above submissions, he prays that the impugned order may be set aside and appeal of the company may be allowed.

5. In respect of the other appellants, he submits that there is no specific instance brought in by the Show Cause Notice to state that the appellants have contravened any provisions of the Central Excise Act, 1944. Since the demand of the Company itself is not sustainable as per the grounds taken in above paragraphs, the penalties imposed on the appellants also cannot be sustained legally.

6. The learned AR reiterates the findings of the Adjudicating Authority. He submits that in the Computer Printouts taken from the premises of SPRML, it was found that various suppliers of Sponge Iron were supplying the goods to them without payment of Excise Duty. From such printouts, it was found that appellant had cleared 1733.02 MT without payment of Excise duty. Therefore, he justifies the confirmed demand.

7. Heard both sides and perused the appeal papers and submissions made by the both sides.

8. We find that the entire proceedings have been initiated solely based on the search operations conducted at the third party SPRML's premises. There is nothing to indicate that any search operations were subsequently conducted in the premises of the appellant and any incriminating documents were seized from them. There is no record of any shortage / excess being found at the appellant's premises after conducting any stock verification. The first point of allegation against the appellant has emanated from the statement of Debashis Shashmal dated 13/11/2014, which itself was taken after about two years from the date of first visit of the officials to the factory premises of SRPML. Before that, he had already recorded four statements in which there was no mention of any clandestine purchase on cash basis by SRPML. Further, we find that when the reliance is placed on the five recorded statements of Debashis Shashmal, it was necessary for the Revenue to follow the Section 9(D) procedure to ascertain as to whether the statements were recorded by him on his own or were they recorded under any pressure or coercion. Only after this, the Statements could have been relied upon as an evidence which the Department has failed to do in this case.

9. We find that the Punjab and Haryana High Court in the case of **G-Tech Industries Vs. Union of India-2016 (339) E.L.T. 209 (P&H)** has held as under:-

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.

10. In the case of **Geetham Steels Pvt Ltd Vs. Commissioner of GST & Central Excise Salem [2025(3) TMI 1098 - CESTAT Chennai]**, wherein it has been observed as follows: -

“57. If we notice the provisions of Section 9D, what flows from it is that 9D(1) stipulates when a statement given under section 14 would be relevant for the purpose of proving, “in any prosecution for an offence”, the truth of the facts which it contains and provides for various scenarios in the sub-sections thereto at (a) and (b). It is only when the Department first adduces evidence in the proceedings before the adjudicating authority, of the existence of the aforementioned scenarios in section 9D(1)(a) that the deponent’s statement is taken as a substantive piece of evidence, without the deponent deposing thereto before the adjudicating authority. That would still not obviate the requirement of the Gazetted officer before whom the statement was given, deposing the factum of such statement having been recorded from the deponent- which is the method or manner of proving the recording of the statement, which statement under section 14 is already considered relevant for the purpose of proving the truth of the fact it contains- that is to say, the said deposition of the Gazetted Officer stating that the deponent had indeed given the statement before him, would be the manner of admitting or mode of proof of the admissible substantive evidence.

58. Again, 9D(1)(b) provides for the deponent's statement given before the Gazetted Officer to be admitted as substantive evidence, when the person who made the statement is examined as a witness in the case before the adjudicating authority and the adjudicating authority is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. This sub section (b) of Section 9D(1) takes care of a situation where the witness who is deposing before the adjudicating authority turns hostile and on an evaluation of the circumstances of the case the adjudicating authority decides to discard the version given by the witness before it and instead place reliance on the earlier statement given before the Gazetted Officer. As elucidated supra, this also applies in a case where the witness deposing stands by his earlier statement and is thereafter offered for cross-examination to the opposite side and in case of minor inconsistencies/no inconsistency, if the adjudicating authority is of the opinion, having regard to the circumstances of the case that the statement should be admitted in evidence in the interests of justice, the adjudicating authority can do so as per this Section 9D(1)(b).

59. However, implicit in this procedure stipulated in 9D(1)(b) is the necessary requirement for the adjudicating authority to depose all the deponents who have given statement under Section 14, save as those that are unavailable in the scenarios given in 9D(1)(a), for the purposes of evaluating whether the statements are voluntary, to attest that he had deposed the contents of the statement and then take a considered decision whether the truth of the facts contained in the statement stand proved or disproved in the facts and circumstances of the case. In other words, it is only after such examination in chief, that the adjudicating authority can arrive at a considered decision, whether to declare the witness appearing before it as a hostile witness and then to decide in the facts and circumstances whether to rely on the earlier statement; or if upon finding major inconsistencies between his earlier deposition and in the contradictions brought about in cross-examination, to not rely on the earlier statement; or if it is only minor discrepancies as that which does not majorly disturb the essential truth of his deposition, to rely upon it, if in the circumstances of the case, the adjudicating deems it fit in the interest of justice.

60. Therefore, we are of the view that Section 9D(2) not only legislatively mandates the adjudicating authority to apply the provisions of S.9D(1), depending on the facts and circumstances of the case, to the extent possible, but also when read along with Section 9D(1)(b), leads to the inexorable

conclusion that the adjudicating authority necessarily has to conduct an examination in chief of the deponent of the statement so as to determine not only the voluntary nature as well as truthfulness of the facts the statement given under Section 14 before the Gazetted Officer contains, but also to determine whether or not the witness is hostile, and to decide whether or not to place reliance on the statement as per the mandate of Section 9(1)(b) in the circumstances of the case, as has been elaborated supra. This interpretation is also in consonance with the decision of the Honourable Apex Court in K I Pavunny's case as stated supra, wherein the Apex Court emphasised that in the case of a retracted confession the court should examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise and if the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. Such an interpretation is also in line with the decision of the jurisdictional Madras High Court cited supra and given the parimateria provisions of the Customs Act, 1962, we are of the view that the said interpretation would hold good under the parimateria provisions of Customs Act as well."

11. We find that the ratio laid down in this case laws are squarely applicable to the facts of the present case. Therefore, we hold that the recorded statements have no evidentiary value in this case.

12. Now coming to the other stand of the appellant recording Section 36(B), procedure not being followed. We find that the computer printouts have been obtained from the computers of third party, without any certification from the person maintaining the computers.

13. This Kolkata Tribunal, in the case of **Ramgarh Sponge Iron Private Limited Vs. Principal Commissioner, CGST & CX, vide Final Order No. 76930-76932/2024 dated 05/09/2024** has held as under:-

7.1.6. In support of their contention that the computer printouts resumed from the computers, pen drives and laptop in this case are not admissible evidences, unless the mandatory procedure prescribed in Section 36B is followed, the appellants cited various decisions. We observe that in the case of Ambica Organics vs. Commissioner of C.Ex. & Cus., Surat-I reported in 2016 (334) E.L.T. 97 (Tri.-Ahmd), it has been held as under:

“7. After hearing both the sides and on perusal of the records, I find that the Central Excise officers while visiting the factory of the appellant, recovered a USB drive in the appellant’s premises. The USB drive was connected with computer and a printout was taken by the computer expert accompanied with the Central Excise officers. The printout gives the details of the certain sales (date-wise) commencing from 1-4-2005. The delivery challans for various chemicals for the month of December, 2005 and January, 2006 were found and seized during the search. The appellants disowned the contents of the printout and stated that it has manipulated the data base with motive, to take revenge from the partner and the firm for the refusal of the loan of Rs. 1 lakh sought by the Computer Operator. The appellant filed an affidavit disclosing this fact on 13-2-2006 i.e. immediately after the raid and a copy of the affidavit was also given to the investigating officer. The Central Excise officers attempted to corroborate the contents of the printout with the statements of 30 persons viz. buyers, transporters etc. The appellants requested for cross-examination of 30 persons which was rejected by the Adjudicating authority. The appellants contended that the statements are predrafted computer statements and it cannot be voluntary nature. After considering the submissions of the appellant, the Commissioner (Appeals) allowed the cross-examination of 4 persons randomly selected. Three of them stated that they were made to sign the pre-drafted statements on a promise that no action shall be taken against them.

8. For the purpose of proper appreciation of the case, the relevant portion of the findings of the Commissioner (Appeals) is reproduced below : -

“4.5 Another contention of the appellant is that department has brought artificial evidence in the form of 30 statements from the buyer parties. The appellant stand is that the statements of the 30 parties are predrafted computer statements and involuntary. Four of the buyers (randomly selected) deposed before me. Three of them stated before me that they were made to sign a predrafted statement on a promise that no action shall be taken against them. One of them stated that his statement was voluntary. In the statements it has been recorded that these person stated that they received the textile auxiliary chemicals without invoice and against cash payments. Statement of these 30 persons (most of them Processors) are against their own interest as it makes them liable for penal action for purchasing dutiable goods on which duty was not paid. However, no show cause notice is given to these persons who have admitted to have received the impugned goods without bills. This fact gives credence to the

allegations made by the appellant that the statements were not voluntary. It is apparent that the thirty statements have been recorded under a promise that no action shall be taken against them. Under these facts and circumstances, the evidentiary value of these thirty statements is considerably weakened. However, the solid evidence in the form of electronic records (USB Drive) and the computer printout from the same are sufficient to nail the appellant.”

9. The Commissioner (Appeals) observed that the evidence in the form of electronic record (USB drive) the computer printout are strong evidence to establish the clandestine removal of the goods. It is seen that the said printout of the data in the USB drive contained the details of raw material and finished goods along with the names and addresses of the suppliers and the purchasers of the finished goods. It is seen that the statements were recorded to corroborate the contents of the printout and the Commissioner (Appeals) had held that the said statements has no strong evidentiary value. Shri Anil Gupta, Partner of the appellant firm had stated that he was not aware of the details contained in the USB drive.

10. Learned Advocate submitted that the clandestine manufacture and removal of the goods cannot be upheld based on the printout of the data contained in the USB drive without following the requirement of condition of Section 36B of the Central Excise Act, 1944. Section 36B of the said Act provides admissibility of microfilms, facsimile copies of documents and computer printouts as documents and as evidence. Clause (c) of Section 36B(1) states that the statement contained in a document and included in a computer printout would be an evidence if the condition mentioned in the sub-section (2) and other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be the document for the purpose of this Act and the rules made thereunder and can be admissible in proceedings. Sub-section (2) of Section 35B provides the condition referred to in sub-section (1) in respect of the computer printout shall be the following viz.

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

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

in the statement of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operational properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied, to the computer in the ordinary course of the said activities.”

*Sub-section (4) of Section 36B requires issue a certificate in this behalf by a person occupying the responsible official position in relation to the operation of the relevant device or the management of the relevant activity (whichever is appropriate) shall be evidence in any matter stated in the certificate and for the purpose of the subsection, which shall be sufficient for a matter to be stated to the best of the knowledge and the belief of the persons stating it. In the present case, the data was not stored in the computer. It is stated that the computer expert accompanied with the Central Excise officers had taken the printout from the USB drive by connecting to the computer. The officers had not obtained any certificate as required under Section 36B of the said Act. It is also noted that none of the conditions under Section 36B(2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the clandestine removal of the goods. It is noted that the requirement of certificate under Section 36B(4) is also to substantiate the veracity of truth in the operation of electronic media. In the case of *M/s. Premier Instrument & Controls Ltd. (supra)*, the Tribunal has held that the printout of the personal computer of the company's officer, had not fulfilled the statutory condition laid down under Section 36B(2) of the Act and the demand is not sustainable. The relevant portion of the said decision is reproduced below :*

- “9. On the demand of duty on waste and scrap, again the appellants have made out a strong case on merits. The demand covering the period November, 1993 to September, 1998 is based on certain computer printout relating to the period February, 1996 to September, 1998. These printouts were generated from a personal computer of Shri G. Sampath Kumar, a junior officer of the Company, whose statements were also recorded by the department. Admittedly, whatever facts were stated by Shri Sampath

Kumar, in his statements, were based on the entries contained in the computer printouts. The statements of others, recorded in this case, did not disclose any additional fact. Therefore, apparently, what is contained in the computer printout is the only basis of the demand of duty on waste and scrap. The question now arises as to whether these printouts are admissible as evidence, in this case. Ld. Sr. Counsel has pointed out that the computer print-outs did not satisfy the statutory conditions. He has referred to the relevant provisions of Section 36B of the Central Excise Act which deals with admissibility of computer printouts etc. as evidence and says that the statement contained in a computer printout shall be deemed to be a document for the purposes of the Act and the rules made thereunder and shall be admissible as evidence of the contents of its original, if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied in relation to the statement and the computer in question. Sub-section (2) reads as under : -

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

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

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

(c) throughout the material part of the said period, the computer was in operation properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.”

*Ld. Sr. Counsel has argued that the above conditions were not fulfilled in respect of the computer printout taken from the personal computer of Shri Sampath Kumar. It appears from the statement of Shri Sampath Kumar and the averments in the memorandum of appeal that it is an admitted fact that Shri Sampath Kumar was the person having lawful control over the use of the computer. The computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the company. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the Company to the personal computer of Shri Sampath Kumar in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. We have considered the Tribunal's decision in *International Computer Ribbon Corporation v. CCE, Chennai (supra)*. In that case, as in the instant case, computer printouts were relied on by the adjudicating authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that the printouts were neither authenticated nor recovered under Mahazar. It was also found that the assessee in that case had disowned the printouts and was not even confronted with what was contained therein. The Tribunal rejected the printouts and the Revenue's finding of clandestine manufacture and clearance. We find a strong parallel between the instant case and the cited case. Nothing contained in the printouts generated by Sampath Kumar's PC can be admitted into evidence for non-fulfilment of the statutory conditions. It is also noteworthy that the computer printouts pertained to the period February, 1996 to September, 1998 only but the information contained therein was used for a finding of clandestine removal of waste and scrap for earlier period also, which, in any case, was not permissible in law. In the result, we hold that the entire demand of duty on waste and scrap is liable to be set aside."*

11. Taking into consideration the overall facts and circumstances of the case, I find that the entire case was made out on the basis of statements of the buyers and the computer printout. Commissioner (Appeals) already held that the evidentiary value of the statements is weak. It is also noted that the statements of the 30 persons were mostly similarly pre-drafted. The investigating officers failed to comply with the conditions of Section

36B of the Act in respect of relying upon this computer printout. There is no adequate material available on record to establish the clandestine removal of goods. Therefore, the demand of duty solely on the basis of these materials cannot be sustained. Hence, as the clearance value was within the SSI exemption, the confiscation of the goods cannot be sustained. So, the imposition of penalties are not warranted”

7.1.7. In the case of *Anvar P.V. Vs. P.K. Basheer* reported in 2017 (352) E.L.T. 416 (S.C.), the Hon'ble Supreme Court has held as under:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. We find that applying the ratio of above case law, the non-certified computer printouts taken from the third party computer also cannot be used as an evidence by the Revenue.

15. Coming to the corroborative evidence, we find that the Revenue has not come out with any corroborative evidence with regard to movement of vehicles, carrying the alleged 1733.02 MT of Sponge Iron which would require movement of about 80 to 90 trucks. No statements have been recorded from the vehicle owners/drivers. No stock taking was conducted at the end of the appellant to verify the finished goods stock. Therefore, the allegation about removal of the goods clandestinely cannot be construed based on the assumptions and presumptions only.

16. The Chhattisgarh High Court in **Hi Tech Abrasives versus Commissioner of C. Excise & Customs, Raipur [2018 (362) E.L.T. 961 (Chhattisgarh)]**, has held as under :

“12.2What, amongst other things, could be relevant consideration of clandestine removal, was discussed as below :

“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.

(vii) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like –

- (a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.
- (b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.
- (c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.
- (d) Quantity of the packing material used.
- (e) The total number of the employees employed and the payment made to them.

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations in cash or kind have been paid by the noticee, such statements are must.

(f) Ostensible discrepancy in the stock of raw materials and the finished product.

(g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. Different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc. These documents ought to have been collected by the respondent department, if at all, they are interested in collector of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K. Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the Tribunals but the respondents-departments are turning deaf-ear to. In this case, they are also turning deaf-ear to their own circular dated 26-6-2014 (Annexure-3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K. Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All

these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive.

The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal"

[Emphasis supplied]

17. The Hon'ble Allahabad High Court in the case of **Continental Cement Company Vs Union Of India [2014 (309) E.L.T. 411 (All.)]**, has held as under:-

"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."

[Emphasis supplied]

18. In view of the factual details, statutory provisions and case laws discussed above, we find that the confirmed demand is legally not sustainable. Accordingly, we set aside the impugned order and allow the appeal of the company.

19. Since the proceedings against the appellant company has been set aside by us, the corollary penalties against the other two appellants also get set aside.

20. The appeals are allowed with consequential relief, if any as per law.

(Order was pronounced in the open court on 21.11.2025)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pooja