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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 75999 of 2016

(Arising out of Order-in-Original No. 50/COMM/CE/SLG/15-16 dated 21.03.2016 passed by Commissioner of CGST & Central Excise, Siliguri.)

M/s North East Engineering Co. Pvt. Ltd,
(Suboljote, P.O.- Matigara, Siliguri & 02(two) others.)

...Appellant

VERSUS

Commissioner of CGST & Central Excise, Siliguri,
(C. R. Building, Haren Mukherjee Road,
Hakimpara, Siliguri-734001.)

.. ...**Respondent**

APPERANCE :
Shri Amit Agarwal, Chartered Accountant & Mr. Dev Agarwal, Advocate for the Appellant
Shri S. K. Jha, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER No...77797./2025

DATE OF HEARING : 19.11.2025
DATE OF DECISION : 19.11.2025

PER R. Muralidhar :

The appellant is engaged in the manufacture of Black Wire, Galvanized Wire. Wire Nail falling under Chapters 72 and 73 of the First Schedule to CETA, 1985. The appellant obtained Central Excise Registration Certificate and had been manufacturing and clearing the finished goods on payment of duty. A show cause notice bearing C. No.V(15)21/ADJ/CE/Comm./SLG/2014 /4090-92 dated 20.3.2015 was issued to the appellant alleging, inter alia, that they had clandestinely manufactured and cleared the finished goods without payment of duty and without accountable in their books of accounts. It was mentioned in the show cause notice that the officers from DGCEI, Head Quarters, New Delhi searched the factory, office and residential premises on March 30, 2013 of M/s. Super Smelters Limited (in short M/s. SSL, Durgapur) and other locations. In course of searches, the officers, inter alia, seized external data storage device and file containing details of

cash book for the month of March, 2011. From the External Data Storage Device details relating to sale of finished goods, namely M.S. Wire Rods in coiled form, billets by M/s. SSL. Durgapur had been retrieved. Statement was recorded on 30.3.2011 from Sri Ravi Bhusan Lal, on 20.07.2012 from Sri Sitaram Agarwal, Chairman-cum-Managing Director of M/s. SSL. Durgapur.The Additional Director, DGCEI, New Delhi sent details to Siliguri Central Excise Commissionerate on 24.1.2014 wherein information regarding buyers of 'M.S. Rods' from M/s, SSL, Durgapur were provided. It appeared in the said information that the appellant had purchased M.S. Wire Rods (coiled form) from M/s. SSL. Durgapur during the period 2010-11. On that basis Sri Arun Goyal, former Director of the appellant company was summoned and his statement was recorded on 21.8.2014 and 8.9.2014. Sri Arun Goyal in his statement denied to have purchased any material from M/s. SSL, Durgapur. When shown the record of M/s. SSL, Durgapur, sales of M.S. Coil. Sri Arun Goyal denied to have received any such goods by their company. He did not know as to why such entries were made in the records of M/s. SSL. Durgapur. Sri Arun Goyal, however, admitted that M.S. Rod (Coil) was a raw material for them. Based on the Raw Materials stock register, finished goods stock register, the input-output ratio was calculated and as per such calculated input-output ratio, quantity of finished goods allegedly clandestinely manufactured and cleared out of the raw materials procured from M/s. SSL. Durgapur during the period 2010-11 had been quantified. The appellant has been asked to show cause as to why central excise duty amounting to Rs.67.43,187/- alleged to have evaded during the period from 2010-11 should not be demanded and recovered from them. The appellants submitted their detailed reply denying the allegation, made a point to the effect that the so called supplier of the material [SSL] has not been made a party to the SCN, questioned the quantification based on input : output ratio, questioned the non-corroboration of the allegation with any proper evidence. However, the Adjudicating authority confirmed the demand, interest and penalty against the company. Being aggrieved, the appellant has filed the present appeals before the Tribunal.

2. The Ld Consultant appearing for the Appellants, makes the following submissions :

2.1. The allegations again the appellant had been made only on the basis of the investigations made to SSL. It has been mentioned that in the private records maintained by them, the name of the appellant company appeared. It had been alleged that M.S. Wire rods stated to have manufactured by M/s. SSL were supplied to the appellant without being covered by central excise invoice and without payment of Central Excise duty.

2.2. The appellant further submitted that M/s. SSL had not been made a party to the show cause notice, but the entire show cause notice had been issued on the basis of the allegations made against the appellant. The demand of duty had been raised against them on the basis of the entries made in the private records seized from the residential premises of the employee of M/s. SSL. Sri Ravi Bhusan Lal, Dy. Manager, (Accounts). Statements of Sri Sita Ram Agarwal, Director of M/s. SSL had been recorded and relied on in the show cause notice. Such statements were obtained behind the back of the appellant. Even in such statement name of the appellant company M/s. North East Engg. Company (P) Ltd. has not been mentioned by the employee or director of M/s. SSL. But such statements had been relied on in the show cause notice.

2.3. The appellant wanted to cross-examine Sri Ravi Bhusan Lal and Sri Sitaram Agarwal of M/s. SSL at the time of hearing of the case to prove that the appellant did not purchase any materials from M/s. SSL at any point of time. This request was not considered by the Adjudicating authority.

2.4. The appellant stated that in the present case the demand of duty had been raised only on the basis of the records and documents stated to have been seized from the premises of M/s. SSL and the residential premises of the employee of the said company. There was no such

corroboration from the appellant's end. Sri Arun Goyal, the former director, clearly denied that the appellant company purchased any material from M/s. SSL. No corroboration was there in their books of accounts that they purchased and/or received any materials from M/s. SSL.

2.5. The allegations in the show cause notice were that not only they purchased such materials from M/s. SSL but they received such materials in their factory and used them in the manufacture of their final products. Such allegations had been made without any evidence whatsoever. There was no evidence about the payment of the materials stated to have purchased from M/s. SSL. There was no evidence that the vehicles were engaged for transportation of such materials, no inquiry was made with the transporters, no evidence was there that they received such materials in their factory and used them in the manufacture of final products in their factory and they were cleared them from their factory without accountal and without payment of duty. Excess consumption of electricity had not been proved. No evidence was there that they sold out any materials to their customers in excess of the materials covered by the central excise invoices issued by them.

2.6. The entire demand of duty on the alleged manufacture and clearance of the materials from their factory was based on assumption, Presumption and suspicion. Such demand of duty was not maintainable under the statute.

2.7. It was further stated that on the basis of third party's records and documents, no demand of duty could be raised without proper, valid and solid corroborative evidence. There must be valid and solid evidence for purchase of receipt of materials in their factory. Without corroborative evidence, no demand of duty could be raised. There having no such evidence in this regard, the entire against them.

2.8. The appellant submits that the allegations of clandestine manufacture and removal of the goods is entirely on the department to

prove that such raw materials had been received by the appellant in their factory and those goods were used for manufacture and clearance from their factory without payment of duty. Without any evidence whatsoever in this regard, merely on the basis of the third party's documents, no adverse conclusion could be made. The director of the company, Sri Arun Goyal specifically denied to have received any goods from M/s. SSL. Under such circumstances only on the basis of the third party's private documents alone, without any corroborative evidence, the allegation of clandestine manufacture and removal of the goods cannot be proved.

3. In view of the foregoing, he submits that the proceedings are legally not sustainable both against the company as well as against the Director.

4. The Ld Consultant places reliance on the following case laws :

2008 (230) E.L.T. 240 (All.)
KUMAR TRADING COMPANY
Versus COMMISSIONER OF TRADE TAX, LUCKNOW
Trade Tax Revision No. 195 of 2007, decided on 24-9-2007

2009 (243) E.L.T. 154 (Tri. - Ahmd.)
RUTVI STEEL & ALLOYS
Versus
COMMISSIONER OF CENTRAL EXCISE, RAJKOT

5. In view of the foregoing, he prays that the impugned order may be set aside and the appeals may be allowed.

6. The learned AR reiterates the findings of the Adjudicating Authority. He submits that in the Computer Printouts taken from the premises of SSL and the statements recorded from their officials, it was found that they were supplying the raw materials to various wire

manufacturers, including the appellant. From such printouts, it was found that appellant had cleared the finished wires 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 emanated on account of verification and investigation taken up at a third party SSL. The basis for issue of the SCN is the Statements Recorded by their Dy Manager and the Managing Director and some private records seized from them along with the computer print-outs. Based on the fact that the appellant's name has appeared as the buyer of the goods on cash basis, the present SCN has been issued. Admittedly, the finished goods of SSL is the Raw Material for the present appellant. In order to withstand the Dept's allegations, the raw material so bought in cash is required to be converted to finished goods [without being accounted for], removed clandestine to the ultimate purchasers from whom cash should be received by the appellant.

9. While for the alleged clandestine purchase of the raw material, the Revenue has a some form of evidence like the private records seized from SSI, in respect of manufacture of the finished goods, we do not find any evidence whatsoever about the excess electricity consumption, engagement of extra labour, excess consumption of other raw materials required for the manufacture. The Tribunals and Courts have been time and again emphasized that the input : output ratio for arriving for the quantification of finished goods is flawed. Apart from this, there is no evidence about inward / outward movement of vehicles. No statements of so called buyers of the finished goods of the appellant on cash basis have been recorded.

10. When the basic structure of the case has been built on the Statements of the officials of SSL, it was necessary for the Revenue to follow the Section 9(D) of the CEA 1944, procedure to ascertain as to

whether the statements were recorded without any coercion or pressure. It is also on record the Director of the appellant has outright denied any cash purchases. Thus it is a case of one Statement against another Statement.

11. 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)** had the occasion to go through such practice of the Revenue to place reliance on the recorded statements and the Court 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.*
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> ***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 :*
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> ***"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, -*
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> *(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*
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> *(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.*

12. We find that the ratio laid down in above case law is squarely applicable to the facts of the present case. Therefore, we hold that the recorded statements have no evidentiary value in the present case.

13. We find that the computer printouts have been obtained from the computers of third party, for which we observe that the procedure specified under Section 36(B) of the CEA 1944 has not been followed. The Hon'ble Supreme Court In the case of **Anvar P.V. Vs. P.K. Basheer reported in 2017 (352) E.L.T. 416 (S.C.),** 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. Applying the ratio of above case law, we hold that the non-certified computer printouts taken from the third party computer cannot be used as an evidence by the Revenue.

15. In the above paragraphs, we have held that the present proceedings have been initiated without any corroborative evidence being brought in by the Revenue. 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 :

"12.2 …….What, 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 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]

16. In view of the factual details, statutory provisions and case laws discussed in the aforesaid paragraphs, we hold that the confirmed demand is legally not sustainable and we set aside the impugned order allowing the appeal of the company.

17. The appeal stands is allowed with consequential relief, if any as per law.

(Dictated and pronounced in the open court)

Sd/-

(R. Muralidhar)
Member (Judicial)

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

Tushar Kr.