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

REGIONAL BENCH – COURT NO. 2

Excise Appeal No. 76031 of 2016

(Arising out of Order-in-Original No. 111/COMMR/DGP/DP-III/15-16 dated 10.03.2016 passed by the Commissioner of Customs, Central Excise and Service Tax, Durgapur Commissionerate, Satyajit Roy Sarani, City Centre, Durgapur – 713 216)

M/s. Adhunik Industries Limited **: Appellant**
Raturia Industrial Estate, Angadpur,
Durgapur – 713 215

VERSUS

Commissioner of Customs, Central Excise and Service Tax, Durgapur **: Respondent**
Satyajit Roy Sarani, City Centre,
Durgapur – 713 216

AND

Excise Appeal No. 76032 of 2016

(Arising out of Order-in-Original No. 111/COMMR/DGP/DP-III/15-16 dated 10.03.2016 passed by the Commissioner of Customs, Central Excise and Service Tax, Durgapur Commissionerate, Satyajit Roy Sarani, City Centre, Durgapur – 713 216)

Shri Jugal Kishor Agarwal **: Appellant**
M/s. Adhunik Industries Limited
Raturia Industrial Estate, Angadpur,
Durgapur – 713 215

VERSUS

Commissioner of Customs, Central Excise and Service Tax, Durgapur **: Respondent**
Satyajit Roy Sarani, City Centre,
Durgapur – 713 216

APPEARANCE:

Shri N.K. Chowdhury, Advocate,
For the Appellant(s)

Shri B.K. Singh and Shri S.K. Jha, both Authorized Representatives,
For the Respondent

CORAM:

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

FINAL ORDER NOs. 77830-77831 / 2025

DATE OF HEARING: 07.11.2025

DATE OF DECISION: 02.12.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

Excise Appeal No. 76031 of 2016 has been filed by M/s. Adhunik Industries Limited, Raturia Industrial Estate, Angadpur, Durgapur – 713 215 (hereinafter referred as the appellant-company) against the Order-in-Original No. 111/COMMR/DGP/DP-III/15-16 dated 10.03.2016 passed by the Ld. Commissioner of Customs, Central Excise and Service Tax, Durgapur Commissionerate, Satyajit Roy Sarani, City Centre, Durgapur – 713 216.

1.1. Excise Appeal No. 76032 of 2016 has been filed by Shri Jugal Kishor Agarwal, Director of the appellant-company against the penalty imposed on him by way of the impugned Order-in-Original dated 10.03.2016.

1.2. As both the appeals involve a common issue, they are taken up together for decision by a common order.

2. The facts of the case are that the appellant-company is a medium scale integrated steel plant engaged in the manufacture of excisable goods viz. TMT Bar, MS Round, MS Flat etc. falling under Chapter 72 of the CETA, 1985. The appellant, during the period 2010-11 and 2011-12, removed 2490.88 MT of MS Round and MS Flat on ex-factory sale basis under 103 & 101 numbers of Central Excise invoices to one M/s. Satabdi Tie-up Pvt. Ltd. on payment of Central Excise duty and the appellant has received payments from the said buyer by Account Payee Cheques.

2.1. A team of officers of Kolkata-III Commissionerate visited the factory premises of M/s Satabdi Tie-Up Pvt. Ltd., 17, Nabin Chandra Das Road, Kolkata-700090, West Bengal (hereinafter referred to

as 'M/s. Satabdi') and the residence of Shri Sudarshan Kothari, the Director of the said company, in connection with an investigation against M/s Satabdi who were registered with Central Excise Department. It was alleged that M/s. Satabdi was involved in availing CENVAT credit on fake invoices without receipt of any inputs and passing of irregular CENVAT Credit without manufacturing of excisable goods.

2.2. The statement of Sri Sudarshan Kothari, Director of M/s. Satabdi was recorded, wherein he has admitted that the company had resorted to paper transactions only. In the said matter, Kolkata- III Commissionerate has issued SCN vide C. No. V(30)33/CE/AE/STUPL/Kol-III/11/PT-1/10948 dated 25.06.2013 against M/s Satabdi. From the documents recovered during the said investigation, it appeared that the appellant herein had sold M.S. Round & M.S. Flats to M/s Satabdi on ex-factory basis during the period November & December 2010 and May 2011 by issuing Central Excise invoices but not sending the goods actually to the buyer. The appellant had adopted the modus operandi of sending the goods to someone and cenvatable invoices were made available to M/s. Satabdi. On the strength of those illegal invoices, M/s Satabdi had taken CENVAT Credit without receiving the goods physically. Accordingly, the said Notice was issued to M/s. Satabdi for recovering the allegedly wrongly availed credit. The said proceedings resulted in disallowing the CENVAT credit availed by M/s. Satabdi vide Order-in-Original dated 30.10.2018.

2.3. On the basis of the documents recovered during the course of investigation of M/s. Satabdi, separate proceedings were initiated against the appellant-company. On 12.12.2013, summons were issued to

the appellant, when the authorized representative of the appellant, Shri Ranen Sarkar, appeared before the authority and explained the details of their transactions that they had sold the said goods on ex-factory basis and the customers had arranged the transportation. The appellant's authorized representative was also shown the statement of Shri Sudarshan Kothari wherein he had stated that their company had resorted to paper transactions by receiving only invoices without supply of any goods. However, the authorised representative, Shri Ranen Sarkar, contended that they had sold the said goods against Central Excise invoices and payments were received by Account Payee Cheques.

2.4. On the basis of scrutiny of records, the officers concluded that the appellant had made entries in their statutory records (DSA) and removed 2490.880 M.T of M.S Round & M.S. Flats, clandestinely to some other customers instead of physically delivering the goods to M/s. Satabdi, without following Central Excise Rules and procedures, resulting in supply of unaccounted finished goods in the open market without payment of Central Excise Duty.

3. Accordingly, a Show Cause Notice dated 24.04.2014 was issued to the appellant, wherein it was proposed to recover central excise duty amounting to Rs. 71,14,525/- (inclusive of cesses) from the appellant in terms of Section 11D of Central Excise Act 1944 along with interest under Section 11DD of the said Act. The Notice also proposed recovery of Rs. 71,14,525/- (inclusive of cesses) from the appellant for clandestine manufacture and clearance of 2490.880 M.T of M.S Round & M.S. Flats, in terms of Section 11A(4) of Central Excise Act 1944 along with appropriate interest under section 11AA of

the Act. Penalties under Section 11AC of Central Excise Act, 1944 read with Rule 26 of Central Excise Rules, 2002 were also proposed.

3.1. On adjudication, the Ld. Commissioner has confirmed the recovery of Rs. 71,14,525/- from the Appellant in terms of Section 11D of Central Excise Act 1944. The said amount of duty already paid by the appellant has been appropriated against this demand confirmed. He also confirmed recovery of central excise duty of Rs. 71,14,525/- from the appellant, along with interest, on account of clandestine removal of their finished goods and equal amount of duty as penalty Section 11AC of Central Excise Act 1944 was also imposed. A penalty of Rs. Rs. 10,00,000/- was imposed on Shri Jugal Kishore Agarwal, Director of the company, under Rule 26 (1) read with Rule 26(2)(ii) of the Central Excise Rules, 2002.

3.2. Aggrieved by the confirmation of demands of central excise duty, along with interest and penalty thereon, the appellant-company has filed appeal before this Tribunal. Shri Jugal Kishore Agarwal, its Director, has filed a separate appeal against the imposition of penalty on him.

4. The Ld. Counsel appearing on behalf of the appellants submitted that the impugned order passed by the Ld. Commissioner is not maintainable in law for the following reasons: -

i. The proceeding is vitiated for not making M/s. Satabdi Tie-up Pvt. Ltd. as a party to this proceeding.

ii. There is no dispute in this case about supply of goods against incorrect invoice on payment of Central Excise duty and hence, the demand

under Section 11A(4) has no leg to stand. The provisions of section 11D has no manner of application since it is not a case that the appellant has collected duty and not paid to the Central Government.

iii. There is no evidence of clandestine removal of goods to any person.

iv. There is no dispute that M/s. Satabdi Tie-up Pvt. Ltd. made payment for the goods through banking channel.

v. Statement of Shri Sudarshan Kothari, Director of M/s. Satabdi Tie-up Pvt. Ltd. has no evidentiary value in view of Section 9D of the Act and also in the absence of any corroborative evidence.

vi. Infrastructural deficiency of the buyer or incapacity of some vehicles and/or statement of some owners of the vehicles cannot be a factor for non-supply of goods.

vii. The buyer never disputed the payments not made by Account Payee Cheques.

viii. Issuance of the Show Cause Notice to the buyer of the goods in connection with some transactions with some other persons does not establish anything.

ix. The demand is also barred by limitation since there was no suppression of fact with intent to evade tax.

x. The period of dispute in this case is 2010-11 and 2011-12. The Show Cause Notice was issued on 24.04.2014, and hence, the extended

period of limitation cannot be invoked in this case.

xi. Separate penalty on the Director, Shri Jugal Kishor Agarwal, is not maintainable.

xii. The proceeding is not maintainable either on merit or on the point of limitation.

4.1. In support of their contention, the appellants have relied on the following decisions and submitted the gist in respect thereof: -

(a) *Gonterman Peipers (India) Ltd. [Order-in-Appeal No. 35-37/Kol-VII/2009 dated 30.09.2009]:* In this case Credit was taken on the basis of the Dealer's Invoice where the Dealer himself had stated that no goods were supplied. On contrary, the appellant's Managing Director stated that they received the goods, payments were made through A/c Payee Cheques, the inputs were used in the manufacture of their final products and final products were cleared on payment of duty and there was ɲo evidence of procurement of inputs from any other sources. Inference on the basis of fake number of vehicles cannot be held to be sufficient credit allowed by allowing the appeal. (paras 7-14)

(b) *Juhi Alloys Ltd. [2013 (296) ELT 533 (Tri-Del.)]:* In this case, it has been held that a manufacturer is entitled to take credit on the basis of invoices issued by the first stage dealer even when it is established that they

manufacturer has issued fake invoices in the name of dealer - credit allowed. (Paras 15-16)

(c) *Parmatma Singh Jatinder Singh Alloys Pvt. Ltd. [2011 (266) ELT 67 (Tri-Del.)]:* In this case, goods received were entered in statutory records and they were used for manufacture of final products payment for inputs made through cheque and for their freight through vouchers assessee could not be denied credit for such inputs. (Paras 17-18)

(d) *Grace Casting Ltd. [2019 (369) ELT 751 (Tri-Ahmd.)]:* In this case non-receipt of inputs alleged solely on the basis of RTO Report according to which vehicle number shown in invoices are not capable for transporting the heavy goods whereas appellant have recorded the receipt of the goods in their CENVAT account. Payment made through cheques, fright also paid for transportation no evidence that appellant had procured unaccounted inputs was allowed. Credit. (Para 27)

(e) *Commissioner (ICD), New Delhi. of Customs [2016 (331) ELT 463 (Tri-Del.)]:* It is a settled law that non-impleadment of necessary parties as respondent is 'grave error of law' and appeals cannot survive in absence of such impleadment. (Paras 23-27)

(f) *Flemingo (DFS) Pvt. Ltd. [2018 (363) ELT 450 (Tri.-Hyd.)]:* It is settled law as held in *G-Tech Industries v. Union of India reported in 2016 (339) ELT 209 (P&H)* in light of Section 9D of Central Excise Act, 1944 or pari materia Section 138B of the Customs Act, 1962 that, if Revenue

chose not to examine any person in the adjudication proceedings, it amounts to giving up that witness and such statement cannot be considered relevant. (Paras 28-37)

4.2. In respect of the appeal filed by Shri Jugal Kishore Agarwal, Director of the appellant-company, it has been submitted that there is no evidence available on record to substantiate the allegation of supply of only invoices without any materials; there is no evidence to implicate him in the alleged offence. Accordingly, the Ld. Counsel for the appellant prayed for setting aside the penalty imposed on the Director.

4.3. In view of the above submissions, the appellants have prayed for setting aside the impugned order and allowing the appeals filed by them.

5. The Ld. Authorized Representative of the Revenue submits that the demands have been confirmed on the basis of documentary evidences recovered from M/s. Satabdi, the receiver of the goods. It is his submission that the investigation conducted at the end of M/s. Satabdi has categorically established that the appellant has only supplied invoices and no goods were received by M/s. Satabdi. Accordingly, he justified the demands of central excise duty confirmed and penalties imposed vide the impugned order.

6. Heard both sides and perused the records.

7. We observe that the entire proceedings have been initiated against the appellants on the basis of another investigation initiated by the officers of Kolkata-III Commissionerate against M/s. Satabdi, who is the receiver of the goods supplied by the appellant-company. In his statements, Shri

Sudarshan Kothari, Director of M/s Satabdi, admitted that his company had resorted to paper transactions, i.e., received only invoices without actual receipt of goods. However, we observe that Shri Ranen Sarkar, authorised representative of the appellant herein has categorically stated that they have sold the said goods on ex-factory basis, against Central Excise invoices and payments were received by Account Payee Cheques. For ready reference, the answers given by Authorised representative of the appellant Shri Ranen Sarkar, are reproduced below:

> *"Q. No. 13: Mr. Sarkar how your company sold finished goods to M/s. Satabdi Tie-Up Pvt Ltd.*
>
> *Ans: M/s. Adhunik Industries Ltd., sold goods to M/s. Satabdi Tie-up under cover of Central excise invoices on ex-factory basis.*
>
> *Q. NO. 14: Mr. Sarkar who have arranged the transportation for such sale to NI/s. Satabdi Tie-up (P) Ltd?*
>
> *Ans: We have sold the goods ex-factory basis and the customer have arranged the transportation.*
>
> *Q. NO. 15: Mr. Sarkar than how your company have mentioned the vehicles no. on the invoices under cover of which the goods were sold of M/s. Satabdi Tie-up?*
>
> *Ans: When the loaded trucks are put on the weigh bridge we seeing the number of vehicles, mention the same on the invoices.*
>
> *Q. No. 16: Mr. Sarkar had your company received any sale order from M/s. Satabdi Tie-up for such sale?*
>
> *Ans: Generally we received verbal order over telephone and execute the sales.*

Q. NO. 17: Mr. Sarkar what were the materials M/s. Satabdi Tie-up order for supplying?

Ans: As per party ledger of M/s. Satabdi Tie-up (P) Ltd, MS Flat, MS Round etc. we were ordered for supplying. The copies of the pages of DSAU during the concern period containing subject entries will be submitted within 10 days.

Q.No. 18: Mr Sarkar, have you paid C.Ex. duty for such clearance to M/s. Satabdi Tie-Up Pvt Ltd? Ans: Yes we have paid C.Ex. Duty for such sales.

Q.No. 19: Mr Sarkar Please see and Signe the vehicles particulars i.e. registration No. WB41C 0407 furnished in the invoice No. 2346 dt. 23.10.10 under cover of which 48.8MT of finished goods were sold to M/s. Satabdi Tie-Up Pvt Ltd and say whether the invoice become legitimated documents to pass on Cenvat Credit?

Ans: We have paid C.Ex. duty for such clearance to M/s. Satabdi Tie-Up Pvt Ltd under cover of invoice No. 2346 dt. 23.10.20 10 and we have no Infrastructure to verify the authenticity of vehicle No.

Q.No. 20 Mr Sarkar, please see and signe the submission of Mr. Ravi Singh, proprietor of M/s. Suraj Transport Agency wherein he has declared that he had no transporting business under the vehicle No. WB41C 6964, WB 41C 6963 and WB41D 1251 with M/s. Satabdi Tie-up Pvt. Ltd. and offer your comments?

Ans: I cannot comment because we have sold the entire goods to M/s. Satabdi Tie-up on ex-factory basis."

7.1. From the Questions and Answers reproduced above, we find that the appellant has sold the goods on ex-factory basis. Since, transportation was the responsibility of the customer, they are not responsible for the discrepancy if any, found on the vehicle numbers said to have been used to transport the said goods sold to M/s. Satabdi. They are not responsible if the customer has not used the said goods for manufacture of finished goods in their factory. They have received the payments for the sale through Account Payee Cheques and discharged duty on the said sale. The duty collected from the customer has also been deposited in the Government account. Thus, we agree with the submission that the appellant cannot be held responsible for the discrepancy, if any, found at the end of the customer.

7.2. In this regard, we observe that there is no dispute that the appellant has discharged duty on the sale of 2490.880 M.T of M.S Round & M.S. Flats and the duty collected from the customer M/s. Satabdi has been paid to the government account. Thus, we observe that the provisions of Section 11D are not applicable for the facts and circumstances of this case. Section 11D can be invoked to recover the duty when the appellant has collected any amount as central excise duty' from the customers and not deposited the same to the government account, which is not the case here. In this case, the appellant has raised central excise duty in the invoices raised by them to their customer (M/s. Satabdi), collected the duty from the customer and deposited the same in the government account. Hence, we hold that there is no necessity to invoke the provisions of Section 11D to recover the duty again, as the same has already been deposited in the government account. Accordingly, we set aside

the demand of central excise duty confirmed under Section 11D of the Central Excise Act, 1944, along with interest confirmed under Section 11DD of the Act, in the impugned order. Accordingly, we also hold that appropriation of the duty already paid against the demand under Section 11D is not warranted and hence, set aside the appropriation of the duty against the same as made in the impugned order.

7.3. However, it is made clear that whatever duty has already been paid by the appellant-company in respect of the goods cleared by them, in the normal course, is not interfered with. As the duty has been correctly paid in respect of the goods cleared by them, the provisions of Section 11D of the Act are not applicable in this case and hence, we hold that appropriation of this amount by invoking the provisions of Section 11D is not sustainable.

8. It is also observed that the Kolkata- III Commissionerate of the Revenue has issued SCN vide C. No. V(30)33/CE/AE/STUPL/Kol-III/11/PT-1/10948 dated 25.06.2013 to the customer namely, M/s. Satabdi, to whom the appellant had sold M.S. Round & M.S. Flats, on ex-factory basis during the period November & December 2010 and May 2011 by issuing Central Excise invoices. It has been submitted by the appellant that if M/s. Satabdi has not used the M.S. Rounds & M.S. Flats in the manufacture of their finished goods, the appellant cannot be held responsible for the same. In this regard, it is on record that separate proceedings have been initiated against M/s. Satabdi by issuing Notice dated 25.06.2013, which have been confirmed vide Order-in-Original dated 30.10.2018.

8.1. We find that the Revenue has also alleged that the appellants have not actually supplied the 2490.880 M.T of M.S Round & M.S. Flats to M/s. Satabdi. The case of the Department is that the appellant had adopted the modus operandi of sending the goods to someone and cenvatable invoices were made available to M/s.Satabdi; on the strength of those illegal invoices M/s Satabdi had taken CENVAT credit without receiving the goods physically. We take note of the fact that a separate Notice has been issued to M/s. Satabdi for recovery of the allegedly wrongly availed credit. The said proceedings resulted in disallowance of the CENVAT Credit availed by M/s. Satabdi vide Order-in-Original dated 30.10.2018. Thus, we observe that the allegation against the appellant that they have clandestinely manufactured and cleared 2490.880 M.T. of M.S Round & M.S. Flats to some other customers other than M/s. Satabdi is not substantiated. Thus, we also find that this allegation of clandestine manufacture and clearance of 2490.880 M.T. of M.S Rounds & M.S. Flats against the appellant is not supported by any evidence.

8.2. We also observe that the demand on this score has been confirmed by the ld. adjudicating authority by relying on the statement of Shri Sudarshan Kothari, Director of M/s. Satabdi, wherein he has admitted that his company had resorted to paper transactions, i.e., received only invoices without actual receipt of goods. However, we observe that his statement has not been tested as mandated under Section 9D of the Central Excise Act, 1944. Accordingly, we are of the view that the said statement has no evidentiary value and cannot be relied upon in the current proceedings against the

appellants. This view stands supported by various decisions of the Hon'ble High Courts and Tribunals.

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

> *"3. The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ` 7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.*
>
> *4. In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*
>
> > *"9D. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*

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

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

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

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

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

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

8. As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the

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

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

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

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

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

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

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

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

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

12. Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating

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

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

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

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

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

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

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

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

18. It is only, therefore,-

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

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

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

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

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

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

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

22. It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to

Respondent No. 2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.

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

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

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

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

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

> *(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).*
>
> *25. The writ petition is allowed in the aforesaid terms."*

8.4. In this regard, we also refer to the decision of the Hon'ble Chhattisgarh High Court in the case of *Hi Tech Abrasives Ltd. v. Commissioner of C.Ex. & Cus., Raipur [2018 (362) E.L.T. 961 (Chattisgarh)],* wherein the Hon'ble High Court has observed that unless the substantive provisions contained in Section 9D of the Act are complied with, a statement recorded during search and seizure operations cannot be treated as a relevant piece of evidence. The relevant paragraph of the aforesaid judgement is as under: -

> *"9.5 Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence*

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

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

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

8.7. We observe that the same view has been expressed by the Hon'ble High Court of Allahabad in the case of *Continental Cement Company v. Union of India [2014 (309) E.L.T. 411 (All.)],* wherein it has been held as under: -

> *"10. We have heard the learned counsel for the parties and gone through the material available on record, from which it appears that Shri Shubhashis Dev, Government Examiner of questioned documents, Shimla gave his written opinion dated 12-6-1998, wherein he has stated that "the documents of this case have been carefully and thoroughly examined. The enclosed writings and signatures stamped and marked were all written by one and the same persons".*
>
> *11. From the above, it appears that all the documents were written by one and the same persons, though the dates and the name of the parties are different. When it is so then the genuineness of the documents cannot be accepted.*
>
> *12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects :*
>
> *(i) To find out the excess production details.*

(ii) To find out whether the excess raw materials have been purchased.

(iii) To find out the dispatch particulars from the regular transporters.

(iv) To find out the realization of sale proceeds.

(v) To find out finished product receipt details from regular dealers/buyers.

(vi) To find out the excess power consumptions.

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

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

15. In view of the above, we are of the opinion that when there is no extra consumption of electricity, purchase of raw materials and transportation payment, then manufacturing of extra goods is not possible. No purchase of raw material out side the books have been proved.

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

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

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

> *"40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following:*
>
> *(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
>
> *(ii) Evidence in support thereof should be of:*
>
> *(a) raw materials, in excess of that contained as per the statutory records;*
>
> *(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*
>
> *(c) discovery of such finished goods outside the factory;*
>
> *(d) instances of sale of such goods to identified parties;*
>
> *(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*
>
> *(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;*
>
> *(g) statements of buyers with some details of illicit manufacture and clearance;*

(h) proof of actual transportation of goods, cleared without payment of duty;

(i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.

Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in Centurian Laboratories v. CCE, Vadodara [2013 (293) E.L.T. 689]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [Hindustan Machines v. CCE [2013 (294) E.L.T. 43]. Members of Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the

decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal."

8.9. From a perusal of the records available before us, we find that there is no corroborative evidence available on record to substantiate the allegation of manufacture and clandestine clearance of the goods in this case. Accordingly, we hold that the demand of central excise duty confirmed against the appellant in the impugned order is not sustainable and hence we set aside the same.

8.10. As the demand of duty does not survive, the question of demanding interest or imposing penalty on the appellant-company does not arise. Accordingly, the same stand set aside.

9. Regarding the penalty imposed on Shri Jugal Kishor Agarwal, Director of the appellant-company herein, we observe that the Department has failed to bring in any corroborative evidence to establish his involvement in the alleged offence. Therefore, on the basis of the documentary evidence available on record, we hold that the penalty imposed on him is liable to be set aside. Accordingly, we set aside the same.

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

(Order pronounced in the open court on **02.12.2025**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd