

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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 76990 of 2018

(Arising out of Order-in-Original No. 01/M.P./Ayukt/2018 dated 09.01.2018 passed by the Commissioner of Central Tax and Central Excise, Patna-II Commissionerate)

M/s. Ornate Labs Private Limited

: Appellant

"Bela Industrial Estate", Bela Chapra Industrial Complex,
Muzaffarpur – 842 005

VERSUS

Commissioner of Central Tax & Central Excise

: Respondent

Patna-II Commissionerate

APPEARANCE:

Shri Ankit Kanodia and Ms. Megha Agarwal, both Advocates,
For the Appellant

Shri Prasenjit Das, Authorized Representative,
For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

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

FINAL ORDER NO. 75289 / 2026

DATE OF HEARING: 20.02.2026

DATE OF DECISION: 24.02.2026

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeal has been filed against the Order-in-Original No. 01/MP/AYUKT/2018 dated 05.01.2018, passed by the Ld. Commissioner of Central Tax & Central Excise, Patna-II, wherein the Ld. Commissioner has confirmed the demand of central excise duty amounting to Rs. 3,13,30,403/- along with interest. In the impugned order, a penalty equal to the demand of duty confirmed has been imposed under 11AC of the Central Excise Act, 1944 and a penalty of Rs.5,000/- has been imposed under Rule 27 of the Central Excise Rules, 2002.

2. The facts of the case are that M/s. Ornate Labs Pvt. Ltd. (hereinafter referred to as the "appellant"), is a private limited company incorporated under the Companies Act, 1956 having its principal place of business registered at Bela Industrial Estate, Bela Chapra Industrial Complex, Muzaffarpur – 842 005. The appellant is engaged in the business of manufacturing of medicament falling under Chapter 30 of the Central Excise Tariff Act, 1985 having Central Excise Registration No. AACCM6171DXM001 for such manufacture and sale of medicaments.

2.1. A Thematic Audit was conducted by CERA, on the books of accounts of the appellant covering the period 2011-12 to 2013-14, on the theme of Central Excise Exemption availed by SSI units. During the course of audit, officers of CERA received 24 sample invoices from the appellant. On analysis of the said 24 invoices, it was observed by CERA that the appellant had not cleared the goods as per the provisions laid down in Section 4A of the Central Excise Act, 1944. It was alleged that the appellant was taking into account much lesser value for the purpose of levy and payment of central excise duty than the declared MRP of the medicines less prescribed abatement of 35% of MRP value, resulting in undervaluation of goods and probable short payment of central excise duty to the tune of Rs. 205.33 lakhs. It was also observed by CERA that the average sale price of unit product manufactured by the appellant during the period from April, 2013 to December, 2013 was much higher than the unit sale price during the period from January, 2014 to March, 2014 resulting into probable escapement of central excise duty to the tune of Rs. 83.33 lakhs.

2.2. On the basis of the above findings of the Audit and subsequent investigation conducted by the Department, a Demand cum Show Cause Notice bearing C.No. V-15/M'Pur/Show Cause Notice-Cell/Adjn/2015/6890 dated 06.07.2016 was issued to the appellant, demanding Central Excise Duty of Rs.3,22,30,403/-, along with interest and penalties.

2.3. The said Notice was adjudicated by the Ld. Commissioner vide the impugned order dated 05.01.2018, confirming the demands of central excise duty, along with interest and penalties, by denying the benefit of exemption Notification No. 08/2003-CE dated 01.03.2003 to the appellant for the period from 2013-14 to 2015-16.

2.4. Aggrieved by the confirmation of central excise duty, along with interest and penalties thereon, the appellant has filed this appeal.

3. During the course of hearing, the Ld. Counsel appearing on behalf of the appellant submitted that the sample invoices for each month submitted for the purpose of audit was a rough estimation for general calculation difference; he submits that there was no such actual invoice issued with the MRP mentioned in the said 24 sample invoices. In respect of the allegation of less assessable value shown in the statutory ER-3 return for the quarter ending March, 2014, the appellant submits that the Ld. adjudicating authority has not taken into account the bulk sales of Paracetamol Tab (500 mg) carrying price of Rs. 0.17 per tablet to the Government of Uttar Pradesh, for which the MRP price was not applicable. The Ld. Counsel for the appellant also stated that at times, they have to offer free goods to their buyers and have never calculated duty on those

goods as no MRP was fixed on those goods; MRP was printed only on the goods supplied to open market and not the goods supplied to Government in bulk.

3.1. With respect to the allegation of the Department that the average sale price of product manufactured by the appellant during the period from April, 2013 to December, 2013 was much higher than the unit sale price during the period from January, 2014 to March 2014, resulting into probable escapement of Central Excise duty, the appellant's contention is that it is a wrong assertion arrived at by the Department since the fact of price fluctuation is a normal commercial reality and not an evidence of duty escapement; it is explained that prices of goods fluctuate by reason of ordinary market forces such as demand and supply dynamics, competition, input costs, capacity utilization, seasonality, contract term variations and commercial strategy. Thus, the appellant submitted that mere inter-period variation in average selling prices, even if substantial, is neither unnatural nor inherently indicative of evasion of duty liability.

3.2. It is the submission of the Ld. Counsel for the appellant that Section 4 of the Central Excise Act, 1944 sets out the statutory basis for valuation of excisable goods where duty is charged with reference to value; that as per Section 4, the assessable value of goods sold in the course of wholesale trade shall be the transaction value i.e., the price actually paid or payable for the goods sold, subject to conditions prescribed in Section 4(1)(a); that the key legal principle is that central excise duty is levied at the time of removal of the goods from the factory, based on the price (transaction value) at that specific moment, provided that price is the sole consideration

for the sale. He points out that the Hon'ble Supreme Court and various Tribunals have consistently held that a subsequent reduction in price, for whatever commercial reason (e.g., market competition, increased raw material costs, or a business decision to sell below cost), cannot be a concern for the Central Excise Department regarding the original duty paid at the time of clearance. Therefore, it is argued that a lower average sale price in a subsequent period, by itself, is not proof of duty evasion. It has also been submitted by the appellant that the valuation of the goods cleared in the earlier period was correctly determined by the prices prevailing at that time and in the subsequent period too, the prices were correctly determined and there has been no evasion of central excise duty as alleged by the Department. They have further stated that where goods are sold at a lower average price in a subsequent period, the duty paid on each removal shall remain correct if based on the actual transaction prices at the relevant dates of removal; that a comparison with prior periods is irrelevant, if at the time of each individual clearance, the correct duty was paid based on actual transactional prices and the terms then prevailing. It has also been emphasized that the law does not permit retrospective imputation of value based on comparative analysis alone; valuation must be grounded in documented agreements, invoices and contemporaneous evidence relevant to each removal.

3.3. Moreover, the Ld. Counsel for the appellant also drew attention to the fact that the allegation of undervaluation and the demand of central excise duty has been arrived at by the Department only based on the 24 sample invoices submitted by the appellant to CERA; the appellant has stated that the

Department has not brought in any other document or concrete evidence to prove its contention of undervaluation; that the scheme of dual pricing, one for internal accounting and one for payment Central Excise duty is permissible under law and cannot be invalidated; that there has been no undervaluation of goods as alleged by the department and hence the appellant cannot be prejudiced with such a charge even when the Department has failed to provide any documentary and strong evidence in that regard.

3.4. The appellant also raised the ground that it is a settled principle that the allegation of clandestine removal is a serious one and the same has to be brought on record by the Department, which has not at all been done in the present case; in support of this view, the appellant relies on the decision of the Hon'ble Delhi High Court in the case of *Commissioner of Central Excise v. Kuber Tobacco Products Pvt. Ltd. [(2024) 18 Centax 417 (Del.)]* dated 11.03.2024.

3.5. Reliance is also placed by the appellant upon the judgment of the Hon'ble Delhi High Court in the case of *Commissioner of Central Excise v. Shakti Zarda Factory (I) Ltd. [2015 (321) E.L.T. 438 (Del.)]*, wherein it was held that "the initial burden was on the Department to prove the allegations of the clandestine receipt of raw material or manufacture and removal of the final products".

3.6. Furthermore, the appellant has also cited the decision of the CESTAT, Kolkata in the case of *Raj Kumar Gupta (Alias) v. Commissioner of CGST & Central Excise, Patna-I, Excise Appeal No. 75370 of 2021 dated 28.07.2023* wherein it has been held that the allegation of clandestine removal has to be proved by bringing on record evidences of

procurement of all the raw materials clandestinely in proportionate quantity and it must be proved to whom the goods have been sold; that in the present case no such evidence has been brought in by the Department.

3.7. In addition to the above, the appellant also relied on the following decisions, in support of their contentions:

- i. *M/s. Arya Fibres Ltd. v Commissioner of C.Ex., Ahmedabad-II* [2014 (311) E.L.T. 529]
- ii. *M/s. Nova Petrochemicals v. Commissioner of C.Ex., Ahmedabad-II* [Final Order Nos. A/11207-11219/2013 dated 26.09.2013]
- iii. *M/s. Asian Plywood Industries Pvt. Ltd. v. Commissioner of CGST & Excise, Patna-II* [Excise Appeal No. 75229 of 2022 dated 28.07.2023]
- iv. *M/s. Shree Krishna Laxami Steel Udyog Private Limited vs Commissioner of Central Excise* [Excise Appeal No.70301 of 2013 dated 13.12.2024]
- v. *M/s. Ambica Iron and Steel Pvt. Ltd. v. Commissioner of Central Excise, Customs And Service Tax, Rourkela* [2022-TIOL-67-CESTAT-KOL]
- vi. *M/s. Bihar Foundary & Castings Ltd. v. CCE, Ranchi* [2019 (8) TMI 527 –CESTAT Kolkata]
- vii. *M/s. Continental Cement Company v. Union of India* [2014 (309) E.L.T. 411 (All) = 2014-TIOL-1527-HC-ALL-CX]
- viii. *M/s. Metals Pvt.Ltd. v. Union of India* [2017 (345) ELT 187 (Jhar.) = 2016-TIOL-2590-HC-JHARKHAND-CX]
- ix. *Commissioner of C.Ex., Meerut-I v. R.A. Castings Pvt.Ltd.* [2012 (26) S.T.R. 262 (All.)]
- x. *Paints and Chemicals v. Commissioner of Central Excise & Customs, Raipur* [2018 (8) TMI 473 (Tri.-Delhi) = 2019-TIOL-1239-CESTAT-DEL]

3.8. In view of the above submissions, the appellant submits that the demand of central excise duty, confirmed on the basis of the value available in 24 invoices, is legally not sustainable. Accordingly, the appellant prayed for setting aside the demands of central excise duty confirmed, along with interest, and penalty in the impugned order.

4. The Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order. The Revenue's contention is that the appellant has maintained two sets of invoices, one for central excise purpose and other one reflecting the actual value; thus, the Department has adopted the average sale price to determine the differential duty payable by the appellant. Accordingly, the Ld. Authorized Representative of the Revenue supported the demands confirmed in the impugned order.

5. Heard both sides and perused the appeal records.

6. We find that the demand in the present case has been raised and confirmed on the basis of an Audit conducted by CERA, on the books of accounts of the appellant covering the period from 2011-12 to 2013-14. During the course of Audit, officers of CERA received 24 sample invoices from the appellant. On analysis of the said 24 invoices, it was gathered by CERA that the appellant has not cleared the goods as per the provisions laid down in Section 4A of the Central Excise Act, 1944. It was alleged that the appellant was taking into account a much lesser value for the purpose of levy and payment of central excise duty than the MRP declared in the said invoices. On the basis of these observations, the Department has

arrived at the average sale price of unit product manufactured by the appellant during the period from April 2013 to December, 2013. It was found that the average sale price, arrived at by the Department, was much higher than the unit sale price declared by the appellant during the period from January, 2014 to March, 2014. Accordingly, on the basis of the average sale price arrived at by the Department, differential central excise duty has been demanded for the entire period from 2011-12 to 2015-16. The demand has been confirmed by denying the benefit of exemption Notification No. 08/2003-CE dated 01.03.2003 as availed by the appellant for the period 2013-14 to 2015-16.

6.1. We do not find any method of valuation in the Central Excise Act, 1944 to adopt the average sale price of one period and demand central excise duty for the earlier period or subsequent period. It is pertinent to note that valuation of goods in the Central Excise Act are governed by Section 4 of the Central Excise Act, 1944, which sets out the statutory basis for valuation of excisable goods where duty is charged with reference to value. As per Section 4, the assessable value of goods sold in the course of wholesale trade shall be the transaction value i.e., the price actually paid or payable for the goods sold, subject to conditions prescribed in Section 4(1)(a). The key legal principle is that central excise duty is levied at the time of removal of the goods from the factory, based on the price (transaction value) at that specific moment, provided that price is the sole consideration for the sale. Any subsequent reduction in price, for whatever commercial reason (e.g., market competition, increased raw material costs, or a business decision to sell below cost), cannot be a

concern for the Central Excise Department regarding the original duty paid at the time of clearance. Therefore, we observe that a lower average sale price in a subsequent period, by itself, cannot be a reason to allege evasion of central excise duty. In the present case, we observe that the valuation of the goods cleared in the earlier period was correctly determined by the appellant, by adopting the prices prevailed at that time. A comparison with prior periods is irrelevant, if at the time of each individual clearance, the correct duty was paid based on actual transactional prices and the terms then prevailing. The law does not permit retrospective imputation of value based on comparative analysis alone. We are of the opinion that the allegation of undervaluation, if any, has to be supported by documentary evidences such as agreements, invoices, flow back of money and contemporaneous evidence relevant to each removal.

6.2. In the present case, it is observed from the records that the allegation of undervaluation and the demand of central excise duty has been arrived at by the Department only on the basis of the 24 sample invoices submitted by the appellant to CERA. The Department has not brought in any other evidence to prove its contention of undervaluation.

6.3. We find that the Department has alleged dual pricing by the appellant. In this regard, however, we observe that the Department has not brought in any evidence to substantiate the allegation that the appellant has actually cleared the goods under two sets of invoices. In fact, we find that the Department has conducted verification of the invoices by the field officers. The verification report received has been recorded by the Id. adjudicating authority in the

impugned order, which is reproduced below for ready reference:

"7. Since address of the manufacturer company was mentioned to be located at Indore and Works as B.I.E. 842 005, a reference through letter dated 07.04.2015 was made to the Asstt Commissioner, C. Ex. & S. Tax Division, Indore to verify whether there was any factory or office in the said name and address ORNATE LABS PVT LTD, 101, Royal Estate, 9/2 South Tukoganj, Indore 452 001. A reply was received from the Asstt Commissioner, Service Tax Division, Indore through letter F. No.: V(ST)3-244/All Misc./2014-15/430 dated 08.04.2015 (Annexure G-2 to the Notice) stating that no such office in the name of M/s Ornate Labs Pvt Ltd is functioning from this premises.

8. A reference also was made to the Dy Commissioner, Commercial Taxes through letter dated 06.06.2016, enclosing therewith the copies of the twenty four invoices, for verification of genuineness of the road permit and vehicle no. in respect of these invoices. Further, since one of these twenty four invoices, invoice no.: 8 dated 16.05.2011 of Rs 4,62,000/- was issued by the Noticee no. 1 to M/s Venus Mediscience Pvt Ltd, Muzaffarpur, a reference, vide letter dated 10.06.2016, was also made to them to verify the genuineness thereof. The Dy Commissioner of Commercial Taxes, East Circle, Muzaffarpur, vide his letter dated 16.06.2016 (Annexure I to the Notice) informed that the invoices were found to have been duly entered in the books of account of the Noticee No.1. M/s Venus Medisciences Pvt Ltd, vide their letter dated 13.06.2016 (Annexure H to the Notice) informed, after verifying the same from their record, that the said invoice has been issued by M/s Ornate Lab Pvt Ltd, Industrial Area, Bela, Muzaffarpur (Noticee no. 1). Thirdly, the products manufactured by the Noticee No.1 were procured from the local market. The products so procured showed same MRPs as shown in the 24 invoices submitted to the Audit for verification but showed the address of the manufacturer as located in Indore which on verification was found to be fake as discussed at para 7 above.

6.4. A perusal of the above verification reports indicates that there was no evidence of another unit located at Indore. The Muzzafarpur unit belonged to the appellant, for which the clearances were found to be accounted. Thus, we observe that the verification by the Department has not brought in any evidence of clandestine removal or dual pricing by the appellant. Further, we also note that the scheme of dual pricing, one for internal accounting and one for payment Central Excise duty is permissible under law and cannot be invalidated. We find that there has been no undervaluation of goods as alleged by the Department and hence the appellant cannot be prejudiced with such a charge, especially when the Department has failed to provide any documentary evidence in support of the allegation of clandestine removal.

6.5. The allegation of the Department is that the average sale price of product manufactured by the appellant during the period from April, 2013 to December, 2013 was much higher than the unit sale price during the period from January, 2014 to March 2014, resulting into probable escapement of Central Excise duty. In this regard, we take note of the fact that the Ld. adjudicating authority has not taken into account the bulk sales of Paracetamol Tab (500 mg) carrying price of Rs. 0.17 per tablet to the Government of Uttar Pradesh, for which the MRP price was not applicable. The appellant has submitted the evidence of invoices issued for clearances of goods in bulk to the Government of Uttar Pradesh without MRP. For ready reference, a sample invoice issued by them for clearances of goods in bulk to the Government of Uttar Pradesh is reproduced below:

TAX INVOICE
ORNATE LABS PVT. LTD.
Industrial Estate Bela, Muzaffarpur-842005

TIN-VAT: 10311595089	VAT-CST: 10311595186	DL: 1418/1419
M/S ORNATE LABS (PVT) LTD 5-KAISERBAGH, J.C. BOSE ROAD LUCKNOW	INV.NO. : 70 ORDER NO. : NIL CHALLAN NO.: 171-175 THROUGH : PRIVATE VEHICLE R/PERMIT NO. : UP58T-2592 NO. OF CASE : 392	DATE : 21/12/2012 DATE : 30/11/2012 DATE : 21/12/2012 DATE : 21/12/2012 P/R MARK : 70/392
DL NO.: 2246/12 & 2247/12 TIN NO. : CST NO. :		

S.No.	Product Name	PACK	BATCH	EXP.	QTY	M.R.P.	RATE	AMOUNT
1	VITALVIT-A 100 ML SOLU	1X120ML	VVAS-125	May-14	19509	N-A	46.74	911,850.66

MARKS : U.P.G.S 2012-13 NOT FOR SALE IN WORDS: Nine Lakh Eleven Thousand Eight Hundred Fifty One Only.	<table border="0"> <tr> <td>TOTAL :</td> <td style="text-align: right;">911850.66</td> </tr> <tr> <td>DISCOUNT :</td> <td style="text-align: right;">0.00</td> </tr> <tr> <td>FORM F ON :</td> <td style="text-align: right;">911850.66</td> </tr> <tr> <td>OTHER ADJ. :</td> <td style="text-align: right;">0.00</td> </tr> <tr> <td>ROUND OFF :</td> <td style="text-align: right;">0.34</td> </tr> <tr> <td>NET PAYABLE :</td> <td style="text-align: right;">911851.00</td> </tr> </table>	TOTAL :	911850.66	DISCOUNT :	0.00	FORM F ON :	911850.66	OTHER ADJ. :	0.00	ROUND OFF :	0.34	NET PAYABLE :	911851.00
TOTAL :	911850.66												
DISCOUNT :	0.00												
FORM F ON :	911850.66												
OTHER ADJ. :	0.00												
ROUND OFF :	0.34												
NET PAYABLE :	911851.00												

Terms & Conditions:

1. Subject to MUZAFFARPUR Jurisdiction.
2. On the strength of Warranty given by the Companies, we hereby this warranty that under this invoice do not contravene in any way the provision of section 18 of the Drug Act 1940.
3. Goods sold on an understanding that buyer is holding all valid licenses. Our responsibility ceases as soon as POSTAL/RR/MTR notes are issued.
4. Rate inclusive of Octroi/Breakage/Leakage & Damage.

ORNATE LABS PVT. LTD.

 Authorised Signatory

6.6. On perusal of the invoices submitted, we find that the appellant has cleared the goods to Uttar Pradesh Government without MRP. We agree with the submission of the appellant that MRP price need not be adopted for the bulk sales made by the appellant to the Government of Uttar Pradesh. We have also taken note of the factual position that the appellant have to offer free goods to their buyers and have never calculated duty on those goods as no MRP was fixed on those goods. MRP was printed only on the goods supplied to open market and not the goods supplied to Government in bulk. Thus, in this set of facts, we are of the view that the demand of central excise duty confirmed in the impugned order on the basis of the average sale price arrived at by the Department, is legally not sustainable.

6.7. From a perusal of the records, it is seen that on the basis of the alleged undervaluation, the Id. adjudicating authority has concluded that the appellant has exceeded the exemption provided to SSI units for the Financial Years 2013-14 to 2015-16 and accordingly, denied the benefit of exemption Notification No. 08/2003-CE dated 01.03.2003 availed by the appellant for the period 2013-14 to 2015-16. As the allegation of undervaluation is not sustained, we hold that the denial of SSI exemption to the appellant for the Financial Years 2013-14 to 2015-16, is legally not sustainable.

6.8. Further, we find that the demand in this case has been raised and confirmed on the allegation of clandestine manufacture and removal of excisable goods. At this juncture, it is relevant to emphasize that clandestine manufacture and removal of excisable goods is a serious allegation, which needs to be substantiated through tangible, direct, affirmative and incontrovertible evidences relating to:

- a. Receipt of raw material inside the factory premises, and non-accountal thereof in the statutory records;
- b. Utilization of such raw material for clandestine manufacture of finished goods;
- c. Manufacture of finished goods with reference to Installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;
- d. Clandestine removal of goods with reference to entry of vehicle/truck in the factory

premises, loading of goods therein, security gate records, transporters' documents, such as L.R.s. statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

e. Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal.

6.9. In the instant case, we observe that no such evidence to the above effect have been brought on record. Since none of the ingredients required for alleging clandestine manufacture and clearance are satisfied in this case, we find that such an allegation against the appellants cannot be sustained, merely on the basis of assumptions and presumptions.

6.10. We observe that a similar issue has 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] wherein it has been held that the allegation of clandestine removal is to be corroborated by supporting evidences. The relevant observations of Tribunal in the said order 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.”

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

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

11. From the above, it appears that all the documents were written by one and the same persons, though the dates and the name of the parties are different. When it is so then the genuineness of the documents cannot be accepted.

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

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

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

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

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

6.12. Further, the Tribunal in *Nova Petrochemicals v. Commissioner of C.Ex., Ahmedabad-II* [Final Order Nos. A/11207-11219/2013 dated 26.09.2013], while dealing with a similar issue, has observed as follows:-

"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 Revenues 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 sales 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 for in excess of what is necessary for manufacture of goods otherwise manufactured and validity 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 document recovered during the search and activities being carried on in the factory of production; etc.”

7. Therefore, by applying the ratio laid down in the above decisions and in the absence of any corroborative evidence available on record to substantiate the allegation of clandestine clearances in the impugned order, we hold that the demand confirmed in the impugned order is not sustainable. Accordingly, we set aside the same. As the demand of central excise duty is not sustained, the question of demanding interest or imposing penalty does not arise and hence we set aside the same.

8. In the result, we set aside the impugned order qua confirming the demand of central excise duty, along with interest and penalties thereon, and allow the appeal filed by the appellant with consequential relief, if any, as per law.

(Order pronounced in the open court on **24.02.2026**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd