

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

REGIONAL BENCH – COURT NO. 1

Excise Appeal No. 77634 of 2018

(Arising out of Order-in-Original No. 28/Commr.Audit/CEX/BBSR/2017-18 dated 27.03.2018 passed by the Commissioner (Audit), G.S.T. and C.Ex., Bhubaneswar, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. Shreeji Ispat Limited

: Appellant

IDCO, Plot No. 93-110,
New Industrial Estate, Jagatpur,
District: Cuttack, PIN – 754 021, Odisha

VERSUS

Commissioner of C.G.S.T. and Central Excise

: Respondent

Bhubaneswar Commissionerate,
Central Revenue Building, Rajaswa Vihar,
Bhubaneswar, PIN – 751 007, Odisha

WITH

Excise Appeal No. 77635 of 2018

(Arising out of Order-in-Original No. 28/Commr.Audit/CEX/BBSR/2017-18 dated 27.03.2018 passed by the Commissioner (Audit), G.S.T. and C.Ex., Bhubaneswar, Central Revenue Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

Surendra Kumar Behera, Managing Director,

: Appellant

M/s. Shreeji Ispat Limited

IDCO, Plot No. 93-110,
New Industrial Estate, Jagatpur,
District: Cuttack, PIN – 754 021, Odisha
[Corres: Plot No. 315, Flat No. 302, ARCHID CENTRAL,
DISTRICT CENTRE, Chandrasekharapur, Bhubaneswar – 751 016,
Odisha]

VERSUS

Commissioner of C.G.S.T. and Central Excise

: Respondent

Bhubaneswar Commissionerate,
Central Revenue Building, Rajaswa Vihar,
Bhubaneswar, PIN – 751 007, Odisha

WITH

Excise Appeal No. 76432 of 2018

(Arising out of Order-in-Original No. 59/CCE/CEX/RKL/2017-18 dated 30.01.2018 passed by the Commissioner of Central Tax, G.S.T. & C.X. Commissionerate, Rourkela, KK-42, Civil Township, Rourkela – 769 004)

M/s. Shreeji Ispat Limited

: Appellant

(Furnace Division),
At-Tanto, Bhadrasahi, Barbil,
District: Keonjhar, Odisha)

VERSUS

Commissioner of C.G.S.T. and Central Excise

: Respondent

Rourkela Commissionerate,
KK-42, Civil Township, Rourkela – 769 004, Odisha

Appeal No(s).: E/77634,77635/2018-DB
& E/76432,76433/2018-DB

AND

Excise Appeal No. 76433 of 2018

(Arising out of Order-in-Original No. 59/CCE/CEX/RKL/2017-18 dated 30.01.2018 passed by the Commissioner of Central Tax, G.S.T. & C.X. Commissionerate, Rourkela, KK-42, Civil Township, Rourkela – 769 004)

Surendra Kumar Behera, Managing Director, : **Appellant**
M/s. Shreeji Ispat Limited
(Furnace Division),
At-Tanto, Bhadrasahi, Barbil,
District: Keonjhar, Odisha)

VERSUS

Commissioner of C.G.S.T. and Central Excise : **Respondent**
Rourkela Commissionerate,
KK-42, Civil Township, Rourkela – 769 004, Odisha

APPEARANCE:

Shri Jnanesh Mohanty, Advocate,
Shri Narendra Kr. Dash, Advocate,
Smt. Shreya Mundhra, Advocate,
Smt. Samriddhi Sinha, Advocate,
For the Appellant(s)

Shri S.K. Singh, Authorized Representative,
Shri A. Mukherjee, Authorized Representative,
For the Respondent

CORAM:

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

FINAL ORDER NOS. 75611-75614 / 2026

DATE OF HEARING: 30.03.2026

DATE OF DECISION: 19.05.2026

ORDER: [PER SHRI ASHOK JINDAL]

All these appeals are having common issues and therefore, they are taken up together, for disposal by way of a common order.

Appeal No(s): E/77634,77635/2018-DB
& E/76432,76433/2018-DB

2. The details of the present appeals are as under: -

Sl. No	Appeal No.	Name(s) of the Appellant	Period of Dispute	Order-in-Original No. & Date	Amount in dispute
1.	E/77634/2018	M/s. Shreeji Ispat Ltd.	June 2010 to 14.02.2013	OIO No. 28/Commr.Au dit/CEX/BBSR/2017-18 dtd. 27.03.2018	Duty Demand: Rs. 6,06,57,938/- Penalty u/s 11AC: Rs. 6,06,57,938/-
2.	E/77635/2018	Surendra Kumar Behera			Penalty u/r 26: Rs. 10,00,000/-
3.	E/76432/2018	M/s. Shreeji Ispat Ltd.	November 2012 to 06.02.2013	OIO No. 59/CCE/C.EX/RKL/2017-18 dated 30.01.2018	Duty Demand: Rs. 3,35,36,642/- Penalty u/s 11AC: Rs. 3,35,36,642/-
4.	E/76433/2018	Surendra Kumar Behera			Penalty u/r 26: Rs. 1,00,000/-

Appeal No(s): E/77634 & 77635/2018

3. The appellant-company, namely, M/s Shreeji Ispat Limited, having its factory at IDCO Plot No. 93-110, New Industrial Estate, Jagatpur, Dist-Cuttack, Odisha, bearing Central Excise Registration No. AAFCS4401DEM001, is engaged in the manufacture of TMT Bars, M.S. Rods, M.S. Flats, M.S. Square Bars, M.S. Angles, M.S. Round, M.S. Scrap & Waste, etc. falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant maintains proper records of manufacture and removal of goods and files periodical statutory returns as prescribed under the Central Excise Rules, 2002.

4. Based on intelligence, officers of the Directorate General of Central Excise Intelligence (DGCEI), Rourkela Regional Unit conducted simultaneous search operations on 14.02.2013 at:

- (i) The factory-cum-office premises of the Appellant at Jagatpur, Cuttack ("SIL factory, Cuttack");
- (ii) The factory-cum-office premises of M/s Shreeji Ispat Ltd. (Furnace Division) at Tanto, Bhadrasahi, Barbil, Dist. Keonjhar ("SIL factory, Tanto"), which is the sister concern of the Appellant;
- (iii) The office premises of M/s S.K. Mineral Handling (P) Ltd. and M/s Kuber Extraction at New Bus Terminus, Barbil;
- (iv) The residential premises of Shri Surendra Kumar Behera, Managing Director, at Flat No. 201 & 202, Archid Avenue, Satyanagar, Bhubaneswar; and
- (v) The residential premises of Shri Nitai Bhattacharya, Manager of SIL factory, Cuttack, at IPCOL Chhak, Jagatpur, Dist. Cuttack.

4.1. During the course of search, various documents as well as statutory records were recovered and seized under Panchanama dated 14.02.2013. A pen drive (Document No. 02/DGCEI/RRU/SIL/F/CTC/13) was allegedly recovered from the office table drawer of Shri Manas Ranjan Patra, Office Assistant of the Appellant's factory at Cuttack. Printouts taken from the said pen drive were kept in Document No. 01/DGCEI/RRU/SIL/F/CTC/13 (Annexure-2 to SCN),

which is the primary document on which the entire allegation of clandestine removal rests. Other documents were also recovered from the residential premises of the Managing Director and the Manager.

4.2. Statements were recorded on the spot on 14.02.2013 under Section 14 of the Central Excise Act, 1944 from:

- (a) Shri Manas Ranjan Patra, Office Assistant, who inter alia stated that the pen drive related to business transactions of the appellant and that 'K' meant "Kacha";
- (b) Shri Nitai Bhattacharya, Manager, who accepted the deposition of Shri Patra and inter alia stated that the pen drive contained business transactions of the Appellant as well as some other companies, and that the data had been entered by Shri Bishnu Prasad Nayak. He further deposed that the pen drive contains business transaction of the Noticee as well as some other companies and the data in the pen drive have been entered by Shri Bishnu Prasad Nayak and at times by Shri Manas Ranjan Patra Office Assistant; and
- (c) Shri Surendra Kumar Behera, Managing Director (Co-noticee), who accepted the statements of Shri Patra and Shri Bhattacharya.

4.3. Subsequently, in his statement dated 19.06.2013, the Shri Surendra Kumar Behera, Managing Director of the appellant-company, stated that the entry 'K' in the pen drive data referred to "Bank" and asserted that the data contained

fabricated/inflated figures prepared specifically for banking purposes to maintain cash credit limits. This position was corroborated by Shri Bishnu Prasad Nayak, Accountant, in his statement dated 12.06.2013, who explained that 'K-Bill' referred to bank-related figures and that the files contained exaggerated figures prepared to enhance credit limits with the banks, rather than representing actual manufacture or clearance of goods.

4.4. Consequent upon the search on 14.02.2013, the appellant made a voluntary payment of Rs. 31,00,000/- towards past Central Excise duty liability vide Challan dated 19.02.2013 and Challan (No. 90099) dated 20.06.2013.

5. Based on the search proceedings, a Show Cause Notice was issued to the appellants by the Additional Director General, DGCEI, Hyderabad vide C.No. 19/2015(RRU)/1110-1111 dated 16.06.2015 alleging suppression of production and clandestine clearance of finished goods amounting to 15,116.34 MT valued at Rs. 52,99,00,223/- without payment of Central Excise duty of Rs. 6,06,57,938/- during the period June 2010 to 14.02.2013, invoking the extended period of limitation under proviso to Section 11A(1)/Section 11A(4) of the Central Excise Act, 1944. The said Show Cause Notice also proposed recovery of interest thereon under Section 11AB/11AA, penalty under Section 11AC read with Rule 25 on the appellant-company, namely, M/s. Shreeji Ispat Limited, and personal penalty under Rule 26 on Shri Surendra Kumar Behera, Managing Director of the appellant-company (co-appellant herein).

5.1. The appellant-company filed a detailed reply dated 29.07.2016, refuting all allegations and contending, inter alia, that:

- (a) The entire demand was based on a pen drive and its printouts without any corroborative evidence;
- (b) The pen drive was used by various employees and was not exclusively owned by the Appellant;
- (c) The data in the pen drive contained fabricated/inflated figures maintained solely for the purpose of enhancing credit limits with banks, which was substantiated by correlating the figures with book debts declared to Bank of Baroda;
- (d) The Department failed to establish clandestine procurement of raw materials, excess production, excess electricity consumption, extra labour engagement, or flow-back of sale proceeds; and
- (e) The statements of buyers were recorded behind the back of the appellant without affording any opportunity of cross-examination.

6. Thereafter, the matter was adjudicated by way of the impugned Order-in-Original No. 28/Commr.Audit/CEX/BBSR/2017-18 dated 27.03.2018, wherein the Id. adjudicating authority confirmed the entire proposed demand of Rs. 6,06,57,938/- towards Central Excise duty (inclusive of cesses), appropriated the voluntary payment of Rs. 31,00,000/-, ordered recovery along with interest

under Section 11AB/11AA of the Act, imposed equal penalty of Rs.6,06,57,938/- under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002, and imposed a personal penalty of Rs. 10,00,000/- on Shri Surendra Kumar Behera under Rule 26 of the said Rules.

6.1. Against the said order, the appellants, namely, M/s. Shreeji Ispat Ltd. and its Managing Director, Shri Surendra Kumar Behera, having filed the appeals bearing Nos. E/77634/2018 and E/77635/2018 respectively.

Appeal No(s): E/76432 & 76433/2018

7. M/s Shreeji Ispat Limited (Furnace Division), having its factory at Tanto, Bhadrasahi, Barbil, Dist-Keonjhar, Odisha, (the appellant-company) bearing Central Excise Registration No. AAFCS4401DEM002, is engaged in the manufacture of M.S. Ingot falling under Chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. The factory has two crucible Induction furnaces of 8 MT capacity. The main raw materials are Sponge Iron, Pig Iron and HMS. Almost all the finished M.S. Ingots of the appellant herein are sold to its sister concern, M/s Shreeji Ispat Limited (Rolling Division) at Jagatpur, Cuttack.

8. Based on intelligence, officers of the DGCEI, Rourkela Regional Unit conducted simultaneous search operations on 14.02.2013 at:

- (i) The factory-cum-office premises of the appellant-company at Tanto, Bhadrasahi, Barbil, Dist. Keonjhar ("SIL factory, Tanto");
- (ii) The factory-cum-office premises of M/s Shreeji Ispat Limited (Rolling Division) at IDCO Plot No. 93-110, New Industrial Estate, Jagatpur, Dist- Cuttack ("SIL factory, Cuttack"), the sister concern of the appellant-company;
- (iii) The office premises of M/s S.K. Mineral Handling (P) Ltd. and M/s Kuber Extraction at New Bus Terminus, Barbil;
- (iv) The residential premises of Shri Surendra Kumar Behera, Managing Director, at Flat No. 201 & 202, Archid Avenue, Satyanagar, Bhubaneswar; and
- (v) The residential premises of Shri Nitai Bhattacharya, Manager of SIL factory, Cuttack, at IPCOL Chhak, Jagatpur, Dist. Cuttack.

8.1. During the course of search, various documents as well as statutory records were recovered and seized under Panchanama dated 14.02.2013. A pen drive was allegedly recovered from the possession of Shri Manas Ranjan Patra, Office Assistant of SIL factory, Cuttack. Printouts taken from the said pen drive were kept in Document No. 04/DGCEI/RRU/SIL/F/CTC/13 (Annexure-5 to the SCN), which is the primary document relied upon by the Department to establish clandestine clearance. Other documents relied upon include loose sheets recovered from the possession of Shri Dilip Kumar Biswal, Accountant of the appellant (Document No. 02/DGCEI/RRU/SIL(O)/13, Annexure-14 to the SCN), and e-mail printouts of daily production log sheets

(Document No. 01/DGCEI/RRU/SIL(O)/13, Annexure-8 to the SCN).

8.2. Statements were recorded under Section 14 of the Central Excise Act, 1944 from:

- (a) Shri Manoj Kumar Jha, In-charge of SIL factory, Tanto, on 14.02.2013;
- (b) Shri Dilip Kumar Biswal, Accountant of the Appellant, on 14.02.2013, who stated that part of the production and clearance was shown in the statutory records as per instructions of the Managing Director;
- (c) Shri Manas Ranjan Patra, Office Assistant of SIL factory, Cuttack, on 14.02.2013;
- (d) Shri Nitai Kumar Bhattacharya, Manager of SIL factory, Cuttack, on 09.05.2013, who categorically stated that the pen drive belonged to Shri Bishnu Prasad Nayak and was used by him; and
- (e) Shri Surendra Kumar Behera, Managing Director (Co-Noticee), on 19.06.2013.

9. The appellant's case, as stated during investigation and in the reply to Show Cause Notice, is that the data contained in the pen drive was authored by Shri Bishnu Prasad Nayak and contained fabricated/inflated figures prepared for submission to banks for the purpose of enhancing credit limits. Shri Bishnu Prasad Nayak, in his statement dated 12.06.2013 (answer to question Nos. 21 and 22), categorically stated that the data in the pen drive was "*meant for bank purpose*" and that the file contained "*actual purchase/sale of the company also some exaggerated figures of both sale and purchase has*

been posted to produce to bank.” This position was corroborated by Shri Nitai Bhattacharya and the Managing Director Shri Surendra Kumar Behera, who reiterated that the data was fabricated for banking purposes. However, these aspects were not considered by the Revenue.

10. Based on the search proceedings, a Show Cause Notice bearing No. 35/2015 dated 16.09.2015 was issued to the appellants by the Additional Director General, DGCEI Zonal Unit, Hyderabad, proposing demand of Central Excise duty of Rs.3,25,59,847/-, Education Cess of Rs. 6,51,197/- and Higher Education Cess of Rs. 3,25,598/-, totalling to Rs. 3,35,36,642/- for the period from November 2012 to 06.02.2013, invoking the extended period of limitation under Section 11A(4) of the Central Excise Act, 1944. The said Notice also proposed recovery of interest under Section 11AA, penalty under Section 11AC read with Rule 25 of the Central Excise Rules, 2002 on the appellant-company, and personal penalty under Rule 26 on Shri Surendra Kumar Behera, Managing Director (co-appellant herein).

10.1. The appellant filed a detailed reply, which was received on 17.01.2017, denying all the allegations and contentions in the Show Cause Notice, inter alia contending that:

- (a) The entire demand was based on presumptions drawn from pen drive data and loose sheets without any corroborative evidence;
- (b) The pen drive was not owned by the Appellant and was used by various employees including those of other companies;

- (c) The data in the pen drive contained fabricated/inflated figures maintained solely for the purpose of banks, as confirmed by the author Shri Bishnu Prasad Nayak;
- (d) No physical stock discrepancy of either raw materials or finished goods was found during the surprise search on 14.02.2013;
- (e) No consignment was ever seized by the DGCEI in transit without proper excise documents;
- (f) Electricity consumption cannot be the sole basis for determining production quantity; and
- (g) The computer printouts from the pen drive were inadmissible in evidence for non-compliance with Section 36B of the Central Excise Act, 1944.

11. Thereafter, the matter was adjudicated vide the impugned Order-in-Original No. 59/CCE/CEX/RKL/2017-18 dated 30.01.2018 wherein the Id. adjudicating authority has confirmed the entire proposed demand of Rs. 3,35,36,642/- towards Central Excise duty (inclusive of cesses), ordered recovery along with interest under Section 11AA of the Act, imposed equal penalty of Rs. 3,35,36,642/- under Section 11AC of the Act read with Rule 25 of the Rules, and imposed a personal penalty of Rs. 1,00,000/- on Shri Surendra Kumar Behera under Rule 26 of the said Rules.

11.1. Against the said order, the appellants, namely, M/s. Shreeji Ispat Ltd. and its Managing Director, Shri Surendra Kumar Behera, having filed the appeals bearing Nos. E/76432/2018 and E/76433/2018 respectively.

12. During the course of hearing, the Ld. Counsel appearing on behalf of the appellants have made various submissions in support of their contentions, which can inter alia be summarized as follows: -

A. The charge of clandestine removal being a serious allegation, proceedings cannot be based on assumptions and presumptions without clinching and corroborative evidence on record. The impugned Orders having failed to do so, are liable to be set aside on this ground itself:

- (i) At the outset, it is submitted by the appellants that it is a settled principle of law that the charge of clandestine removal is a serious charge akin to fraud, which is required to be established with positive, affirmative and tangible evidence and the burden of establishing the said charge lies heavily upon the Revenue. It has been consistently held by the Hon'ble Courts and Tribunals that clinching evidence is required to be adduced to establish the said charge beyond a reasonable doubt. Demand based on presumptions and conjectures is required to be set aside.
- (ii) The entire allegation of clandestine removal of finished goods in the present case is based primarily on printouts taken from seized pen drives along with certain private records recovered from the residential premises of the Managing Director and the Manager, loose sheets recovered from the Accountant and e-mail printouts of daily production log sheets. There is no independent or corroborative evidence whatsoever to substantiate the grave allegation of clandestine removal.

- (iii) In the present case however, there is no evidence of:
- (a) clandestine procurement of the huge quantity of raw materials that would have been required to manufacture the alleged quantity of finished goods;
 - (b) excess electricity consumption commensurate with the alleged additional production;
 - (c) engagement of additional labour for manufacture of such quantities;
 - (d) transportation records or statements from transporters confirming movement of clandestinely removed goods;
 - (e) discrepancies in the physical stock of either raw materials or finished goods found during the search or at any time thereafter;
 - (f) unexplained cash or bank deposits found at the premises of the Appellant; or
 - (g) flow-back of money from alleged buyers to the appellant.
- (iv) In fact, during the course of investigation, the DGCEI officers visited the factory but no discrepancy in the stock of either raw material or finished product was detected.
- (v) Further, pen drives being merely secondary storage devices constitute secondary evidence, whereas the primary evidence would be the original computer system from which the alleged data is purported to have been generated. In the present case, the Department

has erroneously relied upon such secondary evidence without producing or identifying the primary source, i.e., the computer system, thereby failing to establish the authenticity and reliability of the electronic records.

- (vi) Reliance in this regard is placed on the ruling in the case of *M/s North East Engineering Co. Pvt. Ltd. Vs. Commissioner of CGST & Central Excise [2025 (12) TMI 90 – CESTAT Kolkata]*, wherein the Tribunal rejected the demand due to absence of evidence regarding the actual manufacture of the alleged clandestine goods, such as excess electricity consumption, engagement of additional labour, or movement of transport vehicles, holding that a serious charge of clandestine removal cannot be sustained on the basis of assumptions, presumptions, or suspicion.
- (vii) Further reliance is placed on the ruling in *Commissioner, Central Excise & ST Vs. M/s. Chanduka Hi-Tech Steels Pvt. Ltd. [(2025) 12 TMI 443 – CESTAT Kolkata]*, wherein this Tribunal rejected the Revenue's appeal on the ground that clandestine removal is a "serious allegation" that requires cogent and clinching evidence rather than a mere "preponderance of probability" or circumstantial inferences. The demand was set aside because the investigation failed to establish the fundamental pillars of illicit manufacture, including purchase of unaccounted raw materials, excess power consumption, transportation details, or proof of sale proceeds from identified buyers.

(viii) In this context, reliance is also placed on the following judgments:

- a. *Continental Cement Company v. Union of India* reported in 2014 (309) E.L.T. 411 (All.);
- b. *Arya Fibre Pvt. Ltd. vs. Commissioner of C.Ex, Ahmedabad* reported in 2014 (311) ELT 529 (Tri-Ahm);
- c. *CCE, Kolkata-III v. Sai Sulphonate Pvt. Ltd.* reported in 2022 (380) E.L.T. 441 (Cal.);
- d. *Ambica Iron & Steels Private Limited vs. Commissioner of Central Excise, Customs & Service Tax* reported in 2021 (12) TMI 958 – CESTAT Kolkata;
- e. *Commissioner of C.Ex. & S.T., Udaipur v. Mittal Pigment Pvt. Ltd.* reported in 2018 (16) G.S.T.L. 41 (Raj.);
- f. *Bihar Foundry & Castings Ltd. vs. CCE, Ranchi* reported in 2019 (8) TMI 527 – CESTAT Kolkata;
- g. *Commissioner of Central Excise, Bhubaneswar-I v. Minakshi Steels* reported in 2005 (190) E.L.T. 395 (Tri. – Kolkata);
- h. *Umashankar Alloys Pvt. Ltd. vs. Chennai-III – CESTAT Chennai (Excise Appeal no. 41116 of 2016 dated 4 February 2026)*;

(ix) The appellants submit that the allegation in the Show Cause Notices is based only on assumptions and presumptions drawn from documents extracted from a pen drive/loose sheets. Moreover, the absence of any efforts to gather corroborative and concrete evidence to support the grave allegation of clandestine

removal clearly demonstrates that the Impugned Orders have been passed with a pre-conceived mind and is based on conjectures and surmises. It is submitted that merely on the basis of pen drive data, that too not corroborated with any other independent evidence, a case of clandestine removal cannot be established.

- (x) That in the instant case the Department has not established suppression of production, evidence of excess receipt of raw materials, or clandestine removal of goods with reference to any enquiry made with all the buyers, suppliers of raw materials, confessional statements of transporters about transport of goods, flow back of money, electricity consumption regarding production of goods, etc. On the contrary, the demand has been confirmed on the ground of clandestine removal simply based on documents and pen drive data where the appellants have all along disputed that the documents contained inflated figures maintained solely for the purpose of banks to increase credit limits.
- (xi) Thus, in the absence of any corroborative evidence, the demands are untenable and liable to be set aside.

B. The printouts taken from pen drive and other electronic equipment cannot be treated as admissible evidence without complying with the conditions prescribed under Section 36B of the Central Excise Act, 1944:

- (i) The appellant further submits that the computer printouts relied upon by the Department are inadmissible as evidence in as much as Section 36B of the Act states that a statement contained in a computer printout shall be deemed to be a document and shall be admissible as evidence of the contents of its original, only if the conditions mentioned in sub-section (2) and other provisions of the Section are satisfied. The admissibility of such electronic records depends on the satisfaction of four conditions under Section 36B(2), namely:
 - (a) the electronic record must have been generated by the computer during a period in which it was regularly used to store or process information for activities consistently carried out by a person having lawful control over its use;
 - (b) the type of information contained in the electronic record must have been regularly entered into the computer in the ordinary course of the said activity;
 - (c) during the relevant period, the computer was functioning properly; and
 - (d) the information contained in the electronic record must be a reproduction of, or derived from, data that was entered

into the computer in the ordinary course of the said activity.

- (ii) In the present case, the requirements of Section 36B(2) & (4) of the Central Excise Act, 1944 were not complied with. In the present case, the printouts were obtained from pen drives, which are merely storage devices and not original computers used by the appellant-company for maintaining business records. These pen drives were neither proved to belong exclusively to the Appellant nor were they demonstrated to contain authentic business records.
- (iii) Further, the Adjudicating Authority has not obtained any certificate as required under Section 36B(4) of the Act. It has been observed time and again that computer printouts from pen drives are not admissible evidence unless the mandatory procedure prescribed in Section 36B is followed.
- (iv) It is further submitted that it is a settled principle of law that pen drive is a floating storage device and has no evidentiary value on its own and can be admitted as evidence only when it strictly fulfils the conditions specified in Section 36B of the Central Excise Act, 1944.
- (v) Reliance in this regard is placed on the ruling in *Jai Balaji Industries Limited and Ors. vs. Commissioner of CGST & Central Excise, Bolpur Commissionerate reported in 2023 (8) TMI 989 – CESTAT Kolkata* wherein it was held that electronic records such as computer printouts, CDs, and pen drives are admissible in evidence only upon strict compliance with the

requirements of Section 65B(4) of the Evidence Act (which is pari materia with Section 36B of the Central Excise Act, 1944), including certification as to the source, manner of production, and device particulars to ensure authenticity.

- (vi) Further, in *Commissioner, Central Excise & ST Vs. M/s. Chanduka Hi-Tech Steels Pvt. Ltd. [(2025) 12 TMI 443 – CESTAT Kolkata]*, the Tribunal rejected the Revenue's appeal on the grounds that the demand was heavily reliant on electronic data from a pen drive which did not satisfy the rigorous admissibility standards of Section 36B of the Act, as the mandatory conditions of Section 36B(2) regarding the regular use and control of the electronic device were not met.
- (vii) Reliance in this regard also is placed on the following:
 - (a) *Commissioner of Central Excise & Customs, Bhubaneshwar vs. Shivam Steel Corporation reported in 2023 (2) CENTAX 259 (Ori);*
 - (b) *Prinik Steels (P) Ltd. & Ors. vs. Commissioner of Central Excise, Customs & S. Tax, Bhubaneshwar reported in 2023 (12) TMI 299 – CESTAT Kolkata;*
 - (c) *Narsingh Ispat Limited & Ors. vs. Commissioner, C.G.S.T. and Central Excise, Jamshedpur reported in 2024 (3) TMI 1037 – CESTAT Kolkata;*
 - (d) *Parijat Paper Mills Ltd. & Ors. vs. Commissioner of Central Excise & CGST, Meerut reported in 2025 (5) TMI 1529 – CESTAT Allahabad;*
 - (e) *JJ Extrusion Private Limited vs. Commissioner of Central Excise & S. Tax reported in 2025-VIL-320-CESTAT-KOL-CE;*

(f) Popular Paints and Chemicals vs. CCE, Raipur reported in 2018 (8) TMI 473 – CESTAT New Delhi

(g) Premium Packaging Pvt. Ltd. vs. CCE, Kanpur reported in 2005 (184) ELT 165 (Tri. – Del.);

- (viii) Therefore, in the absence of compliance with the statutory prerequisites under Section 36B(2) and (4) of the Act, the reliance placed on the contents of the pen drive is wholly unsustainable in law.
- (ix) It is further submitted that even otherwise the contents of the said pen drive stand duly explained by the Appellant. As categorically stated by Shri Bishnu Prasad Nayak, the Accountant who authored the pen drive data, the figures contained in such records were merely fabricated/estimated projections prepared for submission to the banks for the purpose of enhancement of credit limits, and do not represent actual production or clearance of goods. The said explanation was duly placed before the Adjudicating Authority along with correlation to book debts demonstrating that the excess book debt declared to banks tallied with the fabricated figures in the seized documents. However, the same was completely disregarded without any cogent reasoning.
- (x) Thus, the Department has not only relied upon inadmissible electronic evidence but has also failed to appreciate the explanation on record regarding the nature of such data. In the absence of any independent corroborative evidence such as excess raw material consumption, transportation records, identification of buyers with specific

transactions, flow of consideration, differences in physical stock, or excess cash or bank deposits, the allegation of clandestine removal is wholly unsustainable.

(xi) It is a settled position of law that figures submitted to banks for obtaining credit facilities are often projected and cannot be equated with actual production or clearance. Reliance in this connection is placed on:

- a. *Commissioner of Income Tax-1 Vs. Vrundavan Roller Floor Mill reported in 2016-TIOL-1940-HC-AHM-IT*
- b. *Commissioner of Income Tax Rajkot-I Vs. Proteins Pvt. Ltd. reported in 2016 SCC Online Guj 8163*
- c. *Commissioner of Income Tax Rajkot-I Vs. Proteins Pvt. Ltd. reported in 2014 SCC Online Guj 15052*
- d. *Utkal Metals Vs. Commissioner VAT (Orissa) vide Case No. STREV No. 127 of 2004*

(xii) Accordingly, the impugned orders, being based on inadmissible evidence and uncorroborated assumptions, suffers from non-application of mind, are arbitrary in nature, and are liable to be set aside on this ground as well.

C. When the allegation of clandestine removal is itself not sustainable, there could be no question of imposition of penalty and recovery of interest:

(i) The appellants further submit that in terms of the detailed submissions above, it would be evident that the entire proceedings are based on assumptions and presumptions and there is

no corroborative piece of evidence to prove the charges of clandestine removal of goods levelled against the appellant-Company. When the charge of clandestine removal is itself not sustainable, the recovery of interest and imposition of penalties on the appellant-company and its director are also not sustainable.

- (ii) Reliance in this regard is placed on the judgement of the Tribunal, Kolkata in the case of *M/s. Seeta Integrated Steel & Energy Limited Vs. Commissioner of Central Excise, Customs and Service Tax, Rourkela, Odisha [2025 (5) TMI 1012]*.
- (iii) Reliance is also placed on the judgement of the Tribunal in the case of *Shri Mahavir Ferro Alloys Pvt. Ltd. and Shri Vicky Jain, Managing Director Vs. Commissioner of CGST & C.Ex. [2025 (2) TMI 477]*, whereby it was held that when the demand itself is not sustainable, penalty cannot be imposed.
- (iv) That on the aforesaid facts, the appellants most humbly submit that the Department has failed to prove the charges of clandestine removal and the impugned orders demanding the unprecedented demands without any legal basis are liable to be set aside along with interest and penalties imposed thereon.

D. Penalty under Rule 26 of the Central Excise Rules, 2002 against the Managing Director is illegal, arbitrary and against the principle of natural justice:

- (i) It has been submitted in regard to the imposition of penalty on Shri Surendra Kumar Behera, Managing Director (co-appellant) that no specific role of the Managing Director has been established in the alleged offence. It is submitted that it is settled law that when penalty has been imposed on a company, there is no question of imposing personal penalty on the employee/key managerial person of the said company as well. Reference in this regard is invited to the decision of the Tribunal in the case of *Neptune Spin Fab Pvt. Ltd. vs. CCE [2009 (241) ELT 467]*.
- (ii) Hence, the impugned orders that impose penalties upon Shri Surendra Kumar Behera, are unsustainable, illegal and liable to be set aside.

12.1. Without prejudice to the above, with regard to the Appeal No(s). E/77634 and 77635/2018, the Ld. Counsel for the appellants have taken the additional ground that the statements of buyers recorded behind the back of the appellant do not carry any evidentiary value being contrary to the procedure laid down under Section 9D of the Central Excise Act, 1944, and denial of cross-examination is a gross violation of principles of natural justice. In this regard, it has been mentioned that the respondent has placed reliance on statements of various buyers recorded under

Section 14 of the Central Excise Act, 1944 to allege clandestine removal and to confirm the demand; it is submitted that it is a settled legal position that statements recorded under Section 14 of the Act during investigation cannot be relied upon unless the procedure prescribed under Section 9D of the Act is strictly followed; that Section 9D of the Central Excise Act, 1944 makes it abundantly clear that no reliance can be placed on any statement recorded under Section 14 unless the person who made the statement is first examined as a witness before the adjudicating authority; that such a statement may be admitted in evidence only after the witness has been subjected to examination-in-chief and cross-examination, thereby affording both sides a fair opportunity to test the veracity and reliability of the statement. The Ld. Counsel for the appellants emphasized that the use of the word "shall" in Section 9D(1) makes it clear that the procedural requirements under Section 9D are mandatory in nature and not merely directory. The appellants have cited the decision in the case of *M/s. North East Engineering Co. Pvt. Ltd. Vs. Commissioner of CGST & Central Excise (supra)*, wherein the Tribunal set aside the demand as Revenue failed to follow the mandatory procedure under Section 9D of the Act, which requires statements to be admitted as evidence through a specific examination process to ensure they were not obtained through coercion. Further, they also submit that in the present case, the appellants had specifically requested the adjudicating authority for an opportunity to cross-examine the alleged buyers whose statements were recorded during investigation and relied upon in the adjudication proceedings; however, the said request was not acceded to by the adjudicating authority.

Thus, it is the contention of the appellants that the procedural requirements under Section 9D have not been fulfilled, and the statements have no evidentiary value as they were not subjected to examination-in-chief before the adjudicating authority and the witnesses were not produced for cross-examination as stipulated under Section 9D(1)(b) of the Act; thus, the impugned order in respect of these appeals stands vitiated on account of a gross violation of the principles of natural justice inasmuch as the appellant was not afforded an opportunity to cross-examine the witnesses whose statements have been primarily relied upon to allege clandestine removal; that it is a settled position of law that where any adverse or inculpatory statement is relied upon by the adjudicating authority to fasten liability or sustain a demand, it becomes imperative, in keeping with the principles of natural justice, to offer the party a fair opportunity to cross-examine the person who made such a statement. The Ld. Counsel for the appellants have cited the following case-law in this connection: -

- i. *Andaman Timber Industries Vs. Commissioner of C.Ex., Kolkata-II* reported in 2015 (324) E.L.T. 641 (S.C.);
- ii. *Arya Bhushan Bhandar vs. Union of India* reported in 2002 (143) ELT 25 (SC);
- iii. *Flevel International Vs. Commissioner of Central Excise* reported in 2016 (332) E.L.T. 416 (Del.);
- iv. *G.Tech Industries Vs. Union of India* reported in 2016 (339) ELT 209 (P&H);
- v. *Jai Balaji Industries Limited and Ors. Vs. Commissioner of CGST & Central Excise, Bolpur Commissionerate* reported in 2023 (8) TMI 989 – CESTAT Kolkata;
- vi. *Prinik Steels (P) Ltd. & Ors vs. Commissioner of Central Excise, Customs & S. Tax, Bhubaneswar* reported in 2023 (12) TMI 299 – CESTAT Kolkata;

- vii. *Narsingh Ispat Limited & Ors. vs. Commissioner, C.G.S.T. and Central Excise, Jamshedpur reported in 2024 (3) TMI 1037 – CESTAT Kolkata;*
- viii. *Shree Krishna Laxami Steel Udyog Private Limited & Ors. vs. Commissioner of Central Excise & Service Tax, Jamshedpur reported in 2024 (12) TMI 738 – CESTAT Kolkata;*
- ix. *Vasundhara Metaliks (P) & Ors. Limited vs. Commissioner of Central Excise, Customs & S. Tax Audit Commissionerate, Bhubaneswar reported in 2025 (4) TMI 955 – CESTAT Kolkata;*
- x. *JJ Extrusion Private Limited vs. Commissioner of Central Excise & S. Tax reported in 2025-VIL-320-CESTAT-KOL-CE;*
- xi. *Virajaa Steel & Power Limited & Ors. v. Commissioner of Central Excise reported in 2024 (7) TMI 1039;*
- xii. *Ambika International Vs. Union of India reported in 2018 (361) E.L.T. 90 (P&H);*

12.2. Without prejudice to the above, with regard to the Appeal No(s). E/76432 and 76433/2018, the Ld. Counsel for the appellants have taken the additional ground that the entire exercise is revenue neutral inasmuch as the alleged clandestine clearances were to the appellant's own sister concern, and any duty paid would have been available as eligible CENVAT credit to the receiving unit. Without prejudice to the foregoing submissions and without conceding to the allegations in any manner, the Ld. Counsel for the appellants submit that even if, for the sake of argument, the alleged clandestine clearances are assumed to have taken place, the entire exercise would be revenue neutral inasmuch as the finished goods (M.S. Ingot) manufactured by the appellant at its Furnace Division at Tanto, Barbil were admittedly sold almost entirely to its own sister concern, M/s Shreeji Ispat Limited (Rolling Division) at IDCO Plot No. 93-110, Jagatpur, Cuttack; that both the units are under the common management and control of the same Managing Director, Shri Surendra Kumar

Behera, and share a common financial structure. In such circumstances, it is their stand that any Central Excise duty paid by the appellant (Furnace Division) on its clearances of M.S. Ingot would have been available as eligible CENVAT credit to the receiving unit, i.e., the Rolling Division at Cuttack, for utilisation against its own duty liability on the manufacture of TMT Bars, M.S. Rods, Flats, Angles, etc. The net effect on the Government revenue would therefore be nil, and the entire demand is revenue neutral. Reliance in this regard is placed on the judgement of this Tribunal in the case of *Shri Mahavir Ferro Alloys Pvt. Ltd. and Shri Vicky Jain, Managing Director Vs. Commissioner of CGST & Central Excise, Rourkela [2025 (2) TMI 477 – CESTAT Kolkata]*, wherein, in an identical situation involving clearance of sponge iron to the assessee's own M.S. Ingot unit under common management, the Tribunal had observed that, since both units share a common balance sheet and the excise duty paid by the appellant therein was available as eligible CENVAT credit at the end of the receiving unit, the situation is that of revenue neutral, and accordingly had set aside the demand on this ground. Reliance is further placed by the appellants on the ruling in the case of *Jain Farm Fresh Foods Ltd Versus Commissioner of Central Tax, Tirupati And Sameer Sharma Versus Commissioner of Central Tax, Tirupati - 2024 (3) TMI 687 - CESTAT HYDERABAD* in this regard; that it is a well-settled principle that where the entire transaction is revenue neutral, demand of duty along with interest and penalty cannot be sustained. In view of these submissions, the Ld. Counsel for the appellants have contended that the impugned order in respect of these appeals is liable to be set aside on this ground as well.

12.3. In view of the submissions made hereinabove, the Ld. Counsel for the appellants have prayed for setting aside the impugned orders in toto and allowing the respective appeals, with consequential reliefs.

13. On the other hand, the Ld. Authorized Representatives of the Revenue appearing before us have reiterated the findings in the impugned orders.

14. Heard the parties and considered their submissions.

15. After hearing the arguments advanced by both the sides, we find that the following issues emerge: -

- (A) Whether the allegation of clandestine removal of goods can be based on assumptions and presumptions without providing any corroborative evidence, or not.
- (B) Whether the allegation of clandestine removal can be established on the basis of private records / documents in the absence of any corroborative evidence, or not.
- (C) Whether the print-outs taken from pen drives and other electronic equipment can be treated as admissible evidence without complying with the conditions prescribed under Section 36B of the Central Excise Act, 1944, or not.
- (D) Whether the said statements have any evidentiary value without complying with the procedure laid down under Section 9D of the Central Excise Act, 1944, or not.
- (E) Whether, in the facts and circumstances of the case, penalties can be imposed on the appellants, or not.

Issue (A): Whether the allegation of clandestine removal of goods can be based on assumptions and presumptions without providing any corroborative evidence, or not.

16. We find that in this case, the sole allegation against the appellant is that they have cleared their goods clandestinely without payment of appropriate duties of excise thereof, which is based mainly on the pen drive recovered from the possession of Shri Manas Ranjan Patra, Office Assistant of the appellant-company and the documents contained therein, along with certain other documents, certain private records recovered and the statements of some of the buyers.

16.1. The charge of clandestine removal is a very serious charge and thus, the same has to be established by way of documentary evidence, which can be relied upon during the course of adjudication proceedings. To allege clandestine removal of goods, guidelines have been laid down by this Tribunal in the case of *M/s. Arya Fibres Pvt. Ltd. v. Commissioner of Central Excise, Ahmedabad* [2014 (311) E.L.T. 529 (Tri. – Ahmd.)] which are 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 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.”

16.2. As per the said guidelines framed by this Tribunal, there should be evidence in support of clandestine removal and raw materials found in excess of that contained as per statutory records. In this case, no effort has been made by the investigating team or the Revenue, to find out as to the excess procurement of raw materials, if any, by the appellants. An inference has been drawn on the basis of the documents printouts taken from the pen drive and certain private records and loose sheets. However, no unaccounted raw materials or finished goods have been found, so as to substantiate the allegation of clandestine removal of goods. The allegation of clandestine removal is based on conjectures and surmises and not corroborated with any other independent evidence.

16.3. Further, it is a fact that for clandestine removal of such a huge quantity of goods from their factory premises, excess electricity is required to be used, but no efforts have been made by the investigating team to ascertain the consumption of electricity in excess, if any, of what is necessary to manufacture the goods which are otherwise manufactured and validly cleared by the appellants on payment of duty. No efforts were also made to find out as to the engagement of additional labour for manufacture of such quantities as alleged; no investigation has also been made to find out the mode of transportation or the channels from which payments have been received / made, if any. The investigation has also failed to bring in evidence of any unexplained cash or bank deposits at the premises of the appellants herein.

16.4. In such circumstances, by relying upon the decision in the case of *M/s. Arya Fibres Pvt. Ltd. (supra)*, we hold that the charge of clandestine removal has only been made on the basis of assumptions and presumptions, without any thorough investigation.

16.5. Further, in the case of *Commissioner of Central Excise, Kolkata-III v. M/s. Sai Sulphonate Pvt. Ltd. [2022 (380) E.L.T. 441 (Cal.)]*, the Hon'ble High Court at Calcutta has observed as under: -

"6. In our considered view, the Tribunal rightly granted the relief to the assessee as allegation of clandestine removal is a very serious charge and the onus of establishing the same is first on the department and upon the onus being discharged in the manner common to law, then and then only the burden of proof shifts to the assessee. In the instant case, admittedly there was no material on record establishing the charge of clandestine removal and such charge was made against the assessee by way of an inference taking note of the ratio adopted in the manufacturing process."

16.6. In view of the above observations, we answer the issue in favour of the appellants, that the allegation of clandestine removal of goods cannot be based on assumptions and presumptions without providing any corroborative evidence.

Issue (B): Whether the allegation of clandestine removal can be established on the basis of private records / documents in the absence of any corroborative evidence, or not.

17. We find that in the present case, the records, on the basis of which clandestine removal of goods has been alleged against the appellants, are documents recovered from the pen drive Shri Manas Ranjan Patra, Office Assistant, loose sheets recovered from the possession of Shri Dilip Kumar Biswal, Accountant, e-mail printouts of daily production log sheets and other documents recovered residential premises of the Managing Director and the Manager. Thus, it is to be examined as to whether clandestine removal of goods can be alleged on the basis of such records.

17.1. A similar issue has been examined by this Tribunal in the case of *Sharda Re-Rollers Pvt. Ltd. & ors. v. Commissioner of C.Ex., Cus. & S.T., Odisha [2025 (5) TMI 1281 – CESTAT, Kolkata]*, wherein it has been observed as under:

"8. Moreover, in the case of K. Rajagopal vrs. Commissioner of Central Excise, Madurai, 2002 (142) ELT 128 (Tri-Chennai) this Tribunal held as under:

"6. We have perused the order of the Commissioner which is extracted supra. On a careful reading of the said order, we have to observe that the said finding recorded is totally based on presumptions and assumptions. In all clandestine removals, it has been now well laid that the crux of the issue in respect of clandestine removal is that Revenue cannot proceed solely on the basis of a seized private notebook maintained by a worker unless the entries are corroborated by various other pieces of evidences in as much as that Revenue has to show that appellants have purchased the inputs from market and utilized the same and that the same has been

sold to particular persons through invoices or otherwise and the money has flowed back as capital. In this particular case, admittedly the only piece of evidence is a notebook seized from the premises of the appellant. IT was brought to the notice of the seizing officers that it was maintained by the Accountant who was very much present during the time of investigation. It was the duty of the investigating officers to have sought explanation from the said Accountant with regard to the entries made therein. Non-examination of the Accountant has rendered the document inadmissible evidence. The findings recorded in para 16 that the Accountant is now not available and his whereabouts could not be traced is not acceptable for the reason that at the time of the raid and the seizure of the notebook, the said Accountant was very much present. Be that as it may, the Revenue is required to show that appellants have purchased raw materials valued more than Rs. 1.09 crores. It is the specific plea of the appellants that the inputs are supplied under licence under the Explosives Act and they are required to purchase only through governmental sources. This was explained by the Managing Partner when he was examined by the Investigating officers. Therefore, at the time of investigation, it was the duty of the said officers to have contacted the supplier of Governmental agency and examined them and should have seen through their records as to whether the appellants have purchased such huge quantities of inputs for manufacture of the fireworks. The said non-examination of the supplier of raw material which is controlled and a licensed commodity is fatal to this case and it can be easily concurred that Revenue has not proved the case with regard to the purchase of raw materials for manufacture of final product.

7. It is seen that the appellants have also brought to the notice of the Revenue that fireworks are required to be insured mandatorily while removing the same and various authorities are required to be informed and permission obtained Revenue has not examined this point in the correct

perspective. The danger of removal and penal consequence of non-insurance is a serious matter and the Commissioner ought to have relied on same evidence to show as to how they could manufacture and remove such controlled explosive commodity without proper protection and insurance. Merely to give finding that such clandestine removal is done secretly and stealthily and they do not follow the law is not acceptable in the peculiar facts and circumstances of this case. There is no other corroborative evidence with regard to the sale and purchase by particular persons and there is no evidence of removal through any transporter and the transporters have not been examined and statements recorded. Each link in the aspect of production and clandestine removal is required to be proved and since this has not been done, the demands are required to be set aside for lack of evidence in the matter. It has been laid down by the Tribunal, as in the case of Kashmir Vanaspati that a private notebook cannot be a conclusive piece of evidence to prove clandestine removal. Large number of judgements have been rendered by this Bench and the matter has been analysed carefully and the Tribunal has laid down that proof is required to be produced by dealing with each of the factors required to be proved and it has been laid down very conclusively in the cited judgements that the scribe of the notebook is required to be examined and details of the notebook is required to be proved as in the case of CCE v. Raman Ispat (P) Ltd CCE Mumbai v. Mira Silk Mills, CCE Patna v. Universal Polythene Industries CCE Chandigarh v. Indian Hume Pipes Co. Deepak Tandon v. CCE Bhubaneshwar. Shree Bhallabh Glass Works v. CCE Ahmedabad etc. (all supra)"

And held that private notebooks are not conclusive piece of evidence to prove clandestine removal.

9. Further in the case of Commissioner of C.Ex. Chandigarh versus Laxmi Engineering recovered during raid and corroborated by some supportable evidence holding that there was an attempt of clandestine production and removal of goods then it is necessary to have some positive evidence of

clandestine production and removal of the goods. Admittedly, no such evidence is produced by the Revenue therefore, demand against the appellant is not sustainable.

10. We further take note of the fact that in the case of Commissioner of Central Excise, Haldia versus Lord's Chemicals Ltd. 2010 (258) E.L.T. 48 (Cal.) the Hon'ble High Court observed as under.

"2. Admittedly, a show cause notice was issued on the presumption that the entries, as recorded in the private note book maintained by the labour contractor, should be taken as the clearance figures of finished products from the factory. It is settled law that such presumption is not permissible. The presumption, on the basis of which the show cause notice was issued, was misplaced in the absence of any corroborating, reliable and independent evidence. Therefore, the Tribunal below was right in rejecting the contention of the revenue and in accepting the contention of the assessee. Therefore, the appeal is summarily dismissed.

11. Therefore, on the basis of private documents recovered from the factory of the appellant cannot be the basis to allege clandestine removal of goods in the absence of satisfying the tests laid down in the case of Arya Fibres Pvt. Ltd. (Supra). Further, in the statements recorded during the course of investigation has been relied the same is not the admissible evidence in the light of the decision of the Hon'ble Chattisgarh High Court in the case of Hi Tech Abrasives Ltd. versus Commissioner of C.Excise & Customs, Raipur, 2018 (362) E.L.T. 961 (Chattisgarh) wherein the Hon'ble High Court observed 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 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 adjudicating 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.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Pvt. Ltd. (Laws (SC) 2011 838)=2011 (270) E.L.T. 643 (S.C). That

decision turned on its own facts. In para 19 of the judgement, it was concluded as below:

"19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing Director of the company of his own volition deposited the amount of Rs. 11 lakh towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."

Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that manner."

12. In view of the above discussion and observations it is alleged that appellants were involved in clandestine removal of goods on the basis of private records during the course of investigation and statements recorded during the course of investigation which were not corroborated by the tests laid down in the case of Arya Fibres Pvt. Ltd. (Supra) the demand of Central Excise duty is not sustainable against the appellant. As demand of duty is not sustainable, consequently, no penalty can be imposed on the appellant. In these terms we drop the demand alongwith penalties imposed on the appellant."

17.2 From the above, it is clear the charge of clandestine removal of goods cannot be proved merely on the basis of documents and private records recovered during the course of investigation, in the absence of any corroborative evidence in support. This issue is thus answered in favour of the appellants.

Issue (C): Whether the print-outs taken from pen drives and other electronic equipment can be treated as admissible evidence without complying with the conditions prescribed under Section 36B of the Central Excise Act, 1944, or not.

18. In the present case, the Revenue is harping on the print-outs taken from the pen drive recovered during the course of investigation, which is the primary document on which the entire allegation of clandestine removal rests.

18.1. In terms of Section 36B of the Central Excise Act, 1944, a statement contained in a computer printout shall be deemed to be admissible as evidence only if the conditions laid down therein are satisfied. The admissibility of such electronic records is subject to the following conditions: -

- a. the electronic record must have been generated by the computer during a period in which it was regularly used to store or process information for activities consistently carried out by a person having lawful control over its use;
- b. the type of information contained in the electronic record must have been regularly entered into the computer in the ordinary course of the said activity;
- c. during the relevant period, the computer was functioning properly; and
- d. the information contained in the electronic record must be a reproduction of, or derived from, data that was entered into the computer in the ordinary course of the said activity.

18.2. In the present case, the print-outs obtained from the pen drives were required to be examined in terms of Section 36B of the Central Excise Act, 1944, which is in *pari materia* with Section 65B(4) of the erstwhile Indian Evidence Act, 1872, but the Revenue has failed to do so. The said pen drives were neither proved to be belonging exclusively to the appellant nor were they demonstrated to contain authentic business records. A certificate as required under Section 36B(4) of the Act has also not been obtained by the Id. adjudicating authority. It has been held in a catena of decisions that computer print-outs from pen drives are not admissible as evidence unless the mandatory procedure prescribed under Section 36B of the Act is adhered to.

18.3. This Tribunal had an occasion to examine as to whether, without obtaining a certificate under Section 36B of the Central Excise Act, print-outs generated from personal computers or pen drives could be admitted as evidence or not in the case of *M/s. Trikoot Iron & Steel Casting Ltd. v. Additional Director General (Adjn.), Directorate General of GST Intelligence (Adjudication Cell) [Final Order No. 58546 of 2024 dated 09.09.2024 in Excise Appeal No. 55779 of 2023 – CESTAT, New Delhi]*. The relevant observations of the Tribunal in the aforesaid decision are reproduced below: -

"15. To examine the issues that have been raised, it would be necessary to first examine section 36B of the Central Excise Act. It is reproduced:

"Section 36B- Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. (1) Notwithstanding anything contained in any other law for the time being in force,-

(a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (whether enlarged or not); or

(b) a facsimile copy of a documents; or

(c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a —computer printout).

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

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

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

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

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

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(c) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to be to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in

the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation - For the purposes of this section,-

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

16. Section 3 of the Evidence Act defines "document" as follows:

"—Document. - "Document" means any matter expressed or described upon any substance by means of letter, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

17. "Evidence" in section 3 of the Evidence Act is defined as follows:

"Evidence." -- "Evidence" means and includes — (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."

18. Section 36B of the Central Excise Act deals with cases where any document is required to be produced as an evidence in proceedings under the Central Excise Act and the Rules framed thereunder. Such certificate should be signed by a person occupying a responsible position in relation to the operation of the device in question or the

management of the relevant activities. In such a case it shall be evidence of any matter which is stated therein. It specifically mandates production of a certificate:

(i) identifying the document containing the statement and describing the manner in which it was produced;

(ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,

(iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate.

19. The Central Excise Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Central Excise Act.

20. In respect of section 65B of the Evidence Act, which is pari materia to the provisions of section 36B of the Central Excise Act, it would be relevant to refer to the observations made by the Supreme Court in Anvar P. V. The Supreme Court, held that evidence relating to electronic record shall not be admitted in evidence unless the requirement of section 65B of the Evidence Act is fulfilled. The relevant paragraphs of the said judgment are reproduced:

"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.

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22. xxxxxxxxxxxx. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65A and 65B. to

that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not laydown the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

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24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Sections 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act. (emphasis supplied)

21. The aforesaid judgment of Supreme Court in Anvar P. V. was followed by the Supreme Court in Arjun Panditrao Khotkar vs. Kailash Kushanrao

Gorantyal & others [AIR 2020 SC 4908], though with a slight modification. The Supreme Court held that if the original device is not produced, then electronic record can be produced in accordance with section 65B (1) of the Evidence Act together with the requisite certificate under section 65B (4). The relevant portions of the judgment of the Supreme Court are reproduced below:

"18. Sections 65A and 65B occur in Chapter V of the Evidence Act which is entitled —Of Documentary Evidence. Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act is important, and states that secondary evidence may be given of —the existence, condition or contents of a document in the following cases....

19. Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved after a document becomes admissible in evidence. Section 65A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65B. Section 65B speaks of —admissibility of electronic records which deals with 'existence' and 'contents' of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65A and 65B.

20. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that —special

provisions as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to —admissibility of electronic records.

21. Section 65B(1) opens with a non-obstante clause, and makes it clear that any information that is 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, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that —document as defined by Section 3 of the Evidence Act does not include electronic records.

22. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections 2(a) to 2(d) must be satisfied cumulatively.

23. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" – whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the —best of the knowledge and belief of the person stating it. Here, —doing any of the following things... must be read as doing all of the following things, it being well settled that the

expression 'any' can mean 'all' given the context. xxxxxxxx.

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30. Coming back to Section 65B of the Indian Evidence Act, subsection (1) needs to be analysed. The sub-section begins with a nonobstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a 'document'. This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the 'document' shall then be admissible in any proceedings. The words —...without further proof or production of the original... make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the —deemed document now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

31. The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom - the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where —the computer^{ll}, as defined, happens to be a part of a —computer system^{ll} or —computer network^{ll} (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...". This may more appropriately be read without the words "under Section 62 of the Evidence Act,...". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

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72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

(b) The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a

mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as —.. if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...|| is thus clarified; it is to be read without the words —under Section 62 of the Evidence Act,...|| With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

(c) The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

(d) Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.

(emphasis supplied)

22. *It transpires from the aforesaid two judgments of the Supreme Court in Anvar P. V. and Arjun Panditrao Khotkar that:*

(i) Any documentary evidence by way of an electronic record under the Evidence Act can be proved only in accordance with the procedure prescribed under section 65B of the Evidence Act. The purpose of this provision is to sanctify secondary evidence in electronic form generated by a computer;

(ii) 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) of section 65 of the Evidence Act are satisfied, without further proof or production of the original;

(iii) In view of the provisions of section 65(4) of the Evidence Act, a certificate must accompany the electronic record like computer printout, compact disc, video compact disc or pen drive, pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence;

(iv) Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, that the question of its genuineness would arise. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if the requirements of section 65B of the Evidence Act is not complied with;

(v) An electronic record by way of secondary evidence shall not be admitted in evidence unless the the requirements of section 65B of the Evidence Act has satisfied; and

(vi) This would not apply in a case where the appellant adduces primary evidence by making available in evidence the electronic records.

23. *A Bench of the Tribunal in Agarvanshi Aluminium Ltd. vs. Commissioner of Customs (I), Nhava Sheva [2014 (299) E.L.T. 83 (Tri. – Mum.)], where the*

issue was with respect to section 36B of the Central Excise Act, also observed:

"12. it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).

13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfillment of statutory condition of Section 36B of the Central Excise Act, 1944."

(emphasis supplied)

24. In Popular Paints and Chemicals vs. Commissioner of Central Excise and Customs, Raipur [Excise Appeals No. 52738 of 2016 decided on 06.08.2018], the Tribunal observed:

"15.2. Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act. It has been clearly laid down in para 15 of this judgment that all the safeguards as prescribed in Section 65B (2) & (4), 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 tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are pari materia.

15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is admissible for want of cross examination of, Sh. Vipul Saxena, who has done cloning of the data from the computer system. We, therefore, hold that the computer printouts cannot held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand."

(emphasis supplied)

25. In Global Extrusion Private Limited and Ors. vs. Commissioner of Central Excise & ST, Rajkot [Excise Appeal No. 11963 of 2016 decided on 15.01.2024], the Tribunal observed:

"19. Ongoing through the aforesaid provisions, we find that Section 36B(2) provides the conditions in respect of computer printouts. In the present matter the computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the appellants. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the appellant to the computer in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none

of these conditions was satisfied by the Revenue in this case. In the present case, the data was not stored in the computer but the officers had taken the printout from the Hard Disk drive by connecting to the computer. The officers had not obtained any certificate as required under Section 36B of the said Act. It is also noted that none of the conditions under Section 36B (2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the allegations of the revenue. It is noted that the requirement of certificate under Section 36B (4) is also to substantiate the veracity of truth in the operation of electronic media. We also agree with the contention of the appellants that at the time of sealing and de-sealing of the external data storage device as well as the time of obtaining printouts therefrom, a certificate should have been obtained as per the provision of Section 36B of the Act. No such certificate has been brought on record without which the evidentiary value of these printout get vitiated. As no certificate from the responsible person of the Appellants was obtained by the department, the credibility of the computer printout gets vitiated."

(emphasis supplied)

26. The aforesaid decisions of the Tribunal, which are in the context of the provisions of section 36B of the Central Excise Act, hold that a printout generated from the personal computer that has been seized cannot be admitted in evidence unless the statutory conditions laid down in section 36B of the Central Excise Act are complied with. The decisions also hold that if the data is not stored in the computer but officers take out a printout from the hard disk drive by connecting it to the computer, then a certificate under section 36B of the Central Excise Act is mandatory.

27. The contentions advanced by learned counsel for the appellant and the learned authorized representative appearing for the department have to be examined in the light of the aforesaid observations.

28. What transpires from the two Panchnamas dated 04.07.2013 and 15.07.2013 is:-

(i) The officers found that Vaibhav Goel "removed a hard disc from his kitchen and tried to throw it away";

(ii) During the search, the officers found "three computer monitors installed in a room on the first floor of rear side of the house above the dog house in which some documents and seven pen-drives were also found";

(iii) However, no CPU was found in the said room. On being asked, Mohit Vaish, Accountant informed that there is "one desktop computer connected with the CPU, which is installed in the kitchen of the said premises and these monitors are working as extension of the computer in the kitchen and connected through cable";

(iv) On searching the kitchen, the officers recovered "Computer (CPU, Monitor, Keyboard and Mouse) which was switched on and CPU was found without cover and without having any hard disc";

(v) The officers conducted a thorough search of the entire residential premises and found "one of the hard disc hidden in a corner lying near the dog house";

(vi) The officers also found two hard discs from the cupboard of the kitchen;

(vii) The officers asked Vaibhav Goel to connect the hard disc found in the corner near dog house with the CPU installed in the kitchen;

(viii) On the direction of Vaibhav Goel, Mohit Vaish started the CPU after connecting the said hard disc;

(ix) On being asked by the officers to take the printouts of data captured in the software, Vaibhav Goel informed that being a MS Dos based software, "printout cannot be taken without configuring printer Canon LBP 2900B (available in the residence) with site key and license key".

(x) On being asked how these keys can be taken, Vaibhav Goel stated that he would have to talk to an expert and on direction of Vaibhav Goel, Mohit Vaish spoke to one Dua, who on mobile informed after

some time that site key is 'EIGIDADEJTBO' and license key is 'HJHTVOGVSQ'.

(xi) Mohit Vaish configured the printer and started taking printouts of sale, purchase and cash data, which is stated to contain both accounted and unaccounted transaction;

(xii) Some printouts from one of the pen drive Toshiba 4GB that was recovered were also taken after connecting the same with the CPU;

(xiii) Since the whole process of taking of printouts of the data in the CPU and the pen-drive was taking time and printing stated mal-functioning, the officers discontinued the process of taking printout and seized the three Hard disks and seven pen drives properly. Details of the seized hard discs and pen drives were mentioned in Annexure-A to the Panchanama;

(xiv) Subsequently, on 15.07.2013 another Panchnama was drawn. The Panchnama records that the hard drive mentioned at serial no. 1 was attached with the CPU and printers resumed from the residence of Vaibhav Goel on 04.07.2013 and printouts of the data stored in the hard drive and Toshiba 4GB pen drive were taken;

(xv) The other hard drives and pen drives did not contain any relevant data and so printouts were not taken.

29. It is not in dispute that the hard disk from which the printouts were subsequently taken was not found installed in the CPU. The Panchnama drawn on 04.07.2013 records that the officers found that Vaibhav Goel had removed a hard disc from his kitchen and had tried to throw it away. The panchnama does not mention that any officer had seen Vaibhav Goel actually remove the hard disc from the CPU. It only records that Vaibhav Goel had removed a hard disc from the kitchen and had tried to throw it away. At a different place, the panchnama records that the officers conducted a thorough search of the entire residential premises and found one hard disc hidden in a corner lying near the dog house. What needs to be noticed is that if Vaibhav Goel had thrown the hard disk, it would not have been found hidden in a corner of a room near the dog house. The seven pen drives were also recovered from a room on the first floor of the rear

side of the house. In the said room three computer monitor were also installed without a CPU. The officers were informed that one desktop computer connected with the CPU is installed in the kitchen and these monitors are working as extension of the computer in the kitchen and were connected through a cable. Ultimately the officers recovered CPU, Monitor, Keyboard and Mouse in the room, but the CPU was found without cover and hard disk. The Panchnama does not record that Vaibhav Goel was seen removing the hard disk from the CPU and indeed it would not have been possible for Vaibhav Goel to remove this hard disk from the CPU in the presence of all the officers and throw it away. There is nothing on the record to link the hard disk to the CPU, nor is there anything to link that the hard disc and the pen drive stored information contained in the computer.

30. A hard disk is a rigid magnetic disk that stores data. A pen drive is a data storage device that includes flash memory with an integrated USB interface.

31. The printouts, which are the sole basis for holding that the appellant had indulged in clandestine removal, were taken both on 04.07.2013 and on 15.07.2013 by placing the recovered hard disc and pen drive in the CPU.

32. It is, therefore, clear that the CPU did not contain the hard disk. The hard disk was in fact picked up from the corner of the room. No attempt was made by the department to admit the hard disk and the pen drive in evidence. The required certificate under section 36B (4) of the Central Excise Act was also not produced. Thus, no reliance can be placed on the printouts, in view of the two judgments of the Supreme Court in Anvar P. V. and Arjun Panditrao Khotkar and the three decisions of the Tribunal in Agarvanshi Aluminium, Popular Paints and Chemicals and Global Extrusion.

33. The adjudicating authority, on its own, examined the oral evidence on the points required to be stated in the certificate. This is not permissible in law. The confirmation of demand is based only on the printouts taken after connecting the hard disk and the pen drive to the computer.

34. It is, therefore, not possible to accept the contention advanced by the learned authorized representative appearing for the department that panchnama itself should be treated as a certificate or that the adjudicating authority was justified in itself examining whether the conditions set out in section 36B (4) of the Central Excise Act had been satisfied.

35. The impugned order dated 30.06.2021 passed by the adjudicating authority, therefore, cannot be sustained. It is, accordingly, set aside in so far as the appellant is concerned and the appeal is allowed."

18.4. The said issue has also been examined by this Tribunal in the case of *M/s. Prinik Steels (P) Ltd. & ors. v. Commissioner of C.Ex., Cus. & S.Tax, Bhubaneswar-I* [2023 (12) TMI 299 – CESTAT, Kolkata=(2024) 15 Centax 313 (Tri. – Cal.)]., wherein it was held that the data retrieved from the various premises of the company could not be relied upon as evidence for demanding duty in absence of compliance of the provisions of Section 36B of the Act. In the above case, the Bench has made the following observations: -

"12.1 We observe that various documents were seized from the Factory and Registered office under a Panchanama on 22.08.06. The Panchanama/Seizure Memo has been signed by the witnesses and the authorized signatory of the Appellants company. The documents were also recovered from the premises 'Aparna-2' Plot No. 702/4(B), Rameshwar Patna, Bhubaneshwar, in the presence of Shri. G.D. Agarwal. The seized documents from the Rameshwar Patna office contains details such as payments made to contractors, party ledger, trial balance etc. Computer print outs of these documents were taken in the presence of Shri. Srinivas Padhi who was authorized by the Appellant to witness the retrieval of data from the seized computer. The Appellant contended that Shri. Srinivas Padhi, was a Telephone Operator attended printing of computer

print out at DGCEI office. He was not holding any responsible official position in relation to the operation of relevant device or management of relevant activities. Accordingly, it is their contention that the Certificate given by him will not satisfy the requirement as provided under section 36B. We agree with the contention of the Appellant. The documents retrieved must be certified by the person who operates the computer or the person who is responsible in the company and aware of their day today activities. Authorizing the computer print outs by a Telephone operator who has nothing to do with the data entry would not satisfy the requirement of Section 36B. The question of genuineness or otherwise of computer printout will arise only if conditions of Section 36B are satisfied.

12.2 Regarding relying upon the data recovered from the computers, one of the main objection of the Appellants is that the computer printouts are not admissible in evidence as conditions under section 36B(2)/36B(4) are not satisfied. It is the contention of the Appellants that the computer print outs taken from the seized computers are not accompanied with Certificate as mandated under section 36B(4) containing the following details:

(a) describing the manner in which the data retrieved from the computer(electronic record) was produced

(b) the certificate must furnish the particulars of the device involved in the production of that record (the computer used for production of electronic record. Any admission of clandestine removal as per computerised sale register not relevant unless condition of Section 36B are satisfied. Provisions of Section 36B are mandatory in nature. Computer printout/electronic record cannot be proved by oral evidences.

12.3 The Appellant has relied on the decision of this Tribunal in the case of M/s Jai Balaji Industries Ltd. v. CGST reported in 2023-VIL-771-CESTAT-KOL-CE to drive home the point that the data recovered from computer print outs/pen drive is not a reliable evidence to raise demand of duty, when the person who entered the data is not identified. The relevant part of the said decision is reproduced below:

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12.5 Section 65B of Evidence Act is parimateria with Section 36B of the Central Excise Act, 1944. From the above observation of the Hon'ble Apex Court, we find that unless the conditions of Section 65B(2) of the Evidence Act, which is parimateria with Section 36B(4) of the Central Excise Act are complied with, no reliance can be placed on any computer printouts . Admittedly, the procedure set out in Section 36B has not been followed in this case. Thus, following the judgement of the Hon'ble Apex Court and the other decisions cited above, we hold that the data resumed from the computer print out alone cannot be relied upon to demand duty, without any corroborating evidence."

18.5 Further, we also take note of the fact that in this case, the contents of the said pen drive have been duly accounted for by the appellants. Shri Bishnu Prasad Nayak, Accountant, who authored the pen drive data, had explained that the figures pertained to banking transactions which were inflated / fabricated to obtain financial benefits from the bank and that the same did not represent the actual production / clearance of goods. The above explanation was placed before the Id. adjudicating authority during the course of adjudication proceedings, along with correlation to book debits to show that the excess book debt declared to banks tallied with the fabricated figures in the seized documents. Notwithstanding the above, the Id. adjudicating authority has relied upon the said pen drive data, without any corroborative evidence in support thereof, to allege clandestine removal against the appellants. In the absence of any positive evidence in support of the allegation of clandestine removal of goods on record, the demand raised on the

basis of assumptions and presumptions, by relying on uncorroborated and unverified electronic evidence without following the procedure prescribed under Section 36B, cannot be sustained in the eyes of law.

18.6. In view of the observations hereinabove, we hold that the said print-outs taken from the pen drives and other electronic equipment, recovered during the course of investigation, are not admissible as evidence to corroborate the allegation of clandestine removal of goods against the appellants in the present case. Therefore, the said issue is answered in favour of the appellants.

Issue (D): Whether the said statements have any evidentiary value without complying with the procedure laid down under Section 9D of the Central Excise Act, 1944, or not.

19. In this case, the Revenue has placed reliance on statements of various buyers recorded under Section 14 of the Central Excise Act, 1944 during the course of investigation, to allege clandestine removal of goods and to confirm the demands. It is the settled position of law that statements recorded during investigation cannot be relied upon unless the procedure prescribed under Section 9D of the Central Excise Act, 1944 is strictly followed. Regarding the evidentiary value of the statements without complying with the procedure laid down under Section 9D of the Central Excise Act, the said issue has already been examined by this Tribunal in the case of *M/s. Jai Balaji Industries Limited & ors. v. Commissioner of C.G.S.T. and Central Excise, Bolpur* [2023 (8) TMI 989 – CESTAT, Kolkata], wherein this Tribunal observed as under: -

"13. The next evidence relied upon by the adjudicating authority to confirm the demands in the impugned order are the statements recorded on the date of search and subsequently during the course of investigation. The statements recorded and the contents therein are given below in brief:

13.1 A statement of Shri Sushil Kumar Roy, Associate (Commercial) of JBIL-III was recorded in which he inter alia stated that data sheet retrieved from pen drives were the details of Billets sold 'on bills' as well as 'without bills'; that whenever tax invoice number is not given some of them 'might be' for without bill dispatches because in some of such cases, bills might have been issued from JBIL-IV but entries were made in the pen drives only to keep account. We find that this statement is not very categorical about the clandestine clearances.

13.2 A statement of Shri Kanhaiya Agarwal, weighbridge in-charge of JBIL-III was recorded on 17.07.2014, wherein he inter alia stated that he used to make weighment of goods at the weigh bridge of all incoming raw material as well as of outgoing finished goods. On being asked to explain about the pink weighment slips and slip pad as recovered from JBIL-III, he stated that weight of the material which has to be cleared without invoices was being mentioned in these pink weighment slips which was later handed over to Shri Sushil Kumar Roy. This statement was later retracted by him during cross examination before the adjudicating authority.

13.3. On 17.07.2014, a search was also conducted at the Head Office of Jai Balaji Group in Kolkata. The officers took out printouts of some of the e-mails from company's mail -ID handled by Shri Diptendu Samui, who was working as Accounts officer. Two pen drives were recovered from the possession of Shri Anil Kumar Agarwal. The officers also resumed two laptops under a Panchnama.

13.4. A statement of Shri Diptendu Samui, Accounts Officer, was recorded wherein he was shown certain messages retrieved from his mobile phone. In the present proceedings, there were only two messages showing purchase of scrap of only 15 MT and 10 MT, totally 25 M.T of scrap purchased in cash. Shri Diptendu Samui in his cross examination had categorically stated that both the above entries of

purchase of 25 M.T. of scrap was accounted for in their books of records.

13.5 A statement of Shri Raghunath Jhunjhunwala, weighbridge in-charge of JBIL IV was recorded, wherein he, inter alia, explained the procedure of weighment of raw materials and finished goods. He uses a pink slip for final weighment. He was shown pink slip Nos. 77, 79 both dated 18-08-2013 recovered from M/s. Baba Strips & Tubes Ltd on 3-04-2014 to which he stated that slip No. 77 & 78 was in his handwriting whereas slip No. 79 was in the handwriting of Rudra Tapas.

13.6 A statement of Shri Partho Sarkar, Associate Manager Excise of JBIL-IV was recorded wherein he stated that central excise duty was paid only on the invoices prepared and kept in statutory records. If invoice was not prepared for any consignment, no central excise duty was paid by JBIL-IV. No further investigation was conducted to substantiate this evidence.

13.7 A statement of Shri Anup Kumar Aggarwal, former Vice-President(Commercial) of Group Company was recorded wherein he, inter alia, stated that while working with Jai Balaji Group he was looking after procurement of raw materials; that while directing the dispatch plan as per the direction of Shri Rajiv Jajodia, Director, he used to interact with weighbridge supervisors namely Shri Kanhaiya at Unit-III; that whether a particular consignment was to be dispatched with bill or without bill was decided by the Directors only; and that the payment for such dispatches was received in JBIL group in cheque or cash respectively.

13.8 None of the persons who have given the statements as mentioned above have retracted their statements initially. The Appellants asked for cross examination of the witnesses whose statements have been relied upon to demand duty. The cross examination conducted by the adjudicating authority and the replies given by the witnesses during cross examination are furnished below:

13.9 The gist of cross-examination of various witnesses is as under:-

13.9.1 Sushil Kumar Roy in respect of statement 17-07-2014

(i) The pen drive in question was provided to him by Mr Gautam Banerjee who was an associate like him in the company.

(ii) All the entries, which were found in the pen drives, were not made by him.

(iii) These entries were made by other associates like Shri Gautam Banerjee, Shri Samiran Bose and Shri Krishanu Bhattacharya.

(iv) The data which was fed by him in the pen drives was fed on different computers.

(v) He was pressurized to make these statements.

(vi) He was told by the officers that if he did not make such statements, he would be arrested, but there would be no inconvenience if he stated as mentioned in the statements.

(vii) That despite the entries in the pen drives about clearance of any consignments there was possibility of like order getting cancelled, the vehicle developing breakdown etc.

(viii) Where some of the entries of duty payment had been left blank, he could not say with certainty that no duty was paid in cases of such goods as there was a possibility that duty had been paid on these goods later.

(ix) When he was confronted with 3 pink weighment slips no 65, 66 & 67 all dated 16-07-2014 and asked whether he had made entries in pen drives in respect of these weighment slips, to which he answered that the relevant entries were made by Shri Gautam Banerjee who was another Data Entry Operator.

(x) That inculpatory portions of his statements were recorded by the officers under pressure.

(xi) He had no idea whether the goods were cleared to Shri Girish Tikmani without payment of duty.

13.9.2 Kanhaiya Aggarwal in respect of statement 17-07-2014

The pink slips were prepared in all cases where computer slips was generated.

(i) *The question of clearances of goods without payment of duty on the strength of pink slips did not arise as his role was limited to weighment of the goods and issuance of weighment slips.*

(ii) *He categorically stated that he was asked to say that the goods were cleared without payment of duty.*

(iii) *In some cases the goods were not cleared after weighment due to various reasons such as breakdown of the vehicle.*

(iv) *Not responsible for the dispatch of the goods.*

13.9.3. Raghu Nath Jhunjhunwala in respect of statement dated 17-11-2014

(i) That there were occasions when the vehicle broke down and when some orders were cancelled the goods did not leave the factory despite issuance of pink slips.

(i) Pink slip number 77 which was in his handwriting he was subsequently informed by Shri Partho Sarkar that the said goods were rejected.

(ii) Denied any practice that he used to write year 2003 instead of 2013.

(iii) The purport of his answer to question No.9 and stated that he had made the said averment on the basis of some documents of M/s. Baba Strips and he was forced to write accordingly.

13.9.4 Partho Sarkar in respect of statement 17-11-2014

(i) He was never asked by anyone to prepare the invoice without the pink coloured weighment slips. He also denied that he was asked by anyone not to record any production in the production records. He also denied having been asked by anyone not to record any raw material received in the factory.

(ii) That there were instances where pink slips were issued but no invoice was issued as due to break down of vehicle or order having been cancelled.

13.9.5 Shri Diptendu Samul in respect of statement dated 17-07-2014

Wherever some message of payment on cash was cited in the Show Cause Notice it was clarified by Shri Diptendu Samul that the said purchase was accounted for in their records.

13.9.6 Anup Kumar Agarwal in respect of statement 11-12-2014

(i) He was responsible only for procurements of raw materials. Hence he was not in a position to comment about dispatches.

(ii) Denied having dealt with the sale of finished goods by JBIL or any dispatches of the goods.

(iii) Stated that he had left JBIL at the time recording of his of the statement. He was advised by the DGCEI officials to tender the statement as they desire so that he was free from further investigation.

(iv) Stated that his statement was dictated by DGCEI officials.

13.9.7 Girish Tikmani in respect of statement dated 29-02-2015

He used to receive Pig Iron from JBIL III on the basis of invoices and weighment slips and was making payments to them through RTGS and cheques.

(i) That he was never confronted with any computer printouts by the investigating officers while recording his statement dated 20-2-2015.

(ii) Denied having received any goods from JBIL III without any bill.

(iii) When confronted with the portion of the statement wherein he had stated having received the goods without bills from JBIL III he stated that he was surrounded by many officers and he was under great stress when he wrote his statement.

(iv) Informed that he had retracted from his statement on the very next day and brought on record notarized affidavit dated 21-2-2015.

13.10. From the above, we observe that during the course of cross examination, most of the persons who have given the statements retracted their statements. In the impugned order, the adjudicating

authority has held that if the statements were recorded under threats and duress, it is not understood as to what prevented them from retracting their statements within a reasonable period of time. She further held that all the statements of the concerned persons were supported by documentary evidences. Accordingly, she justified in demanding duty by relying upon these statements. However, a perusal of Section 9D of the Central Excise Act, 1944 clearly establishes that unless a person who has made the statement is examined as a witness before the Adjudicating Authority, no reliance can be placed on any statement recorded under section 14 of the Central Excise Act. Any statement recorded under Section 14 of the Central Excise Act could be admitted in evidence only after the process of examination and cross examination is completed under Section 9D. For undertaking this exercise, it is not necessary that a person should have retracted from his statement. If the argument of the Adjudicating Authority is accepted, then the provisions of Section 9D would become irrelevant. This cannot be the intention of the legislature. In this case, the adjudicating authority has allowed cross examination on selective basis. But, she has not taken into account the retractions made by them during cross examination.

13.11. The Appellants stated that the procedure set out under Section 9D is a mandatory procedure and without following this procedure no reliance can be placed on any statement recorded under Section 14 of the Central Excise Act, 1944. We agree with the contention of the Appellants. In the case of G-Tech Industries Vs Union Of India reported in 2016(339) ELT 209 (P&H), the Hon'ble Punjab and Haryana High Court has given an elaborate findings regarding the procedure to be followed under Section 9D. The relevant Part of the judgement is 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 subsection. 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.

13.12. Once it duly came on record that various statements recorded from the witnesses were not of voluntary nature but were recorded after putting undue pressure upon the witnesses the same could not be admitted in evidence by the Adjudicating Authority. The same clearly lost its evidentiary value. Once these statements are excluded from evidence no reliance could be placed on the computer printouts and other evidences. The law laid down in the Delhi High Court, in the case of C.C.E Vs. Vishnu and Co. Ltd reported in 2016 (332) ELT 793 (Del), is reproduced below:

41. *What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard.*

42. *The contention that it is the responsibility of the noticees to produce the witnesses for cross-examination is a strange one considering that they are witnesses of the Department and that their statements are being relied upon by the Department in support of the SCNs. Since it is relying on such statements, it is the responsibility of the Department to ensure their presence for cross-examination. As already mentioned, whenever such witnesses (i.e. six of them) were produced for cross-examination they resiled from their earlier statements.*

43. *It is not a matter of mere coincidence that none of the witnesses who were cross-examined stood by their earlier statements. It is one thing to overlook this feature on the premise that all of them were under the pressure and control of the noticees. The other approach is to view this with some caution and ask what might be the case if the remaining witnesses were also produced for cross-examination? Importantly, what would be the prejudice caused to the noticees, in such circumstances, by their non-production for cross-examination? Thus a doubt is created in favour of the noticees when such witnesses do not turn up for cross-examination. It is the latter approach that has weighed with the CESTAT. That, in view of this Court, was a possible approach and does not render its order perverse on that score.*

13.13. *In the case of Hi Tech Abrasives Ltd Vs Commissioner of C.Ex and Cus, Raipur, reported in 2018 (362) ELT 961 (Chattisharh), the Hon'ble High Court has held that unless the procedure laid down in Section 9D of the Central Excise Act, 1944 is followed in letter and spirit, no reliance can be placed on any statement recorded under Section 14 of the Central Excise Act, 1944. The relevant part of the judgement is reproduced below:*

9. Findings on Substantial Questions of Law (i) & (ii) :

We shall decide the first two substantial questions of law as they are overlapping. The submission of counsel for the appellant has been that firstly, the Director's statement was not admissible and secondly it cannot be treated as admission because in reply to Show Cause Notice, the said statement was stated to have been obtained under duress. We shall first examine the legal position with regard to the admissibility of the statement of Director which admittedly was taken during search operations by the investigation officers.

9.1 At the outset, it needs to be clarified that during the course of argument, Learned Counsel for the parties agreed that second substantial question of law is with regard to legality of procedure adopted by the adjudicating authority and not the Tribunal as such because the Tribunal has only exercised appellate jurisdiction. This is quite obvious from orders passed by the Tribunal, the appellate authority and pleadings/ground in the appeal. There is no dispute that the adjudicating authority did not record the statement of the Director Mr. Narayan Prasad Tekriwal and the basis of the finding recorded by the adjudicating authority as well as Customs, Excise and Service Tax Appellate Tribunal, has been the statement of the Director as recorded by the investigation officer during investigation. Section 9D of the Central Excise Act of 1944 reads as under :

Section 9D - Relevancy of statements under certain circumstances. A statement made and — (1) 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, -

When the person who made the statement is (a) dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

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

The provisions of sub-section (1) shall, so (2) 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 the Court.

On scanning the anatomy of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. (her, the adjudicating authority).

9.2 At this juncture, we need to notice the provision contained in Section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the court, as they apply in relation to proceeding before the Court. This provision

when read in juxtaposition, the small clauses (a) and (b) under sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the adjudicating authority.

9.3 A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.

9.4 The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.

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.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of Commissioner of Central Excise v. Kalvert Foods India Private Limited (Laws (SC) 2011

838) = 2011 (270) E.L.T. 643 (S.C.). That decision turned on its own facts. In para 19 of the judgment, it was concluded as below :

We are of the considered opinion that it "19. is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides the Managing director of the Company of his own volition deposition the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the Counsel for the Respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress."

Accordingly, on the first and second question of law, we hold that the statement of the Director could not be treated as relevant piece of evidence nor could be relied upon without compliance of Section 9D of the Act. The two questions of law accordingly, stand answered in that mannert statements recorded without following the procedure as set out in Section 9D of the Central Excise Act, 1944 has no evidentiary value :-

13.14. From the above discussion and the decisions cited above, we observe that the statements recorded cannot be relied upon to demand duty, unless the procedure set out in Section 9D are followed. None of the statements recorded in this case conclusively establish any clandestine clearance. During cross examination all of them retracted their earlier statements. Hence, the evidentiary value of the statements have to be examined in the light of the decisions cited above."

19.1. Moreover, it has been alleged in the impugned order that some of the buyers have made inculpatory statements, but we find that none of these buyers have been brought in for cross-examination. It is well

settled that without testing the statement of any witness, which is sought to be relied during the course of adjudication proceedings in terms of Section 9D of the Central Excise Act, 1944, the same is not admissible as evidence, as held by this Tribunal in the case of *M/s. Prinik Steels (P) Ltd. & ors. v. Commissioner of C.Ex., Cus. & S.Tax, Bhubaneswar-I* [2023 (12) TMI 299 – CESTAT, Kolkata=(2024) 15 Centax 313 (Tri. – Cal.)]. The relevant portion of the said order is reproduced below: -

"13. (iii) Whether the procedure as set out in Section 9D of the Central Excise Act, 1944 was followed in this case or not? If not followed, then whether the statements recorded under section 14 of the Central Excise Act, 1944 can be relied upon to demand duty ?

13.1 The Appellant contended that Statements recorded during the course of investigation cannot be relevant without testing the same under section 9D. The provisions of Section 9D of the Act is mandatory and unless the prescriptions of Section 9D are complied, the testimony of witness cannot be treated as relevant piece of material as mandated under section 9D. The Appellant contended that the statements of person/witness relied on in the impugned order are not examined in chief and not allowed Cross Examination in accordance with Section 9D. Hence, such statement cannot be relevant piece of material.

13.2 Regarding admission of cross examination, he stated that the Appellants have requested for cross examination of seven persons Viz, Manoj Kumar Sahoo, Chittaranjan Bhukta, Chittaranjan Nayak, Krishna Charan Padhi, Prasanta Kumar Das, Prasanna Kumar Majhi, and R.C. Samantray, whose statements have been relied upon in the Notice.among the seven, cross examination was conducted only on Shri. Krishna Chandra Padhi.

13.3 The Appellant has pointed out some glaring errors in the drawal of panchanama, seizure documents and the statements recorded during the course of investigation:

(i) According to Shri. G.D. Agarwal, the search was conducted on 22-8-06. The list of documents shown to him on the date of search at Rameshwar Patna office was not the same as the list attached with the seizure memo.

(ii) Shri. G.D. Agarwal vide his statement dated 7-12-07 retracted his averments made in his statement dated 22-8-06.

(iii) Shri. Manoj Kumar Sahoo has stated that on 22-8-06, documents seized under Sl. No. 1 to 12 containing weighment slips were shown to him. But, under seizure memo the document attached was a 'Register'. The Appellant submits that the documents shown to Shri. Sahoo was not the same as the one attached with the seizure memo.

(iv) Regarding the documents recovered at Rameshwar Patna Office, Shri. Sahoo stated that they have been brought from the Appellant Company (Prink Steels), by Chittaranjan Bhukta. The documents were said to have been written by Shri. Chittaranjan Bhukta. This statement of Shri. Sahoo was not confirmed from Shri. Chittaranjan Bhukta who was the author of the entry of the data. In his statement Shri. Chittaranjan Bhukta has stated that the documents were received in the Rameshwar patna office for storage purposes. Shri. Bhukta was confronted with only two pages of the said documents recovered from Rameshwar Patna office.

13.4 We observe that when such glaring discrepancies were pointed out by the Appellant, it is all the more required to follow the provisions of Section 9D and bring out the truth, which has not been done in this case.

13.5 The Appellant relied on the decision of this Tribunal in the case of M/s Jai Balaji Industries Ltd. v. CGST reported in 2023-VIL-771-CESTAT-KOL-CE in support of their contention that the statements recorded in this case cannot be relied upon as the provisions of section 9D are not followed. In the case of G-Tech Industries v. Union of India reported in 2016 (339) E.L.T. 209 (P & H), the Hon'ble Punjab and Haryana High Court has given an elaborate findings regarding the procedure to be followed under section 9D. The relevant Part of the judgement is 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 Rs. 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."

13.6 Had the adjudicating authority followed the provisions of Section 9D and examined the witnesses who have given the statements, the truth in this statement could have come out. Thus, we hold that the statements recorded in this case has lost its evidentiary value by not following the provisions of Section 9D. Thus, we find that

Procedure set out in Section 9D has not been followed in this case. Accordingly, we answer to the question (iii) at Para 11 supra in the negative."

19.2. Further, in the case of *Commissioner of Central Excise, Delhi-I v. M/s. Kuber Tobacco India Ltd. [2016 (338) E.L.T. 113 (Tri. – Del.)]*, the Tribunal at Delhi has dealt with the said issue and observed as under:-

"7. We have gone through the facts of the case wherein the certain machines were installed at Sandeep Poultry Farm Khasra No. 63/3, Village Khera Khurd, New Delhi-110082 found wherein 'Kanchan/Kanchann' brand gutka and 'wiz' brand pan masala manufactured clandestinely without declaring the said premises as registered premises for manufacture of the said gutka. The contention of M/s. Kuber is that they were not involved in the activity of manufacture of gutkhas and the said activity was illicit and misused of their brand name and goodwill of the appellant by certain elements who were manufacturing duplicate goods bearing M/s. Kuber brand names and clearing them in the market. The facts of the case are not in dispute, the appellants have raised the dispute that the statements recorded during the course of investigation cannot be relied upon as admissible evidence in terms of the provisions of Section 9D(2) of the Act. In that circumstance, it is better to extract the provisions of Section 9D which are reproduced as under :-

"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 the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

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

8. The main contention of the appellant is that the deponents whose statements have been relied upon by the adjudicating authority were not put to examination-in-chief before providing an opportunity of cross-examination. A plain reading of sub-section (1) of Section 9D 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. Therefore, there is no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, inasmuch as in adjudication proceedings as in criminal proceedings relating to prosecution. Therefore, sub-section (1) of Section 9D set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer shall be relevant, for the purpose of proving the truth of the facts contained therein. If the circumstances are absent, therefore, the statement, which has been made during the course of inquiry/investigation, before a gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the fact contained therein as observed by Hon'ble Delhi High Court in the case of *J.K. Cigarettes (supra)* wherein Hon'ble High Court has observed as under :-

12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazetted rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into

consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9-D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal.

9. 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, in so far as proving the truth of the contents thereof is concerned, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1). Therefore, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1)(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 interest of justice. The same view has been taken by Hon'ble Allahabad High Court in the case of Parmarth Iron Pvt. Ltd. (supra) wherein the High Court has observed as under :-

16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be

considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.

10. We further find that in the case of Smt. Sharadamma (*supra*), Hon'ble Karnataka High Court has observed as under :-

9. *It is not the duty of the Court to direct the parties or compel the parties as to in what manner they should conduct their case before the Court or also what quality of evidence they should place before the Court. But the duty of the court is only to appreciate the case in the proper perspective and on the basis of what is placed before the Court. Even with regard to the prayer for permitting the applicant to cross-examine the plaintiff, the prayer is misconceived as the question of cross-examination arises only when a witness has tendered evidence in chief-examination. Under section 138 of the Indian Evidence Act, cross-examination follows chief-examination, but not without chief-examination. If there is no chief-examination, there is no cross-examination. It is only witness who is examined in chief who can be cross-examined. Therefore, a prayer for cross-examination of the plaintiff even when the plaintiff has not been examined in chief is ridiculous and not provided for under Section 138 of the Indian Evidence Act. The Trial Court has rightly rejected the application. No scope for interference with an order of this nature.*

11. We further find that in the case of Swiber Offshore Construction Pvt. Ltd. (*supra*), this Tribunal has further observed as under :

6. *We therefore have no hesitation in holding that the impugned Order passed by the Commissioner as an adjudicating authority is appealable order in terms of Section 129A of the Act, even as per the ratio laid down in the above binding precedent. Request for cross-examination has been denied and the witnesses have not been*

examined despite specific reliance by the appellant on Section 138B without there being any objective formation of opinion based on any material on record to come to the conclusion that any specified circumstance mentioned in Section 138B(1)(a) exists. These circumstances mentioned in Section 138B(1)(a) are also contained in pari materia Section 9D(1)(a) and were recorded as follows in J.K. Cigarettes Ltd., [2009 \(242\) E.L.T. 189](#) (Del.).

"25. Section 9D of the Act stipulates following five circumstances, already taken note of, under which statements previously recorded can be made relevant. These are :-

- (a) when the person who had given the statement is dead;*
- (b) when he cannot be found;*
- (c) when he is incapable of giving evidence;*
- (d) when he is kept out of the way by the adverse party; and*
- (e) when his presence cannot be obtained without an amount of delay or expense, which the Officer considers unreasonable."*

These circumstances show that if witness cannot be examined for any of these five reasons, the statement previously recorded would be relevant. The adjudicating authority was therefore bound to follow the binding precedent and in absence of any specified circumstance to consider the statement relevant without examining the witnesses, erred in rejecting the request of the appellant to examine the witnesses and to offer them for cross-examination.

8. The appellant has also relied on the judgment of Hon'ble Apex Court in Sukhwant Singh v. State of Punjab, (1995) 3 SCC 367 to give emphasis on his submission that examination of witness is mandatory unless specified exceptional circumstances mentioned in clause (a) of Section 138B(1) exist. The Hon'ble Apex Court was pleased to hold that -

"8. It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :

"138. Order of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

10. We therefore find force in the submission of the Id. counsel for the appellant. We find no reason to justify rejection of request made by the appellant to the adjudicating authority in light of Section 138B of the Act, to summon witnesses for examination and to offer them for cross-examination if their statements were to be considered as relevant and admitted in evidence in the interest of justice.

12. We further find in the case of Bussa Overseas Properties Ltd., this Tribunal again observed as under :-

24. The fact that in cases relating to smuggling or indeed any case civil or criminal cannot or need not been proved for degree of mathematical precision or that the department governed by strict rules of evidence is again no answer. The department is certainly bound by the contents of the Customs Act, 1962 and the general principles of evidence.

which has been affirmed by the Apex Court.

13. We further find that Hon'ble Punjab & Haryana High Court in the case of Sukhwant Singh, it has been observed as under :-

8. It will be pertinent at this stage to refer to Section 138 of the Indian Evidence Act which provides :

"138. Order of examinations. - Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction for re-examination. - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by prosecution. There is, in our opinion, no meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by prosecution as it does not choose to examine him in chief. However, the practice of tendering witness for cross-examination in session trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898.

14. **In view of the above analysis, it is clear that during adjudication, the adjudicating authority is required to first examine the witness in chief and also to form an opinion that having regard to the facts and circumstances of the case, the statements of the witness are admissible in evidence.**

Thereafter, the witness is offered to be cross-examined. In the absence of examination-in-chief, allowing the cross-examination, is a futile exercise. We further find that the appellant have challenged the impugned order on the ground that the evidence in the form of statements gathered have no link of the appellant to the activities took at Sandeep Poultry Farm which is required to be examined on the basis of records available during the course of adjudication and the same has not been considered judicially."

[Emphasis supplied]

19.3. In terms of Section 9D of the Central Excise Act, for relying upon the statements recorded during the course of investigation, the adjudicating authority was required to examine the witnesses, in chief, and also to form the opinion that, having regard to the facts and circumstances of the case, the statements of the witnesses should be admissible as evidence. Thereafter, the witnesses were required to be offered for cross-examination. In the absence of examination-in-chief, cross-examination cannot be provided and the same would be a futile exercise.

19.4. From the above, it is clear that for placing reliance on the statements to allege clandestine removal of goods against the appellant, the said statements, recorded during the course of investigation, were to be tested as per the provisions laid down under Section 9D of the Central Excise Act, 1944, which the Revenue has failed to do in the instant case. In these circumstances, we hold that the statements recorded during the course of investigation do not have any evidentiary value for alleging clandestine removal of goods on the part of the appellants. Accordingly, the said issue has been answered in favour of the appellants.

Issue (E): Whether, in the facts and circumstances of the case, penalties can be imposed on the appellants, or not.

20. We find that the principal allegation against the appellants is that they were involved in the clandestine manufacture and removal of excisable goods without payment of the applicable duty. However, as discussed in the preceding paragraphs of this Order, the said allegation has not been established and stands rejected. In the absence of the main charge itself, the basis for imposition of penalty does not survive. Accordingly, we hold that no penalty is imposable on the appellants and the penalties imposed upon them are set aside.

21. In view of the discussions hereinabove, we hold as under: -

- (i) The charge of clandestine removal of goods against the appellants on assumptions and presumptions and on the basis of private records, cannot be sustained in the absence of any corroborative evidence on record.
- (ii) Print-outs taken from pen drives and other electronic equipment cannot be treated as admissible evidence without following the procedure prescribed under Section 36B of the Central Excise Act, 1944.
- (iii) The said statements cannot be relied upon against the appellants in the absence of compliance of the procedure laid down under Section 9D of the Central Excise Act, 1944.

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22. In the result, we hold that the entire demands of duty raised against the appellants on the allegation of clandestine removal of goods are not sustainable in the eyes of law and accordingly, the same are set aside. No penalty can be imposed on the appellants.

23. In these terms, the impugned orders are set aside and the appeals are allowed, with consequential relief, if any.

(Order pronounced in the open court on **19.05.2026**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd