

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL Nos. E/161-163/2010

(Arising out of Order-in-Appeal No. SB/102 to 105/Th-I/09 (F.No. V2(76)88/Th-I/08) dated 28.10.2009 passed by Commissioner of Central Excise (Appeals), Mumbai-I)

**Ghanshyam Pandey
Manoj J. Arya
Air Carrying Corporation (I) Pvt. Ltd.**

Appellant

Vs.

Commissioner of Central Excise, Thane-I

Respondent

Appearance:

Ms. Pranali Dixit, Advocate, for appellant
Shri Deepak S. Chavan, Superintendent (AR), for respondent

CORAM:

**Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)**

Date of Hearing: 25.9.2018
Date of Decision: 25.9.2018

ORDER No. A/**87570-87572/2018**

Per: Sanjiv Srivastava

These appeals are directed against order in appeal No SB/102 to 105/Th-1/09 dated 28.10.2009 of Commissioner (Appeal) Mumbai. By the said order Commissioner (Appeal) has upheld the order as follows of Joint Commissioner:-

- i. *"I order for recovery of the total basic duty amounting to Rs 7,21,243/- (Rupees Seven Lakhs Twenty One Thousand Two Hundred Forty Three Only) and Education Cess amounting to Rs 14,425/- (Rupees Fourteen Thousand Four Hundred and Twenty Five Only) leviable on the finished goods CTD bars (as detailed in Annexure A to this Notice) from M/s Air Carrying Corporation (I) Pvt Ltd. under the first proviso to Section 11A (1) of Central Excise Act, 1944. The amount of Rs 7,21,000/- (Rupees Seven Lakhs Twenty One Thousand Only) paid voluntarily, being deposit towards duty on the goods removed without payment of duty should be appropriated against the duty demanded thereon.*
- ii. *I impose a penalty of Rs 7,21,243/- (Rupees Seven Lakhs Twenty One Thousand Two Hundred Forty Three Only) on M/s Air Carrying Corporation (I) Pvt Ltd. under the provisions of Section 11AC of Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002.*
- iii. *Interest at the appropriate rate should be ordered to be recovered from them under the provisions of Section 11AB of Central Excise Act, 1944 read with Rule 8 of Central Excise Rules, 2002.*

- iv. *The goods i.e. CTD bars weighing 261.320 MT valued at Rs 60,10,360/- are held liable for confiscation under the provisions of Rule 25 of Central Excise Rules, 2002. However, since the goods are not available, I do not order for confiscation of the same.*
- v. *As the goods are held liable for confiscation, hence, I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs only) on Shri Manoj Arya, Director M/s Air Carrying Corporation (I) Pvt Ltd under the provisions of Rule 26 of the Central Excise Rules, 2002.*
- vi. *As the goods are held liable for confiscation, hence, I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs only) on Shri Sanjay Mittal, Prop M/s Balaji Steels, Mumbai, Director M/s Air Carrying Corporation (I) Pvt Ltd under the provisions of Rule 26 of the Central Excise Rules, 2002.*
- vii. *As the goods are held liable for confiscation, hence, I impose a penalty of Rs 5,00,000/- (Rupees Five Lakhs only) on Shri Ghanshyam Pandey, Prop of M/s Anand Transport, and authorized signatory of M/s Alok Transport, under the provisions of Rule 26 of the Central Excise Rules, 2002."*

2.1 Acting on the intelligence that Shri Sanjay Mittal, Broker of Iron and Steel products and Proprietor M/s

Balaji Steel was involved in facilitating the clandestine clearances of CTD Bars without payment of Central Excise Duty by manufacturers, his premises was searched on 24.03.2005, and certain incriminating documents were recovered and resumed.

2.2 In his statement recorded on 25.03.2005, Shri Sanjay Mittal stated that the entries made in the two notebooks (Sl No A-7 & A-8) are in respect of those transactions/ saudas brokered by him from various suppliers which were in cash and no Central Excise duty has been paid by the manufacturer/ suppliers in respect of these transaction and no invoices received. Corresponding entries were made in notebook A-11 and note pad A-12, regarding purchases made without bill in cash from local rolling mills.

2.3 In his statement recorded on 30.03.2005, Shri Sandeep Mittal re-iterated that he had brokered deals without payment of Central Excise duty and without Invoice, in respect of various CTD bar manufacturers and traders. He further admitted that in case of local rolling mills the modus operandi was to deliver the M S Ingots purchased from outstation brokers to the CTD manufacturer and lift equivalent quantity of CTD Bars from the said unit without payment of any Central Excise duty. A differential amount of Rs 3000 PMT was paid by him to the said unit. In case of outstation units

the goods were transported by the unit to him along with an invoice in sealed cover, which was carried back by the transporter to the unit after delivery of goods. Traders used to give him their requirements over telephone and then he would get the goods transported through the transport arranged by the trader under cover of fictitious trading challan, in some cases he had given the challans but mostly the challan was arranged by the trader. Goods locally were transported by him in trucks arranged by him from Shri Ghanshyam Pandey of M/s Alok Transport. He had brokered such deals without payment of Central Excise for about 1670 MT per month during the period January 2005 to March 2005.

2.4 From the records resumed during the search of the premises of Shri Sanjay Mittal names of certain manufacturer including Air Carrying Corporation Pvt Ltd were revealed. In his statement, Shri Manoj S Arya Director with M/s Air Carrying Corporation (I) Pvt Ltd admitted to have cleared the said goods without payment of Central Excise Duty through the said broker. They also deposited the amount of Rs 7,27,000/- towards Central Excise Duty vide TR-6 Challan No 06 dated 28.03.2005.

2.5 Statements of some buyers and traders were also recorded, who inter alia admitted that they are mainly

supplying material to the builders/ Contractors in construction lines. They also admitted to have purchased the steel bars through the said broker from these units. The admitted to have made payments against the said purchases in cash and also that they did not received any documents against the said purchases.

2.6. In his statement recorded on 02.04.2005, Shri Ghanshyam Pandey, the transporter working with Shri Sanjay Mittal, deposed-

i. if the goods were transferred from outstation vehicles to his vehicles on the road, no documents were made for such trips but driver was asked to call on the telephone number given to him by Shri Sanjay Mittal, and deliver the goods as per the instructions of the person answering the call.

ii. When the goods were loaded in hi vehicle from rolling mill then the person hiring the vehicle would give pink colour invoices and weigh bridge chits either in open condition or at times in sealed and gummed envelope. When the documents were given in sealed/ gummed envelope then the driver was also given a trading challan. In case were open invoice was given delivery was made at the address indicated on the invoice, and in case of the sealed/ gummed envelope

delivery was made as per the trading challan. In case where the proper open invoice was used for transportation of the goods payments towards transportation were received by him in cheque and the record of such transaction maintained by him. In cases where the goods were carried and delivered as per the trading challan payments were received by him in cash and no record of such transactions maintained.

iii. During the month of January, February and March 2005 he has transported the goods for M/s Air Carrying Corporation.

2.7. In his statement recorded on 25.01.2006, Shri Ghanshyam Pandey confirmed the depositions made by him during his earlier statement and also admitted to have transported the goods as per the entries shown to him from the private records of Shri Mittal. He deposed *"I have to state that I confirm that these entries pertain to the transportation of CTD bars of various sizes done using vehicles belonging to him and his wife and the bars were loaded in the vehicles from the supplier mentioned above i.e. "Durga" and "D Seth" refer to CTD bars loaded in the vehicles from factory of M/s Maa Chintapurni Iron and Steel (I) Ltd and factory of M/s Jai Mahalaxmi Ispat (I) Pvt Ltd, Village Vasuri (Khurd) in Wada Taluka, "acc" refers to CTD bar loaded in the vehicles from the factory of M/s Air Carrying Corporation (I) Pvt Ltd., MIDC*

Murbad, Dist Thane and "Jaina" refers to goods which Shri Sanjay Mittal informed me would be coming from Jaina in some particular vehicle which I was to meet on the way and transfer the goods from the outstation vehicle coming from Jaina to my vehicles for delivery as per instructions of Shri Sanjay Mittal."

2.8 On the basis of the above investigation a Show Cause Notice dated 31st January 2007 has been issued to the Appellants and also Shri Sanjay Mittal demanding the duty short paid in respect of these goods cleared clandestinely from the unit and for imposition of penalty on all concerned. The said show cause notice has been adjudicated by the Joint Commissioner as per his order dated 31.01.2008 holding as in indicated in para 1 supra. Commissioner (Appeal) has by the impugned order upheld the order of the adjudicating authority. Hence this appeal.

3.0 Appellants have filed these appeals challenging the order of Commissioner (Appeal) stating that-

- i. Order is based on assumptions and presumptions and hence not sustainable. In support they relied upon the decisions of tribunal in following cases;
- a. Sharma Chemicals Vs Commissioner of Central Excise Calcutta II [2001 (130) ELT 271 (T)]

b. CCE Shillong Vs Shree Narotam Udyog Pvt Ltd [2003 (158) ELT 40 (T)]

c. CCE Raipur Vs C M Re-Rollers & Fabricators [2004 (168) ELT 506 (T)]

d. Rama Shyam Paper Ltd. Vs CCE Lucknow [2004 (168) ELT 494 (T)]

e. Meenambai Fire Works Ltd & Anr vs CCE Madurai [2002 (49) RLT 832 (T)]

f. Ghodavat Pan Masala Products Ltd Vs Commissioner [2004 (175) ELT 182 (T)]

g. S T Texturiser vs CCE [2006 (200) ELT 234 (T)]

ii. The principle of “Cum duty price” is applicable in this case.

iii. No interest and penalty is sustainable as the demand itself cannot be sustained against them.

4.1 We have heard Ms Manali Dixit, Advocate for the Appellants and Shri Deepak S Chavan, Superintendent, Authorized representative for the revenue.

4.2 Arguing on the behalf of Appellants learned Counsel submitted:-

- i. Since the initiation of the proceedings and during the pendency of his appeal before this tribunal, Shri Ghanshyam Pandey on whom personal penalty of Rs 5,00,000/- has been imposed has

expired. She produced the death certificate of Shri Ghanshyam Pandey and stated that in such circumstances the proceedings against Shri Pandey should abate as will the appeal.

- ii. In respect of other two appeals she submitted that the entire case against them is based on the entries found in the diary recovered from Shri Sanjay Mittal, proprietor of M/s Balaji Steel. She submitted that these diary entries have not been corroborated by any further independent evidence or investigation. Though they have admitted the said entries and also paid the amount of Central Excise duty demanded, these diary entries or payment of Central Excise duty cannot be held against them for alleging clandestine removal.
- iii. In view of the fact that the diary entries have not been corroborated by independent evidences she relying on various decisions of Tribunal submitted that the case against the appellants do not have any merits and the order of Commissioner (Appeal) needs to be set aside.

4.3 Arguing for revenue, learned Authorized representative, submitted that the case of the department is based on the evidences recovered from the premises of M/s Balaji Steel during the course of search. These evidences have been admitted by the

proprietor of M/s Balaji Steels, who has in his statements recorded under Section 14 of the Central Excise Act, 1944 also gave the details of entire modus operandi, by which he was assisting the units in clandestine clearance of their goods. In his statement, Shri Manoj Arya Director of Appellant Unit also has admitted the fact of making the clandestine clearance and has also voluntarily deposited the duty due against the goods clandestinely cleared. No one has till date ever retracted the statements made. Thus by giving the details of diary entry and the statements of Shri Sanjay Mittal Proprietor M/s Balaji Steels and Shri Manoj Arya Director in the Appellant unit revenue has discharged the burden of evidence to allege clandestine clearance against the appellant unit. In the present case appellants have not been able to put forth anything to rebut the case of department on basis of these evidences. Both Adjudicating Authority and Commissioner (Appeals) have independently examined the fact and evidences in the case and have concluded that the case of clandestine clearance has been well established against the appellants. Accordingly he argued for upholding the order.

5.1 The case of the department is based on the evidences recovered during the search of the premises of M/s Balaji Steels on 24.03.2005. During the course of

search certain incriminating documents evidencing the clandestine clearance of the goods by various units were recovered. Entries in certain private records maintained by Shri Sanjay Mittal, proprietor of M/s Balaji Steel became the basis for proceeding against the Air Carrying Corporation. In number of decisions this tribunal has placed reliance on the decision of Apex Court in case of **Central Bureau Of Investigation vs V.C. Shukla & Ors** [(1998)3 S.C.C. 410] (**popularly known as Jain Hawala Diaries Case**), to hold that the case of clandestine clearance cannot be based on the private diaries/ recovered from the co-conspirators. However said decisions have failed to appreciate the fact, in this decision Supreme Court has not discarded such diaries/ documents as an admissible piece of evidence under the Evidence Act, but has laid down the test to determine the manner in which the said documents need to be examined in conjunction with other evidences recovered during the investigations for purpose of establishing the case against the accused. The relevant para's of the said decision of Apex Court are reproduced below:

“The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (wigmore on evidence § 1546). Since,

however, an element of self interest and partisanship of the entrant to make a person - behind whose back and without whose knowledge the entry is made - liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words such statements shall not alone be sufficient to charge any person with liability.

The probative value of the liability created by an entry in books of account came up for consideration in Chandradhar vs. Gauhati Bank [1967 (1) S. C. R. 898]. That case arose out of a suit filed by Gauhati Bank against Chandradhar (the appellant therein) for recovery of a loan of Rs. 40,000/- . IN defence he contended, inter alia, that no loan was taken. To substantiate their claim the Bank solely relied upon certified copy of the accounts maintained by them under Section 4 of the Bankers' Book Evidence Act, 1891 and contended that certified copies became prima facie evidence of the existence of the original entries in the accounts and were admissible to prove the payment of loan given. The suit was decreed by the trial Court and the appeal preferred against it was dismissed by the High Court. In setting aside the decree this Court observed that in the face of the positive case made out by Chandradhar that he did not ever borrow any sum from the Bank, the Bank had to prove that fact of such payment and could not rely on mere entries in the books of account even if they were regularly kept in the course of business in view of the clear language of Section 34 of the Act. This Court further observed that where the entries were not admitted it was the duty of the Bank, if it relied on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as

indicated therein and thereafter the entries would be of use as corroborative evidence.

The same question came up for consideration before different High Court on a number of occasions but to eschew prolixity we would confine our attention to some of the judgments on which Mr. Sibal relied. In Yesuvadiyan Vs. Subba Naicker [A. I. R. 1919 Madras 132] one of the learned judges constituting the Bench had this to say:

S.34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business. he will have to show further by some independent evidence that the entries' represent real and honest transactions and that the moneys were paid in accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true."

While concurring with the above observations the other learned Judge stated as under:

" If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such

consideration could not alone with reference to s.34, Evidence Act, be the basis of a decree."

(emphasis supplied) In Beni Vs. Bisan Dayal [A. I. R 1925 Nagpur 445] it was observed that entries in book s of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In Hira Lal Vs. Ram Rakha [A. I. R. 1953 Pepsu 113] the High Court, while negating a contention that it having been proved that the books of account were regularly kept in the ordinary course of business and that, therefore, all entries therein should be considered to be relevant and to have been prove, said that the rule as laid down in Section 34 of the Act that entries in the books of account regularly kept in the course of business re relevant whenever they refer to a matter in which the court has to enquire was subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability. It is not, therefore, enough merely to prove that the books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon the person relying upon those entries to prove that they were in accordance with facts.

The evidentiary value of entries relevant under Section 34 was also considered in Hiralal Mahabir Pershad (supra) I.D. Dua, J. (as he then was) speaking for the Court observed that such entries though relevant were only corroborative evidence and it is to be shown further by

some independent evidence that the entries represent honest and real transactions and that monies were paid in accordance with those entries.

A conspectus of the above decisions makes it evident that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person. Keeping in view the above principles, even if we proceed on the assumption that the entries made in MR 71/91 are correct and the entries in the other books and loose sheets which we have already found to be not admissible in evidence under Section 34) are admissible under Section 9 of the Act to support an inference about the formers' correctness still those entries would not be sufficient to charge Shri Advani and Shri Shukla with the accusations leveled against them for there is not an iota of independent evidence in support thereof. In that view of the matter we need not discuss, delve into or decide upon the contention raised by Mr. Altaf Ahmed in this regard. Suffice it to say that the statements of the for witnesses, who have admitted receipts of the payments as shown against them in MR 71/91, can at best be proof of reliability of the entries so far they are concerned and not others. In other words, the statements of the above witnesses cannot be independent evidence under Section 34 as against the above two respondents. So far as Shri Advani is concerned Section 34 would not come in aid of the prosecution for another reason also. According to the prosecution case itself his name finds place only in one of the loose sheets (sheet No. 8) and not in MR 71/91. Resultantly, in view of our earlier discussion, section 34 cannot at all be pressed into service against him.

Following conclusion of our discussion on Section 34 of the Act we may now turn to the principle and scope of Section 10 of the Act and its applicability to the entries in question. This section reads as under:-

"Things said or done by conspirator in reference to common design. - where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

In dealing with this Section in Sardul Singh vs. State of Bombay [AIR 1957 S. C. 747], this court observed that it is recognised on well established authority that the principle underlying the reception of evidence of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. Ordinarily, a person cannot be made responsible for the acts of other unless they have been instigated by him or done with his knowledge or consent. This section provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all. But then, the opening of words of the Section makes it abundantly clear that such concept of agency can be availed of, only after the Court is satisfied that there is reasonable ground to believe that they have conspired to commit an offence or an actionable wrong. In other words, only when such a reasonable ground exists, anything said, done or written by any one of them in

reference to their common intention thereafter is relevant against the others, not only for the propose of proving the existence of the conspiracy but also for proving the existence of the conspiracy but also for proving that the other person was a party to it. In Bhagwan Swarup vs. State of Maharashtra [A. I. R 1965 S. C. 682], this court analysed the section as follows:-

" (1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said , done or written before the entered the conspiracy or after the left it' and (5) it can only be used against a co-conspirator and not in his favour."

In the light of the above principles we may now consider the arguments canvassed by Mr. Altaf Ahmed to made the entries in the books and the enclose sheets admissible under the above section as relevant evidence. He submitted that the materials collected during investigation and placed on record clearly establish the existence of a general conspiracy amongst Jains to promote their economic interest by corrupting public servant. He next contended that the materials further disclosed that in order to accomplish the design of the general conspiracy, a number of separate conspiracies with similar purpose had been hatched up between Jains and different public servants."

Since the Apex Court found that in the case before them the tests laid down are not satisfied they proceeded accordingly. However we examine the evidences in the present case on the anvil laid down by the Apex Court. When these documents are examined with reference to other factors/ evidences relied upon by the department, we do not find any reason to hold contrary against the said entries found in the records of co-conspirators.

5.2 When the broker Shri Sanjay Mittal Proprietor of M/s Balaji Steels was confronted with the said documents he has in his various statements admitted the fact of clandestine clearance of goods by various units in deals organized by him. He also gave the detailed modus operandi adopted by him for assisting such clandestine clearance.

5.3 In his statement transporter has also admitted the fact of transporting the said clandestinely cleared goods as per the instructions of the broker. Also he gave the details of such transportation by agreeing with the entries made in the private records maintained by Shri Sanjay Mittal. He also has independently given the modus operandi adopted by the party along with the broker to clear the goods clandestinely.

5.4 Further In his statement recorded on 28.03.2005, Shri Manoj S Arya, Director with M/s Air Carrying Corporation (I) Pvt Ltd stated

“On being asked I state that all our purchases as well as sales are through Market Brokers & our brokers for purchases are Vijay Jindal. Harsh Gandhi. Similarly our major broker for sale are Sanjay Mittal, Harshad Modi & Gandhi. Now being asked by you as to whether any clearances of our CTD bars have been made by us without payment of Central Excise Duty & the details thereof, I state that during the period Jan 05 & March 05, we have cleared our CTD Bars without payment of Central Excise duty in respect of certain transactions due to market pressure. Though I do not remember exact quantum of the same it is around 250 MT. all these transactions were brokered by above mentioned Shri Sanjay Mittal & all these sales were affected to different parties. Our sale pattern is such that the parties are arranged by the broker & as such we do not generally know the parties. On being asked as to how we receive the payment when we do not know the parties. I state that the payment is also received through Sanjay Mittal. On being asked, for the goods cleared on payment of duty who gives the brokerage to the broker for CTD bars. I state that in these deals we pay the brokerage to the broker. Now I have been shown

a computer printout of transaction through Shri Sanjay Mittal appearing in his private records on which supplier/ seller is shown as ACC i.e. Air Carrying Corporation (I) P Ltd. I have gone through the statement & in token thereof have put my dated signature on the same. I understand from the statement that the individual quantity shown in each entry as appearing in the private record reflect the clearance effected by us. On going through it I state that the quantity of 103.4 MT appearing in the first part of the printout has been cleared by us on payment of duty on dates shown against each entry. As regards the entries appearing in second part with vehicle no. shown as from record A-11, I state that these are representing clearances effected by us without payment of duty appearing in pvt records of Shri Sanjay Mittal. I undertake to produce TR-6 challan evidencing voluntary deposit made by us in this regard tomorrow as we have already issued a cheque & TR-6 will be available with us by tomorrow. ...

As per Records of Sanjay Mittal			
Seller Name	Quantity in Kgs	Date	Record No
ACC	9350	26.02.05	A-7 & 8
ACC	10400	28.02.05	A-7 & 8
ACC	10370	28.02.05	A-7 & 8
ACC	16070	28.02.05	A-7 & 8
ACC	10310	28.02.05	A-7 & 8

ACC	7360	28.02.05	A-7 & 8
ACC	17260	28.02.05	A-7 & 8
ACC	11580	28.02.05	A-7 & 8
ACC	10700	20.03.05	A-7 & 8
	103400		
Supplier	Quantity in Kgs	Vehicle No.	Record No
acc	9930	MH195595	A-11
acc	12150	MH04P6658	A-11
acc	12810	MH06L128	A-11
acc	9840	MH-W4578	A-11
acc	10340	MH06B7217	A-11
acc	14010	MH04BU5049	A-11
acc	6710	MH04CG2297	A-11
acc	10950	MH04AL5470	A-11
acc	10210	MH195595	A-11
acc	9850	MH26H5881	A-11
acc	10000	MRS6561	A-11
acc	10950	MHO4397	A-11
acc	11270	MH051079	A-11
acc	14310	MH04BU8855	A-11
acc	14470	MH04CA7110	A-11
acc	13530	MH04AC5791	A-11
acc	8220	MH04CA7109	A-11
acc	11390	MH04CA7110	A-11
acc	5310	MH026B7217	A-11
acc	12040	MH04H8938	A-11
acc	9200	MH04CA3222	A-11
acc	10550	MH195595	A-11
acc	12310	2784	A-11
acc	10970	MH042297	A-11
	261320		A-11

5.5 Thus from the above statements it is quite evident that all three Shri Sanjay Mittal, Shri Ghanshyam Pandey and Shri Manoj S Arya were interrelated to each other in conducting their business. In fact Shri Manoj S Arya has admitted to have been conducting his business through Shri Sanjay Mittal. This fact is further substantiated by the fact that the details of those clearances which were made on payment of duty were also found entered in the records of M/s Balaji Steels. The business dependence and relationship between the two is quite evident from the records and also has been admitted by both in their statements. In the case of Jain Hawala Diary, referred above supra, Supreme Court found nothing of that sort as is evident from the para reproduced below, and which is the basic reason for the said decision.

“At the outset we may point out that no charge was framed against the Jains from having entered into a criminal conspiracy amongst themselves (even though such was the allegation in the charge sheet). We need not, therefore, consider the materials collected during investigation from that perspective. Indeed, according to the charges of conspiracy all the respondents were parties thereto and the conspiracy existed for the period from February, 1990 to January, 1991. Therefore we have to ascertain whether there is Prima facie evidence affording a reasonable ground for us to believe about its such existence.

To persuade us to give an affirmative answer to the above question Mr. Altaf Ahmed drew our attention to the statements of Jacob Mathai (L. W. 4), Dr. P.K. Magu (L.W.14), Vijay Kumar Verma (L. W. 15), Bharat Singh (L. W. 16) C. D.D Reddy (L. W. 17), S.R. Choudhary (L. W. 18), Ram Prasad (L. W. 19), H. P. Guha Roy (L. W. 20) and Narendra Singh (L. W. 21). On perusal of their statements we find that some of them are irrelevant to the charges of conspiracy with which we are now concerned while others, to the extent they can be translated into legally admissible evidence, only indicate that Shri Shukla was known to the Jain Brothers and had gone to their residence on formal occasions. The above statements cannot be made a reasonable ground to believe that all of them have conspired together. So far as Shri Advani is concerned, we find that no one has even spoke about him in their statements. Since the first requirement of Section 10 is not fulfilled the entries in the documents cannot be pressed into service under its latter part.”

5.6 Thus applying the principle of law/ evidence laid down by the Apex Court in this case we have no hesitation in holding that the diaries and other private documents recovered from the premises of broker are admissible pieces of evidence to establish the case of clandestine clearance against the noticee.

5.7 Section 36A of the Central Excise Act, 1944 provides as follows:

“Presumption as to documents in certain cases. -

Where any document is produced by any person or has been seized from the custody or control of any person, in

either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -

(a) unless the contrary is proved by such person, presume -

(i) the truth of the contents of such document;

(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.”

5.8 The Appellants before us have been confronted with these documents during the course of investigation and have been allowed opportunity to disapprove of the contents of document. In their statement the Appellants have after examining the document have admitted the correctness of entries in the said documents. Hence in view of the said Section 36A read along with the decision of the Apex Court in case of Jain Hawala Diaries supra, we are of the view that department has

prima facie discharged the burden of establishing the case of clandestine clearance against the appellants.

5.9 It is also not the case of appellants, that the statements of recorded, were recorded under threat or duress and have been retracted by them immediately on the first available opportunity. In fact the statements made have never been retracted and on the repeated query from the bench, counsel for the appellant was not able to show any evidence to claim such retraction. Further from the adjudication order and the reply to show cause notice also it is evident that the appellants have never retracted their statements either in part or toto. In case of K I Pavunny [1997 (90) ELT 241 (SC)], Hon'ble Apex Court has while upholding the relevancy of the statements recorded for proving the charge of smuggling and clandestine clearance has held as follows:

17. *It would thus be clear that the object of the Act empowering Customs Officers to record the evidence under Section 108 is to collect information of the contravention of the provisions of the Act or concealment of the contraband or avoidance of the duty of excise so as to enable them to collect the evidence of the proof of contravention of the provisions of the Act so as to take proceedings for further action of confiscation of the contraband or imposition of the penalty under the Act etc. By virtue of authority of law, the officer exercising the*

powers under the Act is an authority within the meaning of Section 24 of the Evidence Act.

18. Though the authority/officer on suspecting a person of (1) having committed the crime under the Act can record his statement, such a person per force is not a person accused under the Act. (2) He becomes accused of the offence under the Act only when a [complaint] is laid by the competent Customs Officer in the Court of competent jurisdiction or Magistrate to take cognizance of the offence and summons are issued. Thereafter, he becomes a person accused a statement recorded or given by the person suspected of of the offence. (3) having committed an offence during the inquiry under Section 108 of the Act or during confiscation proceedings is not a person accused of the offence within the meaning of Section 24 of the Evidence Act. (4) Though the Customs Officer is an authority within the meaning of Section 24 of the Evidence Act, by reason of statutory compulsion of recording the statement or the accused giving voluntary statement pursuant to his appearing either after issuance of summons or after the appellant's surrender, such statement cannot be characterised to have been obtained by threat, inducement or promise. (5) The collection of evidence under Section 108 and other relevant provisions relating to search and seizure are only for the purpose of taking further steps for confiscation of contraband and imposition of penalty. (6) The self-same evidence is admissible in evidence on the complaint laid by the Customs Officer for prosecution under Section 135 or other relevant statutes.

19. *Next question for consideration is : whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own hand-writing giving wealth of details running*

into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is: whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before the Magistrate though no complaint was filed and was released on bail. He did not complain to the Magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weightage to the same. It is true that the Magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant's knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bed-room through which he or family members could always watch anyone frequenting

the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying away the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they would immediately catch hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by threat, duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one.

26. *In Naresh J. Sukhawani v. Union of India - 1996 (83) E.L.T. 258 (S.C.) = 1995 Supp. 4 SCC 663 a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra v. Union of India - 1997 (89) E.L.T. 646, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He*

filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in

connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve.

32. *It is true that in criminal law, as also in civil suits, the trial Court and the appellate Court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. The question then is: whether the learned Single Judge of the High Court has committed any error of law in reversing the acquittal by the Magistrate. Not every fanciful reason that erupted from flight of imagination but relevant and germane requires tested. Reasons are the soul of law. Best way to discover truth is through the interplay of viewpoints. Discussion captures the essence of controversy by its appraisal of alternatives, presentation of pros and cons and review on the touchstone of human conduct and all attending relevant circumstances. Truth and falsity are sworn enemies. Man may be prone to speak falsehood but circumstantial evidence will not. Falsity is routed from man's proclivity to faltering but when it is tested on the anvil of circumstantial evidence truth trans. On scanning the evidence and going through the reasoning of the learned Single Judge we find that the learned Judge was right in accepting the confessional statement of the appellant, Ex. P-4 to be a voluntary one and that it could form the basis for conviction. The*

Magistrate had dwelt upon the controversy, no doubt on appreciation of the evidence but not in proper or right perspective. Therefore, it is not necessary for the learned Judge of the High Court to wade through every reasoning and give his reasons for his disagreement with the conclusion reached by the Magistrate. On relevant aspects, the learned Judge has dwelt upon in detail and recorded the disagreement with the Magistrate and reached his conclusions. Therefore, there is no illegality in the approach adopted by the learned Judge. We hold that the learned Judge was right in his findings that the prosecution has proved the case based upon the confession of the appellant given in Ex. P-4 under Section 108 of the Evidence Act and the evidence of PWs 2, 3 and 5. The prosecution proved the case beyond doubt and the High Court has committed no error of law."

5.10 Thus we have no hesitation in holding the truth of the contentions made in the statement recorded under Section 14 of the Central Excise Act, 1944. In view of the evidences that have be produced and recovered during the course of investigation, along with the own admissions of the Director in the unit and the other co-noticees we are not in position to agree with the Appellants contentions that the charges made against them are based on presumptions and assumptions. On the contrary there is sufficient evidence to establish the charges against them. The reliance placed by the appellant on certain decisions of this tribunal in their appeal, cannot help their case because in the case of

clandestine clearance the evidences recovered need to be examined in the fact of each case and it has to be shown that the ratio of the said judgment applicable to the facts/ evidences in the case under consideration. In absence of any such attempt on the part of the counsel to establish how those case are relevant for approving or disapproving the evidences in the present case mere citing of the decision will not advance the case of the appellants in matters of clandestine clearance which are fact and evidence based.

6.1 Larger bench of this tribunal has in case Gopal Industries Ltd [2007 (214) ELT 19 (T-LB) in similar circumstances have held as follows:

***“18.** It is not in dispute that two note books being private record, namely, “daily report tin factory” and “Daily production report” were seized from the factory premises of the appellant on 1-8-1998 under a panchnama in the presence of the authorized signatory of the appellant and two panch witnesses. The authenticity of these two note-books is not disputed, but a contention is canvassed that reliance cannot be placed on such private record in the absence of corroborative evidence to show clandestine removal of the excisable goods.*

***18.1** The “Daily report tin factory” note-book contained details of production and issue of tin containers by the appellant, which did not reflect in the statutory record. The details of production and clearance of tin containers were also shown in the note-book ‘Daily production report’ separately in respect of the appellant firm which*

tallied with the figures shown in the 'Daily report tin factory' which contained figures both for the 'new' tin factory as well in the name of the appellant. In this context, it will be noticed that the managing partner Shri Yogesh Garg confirmed in his statement recorded on 29-9-1998 that the documents recovered under the panchnama on 1-9-1998 were pertaining to production and clearance of tin containers by their factory. He stated that these documents consisted of daily production reports written in note-books, delivery challans, stock record of tins etc. The documents recovered pertained to production and clearance of tin containers. He also stated that amongst other supervisors, even Awadesh Kumar Saxena, Electronics Engineer looked after the production and clearance of the goods of the factory. The authorized signatory of the appellant Girijesh Kumar Rai, confirmed in his statement recorded on 28-9-1998 that the records shown to him were withdrawn from the factory of the appellant in his presence and that he had put his signatures on the said documents at the time of withdrawal on 1-9-1998. The Electronics Engineer, Shri Awadesh Kumar Saxena in his statement dated 28-9-1998 admitted that the portion of daily production reports note-book pertaining to the appellants was prepared by him and that challans and daily production reports which bear his signatures, were prepared by him and they were of the appellant firm. According to him, the daily production report depicted the number of tin containers produced/ manufactured on a specific day. Whenever, he prepared the daily production report/challan he submitted the original copy to the Managing Director. The facts revealed by the Managing Director, Shri Yogesh Garg, the authorized signatory, Shri Girijesh Rai and Shri Awadesh Kumar Saxena make it clear that the said

private documents recovered from the appellant premises on 1-9-1998 were maintained by the appellant and that the record, namely, the daily production reports, challans etc. were pertaining to the clandestine production and removal of tin containers without payment of duty. We have perused copies of these two note-books containing the private record and we find that there were signatures of Awadesh Kumar Saxena, Electronics Engineer at various places. The daily report showed particulars of the opening stock, production and the closing stock of the said excisable goods. Admittedly, the production of the tin containers, which was recorded in these daily record books and which were removed, did not appear in the statutory record i.e. RG. 1 register of the appellant. This not a case where mere private record without anything more is relied upon. The private record was recovered from the factory of the appellant, and it is established beyond doubt and not even disputed that it was so recovered and that it belonged to the appellant. The nature of particulars contained in this private record clearly go to show their intrinsic authenticity about the clandestine production and removal of the excisable goods by the appellants who had obtained the excise registration for the manufacture of such goods in the firm name. There cannot be more authentic evidence than recovery of the said private record from the appellant's factory which admittedly was prepared and bears the signatures of the supervisors of the appellant, and which is proved to have been maintained in the factory, from the statements of the partner Shri Yogesh Garg, the Electronics Engineer, Shri Awadesh Kumar Saxena who has made several daily reports in the said book, and the authorized signatory, Shri Girijesh Rai in whose presence the note-books were recovered under a panchnama. In

answer to question No. 18, Shri Awadesh Kumar Saxena who was shown the Daily production reports, stated in his statement dated 29-9-1998 that all these pertained to the appellants who manufactured the tin containers and that these contained information regarding production and clearance. He also stated in reply to question No. 19 that all challans were prepared by Shri Rajeev Agarwal and others whose signatures he recognized. The authenticity of the recovered documents was admitted by the partner Yogesh Garg [noticee No. (2)] and noticee No. (6) (Girijesh Rai) who also admitted that the record pertained to unaccounted for production and clearance of the tin containers by the appellant. Any subsequent retraction by Shri Awadesh Kumar Saxena has been rightly held to be an afterthought to protect the noticees. This is not a case where any defence was taken up about less consumption of electricity that would have impelled the Revenue Officers to examine consumption of electricity. When production and removal of excisable goods in a clandestine manner is established by such positive documentary evidence and the oral evidence of the managing partner and the supervisor, it cannot be said that the Commissioner committed any error in holding that the appellant had manufactured and cleared tin containers in a clandestine manner. The quantum of liability which is worked out, has not been disputed before us. We find ourselves in complete agreement with the reasoning and findings of the learned Commissioner in holding that the charge of clandestine removal of tin containers by the appellants was established beyond doubt. No further corroboration was required in view of the clinching nature of the oral and documentary evidence establishing clandestine production and removal of tin containers by the appellant. It is evident

that Shri Yogesh Garg, noticee No. (2), partner of the appellant, was in charge of the unit and was having overall control of the affairs of the unit. It was, therefore, rightly held that he was aware that the goods clandestinely manufactured and removed in the name of his partnership firm were liable to be confiscated."

6.2 Hon'ble Apex Court has in case of D Bhurmall [1983 (13) ELT 1546 (SC)] laid down the law of evidence in cases of smuggling of goods. The relevant excerpts from the said decision are reproduced below:

"31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in Blatch v. Archar (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.*

32. *Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned : and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which*

coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence' (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumptiojuris: but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property," though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of Clause (8) of Section 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to 'reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is

enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling.

43. If we may say so with great respect, it is not proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may proportionately with the gravity or the relative triviality of the issues at stake, in some special type of cases, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket, a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within this special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in discharging its burden of proof.

44. These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under Section 167(8) of the Act. The broad effect of the application of the basic principle underlying Section 106 Evidence Act to cases under Section 167(8) of the Act, is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. Amba Lal's case was a case of no evidence. The oily circumstantial evidence viz., the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given, an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an immigrant from Pakistan and had come to India in 1947 before the customs barrier was raised bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts.””

6.3 Hon'ble Madhya Pradesh High Court has in case of R S Company [2017 (351) ELT 264 (MP)], applied the said principles in the case of clandestine clearance under the Central Excise Act, 1944 and held as follows:

25. Heavy reliance has been placed by learned counsel for the appellant upon the judgment delivered in the cases of Commissioner of Central Excise v. Brims Products reported in 2011 (271) E.L.T. 184 (Pat.), Oudh Sugar Mills Ltd. v. Union of India reported in 1978 (2) E.L.T. J172 (S.C.), Premier Packaging Pvt. Ltd. v. CCE

reported in 1986 (26) E.L.T. 333 (Tribunal), Icy Cold Commercial Enterprises v. Collector of C. Ex., Calcutta-1 reported in 1994 (69) E.L.T. 337 (Tribunal), Krishna & Co. v. Collector of Central Excise, Jaipur reported in 1998 (97) E.L.T. 74 (Tribunal), Gurpreet Rubber Industries v. Collector of C. Ex., Chandigarh reported in 1996 (82) E.L.T. 347 (Tribunal), Metal Fitting (P) Ltd. v. Collector of Central Excise, Delhi reported in 1997 (93) E.L.T. 747 (Tribunal), Commissioner of Central Excise, Chandigarh v. Dashmesh Castings (P) Ltd. reported in 2000 (40) RLT 1077 (CEGAT), M/s. Raj Sandeep Co. v. CCE, Chandigarh reported in 1999 (31) RLT 324 = 2003 (162) E.L.T. 1028 (Tribunal), Kothari Pouches Ltd. & Anr. v. Commissioner of Central Excise, New Delhi reported in 2000 (41) RLT 209 (CEGAT) = 2001 (135) E.L.T. 531 (Tribunal), Chariot Cement Co. v. CCE reported in 2003 (110) ECR 205 (Tribunal) = 2003 (161) E.L.T. 598 (Tribunal) and Durga Trading Co. & Ors. v. CCE reported in 2003 (59) RLT 273 (CEGAT-Del.) = 2002 (148) E.L.T. 967 (Tribunal).

26. This Court has carefully gone through the aforesaid judgments relied upon by the learned counsel for the appellant and also heard learned counsel for the respondent. Learned counsel for the respondent has placed reliance upon judgment delivered in the cases of Collector of Customs, Madras v. D. Bhoormull reported in (1974) 2 SCC 544 = 1983 (13) E.L.T. 1546 (S.C.), Shah Guman Mal v. State of Andhra Pradesh reported in (1980) 2 SCC 262 = 1983 (13) E.L.T. 1631 (S.C.) and K.I. Pavunny v. Asst. of Collr. (HQ), C.Ex. reported in 1997 (90) E.L.T. 241 (S.C.) and his contention is that the order passed by the Tribunal does not warrant any interference as purely findings of fact has been arrived at by the Tribunal and there is enough evidence available

about manufacture and removal of goods and about clandestine manufacture and removal of Gutkha and the Tribunal has rightly arrived at conclusion based upon the evidence discussed in appeal that goods was cleared without the payment of Excise Duty.

6.4 In case of Lawn Textile Mills Pvt. Ltd., Hon'ble Madras High Court has vide its order dated 4th September 2018 in Civil Miscellaneous Appeal No.1011 of 2017, has in case of clandestine clear, held as follows:

“16. We have heard the learned counsels for the parties and carefully perused the materials placed on record.

17. The sum and substance of the argument of the learned counsel for the assessee is that the Department has not proved the allegation of clandestine removal. There has been no investigation into the material aspects, which are required to be proved for establishing an allegation of clandestine removal. Further, it is submitted that a case cannot be drawn against the assessee solely based upon uncorroborated diary notings without any independent records.

18. By referring to the decision in Saakeen Alloys Pvt. Ltd. (supra), it was contended that there should be positive evidences for establishing the evasion by the Department and the assessee cannot be charged for clandestine removal of goods without payment of duty solely based upon the confessional statements which in fact, were retracted.

19. In the case of Saakeen Alloys Pvt. Ltd. (supra), the said company was engaged in the manufacture of CTD/Round bars. Search and seizure operations were

conducted in the factory premises and note-books and pendrive were recovered and there was an allegation of illicit clearance made by the said assessee. Based on the documents recovered, show cause notice was issued and ultimately, the Adjudicating Authority confirmed the proposal in the show cause notice and demanded duty. Aggrieved by the said order, the said assessee approached the Tribunal. The Court noted that the Tribunal extensively dealt with the entire factual matrices presented before it and rightly concluded that in case of clandestine removal of excess goods, there needs to be positive evidence for establishing the evasion.

20. *It is further held that in the absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of case, etc., the Tribunal held that there was nothing except a bare confessional statement, which was retracted immediately. Thus, the Court confirmed the order passed by the Tribunal holding that the appeal does not raise any question of law, much less substantial question of law. The appeal filed by the Revenue against the said order was dismissed by the Hon'ble Supreme Court reported in 2015 (319) E.L.T. A117 (SC).*

21. *We find from the said order, the appeal filed by the Revenue was filed with the delay and the delay was condoned and the Special Leave Petition was dismissed without a speaking order. In any event, in the said case, the Court held that the Tribunal made a thorough factual exercise and then came to conclusion that there was no positive proof.*

22. *The decision in the case of Saakeen Alloys Pvt. Ltd. (supra), can hardly come to the advantage of the assessee, as in the instant case, the two authorities and*

the Tribunal factually held that there has been proof to show that there is clandestine removal of goods without payment of duty. Therefore, the decision in Saakeen Alloys Pvt. Ltd. (supra) is distinguishable on facts.

23. So far as the decision in Continental Cement Company (supra) is concerned, the Court came to the conclusion that there was no clinching evidence of the nature of purchase of raw materials, use of electricity, etc. and came to the factual conclusion that there was no clandestine sale of consumption by two various parties. Thus, to apply the said decision to the assessee's case, necessarily we need to look into the factual position, which weighed in the minds of the Adjudicating Authority to confirm the proposal in the show cause notice, which order was confirmed by the first appellate authority as well as the Tribunal.

24. On a perusal of the Order-in-Original dated 27.09.2002, one can easily come to the conclusion that a thorough inspection has been conducted in the factory premises of the assessee, in the presence of the factory Manager and in the presence of two independent witnesses. Mahazar was drawn and sent by the factory Manager, who also gave a statement under Section 14 of the Act. During the relevant time, the Managing Director was away from India and upon arrival, furnished a statement and accepted the deposition of the factory Manager. It is thereafter, the factory Manager as well as the Managing Director sent letters stating that the statements were not voluntary. This aspect was considered by the Adjudicating Authority and was rejected holding that if the Managing Director had doubts about the statements of the factory Manager, he can very well point out the same while giving statements subsequently. Further, in the retraction, the Managing

Director has not questioned the facts and figures, which were available on record. Thus, the Adjudicating Authority, in our view, rightly rejected the retraction as an afterthought.

25. Further, the assessee alleged that the entire seizure could not have been completed within 5 hours and the seizure operation itself was not free from doubt. Considering this aspect, the Adjudicating Authority referred to the details of production and clearance and pointed out the differences when compared to the diary notings containing daily production report and the RG1 as well as clearances. The differences were pointed out. After taking note of the reply given by the assessee as well as the judicial precedents relied thereupon, the Adjudicating Authority held that the assessee has not questioned the facts of the case. The Managing Director accepted the statement given by the factory Manager as true and correct. The retraction was an afterthought and no request was made by the Managing Director to record a further statement from him, apart from not denying the details mentioned in the statement given by the factory Manager. That apart, there was no denial of the allegation in respect of the production or clearances in the assessee's RG1 register, purchases of cotton made by the assessee, which were not accounted for in their Form IV register. Further, the assessee submitted no reply for the shortage of cotton to the tune of 129585.5 kgs while submitting their reply. Further, the Adjudicating Authority pointed out that a stock of 2295 kgs of cotton yarn in packed condition was found during surprise check, which was not accounted for in the RG1 register. Further, the packed stocks, which were in 45 bags, were found without any running serial number and therefore, the said quantity was seized.

26. Further, the Adjudicating Authority pointed out that the assessee was maintaining two sets of invoices; one with pre-printed running serial number and other without any serial number which fact was not denied by the assessee during the personal hearing.

27. The learned Standing Counsel produced a photostat copy of one such invoices which did not contain any serial number, nor details, but contained the seal of the company along with the signature of the Managing Director. Thus, the Adjudicating Authority, on facts, concluded that the assessee failed to account for the goods manufactured as required under the provisions of the Central Excise Laws. The Adjudicating Authority also referred to each of the decisions relied on by the assessee and assigned reasons as to why those decisions will not apply to the facts of the assessee's case. With these findings, the proposal in the show cause notice was confirmed. The Appellate Authority, while considering the grounds raised before him, passed a speaking order by framing a point for consideration viz., whether the assessee had indulged in manufacture of cotton yarn cones without accounting them in the statutory records and clandestinely removed them without payment of duty and without statutory documents during the said period.

28. The Appellate Authority took note of the fact that the assessee has been maintaining two sets of invoices one with pre-printed running serial number and the other without any serial number, which had not been denied by the assessee. Further, the Appellate Authority pointed out that the demand was raised for the difference in quantities between the private records and the RG1 entries and this has been corroborated with shortage noticed in the raw material account apart from the

statement given by the factory Manager and the Managing Director. Thus, the Appellate Authority concluded that the assessee did not dispute that there was no such unaccounted production and clearance of cotton yarn and especially when they had maintained private records in the form of diary to record the production and parallel set of invoices have come into existence goes to show that the owner of the property or the person in whose possession the factory is there ought to have explained the existence of the same. After considering all the grounds raised by the assessee, the appeal was dismissed.

29. On further appeal to the Tribunal, we find that the Tribunal also took note of the submissions made by the assessee both factually as well as on legal aspects and has rendered independent findings as to why the order passed by the First Appellate Authority should be confirmed. Even before the Tribunal, the assessee did not have any explanation for the discrepancies in the quantity or for the matter with regard to the existence of parallel invoices. Thus, on facts, it was held that it is a case of clandestine removal and accordingly, the appeal filed by the assessee was dismissed.

30. The above facts will clearly show that the allegation is one of clandestine removal. It may be true that the burden of proving such an allegation is on the Department. However, clandestine removal with an intention to evade payment of duty is always done in a secrete manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, based on the seized records, if the Department is able to prima facie establish

the case of clandestine removal and the assessee is not able to give any plausible explanation for the same, then the allegation of clandestine removal has to be held to be proved. In other words, the standard and degree of proof, which is required in such cases, may not be the same, as in other cases where there is no allegation of clandestine removal.

31. *As noticed above, the assessee has not denied any of the allegations, which were put forth except for simple and flimsy retraction. If the assessee had sufficient records to establish their innocence, nothing prevented the Managing Director to say so while making the retraction. There was no attempt made by the assessee to state their case by coming forward to give a statement and producing records. The allegation of parallel invoicing has not been disproved in the manner known to law. Thus, we find that the Adjudicating Authority, the Appellate Authority as well as the Tribunal concurred on facts and each of them has given independent reasons for their conclusion.”*

6.4 In view of above settled position of law we do not find merits in the appeals filed by the appellants.

7.1 In view of the above discussions we uphold the order of Commissioner (Appeals) and dismiss the appeal No E/163/10 filed by M/s Air Carrying Corporation (I) Pvt Ltd and appeal No E/162/10 filed by Shri Manoj S Arya.

7.2 The order of Commissioner (Appeals) under challenge in Appeal No E/161/10 filed by Shri

Ghanshyam Pandey to is upheld. However since during the pendency of appeal, Shri Ghanshyam Pandey has expired, hence the proceedings against him for imposition of penalty abate and so the appeal.

7.3 Thus Appeal No E/162/10 and E/163/10 are dismissed and Appeal No E/161/10 abates.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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