

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

APPEAL Nos. E/42,43/2009

(Arising out of Order-in-Original No. 20/M-I/2008 dated 3.10.2008
passed by Commissioner of Central Excise, Mumbai-I)

**Start Rite Shoes Pvt. Ltd.
Ashok Mane**

Appellant

Vs.

Commissioner of Central Excise, Mumbai-I

Respondent

Appearance:

Shri Gajendra Jain, Advocate, for appellant

Shri Ajay Kumar, Additional Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 26.11.2018

Date of Decision: 12.03.2019

ORDER No. A/**85470-85471/2019**

Per: Sanjiv Srivastava

These appeals are directed against order in original No 20/M-I/2008 dated 30.10.2008 of Commissioner Central Excise Mumbai – I. Commissioner has by the said order held as follows:

“40.1 In view of the detailed discussion hereinabove, I, hereby confirm the demand of Central Excise Duty, as discussed above, totally amounting to Rs 66,52,254/- (Rupees Sixty Lakhs Fifty Two Thousand

Two Hundred and Fifty Four only), comprising of BED of Rs 64,60,286/- and SED of Rs 1,91,968/- evaded by M/s Start Rite Shoes Pvt Ltd. during the period January, 1993 to October 1996 under SCN No V/PI/12-358/TF-XII/96/7113 dated 04/02/1998. They should make the payment forthwith.

40.2 M/s Start Rite Shoes Pvt Ltd. shall pay all the dues along with interest as applicable under Section 11AB of Central Excise Act, 1944.

40.3 I impose a penalty of Rs 16,00,000/- (Rupees Sixteen Lakhs only) against M/s Start Rite Shoes Pvt Ltd under Rule 173Q Central Excise Rules, 1944 during the time when duty adjudicated was evaded.

40.4 I impose a penalty of Rs 4,00,000/- (Rupees Four Lakhs only) on Shri Ashok Ramchandra Mane, Director, M/s Start Rite Shoes Pvt Ltd under Rule 209 of the Central Excise Rules, 1944 then in force.

40.5 Proceedings against Shri Ramchandra Bandu Mane, Shivam Bandhu Mane and Shri Atul Ramchandra Mane, Directors of M/s SRSPL is dropped.

40.6 Amounts paid towards Central Excise duty worked out during the investigation, be appropriated against the demands confirmed hereinabove to the extent it relates to the above demand as may be verified by the Assistant Commissioner of Central Excise.

40.7 I hereby drop proceedings against the following persons namely,

- (i) Shri Amar Raghuvir Dhus, Chairman, Navyug Industrial Footwear Cooperative Society Ltd.*
- (ii) Shri Shashikant Dhondiram Pawar, Secretary, Navyug Industrial Footwear Cooperative Society Ltd.*

- (iii) *Shri Dinkar Shankar Shinde, Chairman, Bhartiya Charmakala Gramodyog Sahari Sangh Ltd. Ltd.*
- (iv) *Shri Ravikant Dhondiram Pawar, Secretary, Bhartiya Charmakala Gramodyog Sahari Sangh Ltd. “*

2.1 Appellants are engaged in manufacture of leather footwear falling under Chapter Heading 6401.11 of the Schedule to Central Excise Tariff Act, 1985 primarily for exports.

2.2 As a sequel of investigation undertaken by sales Tax Department, a Show Cause Notice dated 4.1998 has been issued to them proposing to demand Central Excise duty of Rs 2,9387,013/- towards alleged clandestine clearance of leather foot wears during the period January 1993 to October 1996. The demands were raised relying on the following evidences:

- i. 26 statements of various persons recorded during investigation.
- ii. Xerox copies of some private records surrendered to sales tax authorities on 19.10.1996 by Shri Ramachandra Mane, Managing Director of SRSPL.
- iii. Various statutory records maintained and returns filed by SRSPL, for complying with Central Excise Law and Procedures.
- iv. Xerox copies of records of two co-operative societies namely, Navyug Footwear Industrial Co-

op Society and Bharatiya Charmakala Gramudyog Sahakari Sangh obtained from Sales Tax Authorities.

2.3 As per the show cause notice-

- i. Two directors in the appellant Company namely Mr Ramchandra Mane and Mr Ashok Mane effectively controlled the affairs of two co-operative societies namely, Nayug Footwear Industrial Co-op Society and Bharatiya Charmakala Gramudyog Sahakari Sangh. Both the societies were bogus entities and were engaged only in issuing the sale bills without actually manufacturing or supplying any goods.
- ii. The shop owners used to receive the goods clandestinely cleared from the appellant company and bills from the said societies.
- iii. Thus goods shown against the bills raised by the said two societies were actually cleared by the appellant without properly being accounted in their books or records.
- iv. Thus the sale shown from the two societies need to be clubbed with the clearances effected from the appellant company.

2.4 The case was adjudicated by Commissioner of vide his order No 54/MI/2006 dated 05.05.2006 confirming

the demand of duty along with interest. However in the appeal filed by the Appellant's the matter was remanded back to the adjudicating authority by Tribunal vide its order No A/2118 to 2120/WZB/06 C.1 (EB) dated 18.10.2006 for re-adjudication after following the principles of natural justice.

2.5 Matter in remand proceedings have been re-adjudicated by the Commissioner as per the order in para 1, supra. Aggrieved appellants have filed this appeal.

3.1 In their appeal appellants have assailed the impugned order stating-

- i. The entire demand is based on assumptions, presumptions and unauthenticated/ unproved documents. The documents which have been basis for making the demand have been recovered by the sales tax department without any panchnama and the alleged private records so recovered do not bear any reference to the appellants.
- ii. Commissioner has himself in his order observed that manufacture of goods by the appellants is not proved. If there was any doubt in this regard, Commissioner could not have proceeded to confirm the demand. Manufacture and clearance are necessarily to be established by the revenue

and without discharging the said burden demand of Central Excise Duty cannot be sustained.

- iii. The Directors of the Appellant company were not controlling the affairs of the two societies as alleged and held by the Commissioner.
- iv. Appellants have not received an amount from the two societies, for the supply of goods to retail shop owners.
- v. Entire case has been made on the basis of the photocopies of the documents obtained from the sales tax department. Central Excise department could not have proceeded against them on the basis of photocopies received from the sales tax department.
- vi. The author of so called relied upon private records recovered has not been found or established. Tribunal decisions in following cases relied upon-
 - a. LML Ltd [1997 (94) ELT 519 (T)]
 - b. Balbir Steels [2003 (161) ELT 281 (T)]
 - c. Shradha Forge [2005 (179) ELT 336 (T)]
- vii. Department has not established details of description of goods allegedly manufactured and cleared.
- viii. No evidence has been produced to show that these goods were manufactured by the appellants, and no evidence as to raw materials, manpower,

electricity, transporter etc has been put forth.

Following decisions relied upon-

- a. Arch Pharmalabs [2005 9182) ELT 413 (T)]
 - b. Chemco Steels [2005 (191) ELT 856 (T)]
 - c. Mohan Steels [2004 (177) ELT 668 (T)]
 - d. Deena Paints [2001 (43) RLT 805 (T)]
 - e. M M Dyeing and Finishing [2002 (139) ELT 143 (T)]
 - f. Rajasthan Petro Synthetics [2003 (160) ELT 297 (T)]
 - g. Someshwara Cements [2005 (191) ELT 1062 (T)].
- ix. No statement of the person called Raju who allegedly was delivering the goods to the shop owners has been recorded.
 - x. The statements of the Director of Company were recorded under threat and coercion and hence cannot be relied upon.
 - xi. Since nothing was suppressed demand beyond normal period of limitation is barred.
 - xii. Demand needs to be re-quantified after allowing the benefit of cum duty value.
 - xiii. Since no specific provision of Rule 173Q(1) has been invoked, no penalty under said Rule could be imposed {Amrit Foods [2005 (190) ELT 433 (SC)]}

xiv. No penalty is imposable in view of Section 132 of Finance Act, 2001.

3.1 We have heard Shri Gajendra Jain Advocate for the appellants and Shri Ajay Kumar Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellants learned counsel submitted-

- a. To demand excise duty, excise department needs to independently prove that appellants “manufactured” the goods in its premises. It is not sufficient for them to rely on figures supplied by the sales tax department. {Girdharilal Nannelal [1976 (3) SCC 701]}
- b. No evidence has been put forth by the department to show the good clandestinely cleared were manufactured by them. In this regard they have relied upon following decisions-
 - i. Puneet Steels and Alloys Pvt Ltd [2017 (358) ELT 1253 (T)]
 - ii. Vardhman Chemtech [2016 (7) TMI 1320 (CESTAT)]
 - iii. Zoloto Industries [2013 (294) ELT 455 (T)]
- c. No evidence of receipt of raw materials, manpower, electricity transport etc for undertaking alleged

production has been produced. Reliance placed on following decisions_

- i. Continental Cement Company [2014 (309) ELT 411 (ALL)]
- ii. Triveni Engineering & Industries Ltd[2016 (334) ELT 595 (ALL)]
- iii. Sunrise Food Products [2017 (357) ELT 599 (T)]
- iv. Shree Nathjee Industries [2011 (267) ELT 241 (T)]
- v. Rajasthan Explosives & Chemicals [2017(357) ELT 269 (T)]
- vi. Mittal Pigment [2018 (360) ELT 157 (T)]
- vii. Gupta Synthetics Ltd [2014 (312) ELT 225(T)]
- viii. Arch Pharmalabs Ltd [2005 (182 ELT 413 (T)]
- ix. Chemco Steel Pvt Ltd [2005 (191) ELT 856 (T)]
- x. Mohan Steels [2004 (177) ELT 668 (T)]
- xi. Deena Paints [2001 (43) RLT 805 (T)]
- xii. M M Dyeing and Finishing [2002 (139) ELT 143 (T)]
- xiii. Rajasthan Petro Synthetics [2003 (160) ELT 297 (T)]
- xiv. Someshwara Cements [2005 (191) ELT 1062 (T)].

d. Receipt of consideration by the appellants for goods alleged to be manufactured and sold clandestinely, not proved by revenue.

- i. Continental Cement Company [2014 (309) ELT 411 (ALL)]
 - ii. Sunrise Food Products [2017 (357) ELT 599 (T)]
 - iii. Shree Nathjee Industries [2011 (267) ELT 241 (T)]
- e. Loose papers alleged to be Balance Sheet & Profit & Loss statement of the appellants are not substantiated.
- i. Goldy Engineering Works [2017 (345) ELT 149 (T)]
 - ii. Sharadha Forge Pvt Ltd [2005 (179) ELT 336 (T)]
 - iii. Kuber Tobacco Products Ltd [2013 (290) ELT 545 (T)]
- f. Directors have retracted their statement hence their statements cannot be relied upon. Further the charge of clandestine removal cannot be sustained only on the basis of Director's statements held in following cases
- i. Magnum Steels Ltd [2017 (357) ELT 226 (T)]
 - ii. Mittal Pigment Pvt Ltd [2018 (360) ELT 157 (T)]
 - iii. Davinder Sandhu Impex Ltd [2016 (337) ELT 99 (T)]
 - iv. Mahavir Metals Industries [2014 (313) ELT 581 (T)]

- v. Shivam Steel Corporation [2016 (339) ELT 310 (T)]
- g. Case of sales tax before the magistrate is that the goods were got manufactured from others.
- h. Commissioner should have dropped the notice as the case made out in order is not the same as that made in the show cause notice.
- i. Quantification of demand needs to be reworked.
- j. No penalty and interest is imposable.
- k. No penalty is imposable in view of Section 132 of Finance Act, 2001-
 - i. J K Spinning & weaving Mills Ltd [1987 (32) ELT 234 (SC)]
 - ii. Chemo Pulp & Tissue [2000 (119) ELT 715 (T-LB)]
 - iii. Ranga Vilas CS & W Mills [2002 (149) ELT 742 (T)]
 - iv. Shaw Wallace Co [2003 (156) ELT 406 (T)]
 - v. Sunrise Structurals [2004 (117) ECR 307 (t)]
 - vi. Rama Vision Ltd [2005 (181) ELT (SC)]
- l. No penalty under Rule 209A should have been imposed on Shri Ashok Mane.

4.3 Arguing for the revenue learned Authorized Representative submitted-

- i. Statements Shri Abdul Razaque Sheikh Export Executive, Shri Ashok Mane Director, Shri

Sashikant D Pawar Secretary of Nayug Footwear Industrial Co-op Society (NFICS), Shri Dinkar Shankar Shinde Chairman of Bharatiya Charmakala Gramudyog Sahakari Sangh (BCGSL), Shri Amar Raghuveer Dhus of NFICS, Shri Ravi Kant Dhindiram Secretary BCGSL, Smt M Z Kerawala former Chairman of M/s Jai Hind, M/s Jai Bharat and member of NIFCS and present member of M/s Jai Hind, Shri Ramchandra Mane Managing Director of Appellant, and Shri Shivram B Mane, clearly show the modus opearandi adopted by the appellants for the clandestine clearance of the goods by raising invoices and Bills in name of the NFICS and BCGSL.

- ii. In their statement Shri Jalaludin Noorallah Virji partner of M/s Regal Shoes and Shri Hanif Amir Manjee Proprietor of M/s Faith also admitted the fact about receiving the goods through Mr Raju from the Appellants.
- iii. The department has sufficiently discharged the burden to prove clandestine clearance done by the appellants within the preponderance of probability as has been held by the Apex Court in case of D Bhoormal [1983 (13) ELT 1546 (SC)]

5.1 We have considered the submissions made in the appeal and during the course of argument of appeals.

5.2 Commissioner has in his order in para 24, while examining the issue in respect of investigations undertaken against the appellants by sales tax department and police, have observed as follows:

"24. It appears that during the relevant period there was exemption from sales tax on all purchases and sales of leather effected by co-operative societies. If any person was buying leather goods from co-operative societies they did not have to pay further sales tax on it. Further during the relevant period bank finance at concessional rate of interest was being made available to co-operative societies recognized by KVIB. So it appears that certain co-operative societies were set up for availing bank loans at concessional rate of interest and to save sales tax. These societies were not genuine but a sham created by certain individuals who were actually acting in the name of the societies. The proceedings initiated by Sales Tax Authorities have not yet concluded. The proceedings initiated by police have resulted in filing of charge sheet in court and the matter is pending in court. Against this back ground it may be proper to have a look at the charge sheet filed by the police in this regard. The charge sheet reads as under:-

"ALPHA (MANE) GROUP

CHARGE SHEET NO.23

BHARTIYA CHARMAKALA SAHAKARI SANSTHA

CHARGES IN G.B., C.B. CID, C.P. NO.95/96, U/Sec., 465, 467,468,471,403,406,409,420 IPC r/w. 120(b) IPC and or 34, 114 IPC & 147(e-1) & (p) of Maharashtra Co.op. Soc. Act, 1960.

FIRSTLY

*That the accused Nos.1 to 4 respectively being partners i.e. 1) **Ramchandra Bandu Mane** 2) **Shivaram Bandu Mane** 3) **Ashok Ramchandra Mane** and 4) **Anil***

Ramchandra Mane of 1) Startrite Shoes Company, 411-B Sussex Industrial Estate, Sussed Road Byculla, Mumbai 27 2) Mane & Company, 226 Divyadeep, S.V. Road, Borivali (W), Mumbai, 3) K.K. Enterprises, 226 Divyadeep, S.V. Road, Borivali (W), Mumbai and 4) Eros Services, Juhu Scheme Near Sahakar Bhandar, Vileparle (W), Mumbai at Brihan Mumbai and particularly at retail outlets shops of Alpha Footwear, situated at Colaba, Juhu and Kandiwali; and Startrite Shoes Company at Company's office at Sussex Industrial Estate, Byculla Mumbai and at the office of Leather Co-operative Society namely Bharatiya Charmakala Gromoudyog Sahakari Sanstha as registered body, registered under No. BOM/IMD/E/981/83 having its registered office at Palanjee Batanjee Chawl, No.8, Room No.7, Ground Floor, Sussex Road, Byculla, Mumbai-27. During the period from 1983 upto 1996 did hatch a criminal conspiracy to defraud the Government of Maharashtra, in Sales Tax Department by misusing the concessional scheme of Sales Tax, meant for the members of the co-operative Societies of cobblers by camouflaging the actual sales and purchases of Leather goods from the individual cobblers in open market as sale and purchase by society floated and controlled by themselves and their agents, and thereby causing loss of revenue in form of sales tax which they were supposed to collect on behalf of Government and deposit it with the Sales Tax Department, and for that purpose all of them agreed to do or caused to be done the following various Illegal Acts:

A. To float and register the cobblers co-operative society by name Bharatiya Charmakala Gramoudyog Sahakari Sanstha by manipulating the Membership Forms, Membership Registers and other allied documents required for registration of society, which was initially a genuine society consisting of 57 genuine persons, which numbers was inflated by bogus entries in membership register in fictitious names from time to time.

B. To approach Maharashtra State Khadi and Village Industrial Commission with the application for registration of the said society as an eligible society producing leather goods which could claim the concession of exemption from collection and payment of sales tax on sale and purchase of the leather goods supposed to have been produced by the poor cobbler members of such society and thereafter to apply for and obtain exemption of sales tax from sales tax department on the strength of certificate issued by Maharashtra State Khadi and Village Industrial Board, and then to avail of such exemption from collection and deposit of the sales tax which they were in fact supposed to collect.

C. To fabricate and manipulate the record of sale and purchase such as 1) Sales Bills, 2) Sales Registers, 3) Cash Book, 4) Purchase Registers, 5) Purchase Vouchers and other allied documents of leather goods at both the ends i.e. society's record on one hand and companies record on other hand to serve the purpose of camouflaging the transaction of actual sale and purchase from individual cobblers and other institution in open market (emphasis supplied)

D. To fabricate and manipulate the records to support the fictitious production of leather goods shown to have been produced by the aforesaid society out of the so called raw material purchased from out of State for purpose of such productions, and also, showing the fictitious expenses on labour for such fictitious production, allegedly shown paid to the members of society.

E. To fabricate and submit the yearly turnover returns of the 1) Startrite Show Company, 2) Mane & Company, 3) K.K. Enterprises, 4) Eros Services and 5) Alpha Footwear and Bhartiya Charmakal Society to sales tax department in order to claim and avail of the exemption from sales tax on the strength of such fraudulent returns.

F. To mislead and misrepresent the sales tax department of the Government of Maharashtra on the strength of aforesaid fraudulent set of documents to vouch for diversion of actual purchase from individual cobblers and other companies to purchases from co-operative society, with intention to avail of the concession meant for such society and thereby to actually induce the officers and staff of sales tax department in granting the exemption from payment of sales tax and thereby to cause wrongful loss to Government of Maharashtra in collection of due tax on sale and purchase of leather goods by persons other than the society and thereby to cheat the Government in that behalf.

And thereby Accused Nos.1 to 4 did commit the offence of hatching criminal conspiracy punishable u/s. 120(b) IPC, r/w 465,467,468,471,403,406,409,420 IPC.

SECONDLY

*That in pursuance to the aforesaid criminal conspiracy and in furtherance of common intention of all the accused in the course of same transaction at the aforesaid date, time, place and duration, accused namely **1) Ramchandra Bandu Mane, 2) Shivram Bandu Mane, 3) Ashok Ramchandra Mane and 4) Anil Ramchandra Mane** the office bearers of aforesaid companies, in their respective capacities caused fabrication Society i.e. **Bhartiya Charmakala Sahakari Sanstha** by filling in false application forms, making false entries in application, preparing false record of receipt of membership fees, preparing false record of receipt of membership members of society, making false entries in the Shares functioning of the society as listed in detail in the statement annexed as "A" and thereby committed the offences of forgery, forgery of valuable securities, forgery for purpose of cheating and using the forged documents as genuine, punishable u/s. 465,467,468,471 IPC r/w. 120(b) IPC and or 34 IPC and or 114 IPC.*

THIRDLY

*That in pursuance to the aforesaid criminal conspiracy and in furtherance of common intention of all the accused in the course of same transaction at the aforesaid date, time, place and duration, accused namely 1) **Ramchandra Bandhu Mane, 2) Shivram Bandu Mane, 3) Ashok Ramchandra Mane and 4) Anil Ramchandra Mane** the office bearers of aforesaid companies, in their respective capacities caused fabrication of the documents, which were required for showing diversion of sale and purchase of leather goods from open market as allegedly manufactured by the members of society with purpose to avoid collection and payment of sales tax otherwise required to be collected and paid by 1) **Startrite Shoes Company, 2) Mane & Company 3) K.K. Enterprises, 4) Eros Services and 5) Alpha Footwear and Bhartiya Charmakala Society**, such as purchase of raw materials bills, sales bills, sales registers, raw material distribution registers, labour charges payment registers, ledger and cash books as mentioned in detailed in the list annexed as "A" and thereby committed the offences of forgery, forgery of valuable securities, forgery for purpose of cheating and using the forged documents as genuine, punishable u/s. 465,467,468,471 IPC r/w. 120(b) IPC and or 34 IPC and or 114 IPC.*

FOURTHLY

*That in pursuance to the aforesaid criminal conspiracy and in furtherance of common intention of all the accused in the course of same transaction at the aforesaid date, time, place and duration, accused namely 1) **Ramchandra Bandu Mane, 2) Shivram Bandu Mane, 3) Ashok Ramchandra Mane and 4) Anil Ramchandra Mane**, the office bearers of aforesaid companies, in their respective capacities, approached through the aforesaid society and their agents either acting as office bearers of the said society or otherwise to Maharashtra State Khadi & Village Industries Board for recommendation of the said **Bhartiya Charmakala Society** for exemption from*

payment of sales tax to Sale Tax Department and after getting such recommendation did approach Sale Tax Department and applied for, and obtained exemption Certificates entitling the society not to collect and pay the sales tax from time to time and on the strength of such exemption did dishonestly avoid to collect and pay sales tax to the total tune of Rs.26,05,733/- approximately at the rate of Rs.48 for the aforesaid period and thereby caused wrongful loss to State Exchequer to that extent on account of such misrepresentation and thereby committed the offence of cheating punishable u/s. 420 IPC r/w 120(b) IPC and or 34 IPC and or 114 IPC.

LASTLY

That accused No.2 Shivram Bandu Mane, 3) Ashok Ramchandra Mane and 4) Anil Ramchandra Mane in the capacity of promoter members of a registered co-operative society by name Bhartiya Chamkala Chamudyog Sahakari Sangh Maryadit showed as having collected money (Share Capital) by misleading other members about the purpose of the society, to facilitate registration of the society; and secondly they intentionally had shown false transaction of manufacture of leather goods and sale of the same to 1) Startrite Shoes Company, 411-B, Sussex Industrial Estate, Sussed Road, Byculla, Mumbai-27 2) Mane & Company, 226, Divyadeep, S.V. Road, Borivali (W), Mumbai and 4) Eros Services, Juhu Scheme, Near Sahakar Bhandar, Vileparle (W), claiming sales tax exemption and actually availed of such exemption for their benefits and thus accused numbers 2 to 4 and for that purpose cause to falsify the books, papers or securities and other valuable documents belonging to the society and thereby committed the offences punishable u/s 147 (e-l) & (p) of the Maharashtra Co-operative Societies Act, 1960."

25. The reasons for stating this background is that while for sales tax authorities it is enough to prove "sale of goods" and

evasion of sales tax payable on the sale involved for demanding excise duty from SRSPL, there is a need to prove "manufacture of goods" by SRSPL. The main argument raised in defence is that no proof of manufacture of the impugned footwear by SRSPL is adduced. So the evidence has to be appreciated to see whether there is any evidence of manufacture by SRSPL of the goods for which duty is demanded in the SCN from SRSPL."

5.3 In respect of the recovery of documents relied upon for alleging the clandestine clearance Commissioner has in para 28 to 30 of his order recorded as follows:

"28. The major objection that remains to be dealt with is that the alleged private records are not seized under any panchnama and they do not indicate the name of SRSPL in any way. Another issue raised is that the department cannot rely on photocopies.

29. I have considered the objection that these documents are not recovered under a panchnama and the documents do not bear the name of any firm or person who maintained it. But from the receipt given by the sales tax authority to Shri Ramchandra Mane, M.D. of SRSPL (ANM. B. S.No.36 to SCN) for the records withdrawn by them from the premises of SRSPL and the letter from Shri Ashok Mane to sales tax office confirming that the records were withdrawn from the office and factory premises (ANN B, S.No.37 to SCN) it is clear that these records belong to SRSPL. After these evidences are put forward, if Shri Mane denies that these are not records of SRSPL the burden to prove the owner of the records shifts to Shri Mane. But Shri Mane has nothing to say in this matter. So I find it proper to consider that

these are secret records maintained by SRSPL. In the normal course nobody will indicate the name of the company or put any signatures in such records of clandestine activities for tax evasion. So the records cannot be rejected as evidence for the reason that the register does not indicate the company's name or the signature of any authorized person of the company.

30. The documents relied upon in this SCN are relied upon in the charge sheet filed before the court also against these notices. So the notices have access to these documents if they so desire. In fact for defending the charge against them in the court they have to go through the original document if they are disputing it. They have only raised the objection that it is only a photocopy and there is no objection that the records are different from the original. Since this is only a technical objection and since strict rules of evidence are not applicable to quasi-judicial proceedings I hold that these can be relied upon as evidence."

5.4 Section 36A & 36B of Central Excise Act, 1944 provides as follows:

"Section 36A

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 persons 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.

SECTION 36B

(1) Notwithstanding anything contained in any other law for the time being in force, -

- (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or*
- (b) a facsimile copy of a document; or*
- (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer print out"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made there under and shall be admissible in any proceedings there under, 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.*

(2)"

The provisions of Section 36A has been held applicable to the adjudication proceedings also in case of CCE, Surat-I v. Umiya Chem Industries, [2005 (185) E.L.T. 410 (Trib)]. This judgment of the Tribunal has been affirmed by Hon'ble Gujarat High Court vide judgment reported in 2009 (239) E.L.T. 429 (Guj). Hon'ble M P High Court has in case of Wear Well Tyre and Tubes Pvt Ltd [2013 (294) ELT 185 (MP)] has held as follows:

“ 7. After considering the submissions made by learned counsel for the parties and looking to the facts and circumstances of the case, it appears that the learned Additional Sessions Judge has rightly discussed the matter in detail. There is no illegality or perversity visible in the order passed by the learned Sessions Judge. The judgments and orders passed in the case of Smt. Rekha Rana (supra) and Deoki Nandan Aggarwal (supra) cannot be applied in the present case because in those orders an interpretation of the general provisions of the Evidence Act was given. In both the judgments special provisions under Section 36A and 36B of the Act were not considered. It is settled law that if any provision is given in a Special Act which is contrary to the provisions of the general law then the special law shall supersede the provisions of the general law. Under such circumstances, looking at the provisions of Sections 36A and 36B of the Act, the prosecution not only could file copy of the documents as mentioned under Section 36B of the Act but, prove such copies as original. There is no need to file or show the original documents before the trial Court. Under such circumstances, the application of the prosecution appears to be a formality. The prosecution could prove the copies of the documents as mentioned

under Section 36B of the Act and therefore, if the revisionary Court has accepted the application filed by the prosecution then no illegality or perversity has been done by the revisionary Court.”

In view of the discussions as above we do not find any merits in the submissions made to the effect that revenue has proceeded on the basis of the photocopies of document obtained from Sales Tax Department.

5.5 Appellants have relied upon the decision of Apex Court in case of Girdhari Lal Nanne Lal, supra to argue that for making the demand reliance placed on the documents received from the Sales Tax department is not correct. In case of Girdhari Lal Nannelal, Apex Court was dealing with the issue of determination of liability to sales tax on the basis of income received. In para 7, Apex Court stated –

“7. The approach which may be permissible for imposing liability for payment of income-tax in respect of the unexplained acquisition of money may not hold good in sales tax cases. For the purpose of income-tax it may in appropriate cases be permissible to treat unexplained acquisition of money by the assessee to be the assessee's income from undisclosed sources and assess him as such. As against that, for the purpose of levy of sales tax it would be necessary not only to show that the source of money has not been explained but also to show the existence of some material to indicate that the acquisition of money by the assessee has resulted from transactions liable to sales tax and not from other sources. Further,

whereas in a case like the present a credit entry in respect of Rs. 10,000 stands in the name of the wife of the partner, no presumption arises that the said amount represents the income of the firm and not of the partner or his wife. The fact that neither the assessee-firm nor its partner or his wife adduced satisfactory material to show the source of that money would not, in the absence of anything more, lead to the inference that the said sum represents the income of the firm accruing from undisclosed sale transactions. It was, in our opinion, necessary to produce more material in order to connect the amount of Rs. 10,000 with the income of the assessee-firm as a result of sales. In the absence of such material, the mere absence of explanation regarding the source of Rs. 10,000 would not justify the conclusion that the sum in dispute represents profits of the firm derived from undisclosed sales."

The issue was not vis a vis the documents received from the sales tax authority which were independently examined and scrutinized for the purpose of demand of Central Excise duty. Commissioner has in his order in para 31, specifically held as follows:

"31. It is clear that the societies were a sham maintaining only some accounts without actually manufacturing or selling footwear. For deciding liability of excise duty what is crucial is manufacture of goods. So the books of accounts of the societies are not very relevant for deciding excise duty liability. So the issue to be examined is whether there is any evidence of evasion of excise duty based on the private records recovered by Sales Tax Authorities from Shri Ramachandra Mane and

accepted to be records of SRSPL by Shri Ashok Mane in his statement dated 28.2.97.”

Since the approach of Commissioner was to determine the demand on the basis of manufacture, reliance placed by the documents recovered or surrendered by the appellant to the sales tax authority cannot be faulted with.

5.6 All other arguments raised by the appellants with regards to production of the goods, receipt of raw material, power consumption transportation and manpower has been dealt by the Commissioner in para 32 and 33 of his order. Said paras of the order are reproduced below-

“32. In the matter of confirming duty demanded based on the entries in private records recovered from Shri Ramachandra Mane, arguments other than those dealt with above are,-

(a) Manufacture of the impugned goods by SRSPL is not proved.

(b) The private balance sheet shows figures for procurement of raw material as well as conversion charges. This gives strong support to the theory that the goods were got manufactured through some body else by the person maintaining the accounts.

(c) The statements of dealers implied that they had purchased shoes from SRSPL and got bills from two co-operative societies namely Navyug Footwear Industrial Co-op Society and Bharatiya Charmakala Gramudyog Sahakari Sangh Ltd. However in cross examination these witnesses say what they originally stated is their bonafide impression and they do not

know anything conclusively to say that the shoes in question were manufactured by SRSPL.

(d) The statements of 17 dealers (owners of shoe shops) are relied upon. These dealers stated that they bought shoes from SRSPL as per the books of accounts (allegedly of SRSPL) shown to them, received bills of the societies and issued cheques to the societies concerned. These dealers were cross examined. The main relevant issue that comes out in the cross-examination is that they never used to deal directly with SRSPL. One Mr. Raju and another Mr. Shinde used to contact them with samples and get orders. They used to get shoes without any packing or any indication to show that the goods were manufactured by SRSPL. They used to issue cheques for payments to the concerned society and hand over to Shri Raju or Shri Shinde. Mr. Raju used to give them the impression that the shoes were manufactured by SRSPL and they had a bonafide impression that the shoes they bought were manufactured by SRSPL. But no investigation to identify Shri Raju or Shri Shinde was carried out. It is not shown with any evidence that these persons were employees of SRSPL. Their depositions have not been recorded. With the result the link between SRSPL and the shoes bought by the dealers remains unsubstantiated.

(e) It is argued that since the proceeds of cheques issued to societies by the dealers to the societies were returned to the dealers in cash (after deducting 2% to 3% commission) SRSPL had nothing to do with the transaction. It is argued that if the goods belonged to SRSPL the money would have been paid to SRSPL. However this is a false argument. The deposition of the office bearers of the societies is that the proceeds of the cheques were paid to the persons who brought the cheques (that is to say persons like Mr. Raju or Mr. Shinde, who are alleged to be employees of SRSPL). The statement is not that the proceeds were returned to the dealers who issued the cheques.

33. The arguments in favour of confirming excise duty demanded on the basis of sales recorded in the private records recovered from Shri Ramachandra Mane are,-

(a) The statements of various persons show that the two fictitious co-operative societies were functioning from the premises of SRSPL. The account books of the societies were recovered by the sales tax authorities from the premises of SRSPL. There are records which show that raw materials ordered in the name of the societies were shipped to the premises of SRSPL. For example in a communication dated 30/11/95 relating to confirmation of dispatch of "Synthetic Materials for footwear uppers" shipped under letter of credit 11-1/0557/95 addressed by CONF.AR.C of Italy the destination of goods is shown as "NAVYUG/START RITE". The reply to this communication is sent by fax in the letter head of SRS Start Rite Shoes Pvt. Ltd. on 21-11-95. All these facts shows that SRSPL was engaged in the manufacture of shows for sale through the societies.

(b) The buyers of shoes as per these accounts stated in their initial statement that they had purchased such shoes from SRSPL. During cross-examination it emerged that their initial statement was only their bonafide impression based on their dealing with Mr. Raju or Mr. Shinde, the sales persons. They had not directly interacted with SRSPL. This evidence is to be appreciated considering the fact that the dealers are also accused of evading sales tax by routing their transaction through the co-operative societies.

(c) The statement of Shri Ashok Mane on 28.2.97 (Para 11 herein above) the salient part of which reads as under:

"After going through and scrutinizing the said documents, Shri Ashok Mane immediately agreed and accepted that all the documents/records mentioned in the said letter and acknowledgment receipt belonged to SRSPL; that all the documents shown, to him in his earlier statement were the same records as those mentioned in the said letter. He also accepted and admitted to the fact that SRSPL have cleared

leather footwear to all the parties reflected in these private documents/records clandestinely without payment of Central Excise Duty; that he could not identify these records because he was not shown the letter of receipt, indicating his intention of misleading this office as far as possible. On the basis of the above facts he also agreed to pay RS.20 Lakhs towards the central excise duty liability under protest."

5.7 Appellants have relied upon plethora of case laws to argue that revenue should establish the clandestine clearance to hilt by producing the evidence receipt of raw material, transportation, power consumption, manpower employed and actual manufacture of goods clandestinely cleared. From the facts as stated above the issue has arisen on the basis of sales shown to be effected through two Cooperative Societies, which have been found to be bogus and not undertaking any activity other than issuing the invoices for sale of goods and receiving the payments against the such invoices for which the goods were being supplied from elsewhere. In their statements-

A. Recorded on 3.12.1996 and 7.05.1997, Shri Dinkar Shankar Shinde, the Chairman of the Bharatiya Charmakala Gramudyog Shahakari Sangh Ltd stated that,

- o the society was formed by Shri Ramchandra Mane and Shri Ashok Mane and on record there were

around 350 members which are bogus and non existent;

- o the main business of the society was to prepare sales bills on the basis of the information provided by the show rooms or shoe dealers and to maintain registers like purchase, sales ledgers etc.

B. Recorded on 30.01.1997 and 09.05.1997, Shri Amar Raghuveer Dhus, Chairman of Navyug Footwear Industrial Co-operative Society stated that,

- o he was made Chairman and Treasurer from 1994 to 1996 on the instruction of Shri Ashok Mane, Director of SRSPL;
- o the society was controlled by Shi Ashok Mane, a all the accounts/ records of the day to day activity were looked and maintained by Shri S D Pawar under instruction of Shri Ashok Mane;
- o around 340 bogus members were registered with the society;
- o he was only signing the cheques and office documents sent to him by Shri Pawar at the instance of Shri Ashok Mane;
- o he had never attended any meeting of the society.

C. Recorded on 9.01.1997 and 13.01.1997, Smt M Z Kerawala, former Chairperson Jai Hind, Jai Bharat and

Member of Navyug Footwear Industrial Co-operative Society stated that-

- o Jaihind and Jaibharat were controlled by Shri Rafique Malik of Metro Shoes Ltd and herself;
- o Navyug was controlled by SRSPL;
- o These societies did not manufacture any footwear but were used as an instrument for routing the footwear manufactured by other manufacturing units and for supplying bogus bills to the shoe shops;
- o Only bogus purchases and sales transaction were shown in the records of these societies;
- o Delivery of footwear were received from Shri Ramchandra Mane and Shri Ashok Mane of SRSPL and other footwear manufacturers;
- o Footwear from SRSPL were received on the challans of Navyug to the tune of Rs 80 lakhs;
- o The payments were made in cash.

5.8 From the scheme of things as emerge from the above statement we find that this is a case wherein bogus transactions were undertaken through the cooperative society to cover the goods clandestinely cleared by the shoe manufacturers. In our view in cases of such type corporate veil needs to be pierced (lifted) and to determine the actual persons who had actually controlled the affair of said societies. Hon'ble Supreme

Court has in case of Calcutta Chromtype Ltd [1998 (99) ELT 202 (SC)], held as follows while approving such an approach:

12. *The principle that a company under the Companies Act, 1956 is a separate entity and, therefore, where the manufacturer and the buyer are two separate companies, they cannot, than anything more, be 'related persons' within the meaning of clause (c) of sub-section (4) of Section 4 of the Act is not of universal application. Law has traveled quite a bit after decision of the House of Lords in the case of Salomon v. Salomon [1897 AC 22]. This is how this Court noticed in Tata Engineering and Locomotive Company Ltd. v. State of Bihar & Ors. [(1964) 6 SCR 885] :*

"The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purposes; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the of Salomon v. Salomon & Co. [(1897) A.C. 22 H.L.] was pronounced in 1897; and indeed, it has always been the well recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal

and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.”

13. *In Life Insurance Corporation of India v. Escorts Ltd. & Ors. [(1986) 1 SCC 264], this Court again considered this question and said :*

“While it is firmly established ever since Salomon v. A. Salomon & Co. Ltd. [(1897) AC 22 HL] was decided that a company has an independent and legal personality distinct from the individuals who are its members, it has since been held that the corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are in certain exceptional circumstances. Pennington in his Company Law (4th Ed.) states :

Four inroads have been made by the law on the principle of separate legal personality of companies. By far the most extensive of these has been made by legislation imposing taxation. The Government, naturally enough, does not willingly suffer schemes for the avoidance of taxation which depend for their success on the employment of the principle of separate legal personality, and in fact legislation has gone so far that in certain

circumstances taxation can be heavier if companies are employed by the taxpayer in an attempt to minimise his tax liability than if he uses other means to give effect to his wishes. Taxation of companies is a complex subject, and is outside the scope of this book. The reader who wishes to pursue the subject is referred to the many standard text books on Corporation Tax, Income Tax, Capital Gains Tax and Capital Transfer Tax.

The other inroads on the principle of separate corporate personality have been made by two sections of the Companies Act, 1948, by judicial disregard of the principle where the protection of public interests is of paramount importance, or where the company has been formed to evade obligations imposed by the law, and by the Courts implying in certain cases that a company is an agent or trustee for its members.

In Palmer's Company Law (23rd Ed.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (4th Ed.), a chapter is devoted to 'lifting the veil' and the various occasions when that may be done are discussed. In Tata Engineering and Locomotive Co. Ltd. [(1964) 6 SCR 885], the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In CIT v. Sri Meenakshi Mills Ltd. [AIR 1967 SC 819], the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v.

Associated Rubber Industry Ltd. [(1985) 4 SCC 114], resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."

14. *In M/s. McDowell and Company Ltd. v. Commercial Tax Officer [(1985) 3 SCC 230 = (1985) 154 ITR 148], this Court examined the concept of tax avoidance or rather the legitimacy of the art of dodging tax without breaking the law. This Court stressed upon the need to make a departure from the Westminster principle based upon the observations of Lord Tomlin in the case of IRC v. Duke of Westminster [(1936) AC 1] that every assessee is entitled to arrange his affairs as to not attract taxes. The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot be part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can today no longer be applauded and legitimised as a splendid work by a wise man but has to be condemned and punished with severest of penalties. If we examine the thrust of all*

the decisions, there is no bar on the authorities to lift the veil of a company, whether a manufacturer or a buyer, to see it was not wearing that mask of not being treated as related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons. Under subsection (1) of Section 4 of the Act, value of the excisable goods shall not be deemed to be normal price thereof, i.e., the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, if the buyer is a related person and price is not the sole consideration for sale. As to who is a related person, we have to see its definition of Section 4(4)(c) of the Act. It is not only that both, the manufacturer and the buyer, are associated with each other for which corporate veil may be lifted to see who is behind it but also that they should have interest, directly or indirectly, in the business of each other. But once it is found that persons behind the manufacturer and the buyer are same, it is apparent that buyer is associated with the manufacturer, i.e., the assessee and then regard being had to the common course of natural events, human conduct and public and private business it can be presumed that they have interest, directly or indirectly, in the business of each other (refer Section 114 of the Evidence Act). It is, however, difficult to lay down any broad principle to hold as to when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend upon the facts and circumstances of each case and it will have to be seen who is calling the shots in both the assessee and the buyer. When it is the same person the authorities can certainly fall back on the third proviso to clause (a) of Section 4(1) of the Act, to arrive at the value of the

excisable goods. It cannot be that when the same person incorporates two companies of which one is the manufacturer of excisable goods and other is the buyer of those goods, the two companies being separate legal entities, the Excise authorities are barred from probing anything further to find out who is the person behind these two companies. It is difficult to accept such a narrow interpretation. True that shareholdings in a company can change but that is the very purpose to lift the veil to find out if the two companies are associated with each other. Law is specific that when duty of excise is chargeable on the goods with reference to its value than the normal price on which the goods are sold shall be deemed to be the value provided (1) the buyer is not a related person and (2) the price is the sole consideration. It is a deeming provision and the two conditions have to be satisfied for the case is to fall under clause (a) of Section 4(1) keeping in view as to who is the related person within the meaning of clause (c) of Section 4(4) of the Act. Again if the price is not the sole consideration, then again clause (a) of Section 4(1) will not be applicable to arrive at the value of the excisable goods for the purpose of levy of duty of excise.

15. *In the present case, we do find that the authorities of and the Appellate Tribunal did address themselves to the basic question as to the shareholdings of both, the assessee and the buyer, inasmuch as they found that the Managing Director of both the companies was the same and one more Director was common. It was also found that the shares of both the companies were held by the members of the 'Sharma family' but that is quite a vague expression and, therefore, in our view, the Appellate Tribunal was partly right in giving the direction to ascertain the break up of the shares of each member of*

the family in the two companies. To lift the veil the actual shareholding of both the companies and the persons in control of the management of both the companies needed to be ascertained to consider the identity of interest of both the companies in the business of each other. No presumption of such mutuality of interest in the business of each other could have been drawn without the factual data.”

In case of R K Chadda Vs State of UP [(2015) 76 VST 87 (All)], Hon'ble Allahabad High Court has held-

“17. *Since then, the doctrine of lifting of the corporate veil has been firmly established in a series of cases. The corporate veil could be lifted when it is found that the corporate personality was used as a mask for evasion of tax where transactions were found to be a sham or collusive or where the corporate personality was employed to circumvent statutory liability or to evade the tax liability. In such a situation, the veil could be lifted to find out the real culprits hiding behind it. It was held that even though there are no statutory provisions, the circumstances so existing in the particular case warrants the lifting of the corporate veil to realize the tax from the Directors or partners as the case may be as has been held in Telco & Ors. v. State of Bihar - AIR 1965 SC 40 (paras 24 & 27); CIT v. Shree Minakshi Mills Ltd., Madurai - AIR 1967 SC 819 (para 8); New Horizon Ltd. & Another v. Union of India and Others (1995) 1 SCC 478; Delhi Development Authority v. Skipper Construction Co. P. Ltd. (1996) 4 SCC 622 (paras 24 to 28); Calcutta Chromotype Ltd. v. Collector of Central Excise, Kolkata - AIR 1998 SC 1631 = 1998 (99) E.L.T. 202 (S.C.) (paras 12, 14); Shubhra Mukharjee & Another v. Bharat Cooking Coal Ltd. & Another - (2003) 3 SCC 312; Kapila Hingorani*

v. State of Bihar - JT 2003 (5) SC 1 (paras 25, 26, 27); Vodafone International Holding B.V. v. Union of India and Others - JT 2012 (1) SC 410 (paras 167 & 168)."

5.9 From the facts as stated in the statements referred above and also the case as investigated by police, (refer charge sheet in para 5.2 supra) we find that the real actors behind the both the bogus co-operative societies were Shri Ashok Mane and Shri Ramchandra Mane the Directors of SRSPL. Further the fact of supply of goods by Appellant to various shop owners in the name and against the bills of Cooperative Societies has been admitted by various shop owners in their statements. The issue in respect of admissibility of the statements recorded under Section 14 of Central Excise Act, 1944 is well settled and the depositions made in the statements cannot be discarded. The shop owners have admitted receiving the goods from Appellant and invoice from the society, and such admission is itself enough to hold that the goods were manufactured and cleared by the appellants clandestinely. Once revenue is able to make allegation of clandestine clearance on the basis of records and circumstantial evidence such as statements of the person concerned, it has discharged its burden and it is for the Appellant to show that charge of clandestine clearance is not true in their case.

5.10 Some of these dealers were cross examined during the course of adjudication proceedings and they have stated as follows:

**Examination of Shri Jalaluddinn Noorallah Virji,
Partner M/s Regal Shoes**

Q 18 Whether purchases from Co-operative society were pre-dominant in nature?

Ans. A considerable quantity was purchased from Co-operative Society.

Examination of Shri Karim Amir Jaffer

Q 6 Do you know the source from which Raju used to bring the shoes?

Ans. Raju used to mention Mr Mane.

Q 6a Is it possible that Raju could have procured from any other source

Ans. Yes it is possible.

Q 14 What do you mean by saying that Mr Mane used to control the society?

Ans. Mr Raju used to get the Bills and mention Mr Mane's name.

Examination of Shri Salim Kamaruddin Jaffer

Q 6 Do you know the source from which Raju used to bring the shoes?

Ans. As per my knowledge it was from Mane.

Q 6a Is it possible that Raju could have procured from any other source

Ans. I am not able to answer this.

Q 7. Do you have any personal knowledge from which you can say the goods bought by you were manufactured by Start Rite Shoes?

Ans. I know that the shoes used to come from Mane and he was also the owner of Start Rite Shoes.

Q 8 You have seen one pages 111 and 113. While looking at this page can you say that the transaction represented therein pertains to goods supplied to you by Start Rite Shoes?

Ans. I will ask my accountant and will get back to you. I am not aware of it now.

Q.14 What do you mean by saying that Mr Mane used to control the society?

Ans. Mr Raju used to say they are from Mr Mane. The bills were from the society.

Examination of Shri Akbar Amirali Jaffer

Q 6 Do you know the source from which Raju used to bring the shoes?

Ans. Sources could have been multiple. But we had visited one factory as I stated in my statement.

Q.14 What do you mean by saying that Mr Mane used to control the society?

Ans. The person who supplied the goods would have told us.

Examination of Shri Jalaloodin Lataf Ali Merchant, Partner of M/s Red Shoes

Q.6 Who used to bring the shoes? Who used to bring the invoice?

Ans. Sometimes Raju was bringing shoes, sometimes he used to send it through some other person. Mr Shinde used to bring the invoices.

Q.7 Where the invoices kutcha invoices?

Ans. No. They were proper, issued by certain societies like that of Bharti Co-op Society.

Q 9 Did you know the sources from which Raju used to bring the shoes?

Ans. I was under impression that it used to come from Start Rite Shoes. In my mind, I was buying from Start Rite Shoes. I have not done any independent verification of the source.

Q 10 Did you have any personal knowledge from which you can say that the goods were manufactured in the factory of Start Rite Shoes?

Ans. I have visited the factory of Start Rite Shoes a few times for seeing samples. So when goods as per sample came I presumed that it was coming from Start Rite Shoes.

Q.11 But you said Raju used to come to you and show the samples?

Ans. Yes that is true. But I have visited the factory of Start Rite Shoes also a few times.

Q.12 Is it possible that the shoes supplied from multiple sources?

Ans. Logically it is possible.

Examination of Shri Haneef Amir Manji

Q.6 Do you know the source from which Raju used to bring the samples?

Ans. Raju used to say that he was bringing from Start Rite Shoes.

Q.7 Is it possible that the goods were made by somebody else?

Ans. May be.

Q.9 Who used to bring samples and who used to bring the shoes and who used to bring invoices?

Ans. Raju was bringing the samples. Raju used to supply through carrier. Invoice was brought by Raju and cash was given to him.

Examination of Shri Karim Rehmtulla Tejani

Q.7 Do you have any personal knowledge from which you can say the shoes were manufactured by Start Rite?

An. Raju used to mention the name.

Examination of Shri Rafiq R Tejani

Q.6 Do you know the source from which Raju used to bring the shoes?

Ans. Raju used to say that the shoes were from M/s Start Rite Shoes. This is my only information in the matter.

Q.7 Do you have any personal knowledge from which you can say that the goods were manufactured by Start Rite Shoes?

Ans. That is what was told by Mr Raju. Otherwise there was no personal knowledge.

Q.15 What do you mean by saying that Mane used to control the society?

Ans. Raju used to say so.

From the above records of cross examination it is quite evident that the shoes were supplied to these shop owners through one Mr Raju and were the goods supplied were from the M/s Start Rite Shoes. Most of the dealers have even during the cross examination before the adjudicating authority, with the pre-

ponderence of probability admitted that shoes received by them were manufactured and cleared by M/s Start Rite Shoes against the invoices issued by the co-operative society.

5.11 Hon'ble Supreme Court has in case of D Bhoormul [1983 (13) ELT 1546 (SC)], has held as follows:

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 if Evidence' (12th Edn. Article 320, page 291), the*

“presumption of innocence is, no doubt, presumptio juris : 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.

33. *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.*

34. *The propriety and legality of the Collector's impugned order had to be judged in the light of the above principles.*

35. *It is not correct to say that this is a case of no evidence. While it is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull and Bhoormull, could reasonably lead to conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.*

5.12 Decisions relied upon by the appellant seeking the establishment of production, receipt of raw material, power consumption, transport, manpower usage etc., cannot be applicable to present case as in present case appellants have used the mask of co-operative societies which have been found to be bogus for their nefarious activities. In our view the case of revenue is well established within pre-ponderance of probability as has been held by the Apex Court in case of D Bhoormal, supra.

5.13 Since the issue is in respect of duty evasion by committing fraud etc., in our view extended period of limitation under proviso to Section 11A(1) will be applicable in the present case.

5.14 Appellants have raised the issue with regards to quantification of duty in their Appeal. However we find Commissioner has in para 36 & 37 of his order clearly stated the principles for quantification of duty and we do not find any merits in such a submission made by the appellants. The para 36 and 37 of the order are reproduced below:

5.15 As far as issue of allowing cum duty value benefit is concerned we do not find any merits in that submission as the issue is one involving fraud and clandestine clearance. Tribunal has in case of-

A. Jay Jalaram Processors [2014 (313) ELT 724 (T-Ahd)] held-

7. If that be so, such value has to be adopted as assessable value for the purpose of quantification of duty. It has to be kept in mind that the clearances were effected by the appellant without payment of any duty and the consideration received by him from merchant manufacturer was without including the element of duty. It is not a simpliciter case of non-payment of duty, in which case the entire realization has to be treated as cum duty price where the duty is being subsequently confirmed against an assessee. It is the case of clandestine removal and the Revenue, while adopting the value of fabrics, has not adopted the cum duty value but has adopted the value at which the finished fabrics were cleared without including the factor of duty. As such, I find no merits in the contention of the learned advocate that the duty is required to be re-quantified.

B. Sagar Spun Pipes [2014 (305) ELT 179 (T)] held-

“5.2 As regards the cum-duty benefit claimed by the appellant, reliance has been placed by the learned Counsel for the appellant in the cases of Camlin Ltd., Formica India, Srichakra Tyres, Maruti Udyog cited (supra). The Maruti Udyog case dealt with a situation where the appellant Maruti Udyog Ltd. did not discharge excise duty on the waste and scrap of aluminium and iron and steel sold by them to various buyers. The appellant had also availed Cenvat Credit of the duty paid on the inputs under Rule 57A of the Central Excise Rules. In that case, the Hon'ble Apex Court held that “the facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case, the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty.” Similarly, in the case of Supreme Fabrics Ltd., the issue was whether excise duty was payable on loading charges which the appellant had claimed as abatement while computing the taxable value. In that context, the Hon'ble Apex Court held that loading charges form part of assessable value and excise duty would be leviable and the loading charges so collected should be treated as cum-duty tax. In Srichakra Tyres Ltd. case, the facts of the case were that the appellant cleared tyres on the sale price declared by them. Later on price revisions were effected upwards but they did not discharge the additional duty liability on the enhanced prices collected from the customers. In the context of duty demand on the enhanced price, that is,

the revised price collected minus the original price on which the duty was raised, the question of cum-duty liability was considered. In that context it was held that the consideration should be treated cum tax. It is worth noting that in all these decisions, the appellants were discharging duty liability on some price and the demand for differential duty arose on account of price revision. It was in that context it was held the consideration received should be treated as cum tax. In the facts of the case before us, the appellant had not discharged any excise duty liability on the clearances effected in excess of Rs. 30 lakhs and it is a pure case of tax evasion. Therefore, the facts of the present case are distinguishable from those obtaining in Srichakra Tyres and Maruti Udyog case cited supra. It is a settled position in law facts of a decision relied upon have to be shown to fit the factual situation of a given case. Without such discussion reliance could not be placed on a decision. Circumstantial flexibility one additional or different fact may make a world by difference between conclusions in two cases, as held by the Apex Court in Alnoori Tobacco Products [2004 (170) E.L.T. 135 (S.C.)]"

5.16 Appellants have contended that in view of Section 132 of Finance Act, 2001, no penalty is imposable on them. For ease of reference the said Section is reproduced below:

Section 132. Validation of certain action taken. Any action taken or anything done or omitted to be done or purporting to have been taken or done or omitted to be done under any rule, notification, or order made or issued under the Central Excise Act, or any notification or order issued under such rule at any time during the period

commencing on and from the 28th day of February, 1944 and ending with the day, the Finance Bill, 2001 receives the assent of the President shall be deemed to be and to always have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made by section 125 of the Finance Act, 2001 had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,—

- a. any action taken or anything done or omitted to be done, during the said period in respect of any excisable goods under any of such rule, notification or order, shall be deemed to be and shall be deemed to always have been, as validly taken or done or omitted to be done as if the amendment made by section 125 of the Finance Act, 2001 had been in force at all material times;*
- b. no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for any action taken or anything done or omitted to be done, in respect of any excisable goods under any of such rule, notification or order, and no enforcement shall be made by any court, of any decree or order relating to such action taken or anything done or omitted to be done as if the amendment made by section 125 of the Finance Act, 2001 had been in force at all material times;*
- c. recovery shall be made of all such amounts of duty or interest or penalty or fine or credit of duty in respect of inputs or capital goods or other charges which have not been collected or, as the case may be, which have been refunded, as if the*

amendment made by section 125 of the Finance Act, 2001 had been in force at all material times.

Explanation.—For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force.

The issue in this respect also is covered by the decision of Apex Court in case of Chandpaklal Ramanlal Shah Vs Reliance Industries [2017 (354) ELT 289 (SC)]

“4. Learned Solicitor General appearing for the appellant submitted that the view taken by the High Court is erroneous. The charge against the respondent was of evasion of excise duty under Section 9(1)(b) which remains unamended. The evasion was on account of the respondent having taken credit without following the procedure under Rule 56A. By omission of the said Rule, the charge did not suffer from any legal infirmity. Alternatively, it was submitted that Section 6 of the General Clauses Act applied to omission which was also repeal. It also applies to a Rule. In this regard, reliance has been placed on Fibre Boards Pvt. Ltd. Bangalore versus Commissioner of Income Tax, Bangalore, Shree Bhagwati Steel Rolling Mills versus Commissioner of Central Excise.

It was also submitted that retrospective amendment has been made to the Act by the Finance Act, 2001 making it clear that actions taken under a rule will not lapse even if the rule is omitted. The Explanation applied only to future action and not to continuing action. Reliance has been placed on a full Bench Judgment of the Allahabad High

Court in Simholi Sugar Mills Ltd. versus Union of India It was also submitted that penalty for wrongly taking credit was upheld by the Tribunal in Reliance Industries Ltd. versus CCE6, which has attained finality.

5. Opposing the above submissions, learned senior counsel for the respondent submitted that Section 6 of the General Clauses Act did not apply omission and applied only to repeal. It did not apply to a rule and applied only to an Act or Regulation as held in Kohlapur Cane Sugar Works Ltd. (supra). He further submitted that in view of Explanation to Section 132 of the Finance Act, 2001, prosecution could not continue as there was no retrospective validation of the prosecution.

6. It is not necessary to go into all the rival contentions. In our view, the matter can be decided on a short point. The charge against the respondent is of evasion of duty. The ingredient of the offence is the evasion. The omission of a procedural rule for availing the credit cannot in any manner affect the said charge. The prosecution cannot be deprived of opportunity to prove evasion which by itself is an offence. In this view of the matter, there was no justification for the High Court to quash the charge merely on the ground of Rule 56A having been omitted.”

Hence we reject the said argument advanced by the appellant. Hence the penalty imposed by the adjudicating authority under rule 173Q of the erstwhile Central Excise Rules, 1944 is upheld.

5.17 It has been urged that no penalty could have been imposed on Shri Ashok Mane, Director of the Company. In the present case we find that Shri Ashok Mane was

main actor responsible for commission of fraud leading to evasion of Central Excise Duty. Commissioner has in para 38 of his order brought out the role of Shri Ashok Mane stating *"It is seen that Shri Ashok Mane who was looking after the marketing operations of SRSPL and also the person who was defacto controlling the affairs of the two fictitious societies has been responsible for selling the clandestinely removed goods is liable to penalty under Rule 209A of the Central Excise Rules, 1944 which was in force when the duty evasion took place."* In view of the fact that Shri Ashok Mane was responsible for causing the duty evasion by resorting to the fraud through fictitious cooperative societies we do not find any merits in such a submission made on behalf of Shri Ashok Mane.

6.1 In view of above we do not find any merits in the appeals filed by the Appellants and reject the same.

(Pronounced in court 12.03.2019)

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

(Sanjiv Srivastava)
Member (Technical)