CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 928 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Shiv Shakti Rolling Mills Pvt Ltd
C-57 to 63, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 929 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Matsyodari Steel & Alloy Pvt Ltd
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 930 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Vijay B Mittal
Matsyodari Steel & Alloy Pvt Ltd
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 931 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Vijay B Mittal
Matsyodari Steel & Alloy Pvt. Ltd.
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 932 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Deepak B Mittal
Matsyodari Steel & Alloy Pvt. Ltd.
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 933 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Mukesh B Mittal
Matsyodari Steel & Alloy Pvt. Ltd.
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 934 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Dhuji S Kamad
Pooja Steel Industries
C-12/1, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 935 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Shivprasad M Mundhra
Matsyodari Steel & Alloy Pvt. Ltd.
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 936 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Kishan Sadoramal Kukreja
MKT Trading, Near Ganpati Mandir,
Nath Baba Galli, Jalna, Maharashtra … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 937 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Pramod Dhanulal Sawji
Mahesh Steel,
B-18, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 938 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Umesh Mulchand Oswal
Jinendra Steels,
T-394, Adinath Society, Pune Satara Road, Pune … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 939 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Dinesh Satyanarayan Bharuka
Dinesh Steel and Ganesh Traders,
Ajintha Nagar, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 940 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Sumit N Sharma
Matsyodari Steel & Alloy Pvt Ltd
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 941 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Sumit N Sharma
Matsyodari Steel & Alloy Pvt Ltd
D-32, Additional MIDC, Jalna, Maharashtra. … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

WITH

EXCISE APPEAL NO: 942 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Samadhan K Bhutekar
Shiv Shakti Rolling Mills Pvt. Ltd.
C-57 to 63, Additional MIDC, Jalna, Maharashtra … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

AND

EXCISE APPEAL NO: 943 OF 2012

[Arising out of Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad.]

Ramrao Sahebrao Waghmare
Shiv Shakti Rolling Mills Pvt. Ltd.
C-57 to 63, Additional MIDC, Jalna, Maharashtra … ***Appellant***

versus

Commissioner of Central Excise
Town Centre, N-5, CIDCO, Aurangabad 431 003 ***…Respondent***

APPEARANCE:

Shri Kamal Jeet Singh, Advocate for the appellants

Shri C Dhanasekharan, Special Counsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 86395-86410/2023

DATE OF HEARING: 01/06/2023
DATE OF DECISION: 28/09/2023

PER: C J MATHEW

In these appeals, led by M/s Matsyodhari Steel & Alloy Pvt Ltd and M/s Shiv Shakti Rolling Mills Pvt Ltd wherein several individuals are before us in addition, challenge is to the determination of clandestine clearance of 14192.265 MTs of ‘mild steel ingots’, ‘gully’ and ‘risers’, valued at ₹ 31,71,30,516 with penal consequences over and above duty liability of ₹ 5,15,37,265 and the determination of clandestine clearance of 13864.960 MTs of ‘mild steel TMT bars’, ‘misrolls’ and ‘melting’, valued at ₹ 36,27,92,630 with penal consequences over and above duty liability of ₹ 5,87,54,605 respectively.

2. According to Learned Counsel for the appellants, the order[1] of Commissioner of Central Excise, Customs & Service Tax, Aurangabad, disposing off the respective show cause notices, was in contravention of the principles of natural justice inasmuch as it was marked by hindrance to effective defence sought to be brought on record through cross-examination of several persons whose testimony, during investigations, had been relied upon in the notices and by denial of ascertainment of provenance of ‘pen drive’ in the light of disowning of its recovery in the limited cross-examination as was permitted.

3. He went on to disparage the foundation of the order impugned

[1] [Order-in-Original No. 05-06/CEX/Comm./2012 dated 26th March 2012]

herein in the light of failure of notices of clandestine removal issued to M/s Matsyodhari Steel & Alloy Pvt Ltd and other purported suppliers of ‘ingots’ alleged to have been illicitly cleared to M/s Shiv Shakti Rolling Mills Pvt Ltd. He pointed out that, in response of 27th April 2011 itself styled as ‘interim’, cross-examination had been sought for but denied in communication of 3rd November 2011 fixing the hearing for 23rd November 2011; relenting thereafter, the adjudicating authority did permit cross-examination of 14 persons on 27th February 2012. It was contended that with disowning of ‘pen drive’, alleged to have been seized from two of the noticees herein, their request for forensic analysis in their letter of 29th February 2012 was natural corollary that, however, was denied. It was further informed that letter of 1st March 2012, scheduling hearing on 6th March 2012, was responded to on the day before which was followed by letter of 6th March 2012 appointing 15th March 2012 for hearing and that all that had been achieved by their insistence on forensic testing was letter of 13th March 2012 for re-scheduling of hearing to 21st March 2012 and that, despite further reply of 28th March 2012 seeking fresh date for hearing, the impugned order came to be passed *ex parte* in the meanwhile. It was further contended that voluminous records such as ‘logsheets’ and ‘weighbridge slips’, that had purportedly found reliable owing to affirmation in the statements relied upon, is not tenable in the absence of cross-examination and could not have been refuted effectively in the limited time granted for representational appearance.

4. Reliance was placed on the decision of the Hon'ble Supreme Court in *Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II [2015 (324) ELT 641 (SC)]*, of the Hon'ble High Court of Delhi in *Commissioner of Central Excise, Delhi v. Vishnu & Co Pvt Ltd [2016 (332) ELT 793 (Del)]*, of the Hon'ble High Court of Punjab & Haryana in *G Tech Industries v. Union of India [2016 (339) ELT 209 (P&H)]* and of the Tribunal in *Arya Fibres Pvt Ltd v. Commissioner of Central Excise, Ahmedabad-III [2014 (311) ELT 529 (Tri-Ahmd)]*.

5. According to Learned Authorized Representative, the appellants had not been able to justify the requirement of cross-examining 44 witnesses. He placed reliance on the decisions of the Hon'ble Supreme Court in *Commissioner of Central Excise, Madras v. Systems & Components Pvt Ltd [2004 (165) ELT 136 (SC)]* and in *Naresh J Sukhawani v. Union of India [1996 (83) ELT 258 (SC)]* and of the Tribunal in *Ureka Polymer Ltd v. Commissioner of Central Excise, New Delhi [2011 (127) ELT 618 (Tri-Del)]*.

6. We find that the impugned order was issued without the participation of the noticees. And the participation, such as it was, limited to cross-examination of some of those whose statements had

been relied upon had already established that the voluntary nature thereof was suspect. Accordingly, these cannot be relied upon as held by the Hon'ble Supreme Court in re Andaman Timber Industries. In such circumstances and, more particularly, as the other statements were claimed to contain affirmation of informal records that became the foundation of the case against the noticees, failure to allow cross-examination without an iota of justification thereof precludes consideration of those untested facts in adjudicatory proceedings.

7. It is no secret that establishing 'clandestine removal' is easier said than done and much latitude, in the form of preponderance of probability and deducing from corroborative evidence affirming testimony in statements, is permissible in determining the outcome. However, the proceedings may not be allowed to draw upon that flexibility for discarding even the most fundamental canon of evidence. Reliance upon a statement, to the exclusion of any material facts, in a show cause notice is, in effect, 'examination-in-chief' and credibility of the contents therein for resort to conclusion of detriment rests upon quicksand except by assertion through challenge of 'cross-examination'; we are unable to appreciate the notion of lack of bias in such denial that, especially in the light of section 9D of Central Excise Act, 1944, should not have occurred save with detailed justification. A statement that serves to connect the dots, as facts may be called, for the purpose of determining inculpatory responsibility and willful acts

of omission and commission. A case made out on statements and peripheral records must find corroboration in each other; the validity of statements lies in sustaining through cross-examination and, hence, the significance of section 9D of Central Excise Act, 1944.

8. Remarkably, the impugned order has disposed off this aspect thus

> *'5.1 The Assessees and the co-noticees failed to reply to SCNs. Personal hearing in the cases was fixed on 13.04.2011 / 21.04.2011 / 28.04.2011 / 05.05.2011 and an opportunity was given to them and vide this office letters dated 01.04.2011 they were asked to attend the hearing on any of these dates. The assessees vide letters both dated 8.04.2011, sought for extension of two months time to file replies to SCNs. Then they filed an interim replies vide letters dated 27.4.2011, wherein they requested, to allow cross examination of 44 persons, to allow verification of Originals of relied upon documents and stated that they would file reply thereafter. Assessees were then intimated vide this office's letters dated 12.05.2011, to verify the original relied upon records at the office of DGCEI, Mumbai. Thereafter, since the assessees did not file replies to SCNs, therefore vide this office letters dated 22.09.2011, they were asked to file replies to SCNs. In response the assessees vide letters dated 10.10.2011 requested to allow the cross examination of all witnesses and stated that after cross examination they would file final replies to SCNs. The personal hearing in this case was fixed on 01.11.2011. In response to this the assessees vide their letters dared 31.10.2011 have again requested for allowing cross examination. Then vide this office's letter dated 03.11.2011 assessees were informed that considering*

the facts of the case, cross examination is denied and that the personal hearing has again been fixed on 23.11.2011. The co-noticees did not appear on any of the above dates for personal hearing nor did they seek any extension. This time Shri D.R.Gadekar and Shri Vijay Mittal appeared for hearing on belief of the assessees on 23.11.2011 and again requested to allow cross examination stating that several statements have been retracted and huge number of documents have been mentioned as having been seen by the deponents and they stated that they would re-examine the list of persons to be cross examined and they sought for fresh date for the same. Accordingly vide their letters both dated 25.11.2011 they submitted list of 14 witnesses who are common in both the SCNs and requested for allowing cross examination. The cross examination of these witnesses was allowed and fixed on 20.12.2011. The consultant of the assessees could complete cross examination of 8 witnesses on 20.12.2011. The cross examination of remaining 6 witnesses was fixed on 12.01.12, assessees sought extention vide letters dated11.01.2012. It was then refixed on 24.01.2012 and this time also they sought extention vide their letters dated 23.01.2012. The cross examination was again fixed on 27.02.2012. The consultant of the assessees appeared and completed the cross examination of these remaining 6 witnesses on 27.02.2012. After the cross examination, personal hearing in the cases was fixed on 06.03.2012 but assesses vide their letters both dated 29.2.12 stated that cross examination has been completed on 27.02.2012 and looking to the voluminous record to enable them to file replies to SCNs they requested for extention for hearing. They also stated that Shri Sumit Sharma, during his cross examination, has since denied the fact of recovery of any pendrive from his possession, therefore, forensic testing of the pendrive may be done. Persona! hearing was then refixed on

15.03,2012. Assessees again sought for extention vide their letters dated 12.3.2012 wherein they stated that they have requested for forensic analysis of the pendrive. They also stated that their request for cross examinanation of all the witnesses has been denied. In the Judgment and Order dated 12-5-2010 in GCR No. 3/2006 of Punjab & Haryana High Court as reported in 2010 (255) E.L.T. 188 (P & H) (Harinder Pal Singh Shergill v. Registrar, CEGAT), the Hon'ble Punjab & Haryana High Court in its impugned order rejected the reference contending that adequate opportunity of hearing was not granted to the assessee. The Court held that mere fact of filing Song list of 14 witnesses for cross-examination was sufficient to prove that disposal of matter intended to be delayed. Further, the Hon'ble Supreme Court Bench comprising Hon'ble Mr. Justice Mukundakam Sharma and Hon'ble Mr. Justice Anil R. Dave on 1-10-2010 dismissed the Petition for Special Leave to Appeal (Civil) No. 26940 of 2010 filed by Harinder Pal Singh Shergill against the said Judgment and Order dated 12-5-2010. From the said citation, it can be concluded that the assessee's repeated requests for cross-examination of more than 44 witnesses is not tenable and smacks of attempt to delay the adjudication proceedings. It would be appropriate to note that despite this, the request of the assessees to cross-examine as many as 14 witnesses was acceded to and accordingly conducted on two different dates, viz., 20.12.2011 and 27.02.2012, details of which are furnished in the preceeding paras. Further they stated that original relied upon documents may be made available to them for verification.So far as their request for verication of original record is concerned, it has already been discussed above that they had made such a request in past and they had been informed under this offic's letter dated 12.05.2011 that they may verify the originals at DGCEI, Mumbai and thereafter assessees have not

> *made any such request and proceeded to request for allowing cross examination and now after completion of cross examination, based on the same records, they again came up with this request to get extention of time. About cross examination also it has been mentioned above that the assessees have sought time during persona! hearing on 23.11.2011 to reexamine the list of witnesses and thereafter they have filed letter for cross examining 14 witnesses and accordingly it was allowed and completed by them.These facts show that assessees are not serious in completing the adjudication proceedings.So far as their request for forensic analysis of pendrive is concerned, specific findings are given in ensuing paras. Apart from these, another opportunity was given to asseessees and personal hearing was refixed on 21.3.2012, which they failed to attend.'*

which, in our opinion, is not constructive compliance with requisite for acceptability of statements. Any statement that does not pass muster within the intent of

> *'9D. Relevancy of statements under certain circumstances.—*
>
> *(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—*
>
> *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*

> *(b)* *when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
>
> *(2)* *The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.*

of Central Excise Act, 1944 is to be excluded from consideration.

9. That has been explained, in *re Vishnu & Co*, by the Hon'ble High Court of Delhi thus

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

leaving no room for selective ascertainment. In *re G Tech Industries,* it has been held that

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

10. The bare essentials for establishing occurrence of clandestine removal has been elaborated thus

> *'40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*
>
> *(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
>
> *(ii) Evidence in support thereof should be of :*
>
> *(a) raw materials, in excess of that contained as*

per the statutory records;

(b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;

(c) discovery of such finished goods outside the factory;

(d) instances of sale of such goods to identified parties;

(e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) statements of buyers with some details of illicit manufacture and clearance;

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

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

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

> *another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal.'*

in *re Arya Fibres Pvt Ltd* which does not appear to have been adhered to in the impugned order.

11. It did emerge through the limited cross-examination that a 'pen drive' was the fount of computation of the extent of clearances and the person from whom it was purportedly seized had denied any connection thereto. The request of the appellants for determination of its validity as evidence was not only ignored but the adjudicating authority proceeded to dispose off the notice without placing on record the reason for such denial. That is certainly not in consonance with the principles of natural justice or even in conformity with adherence to testing of evidence. A determination, judicial or quasi-judicial, is application of known law to established facts. The facts are not established here and the adjudication proceedings stand vitiated accordingly.

12. The reliance placed on the decision in re *Systems & Components Pvt Ltd* does not appear to be appropriate as the issue therein was the technical usage of particular goods upon which classification turned. In *re Naresh J Sukhawani*, the issue was imposition of penalty on the basis of inclupatory statements; here duty leviability has been sought to be upheld by such statements when the key to such recovery is the occurrence of the 'taxable event' which should be established by corroborative evidence. In *re Ureka Polymers Ltd*, the receipt of raw materials, remaining unaccounted, was held as sufficing to relieve central excise authorities of further onus to conclude that clandestine removal had occurred; neither is there evidence of receipts nor of further sales thereafter in the present dispute.

13. In the light of sanctity of section 9D of Central Excise Act, 1994, the outcome of the notices can rest squarely on statements that comply thereon and any documents, including 'data repository', that are, substantially, unchallenged. We find a woeful lack of either in the impugned order. It is now too late to subject the 'pen drive' to any testing parameter for acceptability. The plea for cross-examination of witnesses were made before the adjudicating authority. Both were willfully and deliberately denied in breach of statutory mandate of section 9D of Central Excise Act, 1944. Nothing remains of the facts upon which the detriments in the impugned order had been erected.

Consequently, the impugned order lacks authority of law. The appeals are allowed and impugned order set aside.

(Order pronounced in the open court on 28/09/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*