AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

TAXC No. 54 of 2017

- M/s Hi Tech Abrasives Limited At- 740/ I And J, Sector-B, Urla Industrial Complex, P.O. Urla, District Raipur, Chhattisgarh, 493221, Chhattisgarh

---- Appellant

Versus

- The Commissioner, Central Excise And Customs Raipur Commissionerate, Central Excise Building, Dhamtari Road, Tikrapara, Raipur, Chhattisgarh, 492001, Chhattisgarh

---- Respondent

For Appellant : Shri Kartik Kurmi, Shri S.B.Sharma and Shri Dharmesh Shrivastava, Advocates.
For Respondent : Shri Vinay Pandey, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Order on Board by Manindra Mohan Shrivastava,J.

04/07/2018

This appeal is directed against the order dated 07/10/2006 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi by which the revenue appeal has been allowed and the order passed by the Commissioner (Appeals) has been set aside, thereby restoring the order of adjudicating authority in the matter of imposition of Excise Duty along with interest and penalty.

2. Brief factual matrix of the case giving rise to this appeal are that assessee is a manufacturer of Iron and Steel items such as Steel

shots, CI shots, and Mild Steel Ingots falling under chapter 72 of the Central Excise Tariff Act. The departmental officers visited the factory of the assessee on 06/06/2003 and carried out the verifications of inputs and various products in which shortage of raw material as well as finished goods were found. Thereafter, the department carried out investigation and came to the conclusion that the assessee has cleared inputs on which Cenvat credit have been taken as well as some finished products which were clandestinely removed without payment of duty. Upon conclusion of investigation, a show-cause notice dated 11/07/2007 was issued to the assessee which was adjudicated vide order dated 09/05/2008. The adjudicating authority held that assessee was liable to pay duty to the extent of Rs. 28,19,972/- along with interest and penalty which was also imposed Under Section 11 AC of the Excise Act and also under Rule 25 of the Central Excise Rules. Assessee successfully challenged the order of the adjudicating authority before the Commissioner (Appeals) where the demand was set aside and Revenue then preferred the appeal before the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (CESTAT). The CESTAT took the view that the statements of the Director of the Company admitted clandestine removal coupled with the entries made in notebook No. 1 seized during search operation carried out in the premises of M/s Steel Abrasive Ltd. said to be the sister company of the appellant. On this consideration the appeal of the revenue was allowed and the demand raised by the adjudicating authority was restored.

3. This appeal has been admitted on the following five substantial

questions of law -

> "(i) On the facts and in the circumstances of the case, did the Tribunal act contrary to the law relying on the statement of the Director of Appellant to decide the appeal against the Appellant herein?
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> (ii) Is the procedure adopted by the Appellate Tribunal contrary to Section 9D of the Central Excise Act, 1944?
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> (iii) Did the Tribunal act in accordance with law in upholding the penalty equal to duty under Section 11AC of the Central Excise Act, 1944 and the penalty under Rule 25 of the Central Excise Rules 2002?
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> (iv) Was the demand barred by limitation period of one year under Section 11AC(1) of the Central Excise Act, 1944?
>
> (v) On the facts and in the circumstances of the case, can the finding rendered by the Tribunal be treated as perverse warranting intrference under Section 35 G of th Central Excise Act, 1944 on any ground referable as substantial question of law?"

4. Learned counsel of the appellant argued that the statement of the Director could not be admitted in evidence contrary to the provisions contained in Section 9 D of the Central Excise Act, 1944. He would argue that the Law mandatorily requires that only those statements which are recorded before the adjudicating authority during the proceedings would be admissible. The so called statement and admission of the Director said to have been recorded during investigation by the investigating authority without being tested by recording the statement of the same person by the adjudicating authority during proceeding under Show Cause Notice, was not admissible. In support of the submission, learned counsel relied upon **2006 TIOL-1238- P&H, CX** in the matter of **Ambica Inter national Vs. UOI.**

5. Next submission is that as far as imposition of double penalty, one under Section 11 AC of the Central Excise Act of 1944 and the other under Rule 25 of Central Excise Rules, 2002 is concerned, it could not be simultaneously imposed as Rule 25 permits imposition of penalty subject to the provision contained in section 11 AC of the Act of 1944 meaning thereby that the total penalty imposed under the two provisions could not exceed the maximum penalty which can be imposed under Section 11 AC. The other submission is that the board has clarified this aspect by issuing circular in exercise of the statutory power under Section 37 B of the Act of 1944 in which it has been provided in clause 2.2 that if penalty is imposed under Section 11 AC, penalty under Rule 25 of the Act will not be imposed.

6. In so far as limitation aspect is concerned, demand of Rs. 1,58,453/- is against shortage of inputs as well as finished products at the time of verification. It has been submitted that upon verification of stock, shortage/excess of raw material and finished product was noticed. The assessee accepted the same as unexplained and also paid additional duty of Rs. 1,58,453/- therefore this aspect having been brought to the notice of the authority, the proceedings ought to be initiated within the period of one year and extended period of limitation was not invokable. In support of this contention, reliance has been placed on the decision of the Supreme Court reported in **2011 (270) ELT 305 (SC)** in the matter of **CCE Vs. Pal Micro system Ltd.** Submission of learned counsel for the appellant is that once the statement of the Director recorded during the investigation is held inadmissible, the only material is unverified notebook containing certain

entries which could not be made basis to draw inference of clandestine removal more so, when the author of the said document Mr. Sanjay Kejriwal was not called to appear before the adjudicating authority and give his statement. Even the investigation officers did not make any attempt to record his statement. It is submitted that as held by the Commissioner (Appeals), the Tribunals have taken consistent view on the aspect that private documents can not be made bases to draw inference of clandestine removal unless the statements of the author of the document is recorded and he is also examined by the adjudicating authority as required under Section 9 D of the Act of 1944, therefore, the inference of clandestine removal on said shaky piece of private documents is perverse as the entries made in the notebook without proper verification do not constitute legally admissible evidence, as such, it would be a case of perverse finding.

7. On the other hand, counsel for Revenue supports the order passed by the CESTAT by submitting that when the investigation was carried out in the premises, not only shortage/excess of raw material and finished products were found but various documents including number of notebooks particularly notebook 1 was also found which contained number of entries relating to sale and purchase of manufactured goods said to be sold by the appellant and purchased by sister concern M/s Steel Abrasive Ltd. These entries were carefully scrutinized by the adjudicating authority and it was found that number of entries with regard to purchase of finished products and onwards sale to buyers were not supported with any invoice. Upon this close and careful scrutiny, the adjudicating authority rightly drew inference of

clandestine removal of finished products and duty has been levied. He would next submit that once it is proved that the assessee was engaged in clandestine removal, liability towards interest and penalty can not be denied and the adjudicating authority, therefore, has committed no illegality in coming to the conclusion that the assessee, in addition to liability for payment of excise duty was also liable to pay interest as well as penalty.

8. Counsel for the Revenue would further submit that the instruction issued by CBEC in the matter of simultaneous leviability of penalty under Section 11 AC of the Act of 1944 and Rule 25 of the Central Excise Rules, 2002 are guidelines and in appropriate case, nothing inhibits the adjudicating authority in imposing penalty under both the provisions operating simultaneously and not to the exclusion of each other. Next submission of counsel for the Revenue is that the Director's statement, though, may not have been recorded before the adjudicating authority, nevertheless, the Director never retracted his statements as given to the investigation officers, therefore, the adjudicating authority and the Tribunal can not be said to have committed illegality in relaying upon the same and the assessee is not entitled to get any benefit on account of technical violation of his statement having not been recorded before the adjudicating authority. In so far as the applicability of the extended period of limitation is concerned, counsel for the Revenue would contend that once the case of shortage of excess of raw material or finished products is found, the provisions relating to extended limitation would become applicable and therefore, it can not be said that in respect of that, proceedings relating

to imposition of penalty and interest in respect of duty paid with regard to shortage/ excess of stocks is barred by limitation. Lastly, he would submit that even if for argument sake, the statement of the Director of the Company is not liable to be excluded from consideration, nevertheless, the entries made in the notebook No. 1 constitute a relevant admissible evidence to draw a reasonable inference of clandestine removal even if the author of the said documents has not been examined or his statement not taken. He would submit that such a procedure is not mandatory but may be necessary in appropriate case to assess evidentiary value of the documents but the document would, nevertheless, constitute admissible evidence.

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

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

9.1 At the outset, it needs to be clarified that during the course of argument, learned counsel for the parties agreed that second substantial question of law is with regard to legality of procedure adopted by the adjudicating authority and not the Tribunal as such because the Tribunal has only exercised appellate jurisdiction. This is

quite obvious from orders passed by the Tribunal, the appellate authority and pleadings/ground in the appeal. There is no dispute that the adjudicating authority did not record the statement of the Director Mr. Narayan Prasad Tekriwal and the basis of the finding recorded by the adjudicating authority as well as Customs, Excise and Service Tax Appellate Tribunal, has been the statement of the Director as recorded by the investigation officer during investigation. Section 9 D of the Central Excise Act of 1944 reads as under :

> Section 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,-
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> (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 amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest 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 the Court.

On scanning the anatomy of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the

facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. (her, th adjudicating authority).

9.2. At this juncture, we need to notice the provision contained in section 9D which provides that sub-section (1) shall, as far as may be, applied in relation to the proceedings under the Act, other than the proceeding before the court, as they apply in relation to proceeding before the court. This provision when read in juxtaposition, the small clause (a) and (b) under sub-section (1), requirement of law of recording of examination as witness would be in relation to the proceedings before the adjudicating authority.

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

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

9.5. Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational,logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we

would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of **Ambica Inter national Vs. UOI** rendered by the High Court of Punjab and Haryana.

Reliance has been placed by the Counsel for the Revenue on the decision in the matter of **Commissioner of Central Excise Versus Kalvert Foods India Private Limited (Laws (SC) 2011 8 38). T**hat decision turned on its own facts. In para 19 of the judgment, it was concluded as below:

"19. We are of the considered opinion that it is

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

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

10. **Findings on Substantial Question of Law (iii) :**

The third issue relates to the legal permissibility of imposition of penalty simultaneously under Section 11 AC of the Act of 1944 and Rule 25 of the Central Excise Act, 2002. but for the statutory circular issued by CBEC, we would have dwelt upon the statutory scheme of the Act as contained under Section 11 AC and Section 37 (4), required to be read in juxtaposition with provisions contained in Rule 25 of the Rules of 2002. We, however, have perused the circular issued by the

CBEC as published in para in CBEC's Central Excise Manual, Clause 2.2 reads as follows-

> 2.2 If penalty is imposed under Section 11AC, penalty under rule 25 will not be imposed. This, however, does not preclude the Department from confiscating the goods, imposing any fine in lieu of confiscation and prosecuting a person."

10.1. The aforesaid clarification, in our opinion must conclude this issue. We are inclined to accept the submission made by the learned counsel for the appellant that clarification issued by the CBEC in exercise of statuary power under Section 37 B of Excise Act prohibits imposition of penalty both under Section 11 AC of the Act and Rule 25 of the Rules of 2002. Section 37 B reads thus :

> "37 B Instructions to Central Excise Officers:
>
> The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on [such goods or for the implementation of any other provision of this Act], issue such orders, instructions and directions to th Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe ad follow such orders, instructions and directions of the said Board:
>
> PROVIDED that no such orders, instructions or directions shall be issued.
>
> (a) so as to require any Central Excise Officer to make

particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the [Commissioner of Central Excise (Appeals)] in the exercise of his appellate functions.

10.2 Counsel for revenue does not seriously dispute the submission that the circular containing aforesaid clarification was issued in exercise of statuary powers under Section 37 B of the Act of the 1944. If that be so, the adjudicating authority could not have proceeded to impose penalty simultaneously under Section 11 AC of the Act and Rule 25 of the Rules of 2002.

We accordingly hold that the Customs, Excise and Service Tax Appellate Tribunal/adjudicating authority was not justified in law in imposing penalty simultaneously under Section 11 AC of the Act of 1944 and under Rule 25 of the CEC Rules 2002, in view of the specific Bar created under clause 2.2 of the statutory circular issued by CEC, in view of 37 B of the Act of 1944.

11. **Finding on Substantial Question of Law (iv):**

The substantial question of law (d) as framed, relates to the issue of limitation. It is admitted position that when the search operations were carried out on 06/06/2003, certain shortage/ excess of the stock of raw material and finished products was found and the assessee also admitted this position and paid additional duty of Rs. 1,58,453/-. On this admitted factual position we have to see whether

the adjudicating authority was entitled under the law to initiate proceedings beyond one year on an assumption of authority that proceeding could be initiated within the extended period of limitation.

11.1 The legal position in this regard is no longer *res integra* . Hon'ble Supreme court in the case of **CCE Vs PAL Microsystems Ltd. r**eported in **[2011(270) ELT 305 (SC)],** has held :

> " 16. We have carefully gone through the facts as ascertained by the Tribunal. Upon perusal of the order of the Tribunal as well as the judgment delivered by the High Court , it is not in dispute that alleged suppression of payment of duty by the respondent-company, was brought to the notice of the authority on 25th October, 1996, when the Superintendent of Central Excise had inspected the premises of the respondent-assessee whereas the show cause notice was issued on 26th June 2000. The department could not establish that there was any suppression of facts or a fraud on the part of the respondent-assessee. We find that the honest mistake committed in maintenance of stock register etc. was frankly admitted by the Managing director of the respondent-assessee. There is no finding to the effect that there was a fraud or willful mis-statement or suppression of facts. Thus, it is very clear that the notice was issued after expire of the period of limitation. In the set of facts, the judgment delivered in the case of ***Nizam Sugar Factory Vs. Collector 2006 (197) ELT 465 SC*** would squarely be applicable. In view of the aforestated facts, we are of the view that the judgment delivered by the High Court cannot be interfered."

11.2. In view of the aforesaid enunciation of law, it is apparent that the

period of limitation would begin to run from the date of carrying out search and seizure operation and in that case, the extended period of limitation can not be taken recourse to as the proceeding, in any case, were required to be initiated within a period of one year. The show cause notice, in so far as the proceedings in respect of shortage/ excess of stock as is concerned were initiated beyond this period and is therefore, required to be held beyond the authority of law. Consequent levy of interest and penalty is also held illegal.

12. **Finding on Substantial Question of Law (v):**

Having held that the Director's statement could not be taken into consideration as the same was not relevant and admissible in evidence for want of non-compliance of the mandatory provisions contained in Section 9D of the Act, what remains to be considered is whether the entries made in the notebook 1, which relates specifically to the allegation of clandestine removal by the appellant, herein, could be sustained in law. It is the contention of counsel for the appellant that the notebook constituted a private document which is said to be recorded by the employee namely Sanjay Kejriwal. His statement was not recorded by the investigation officers. We find that this factual averment is not disputed, meaning thereby that the notebook, which was relied upon by the authority and purported to have been prepared by Sanjay Kejriwal was taken as one of the material to draw inference of clandestine removal. The Commissioner (Appeals), while dealing with this issue has come to the conclusion notebook being private document ought not to be admitted in evidence without recording statements of its author relaying upon various decision rendered by the

Tribunal. It appears that the view which was taken by the Commissioner (Appeals) was based on the consistent view taken by the Tribunal in this respect.

12.1. Counsel for the appellant also relied upon the judgment of the Delhi High Court reported in **2016 (332) ELT (379), Commissioner of Central Excise, Delhi-i Vs. Vishnu & Co. Pvt. Ltd.** which also holds that the statement contained in private documents, without examining it's author, would not constitute relevant evidence of clandestine removal.

12.2. We have gone through the detailed order passed by the adjudicating authority and we find that so far as the demand of challenge in the present case is concerned it rested only on two materials. One was the so called statement of the Director which the adjudicating authority and the Customs, Excise and Service Tax Appellate Tribunal received in advance as admission of clandestine removal by the Director of the appellant/Company and the other was the notebook which contained certain entries, which according to the adjudicating authority constitute relevant material to draw inference of clandestine removal by the avoidance of payment of duty. Once we have held that the statement of the Director could not be admitted as relevant piece of evidence, there is no question of there being any admission on the statement of the Director of the company. Then the only other material left is unverified private document in the form of certain entries made in the note book, seized during search operations. In view of what has been held by the Delhi High court, with which we are in complete agreement and that the Tribunal has also taken a

consistent view in this respect that without recording the statement of the author, the contents of private document would not constitute material, we are left with no legally admissible evidence on record to draw inference of clandestine removal. The inference regarding clandestine removal ought to be outcome of a detailed investigation and consideration of other relevant incriminating material which could be based on the stock of raw material, finished products, use of consumption of electricity, employment of labour and many other relevant material as noticed in the decisions reported in **2014 (309) ELT 411 and 2017 (345) ELT 187** rendered by the High Court of Allahabad and High Court of Jharkhand, respectively. What, amongst other things, could be relevant consideration of clandestine removal, was discussed as below:

> "12. Further, unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of presumptions and assumptions. Clandestine removal is a serious charge against the manufacturer, which is required to be discharged by the Revenue by production of sufficient and tangible evidence. On careful examination, it is found that with regard to alleged removals, the department has not investigated the following aspects:
>
> i) To find out the excess production details.
>
> ii) To find out whether the excess raw materials have been purchased.
>
> Iii) To find out the dispatch particulars from the regular transporters

iv) To find out the realization of sale proceeds

v) To find out finished product receipt details from regular dealers/buyers

vi) To find out the excess power consumptions.

vi) Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like-

(a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.

(b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.

(c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.

(d) Quantity of the packing material used.

(e) The total number of the employees employed and the payment made to them.

In this case, statements of th labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations in cash or kind have been paid by the noticee, such statements are must.

(f) Ostensible discrepancy in the stock of raw materials and the finished product.

(g) Clandestine removal of goods with reference to entry/exit of vehicles like Trucks, etc. in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck, etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. Different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees, etc.

These documents ought to have been collected by the respondent-department, if at all, they are interested in collector of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K.Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the Tribunals but the respondents-departments are turning ***deaf-ear to***. In this case, *they are also turning* ***deaf-ear*** *to their own circular dated 26-06-2014* (Annexure -3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K.Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the substantive piece of evidence is must. Few such evidences have been

referred by this Court. The list of these evidences is not exhaustive.

(I) The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal."

12.3. We, therefore, come to the conclusion that without there being clinching evidence much less relevant admissible evidence on record, the adjudicating authority drew an inference of clandestine removal which cannot be sustained in law. We accordingly decide the fifth substantial question of law in the manner that the Tribunal committed perversity in law in coming to the conclusion that there existed relevant and material evidence to draw inference of clandestine removal. We accordingly answer the said question of law as above.

In the result, appeal has to be allowed. Order passed by the Customs, Excise and Service Tax Appellate Tribunal is set aside and the order of the Commissioner (Appeals) is restored.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge

suguna