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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.77761 of 2018

(Arising out of Order-in-Appeal No.185-186/RAN/2018 dated 11.04.2018 passed by Commissioner, CGST & CX (Appeals), Ranchi.)

M/s. Vikromatic Steels Pvt.Ltd.
(Maheshamara, Bajinathur, B. Deoghar-814212.)

...Appellant

VERSUS

Commissioner, CGST & CX, Ranchi

.....Respondent

(C.R. Building, 5A, Main Road, Ranchi, Jharkhand)

WITH

Excise Appeal No.77762 of 2018

(Arising out of Order-in-Appeal No.185-186/RAN/2018 dated 11.04.2018 passed by Commissioner, CGST & CX (Appeals), Ranchi.)

Shri Jai Prakash Choudhary, Director
M/s. Vikromatic Steels Pvt.Ltd.
(Maheshamara, Bajinathur, B. Deoghar-814212.)

...Appellant

VERSUS

Commissioner, CGST & CX, Ranchi

.....Respondent

(C.R. Building, 5A, Main Road, Ranchi, Jharkhand)

APPEARANCE

Shri Arnab Chakraborty & Shri Abhijit Biswas, Advocates for the Appellant (s)
Shri A. Mukherjee, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 77832-77833/2025

DATE OF HEARING : 21.11.2025
DATE OF DECISION : 02.12.2025

Per : R. MURALIDHAR :

The appellants are engaged in the manufacture of M.S. Ingots, TMT Bars and Flats, falling under Chapter 72 of the Central Excise Tariff Act, 1985. The appellant, during the said period had cleared the said goods on payment of duty and had been filing its returns with the respective authorities in compliance with the terms of the Act. On February 26, 2014, the officers of DGCEI, Regional Unit, Jamshedpur conducted a search of the appellant's factory premises situated at Maheshamara, Bajinathpur,B. Deoghar. In the course of such operation, the DGCEI obtained some loose sheets and a purported weekly wages register from a pen drive alleged to have been recovered from Sujit Dubey, the cashier of the company. A physical stock taking of the said goods was also conducted by the DGCEI at the said premises and a Report dated 26.2.2014 was prepared by them in pursuance thereof. Further to the search operation conducted as aforesaid, the DGCEI also obtained statements from Ramesh Choudhary, factory-in-charge of the company, Sujit Dubey, cashier of the company, and Jaiprakash Choudhary, Director of the company. Thereafter, DGCEI issued to the company a Show Cause Notice bearing DGCEI No. F.No.45/KZU/KOL/JRU/ Gr.C/2016/1376 dated March 17, 2015. By the said Show Cause Notice it was alleged that the appellant had during the said period, clandestinely cleared the said goods without issuing excise invoices or paying duty thereon, or without making any declaration in respect thereto in the ER1 returns filed by it before the concerned jurisdictional authorities. The company was accordingly required to show cause as to why an amount of Rs. 97,97,194/- should not be recovered from it with interest thereon and as to

why penalty should not also be imposed upon it in terms of Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002. The SCN also sought to impose penalty on the Director. The appellants duly submitted their respective replies to the show cause notice by separate letters both dated January 10, 2017 denying the misconceived allegations contained against them in the show cause notice. After due process the he Additional Commissioner proceeded to pass an Order-in-Original bearing No. 03/2017/C.EX/ADC/DNB(H) dated January 31, 2017, confirming the allegations and demands contained in the Show Cause Notice and accordingly directed recovery of duty of Rs. 97,97,194/-; an amount of Rs. 10,00,000/- which had been deposited under protest by the company prior to the issuance of the Show Cause Notice, was appropriated thereagainst. Further, a penalty of Rs. 97,97,194/- was also imposed upon the company, in terms of Section 11AC of the Act. A penalty of Rs. 97,97,194/- was imposed against the Director of the company in terms of Rule 26 of CER 2002. Being aggrieved, they filed appeals before the Commissioner (Appeals), which came to be dismissed by him. Being dissatisfied with the impugned OIAs, the appellants have filed the present Appeals before the Tribunal.

2. The Ld Counsel appearing on behalf of the appellants makes the following submissions :

2.1 A mere perusal of the said impugned order reveal that the allegations and demands made against the company, are founded entirely on some loose sheets and a register allegedly resumed from a pen drive purportedly recovered from Sujit Dubey, who was the cashier of the company during the said period. Though the DGCEI had conducted a stock verification at the said

premises, no reliance was placed upon the same for quantifying the alleged liabilities of the appellant during the said period, and the same appears to contradict the very demands confirmed against the appellant. In the premises, the Commissioner (Appeals) ought to have appreciated that the stated demands and allegations made against the company are wholly uncorroborated by any real evidence, and are instead contradictory in nature and based on documents that have no evidentiary value whatsoever, and do not in any event, share any relevance to the operations of the company at the said premises.

2.2 The Commissioner (Appeals) in holding that the appellant company was required to establish that the purported documents obtained from the said pen drive did not bear any relation to the subject impugned transactions, failed to appreciate further that the burden of establishing such relation rests on the authorities concerned and not on the appellant company. Apart from a mere averment that the purported data contained in the pen drive pertained to the subject transactions or had any connection with the manufacturing operations of the appellant company, there was no evidence put forward in support of the same apart from a reference to statements of witnesses who had subsequently retracted the same. The said impugned order is thus, plainly arbitrary and founded on mere presumptions and assumptions.

2.3 The stated documents obtained from the pen drive allegedly recovered from Sujit Dubey, have been sought to be corroborated by the statements of Jai Prakash Choudhary and Sujit Dubey. However, a perusal of the statement of Jai Prakash Choudhary dated 14.3.2014, particularly his response to

Question No. 27, it is apparent that he did not agree with the materials purportedly recovered from the said pen drive and had disputed the same.

2.4 Further Sujit Dubey had expressly acknowledged being the cashier of the company in his statement dated 26.2.2014. It is inconceivable therefore, that a cashier would be required to maintain a detailed wage and attendance sheet of labourers employed at the factory premises. Sujit Dubey in his statement had also expressed that he would obtain data relating to the work done by labourers at the said premises from one Ranjit Mondal, alleged Supervisor at the factory premises. However, no such person was identified, during the course of the investigation by the concerned authorities, and no reference to any such person was made by either Ramesh Choudhary or Jai Prakash Choudhary in their statements, which have been relied upon in the Show Cause Notice and the said impugned order. Rather, Ramesh Choudhary in his statement dated 26.2.2014 in answer to Question No. 12 stated that Mr. Diwakar Singh and Mr. Bhola Rawani supervised the production of the said goods at the said premises and made no mention of any person named Ranjit Mondal. Further, in his reply to Question No. 10, Ramesh Choudhary also stated that the day to day figure of production is communicated by the production supervisor over the phone to the accounts branch, and that no slip of production is prepared or any register maintained in this respect. It was also conveyed by Mr. Choudhary in reply to Question No. 3, that Mr. Prafulla Badanam looked after the Accounts and Taxation issues of the appellant, and that Mr. Sachin Kumar Choudhary tends to the sale and purchase accounting thereof. No reference to any Ranjit Mondal was thus made, and his employment with the appellants as an alleged "Supervisor", is

wholly uncorroborated and unproven. In the premises, the Commissioner (Appeals) ought to have appreciated that the relied upon statements were self-contradictory, and that Mr. Dubey's statements regarding the alleged wage, production and labour employment details were false, and wholly unreliable.

2.5 Furthermore, in order to verify the veracity and correctness of the data obtained from the documents obtained from the pen drive, it was incumbent on the authorities concerned to obtain clarification in regard thereto from Ranjit Mondal, or any one or more of the supervisors named by Sujit Dubey and Ramesh Choudhary. However, no such steps were taken, in spite of the glaring contradictions and inconsistencies in the relied upon materials.

2.6 Even otherwise, the contents of the said seized loose sheets bearing No. 04/DGCEI/JRV/VSPL/F/14, are irreconcilable and contradictory in nature. Specifically, in the said seized document, for several weeks listed therein, the number of workers alleged to have been engaged by the company is shown as being in excess of 150. However, on comparing the same with the monthly attendance register of workers maintained by the appellant, and duly verified by the ESIC and EPF and other statutory authorities periodically, it will be apparent that the number of workers engaged by the company at the said premises, at no point of time during the said period, exceeded 35-36. Incidentally, ESI and EPF benefits accorded to such workers are provided on the basis of records maintained in the said attendance register, which the Commissioner (Appeals), without reason, failed to take into consideration in confirming the demands and allegations contained in the impugned order. No

attempt was made by such authorities either to verify with the ESIC and EPF authorities as to the correctness and reliability of the said attendance register mainlined by the appellant at the said premises. There is also no evidence of any payment of wages to the estimated hundred-odd workers purported to have been hired by the appellant in addition to those declared in its attendance register.

2.7 The unreliability of the seized "Weekly Wage Register" is further apparent on a perusal of the names and descriptions contained therein. For instance, of the 153 names contained in the said seized document, the following names appear:

(i) Carriage Contractor

(ii) Rod Cutting Contractor

(iii) Hukdi Contractor

(iv) Rolling Mill Stand

(v) Maintenance

2.8 It is thus inconceivable how any of these stated items/descriptions can be said to be a "worker" or "labourer" of the appellant.

2.9 Further the Statements relied upon have not been subjected to the procedure specified under Section 9D of the Act. Therefore, even the statements purported to be favouring the respondents cannot be taken as evidence without application of the procedure prescribed under Section 9D of the Act. In this respect reliance is placed upon the following decisions :-

(i) **G-Tech Industries** Vs. **Union of India**, **2016 (339) E.L.T. 209 (P&H)**, paras 8 and 9

(ii) **Hi-Tech Abrasives Ltd.** Vs. **CCE Raipur**, **2018 (362) ELT 961 (Chhattisgarh)**, paras 9.2 to 9.5.

(iii) **Khaitan Winding Wire Pvt. Ltd** Vs. **Commissioner of Central Excise, Kolkata**, **2025 (9) TMI 59-CESTAT, KOLKATA.**

2.10 In view of the aforesaid, it is apparent that the statements sought to be relied upon by the Department cannot be relied upon for sustaining the allegations of clandestine clearance of the said goods by the appellant company during the said period.

2.11 In the case of TMT bars, the average weight of a bundle in each of the 9 lots under consideration was arrived at on a basis that was not disclosed to the appellants by the concerned authorities. Furthermore, taking the product of the quantity, in bundles, with the "average weight of 1 bundle", the unit quantity in kilograms has been arrived at for each lot. Since the very basis of determining the alleged "average weight" of a bundle is to be taken as mere assumption, in the absence of any basis been disclosed, the figures pertaining to quantity are also assumed in nature and no credence reliance can be placed upon in the premises. A mere averment has been made that the stock taking of goods at the said premises was correct in view of it having been conducted in the presence of witnesses.

2.12 Furthermore, from the outset, the ingots or/are fed into the rolling mills on piece basis approximately whereof is 72.5 kg per piece (and not 100 kg as alleged). The manufacturing process and the rolling mills of M.S.flats and M.S.bars take place under separate production schedules. The M.S.flats which are produced are 22 mm x 6 mm long pieces, which are then cut into further pieces. The M.S.bars which come out of the rolling mills are of 160 feet length approximately, having a diameter between 8 mm and 25 mm, which are cut into 44 feet length pieces each, and the balance as random pieces. From the said weights, the burning loss and missroll, to the extent of 2 ½% to 3% are deducted, and the balance 97.5% and 97% are taken as finished goods weight (M.S.bars/M.S.flats) in the DSA. However, at the time of clearance of the said M.S.bars/M.S. flats, they are cleared on actual weighment and duty is paid on actual weighment basis. In making the ingots, the raw materials required are sponge iron, pig iron and other scrap materials. They are fed together in the induction furnace for manufacture of the ingots. The yield of sponge iron and pig iron, as known and accepted in the industry, is 75 to 78% in case of sponge iron and an 80 to 90% in case of pig iron. Since they are fed together along with other scrap materials, an average yield loss of 15% to 20% is taken by the appellant in determining the total ingot quantity. This total weight deducted by the number of ingot pieces is taken as the approximate per piece weight. Thus, it is apparent that except at the time of clearance of the said M.S.bars and M.S.flats upon payment of duty, the entire exercise of weighment at different stages are all on the basis of estimation, including that of the ingots taken and fed into the rolling mills.

2.13 It has also not been disputed that there was no discrepancy in the stock of the basic raw materials, viz. pig iron, sponge iron and other scrap, etc., using which the ingots were manufactured, and which ingots in turn were used as raw materials for manufacture of M.S.bars and M.S.flats that were detected on physical stock verification. No record showing any excess payment to labourers stand placed on record. There was no allegation based on electricity consumption, or any input output ratio pertaining to material conversion into finished goods, let alone providing any evidence in this respect. There is also no evidence on record, to show how the purported excess quantity of raw materials that were necessary for the manufacture of the said goods alleged to have been cleared clandestinely by the appellant company, was acquired, and from whom, or any payment that would have been required to be made in respect of such transactions. At no stage of the subject adjudication proceedings has any reference been made to any of the purported suppliers of such excess quantity of raw materials, and none has been approached by the authorities concerned for verification or any statement obtained therefrom in support of the allegations made against the appellant company, as aforesaid. This is in spite of the fact that Ramesh Choudhary in his statement had expressly identified some of the suppliers of the said raw materials of the appellant company, being particularly, IISCO Burnpur, Suluja Steel & Power Ltd., Giridih, Jindal Steel & Power Ltd., Patrau, and Tata Steel Limited, Jamshedpur. Likewise, no clarification or statements were obtained from the purchasers of the said goods manufactured by the appellant, and no evidence has been forwarded in respect of any clearance of excess goods from the said premises, in addition to those declared by the appellant in its returns and statutory records.

2.14 In the entire of the show cause notice and the RUDs enclosed therewith and the impugned order there is no positive evidence disclosed which establishes that the purported entries which allegedly are not supported by central excise invoices related to the said goods removed without payment of duty. It is a settled principle of law that the onus to establish clandestine removal is on the Department. The purported basis adopted in the impugned order to get around this specific requirement of law is patently erroneous and has no merit or substance whatsoever.

2.15 In this regard reliance is placed upon, inter alia, the following decisions:-

(i) **Shree Krishna Laxmi Steel Udyog Pvt. Ltd.**Vs.**Commissioner of Central Excise and Service Tax, 2024 (12) TMI-738-CESTAT KOLKATA.**

(ii) **Commissioner of Central Excise** Vs. **Brims Products 2011 (271) ELT 184 (Pat)**, paras 8-10,

(iii) **Commissioner of Central Excise** Vs. **Shingar Lamps Private Ltd. 2010 (255) ELT 221 (P&H)**

(iv) **Swati Polyester** Vs. **Commissioner of Central Excise 2005 (192) ELT 985 (T) - Commissioner**Vs.**Swati Polyester, 2015 (321) ELT A217 (SC).**

(v) **Commissioner of Central Excise** Vs. **Lord's Chemicals Ltd. 2010 (258) ELT 48 (Cal)**, para 24,

(vi) **Sharda Re-rollers Pvt. Ltd.** Vs. **CCE, C&ST, 2025 (5) TMI 1281-CESTAT KOLKATA**

(vii) **Dinabandhu Steel & Power Ltd.** Vs. **CCE & ST 2024 (4) TMI 721-CESTAT, KOLKATA**

(viii) **Crackers India (Alloys) Ltd.** Vs. **CCE & ST 2025 (5) TMI 1282-CESTAT, KOLKATA.**

(ix) **Seeta Integrated Steel & Energy Ltd.** Vs. **CCE, C & ST 2025 (5) TMI 1012-CESTAT, KOLKATA.**

(x) **Prinik Steels Pvt. Ltd.** Vs. **Commissioner of CE, C & ST, (2024) 15 Centax 313 (Tri-Cal)**

2.16 Further, in the instant case, the respondent authorities of alleged print outs taken from a pen drive. However, the mandatory requirement of Section 36B of the Act, it would be evident ex facie has not been satisfied. Hence, as, inter alia, held by this Hon'ble Tribunal in **Crackers India (Alloys) Ltd.** Vs. **CCE & ST** (Supra) and in the case of **Rashmi Cement Ltd.** Vs. **Commissioner of Central Tax**, **2025(9) TMI 397-CESTAT KOLKATA** the contents thereof cannot be treated as admissible evidence.

2.17 It is submitted that the impugned order in so far as the same has imposed penalties upon the director of the Company, (the appellant Nos. 2) is contrary to law and unsustainable. The condition precedent laid down in Rule 26 of the said Rules, which have to be satisfied for imposition of penalty thereunder having not been satisfied in the instant case. Finding to the contrary of the Commissioner in the impugned order is misconceived and contrary to the materials on record.

3. In view of the above submissions, the Ld Counsel, prays the appeals may be allowed.

4. The Ld AR appearing for the Revenue reiterates the detailed findings of the lower authority. He submits that in view of the search and investigation, the Revenue came across the pendrive and loose sheets showing the details of clandestine removals. The Dept. is not required to prove with precision the fact of clandestine removal, when the factual evidence taken together, prove that the contravention has taken place. The recorded statements also confirm the maintenance of different loose sheets, accounts and data in the pen-drive. All these evidence are material to the present case. Therefore, he justifies the confirmed demand, interest and penalties. He prays that the appeals may be dismissed.

5. Heard both the sides. We have also gone through the appeal papers, and submissions made by both the sides.

6. Admittedly, the entire case has emanated from the search operations taken up by Dept officials, wherein they have come across several private documents, pen drive etc. showing the details of removals, which as per Revenue, are not backed by proper Central Excise Invoices. As per the Dept., the statements of various officials have been recorded, wherein the role of the company, its executive in such clandestine activities are described.

7. The crux of the arguments of the appellant company can be summarized as under :

(a) The so called private records / loose sheets, as per Revenue are the Wages paid details for the appellant company's workers. Based on the amounts paid under these sheets, the quantification of the finished goods have been arrived at. Since there is no perfect formula to arrive at the production details based on the wages paid pages alone, the quantification cannot be said to be proper.

(b) In several cases, the payments have been made to the contractors for undertaking various production activities. These also have been taken as payments made to the workers for manufacturing activity.

(c) In the Statement recorded, there is also a clear mention of the Labour Contractor Ranjit Mondal, whose statement would be material to ascertain as to for what purpose, the workers were deployed by him. His statement was not recorded.

(d) The stock taking was conducted. The procedure of stock taking was to arrive at the average weight of a bundle, multiply with the total bundles to arrive the full quantity. After stock taking, the Revenue did not allege any shortage / excess by comparing the same with the RG 1 Register. The average weight per bundle / per pc was hypothetically connected to the wages to arrive at the quantity manufactured the alleged clandestine goods.

(e) The procedure prescribed under Section 9D of the CEA 1944, was not followed by presenting the persons recording the Statement before the Adjudicating authority.

(f) The cross-examination sought by the appellant was not granted

(g) The pen-drive, the computer print outetc have not been certified by the person maintaining the same as is required under Section 36 B of the CEA 1944

(h) No corroborative evidence towards clandestine purchase of raw materials, usage of additional electricity, to and fro movement of the raw materials and finished goods, statement of the vehicle owners, drivers, statement of the alleged

purchasers of the finished goods etc. was brought in by the Revenue.

(i) Various case laws have been cited in respect of (e), (f), (g) and (h) above, wherein it has been held that the charges of clandestine removal cannot survive if the procedures are not followed and if no corroborative evidence is brought in.

8. We find force in the argument that statutory provisions are required to be followed, so as to ascertain as to whether the recorded statements and the computer prints outs would have evidentiary value or not. The High Courts and Tribunals have been consistently holding that if the specified procedure under statute are not followed, the computer print outs cannot be form part of Revenue's evidence, if Section 36B is not followed. Similarly, if the procedure under Section 9D is not followed, then the recorded statements cannot have any evidentiary value. Some of such decisions are discussed below :

9. The Punjab and Haryana High Court in the case of **G-Tech Industries Vs. Union of India-2016 (339) E.L.T. 209 (P&H)** has held as under:-

> ***3.*** *The petitioner seeks, by means of the present writ petition, to challenge Order-in-Original No. V(29)15/ce/Commr.Adj/Chd-II/44/2015, dated 4-4-2016 issued by respondent No. 2 whereby respondent No. 2 has confirmed differential Central Excise Duty (hereinafter referred to "as duty") demand of ` 7,08,38,008/- with interest and equivalent penalty. It is contended that the impugned order-in-original has been passed in flagrant violation of Section 9D of the Central Excise Act, 1944 (hereinafter referred to as "the Act") by relying upon the statements*

recorded under Section 14 of the Act without first admitting them in evidence in accordance with the procedure prescribed in this regard by Section 9D(1)(b) of the Act.

4. *In view of the fact that the case of the petitioner is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*

"9D. Relevancy of statements under certain circumstances. *- (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

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

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

5. *A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.*

6. *Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.&K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.) = 2011 (22) S.T.R. 225 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.*

7. *There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.*

8. *As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).*

9. *The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

10. *Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said sub-section, which are contained in clauses (a) and (b) thereof.*

11. *Clause (a) of Section 9D(1) refers to the following circumstances :*

(i) when the person who made the statement is dead,

(ii) when the person who made the statement cannot be found,

(iii) when the person who made the statement is incapable of giving evidence,

(iv) when the person who made the statement is kept out of the way by the adverse party, and

(v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

12. *Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is self-evident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of sub-section (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioner has also invited attention to an unreported short order of the Supreme Court in UOI and Another v. GTC India*

and Others in SLP (C) No. 21831/1994, dated 3-1-1995 [since reported in 1995 (75) E.L.T. A177 (S.C.)], wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

13. *If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.*

(i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

(ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

14. *There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.*

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

16. *Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in*

accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. *In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.*

18. *It is only, therefore,-*

(i) after the person whose statement has already been recorded before a Gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

19. *Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.*

20. *Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd.,2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

21. *That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd.,2007 (216) E.L.T. 659 (S.C.), which upheld the decision*

of the Tribunal in Bussa Overseas Properties Ltd. v. C.C.,2001 (137) E.L.T. 637 (T).

22. *It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby.*

23. *The said Order-in-Original, dated 4-4-2016, passed by Respondent No. 2 is, therefore, clearly liable to be set aside.*

24. *In view of the above facts and circumstances, the impugned Order-in-Original dated 4-4-2016 passed by respondent No. 2 stands set aside. Resultantly, the show cause notice issued to the petitioner is remanded to respondent No. 2 for adjudication de novo by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial Authorities in this regard including the principles of natural justice in the following manner :-*

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examination-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue

to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I.,2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.).

25. *The writ petition is allowed in the aforesaid terms.*

10. In the case of **Geetham Steels Pvt Ltd Vs. Commissioner of GST & Central Excise Salem [2025(3) TMI 1098 - CESTAT Chennai],** wherein it has been observed as follows: -

"57. If we notice the provisions of Section 9D, what flows from it ***is that 9D(1) stipulates when a statement given under section 14 would be relevant for the purpose of proving, "in any prosecution for an offence", the truth of the facts which it contains and provides for various scenarios in the sub-sections thereto at (a) and (b). It is only when the Department first adduces evidence in the proceedings before the adjudicating authority, of the existence of the aforementioned scenarios in section 9D(1)(a) that the dep****onent's statement is taken as a substantive piece of evidence, without the deponent deposing thereto before the adjudicating authority. That would still not obviate the requirement of the Gazetted officer before whom the statement was given, deposing the factum of such statement having been recorded from the deponent- which is the method or*

manner of proving the recording of the statement, which statement under section 14 is already considered relevant for the purpose of proving the truth of the fact it contains- that is to say, the said deposition of the Gazetted Officer stating that the deponent had indeed given the statement before him, would be the manner of admitting or mode of proof of the admissible substantive evidence.

58. Again, 9D(1)(b) provides for the deponent's statement given before the Gazetted Officer to be admitted as substantive evidence, when the person who made the statement is examined as a witness in the case before the adjudicating authority and the adjudicating authority is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. This sub section (b) of Section 9D(1) takes care of a situation where the witness who is deposing before the adjudicating authority turns hostile and on an evaluation of the circumstances of the case the adjudicating authority decides to discard the version given by the witness before it and instead place reliance on the earlier statement given before the Gazetted Officer. As elucidated supra, this also applies in a case where the witness deposing stands by his earlier statement and is thereafter offered for cross-examination to the opposite side and in case of minor inconsistencies/no inconsistency, if the adjudicating authority is of the opinion, having regard to the circumstances of the case that the statement should be admitted in evidence in the interests of justice, the adjudicating authority can do so as per this Section 9D(1)(b).

59. However, implicit in this procedure stipulated in 9D(1)(b) is the necessary requirement for the adjudicating authority to depose all the deponents who have given statement under Section 14, save as those that are unavailable in the scenarios given in 9D(1)(a), for the purposes of evaluating whether the statements are voluntary, to attest that he had deposed the contents of the statement and then take a considered decision whether the truth of the facts contained in the statement stand proved or disproved in the facts and circumstances of the case. In other words, it is only after such examination in chief, that the adjudicating authority can arrive at a considered decision, whether to declare the witness appearing before it as a hostile witness and then to decide in the facts and circumstances whether to rely on the earlier

statement; or if upon finding major inconsistencies between his earlier deposition and in the contradictions brought about in cross-examination, to not rely on the earlier statement; or if it is only minor discrepancies as that which does not majorly disturb the essential truth of his deposition, to rely upon it, if in the circumstances of the case, the adjudicating deems it fit in the interest of justice.

60. Therefore, we are of the view that Section 9D(2) not only legislatively mandates the adjudicating authority to apply the provisions of S.9D(1), depending on the facts and circumstances of the case, to the extent possible , but also when read along with Section 9D(1)(b), leads to the inexorable conclusion that the adjudicating authority necessarily has to conduct an examination in chief of the deponent of the statement so as to determine not only the voluntary nature as well as truthfulness of the facts the statement given under Section 14 before the Gazetted Officer contains, but also to determine whether or not the witness is hostile, and to decide whether or not to place reliance on the statement as per the mandate of Section 9(1)(b) in the circumstances of the case, as has been elaborated supra. This interpretation is also in consonance with the decision of the Honourable Apex Court in K I Pavunny's case as stated supra, wherein the Apex Court emphasised that in the case of a retracted confession the court should examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise and if the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. Such an interpretation is also in line with the decision of the jurisdictional Madras High Court cited supra and given the parimateria provisions of the Customs Act, 1962, we are of the view that the said interpretation would hold good under the parimateria provisions of Customs Act as well."

11. In the case of **Anvar P.V. Vs. P.K. Basheer reported in 2017 (352) E.L.T. 416 (S.C.)**, the Hon'ble Supreme Court has held as under:

"13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act :

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

12. CESTAT New Delhi dealing with both Section 9D and Section 36B , in the case of ***Surya Wires Pvt. Ltd Vs Principal Commissoner, CGST, Raipur (EXCISE APPEAL NO. 51096 OF 2022) – Final Order No. 50453-50454/2025 dated 1.4.2025,*** has held:

4. xxxxxxxxxxxxxx Statements of Harsh Agrawal and Surendra Kumar Jain (Directors of the appellant), Narendra Kumar Rathod (security guard), Satyanand Soi (security-in-charge) and Ishwar Prasad Verma (loading-in-charge) were recorded under section 14 of the Central Excise Act.

6. The show cause notice also deals with duty liability arrived at on the basis of loose papers recovered from the premises of the appellant. The relevant portions of the show cause notice relating to this allegation are reproduced below:

"11.1 Loose papers recovered from the premises of the Noticee No. 1 containing details of truck number, Estimated Bill of loaded vehicle, description of goods, name of the party, Kanta Parchi in respect of GI Wire, Steam Coal, HB Wire, Stay Wire, Wire Rod and Barbed Wire loaded for dispatch containing pages from 1 to 277. The details of such loose papers recovered from the factory premises of the Noticee No. 1 are mentioned in the Panchnama dated 08.04.2016. Each of the documents was perused by Shri Harsh Agrawal, Director of Noticee No. 1 and he accepted in very unambiguous terms that all the documents recovered and which were perused by him, pertained to his factory and prepared by his staff as deposed in reply to question no. 5 of his statement dated 08/09.04.2016

(RUD-2) recorded under Section 14 of the Central Excise Act, 1944. On verification/comparison from/with Sales Register for the month of April 2016, submitted by the Noticee No. 1 vide their letter dated 07.06.2018, it appeared that in some cases, clearance of said goods have been made clandestinely without accounting for in its books of accounts, without issuing of Central Excise Invoice and without payment of Central Excise Duty.

9. Shri K. Krishnamohan Menon, learned counsel for the appellant assisted by Ms. Parul Sachdeva and Ms. Prerna Jain made the following submissions: (i) Statements of witnesses recorded under section 14 of the Central Excise Act before a Gazetted Central Excise Officer during the course of investigation cannot be relied upon unless the procedure contemplated under section 9D of the Central Excise Act is scrupulously followed. Such statements would have no evidentiary value if the persons making them are not examined before the adjudicating authority and they are admitted in evidence in the interests of justice as is contemplated under section 9D(1)(b) of the Central Excise Act. In this connection reliance has been placed on the following decisions:

(a) Jindal Drugs Pvt. Ltd. vs. Union Of India6;

(b) G-Tech Industries vs. Union of India7;

(c) M/s. Anjani Steels Ltd. vs. Commissioner of Central Excise and Service Tax, Raipur8;

(d) M/s. DroliaElectrosteel P. Ltd. vs. Commissioner, Customs, Central Excise & Service Tax,

12. A perusal of the impugned order shows that it is based primarily on the statements of Harsh Agrawal, Director of the appellant, Narendra Kumar Rathod, security guard of the appellant, Satyanand Soi, security-in-charge of the appellant and Ishwar Prasad Verma, loading-in-charge of the appellant. These statements were recorded by the Officer under section 14 of the Central Excise Act.

13. The first and foremost issue that arises for consideration is whether such statements could have been considered as relevant and relied upon without following the procedure contemplated in section 9D of the Central Excise Act relating to relevancy of statements under certain circumstances. 14. The statement of witnesses are recorded under section 14 of the Central Excise Act and section 9D of the Central Excise Act deals with relevancy of these statements under certain circumstances. 15.

The statement of witnesses are recorded under section 108 of the Customs Act, 196223 and section 138B of the Customs Act deals with relevancy of statements under certain circumstances. 16. It would, therefore, be appropriate to examine these sections of the two Acts at length. Central Excise Act 17. Section 14 of the Central Excise Act deals with power to summon persons to give evidence and produce documents in inquiries under the Central Excise Act. Any Central Excise Officer duly empowered by the Central Government in this behalf has the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document in any inquiry which such Officer is making for any of the purposes of the Central Excise Act. 18. Section 9D of the Central Excise Act deals with relevancy of statements under certain circumstances and it is reproduced below:

> *"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."*

21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of

sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

22. It would now be appropriate to examine certain decisions interpretating section 9D of the Central Excise Act and section 138B of the Customs Act. 23. In ***Ambika International vs. Union of India decided on 17.06.2016, t****he Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that if none of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence*

by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority.

25. In Hi Tech Abrasives Ltd. vs. Commissioner of C. Ex. &Cus., Raipur25 decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on the statement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in Ambika International, the Chhattisgarh High Court held: "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 assesseeare 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. The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement

recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice. In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana." (emphasis supplied)

28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements

recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.

34. The confirmation of demand of central excise duty to the extent of Rs. 3,04,24,623/- is based on the statements of persons who were not examined by the department before the adjudicating authority. This examination was absolutely necessary in terms of the provisions of section 9D of the Central Excise Act. In the absence of examination of such persons before the adjudicating authority and in the absence of admission of such statements in evidence, such statements would not be relevant. For the reasons stated above, the said demand would have to be set aside.

13. We find that applying the ratio of above case law, the non-certified computer printouts taken computer and recorded statements without following the statutory provisions, cannot be used as an evidence by the Revenue. We hold that the computer printouts as well as the recorded statements would have not evidentiary value in the present case.

14. Coming to the corroborative evidence, we find that the Revenue has not come out with any corroborative evidence with regard to consumption of other raw materials, excess electricity consumption, movement of vehicles, statement of purported buyers of finished goods on cash, private cash receipt records etc.. Even the quantification of manufacture is without any proper basis. The deployment of labour itself cannot make the Revenue arrive at the production details. No statements have been recorded from the vehicle owners/drivers. The stock taking conducted did not show any excess / short nor any demand was made on account of any deficiency noticed during the stock taking. Therefore, the allegation about removal of the goods clandestinely cannot be arrived at based on assumptions and presumptions.

15. The Chhattisgarh High Court in **Hi Tech Abrasives versus Commissioner of C. Excise & Customs, Raipur [2018 (362) E.L.T. 961 (Chhattisgarh)],** has held as under :

> *"12.2 ……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.*
> > *(vii) 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 the 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 haveThese 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 26-6-2014 (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.

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"

[Emphasis supplied]

16. The Hon'ble Allahabad High Court in the case of **Continental Cement Company Vs Union Of India [2014 (309) E.L.T. 411 (All.)]**, has held as under:-

> *"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.*
>
> *13. Thus, to prove the allegation of clandestine sale, further corroborative evidence is also required. For this purpose no investigation was conducted by the Department.*
>
> *14. In the instant case, no investigation was made by the Department, even the consumption of electricity was not examined by the Department who adopted the short cut method by raising the demand and levied the penalties. The statement of so calledbuyers, namely M/s. Singhal Cement Agency, M/s. Praveen Cement Agency; and M/s. Taj Traders are based on memory alone and their statements were not supported by any documentary evidence/proof. The mischievous role of Shri Anil Kumar erstwhile Director with the assistance of Accountant Sri Vasts cannot be ruled out."*
>
> [Emphasis supplied]

17. We find that the ratio laid down in the above cases are squarely applicable to the facts of the present case. Therefore, even on this ground that the Revenue failed to bring in the corroborative evidence, the Revenue's case fails.

18. In view of the foregoing, we set aside the impugned order and allow the appeal filed by the appellant company. Since the demand against the appellant company has been set aside, the penalty imposed on the appellant Director also does not survive.

19. The impugned order stands set aside. The appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 02.12.2025.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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