

IN THE CUSTOMS, EXCISE AND SERVICE TAX

APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH, COURT NO. III

Excise Appeal No.1976-1984 of 2005 and

No.2549-2551 of 2005

[Arising out of Order-In-Original No.72/2005, dated 14.03.2005 issued by CCE, Delhi-I]

Date of Hearing : 24.11.2011

Pronounced On : 04.05.2012.

For approval and signature:

Honble Ms. Archana Wadhwa, Judicial Member

Honble Mr. Mathew John, Technical Member

1 Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2 Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3 Whether Their Lordships wish to see the fair copy of the Order?

4 Whether Order is to be circulated to the Departmental authorities?

M/s Hindustan Machines

Appellants

M/s Asiatic Engg. P.Ltd.

M/s Dynamic Engineers

M/s Konark Industries

Shri Harish Kumar

Shri R.K.Arora

M/s Technocrat Marketing P.Ltd.

M/s Kaveri Shilp Kala Ltd.

Shri Hari Om Bhatia

M/s Panchsheel Agencies

M/s N.D.Sales

M/s Ideal Home Appliances

Vs.

CCE, Delhi

Respondent

Coram: Honble Ms. Archana Wadhwa, Judicial Member

Honble Mr. Mathew John, Technical Member

Appearance:

Shri K.K.Anand, Advocate for M/s Hindustan Machines and Shri Bipin Garg, Advocate for M/s Kaveri Shilp Kala Ltd., M/s Panchsheel Agencies, M/s N.D.Sales & M/s Ideal Home Appliances - for the Appellants

Shri R.K.Varma, DR for the Respondent

ORDER NO . 55615-55626 DATED 14/02/2013

Per Ms. Archana Wadhwa:

All the appeals are being disposed of by a common order as they arise out of the same impugned order vide which duties stands confirmed against various manufacturing units along with imposition of penalties. In addition, penalties stands imposed on the other appellants.

2. As per the facts on record, M/s Hindustan Machines, Konark Industries, Dynamic Engineers (I) & (II) and Konark Industries and Asiatic Engineers P.Ltd. are the units engaged in the manufacture of various household products under the brand names of Maharaja and Maharaja Whiteline. All the units were availing the benefit of SSI exemption Notification No.175/86-CE. M/s Hindustan Machines were manufacturing toasters, irons, mixer grinders w.e.f. 1975 onwards. M/s Dynamic Engineers were engaged in the manufacture of mixer grinder of different models and came into existence in the year 1986. M/s Dynamic Engineers-II was a manufacturing unit set up by Dynamic Engineers-I for the manufacture of triple jar mixers for supply to manufacturers of mixer grinders etc. and came into existence in 1990. M/s Konark Industries was manufacturing juicer mixer, grinders and jar attachments w.e.f. 1988. M/s Asiatic Engineers were set up in 1988 for manufacture of washing machine and centrifugal dryers. Demand of duties stands confirmed against the manufacturing units by denying them the benefit of Notification No.175/86-CE, dtd. 01.03.86 in respect of the excisable goods manufactured by them for the period upto 31.03.90 as also on the charges of clandestine removal of the goods by the said manufacturing units. The said findings stands arrived at by the Commissioner based upon the documents seized from various premises and the investigation made at various levels. We shall be dealing with the facts, statements, evidences and the submissions made by the both the sides duly represented by Shri K.K.Anand, and Shri Bipin Garg, Id. Advocates appearing for the appellants and Shri R.K.Varma, Id. DR appearing for the Revenue, while dealing separately with the various issues.

3. The issue required to be decided in the present set of appeals stands framed by the Commissioner in his impugned order. For ready reference, the same are being reproduced below:-

(i) The issue of availability of Small Scale exemption under Notification No.175/86 by the manufacturers of Maharaja brand household goods.

(ii) The issue of clandestine clearances as alleged in the Show Cause Notice, whether sustainable or not.

(iii) The issue of confiscation of seized goods at different premises in course of searches.

(iv) The expenses incurred on publicity and advertisement by marketing company whether should be included in computing assessable value. The issue of inclusion of warranty/service charges in Assessable value.

(v) The issue of relying on various statements relied in the Show Cause Notice in view of no cross-examination of the persons.

(vi) Extended period of limitation whether to be invoked or not.

4. It is seen that M/s Hindustan Machines is a partnership firm of Shri Harish Kumar and his mother Smt. Raksha Devi. The said brand name Maharaja was registered in the name of Shri Harish Kumar and Smt. Raksha Devi as also in the name of Smt. Radha Agrawal, mother-in-law of Shri Harish Kumar. The said registration was in respect of mixer cum grinder for kitchen use. In respect of washing machine, the said trade mark was registered in the name of Shri Harish Kumar and Smt. Raksha Devi. The said M/s Hindustan Machines which came into existence in the year 1975 was manufacturing mixer grinder under the brand name Maharaja. The said appellant was availing the central excise exemption granted under various SSI Notifications from time to time during the period 1984-85 onwards. The goods manufactured by the said appellants were being sold by a marketing company under the name and style of Maharaja Kitchen Aid P.Ltd. Shri Harish Kumar and one Shri R.K.Arora were the Directors of M/s Maharaja Kitchen Aid P.Ltd., which came into existence in 1983. However, the said firm subsequently closed its operations.

M/s Technocrat Marketing P.Ltd., another marketing firm came into existence on 09.05.88. One Smt. Sunita Bhatia, w/o Shri Hariom Bhatia, C.A. was the Director in the said company along with Shri R.K.Arora, which was formed to market the household appliances. It is seen that the allegations of excess clandestine clearances and the consequent denial of small scale Notification are primarily based upon the recovery of one document titled as sale statement and some other documents recovered from the business premises of M/s Technocrat Marketing P.Ltd. and the residential premises of Shri H.O.Bhatia read with the statements of various persons and the other evidences collected during the course of investigation.

5. In as much as M/s Hindustan Machines, was availing the benefit of SSI exemption Notification, all other manufacturing units, manufacturing the goods under brand name of Maharaja, were also availing the benefit of Notification No.175/86-CE. It may be observed here that in terms of para 7 of the said Notification, use of brand name of another person debarred availment of SSI Notification in case the brand name owner was not entitled to the benefit of SSI Notification No.175/86-CE. However, if the brand name owner was availing the benefit of SSI exemption in terms of the said Notification, other manufacturers manufacturing the goods with the brand name of such owners would also become entitled to the benefit of SSI exemption. In as much as M/s Hindustan Machines was themselves availing the benefit of Notification in question, all other manufacturing units, manufacturing goods under the brand name of Maharaja, were entitled to the benefit of SSI exemption Notification.

6. The said M/s Hindustan Machines declared the total value of clearances for the year 1987-88 as Rs.9,49,096/-. The Notification No.175/86-CE was not available to small scale manufacturing units if the total clearances of its final product from its factory exceeded Rs.1.50 crores in the preceding financial year. However, as M/s Hindustan Machines declared the total clearances for the financial year 1987-88 as Rs.9,49,096/- they were availing the benefit of SSI exemption Notification during the next financial year, i.e., 1988-89 and onwards. In as much as M/s Hindustan Machines was availing the benefit, all other units using its brand name were also availing the benefit.

7. The Revenues allegation and findings are that during the year 1987-88, the total clearances made from the factory of M/s Hindustan Machines were to the tune of Rs.1.89 cores. As the total clearances exceeded the eligibility criteria of Rs.1.5 crores during the financial year, i.e., 1978-88, they were not entitled to the benefit of SSI exemption Notification in the succeeding period and consequently all other manufacturing units were not entitled for the benefit of said exemption.

8. It is seen that simultaneous searches were made in the factory premises of all the manufacturing units as also in the premises of M/s Technocrat Marketing P.Ltd. P.Ltd which is a marketing unit of household appliances along with the residential premises of various persons. A document titled as Sales Statement of 1987 was recovered from the premises of M/s Technocrat Marketing P.Ltd. with endorsement of Sasi/File/SD-Satish, dtd. 12.12.90. According to the Revenue, the said document gave details of number of household appliances sold during the 12 months period from January to December, 1987, in respect of some of the dealers. According to the said statement, total quantity of goods sold during the said period of 12 months worked out to be 23,709. In as much as the dealers whose names appeared in the said statement were dealers of Maharaja Household Appliances, Revenue entertained a view that the statement reflects upon the clandestine clearances of the said goods from the factory of M/s Hindustan Machines, without reflecting in any statutory documents. Another documents being a letter dtd. 30.08.89 addressed to Shri R.K.Arora was recovered wherein the sales figures for the first 6 months were reflected. In another communication addressed to Shri Satish

Bhatia dtd. 29.01.86 recovered from the residence of Shri Hari Om Bhatia communication about the despatch of the goods was made.

9. Based upon the above seized documents, the Revenue calculated the clandestine removal made by the said Maharaja Group of Companies. In para 8.5 of the impugned order of the Commissioner, it stands recorded that in as much as the said sales statement recovered from the premises of marketing company reflected only the quantity of triple jar mixers sold in the Southern States, which region formed for about 50% of the total sales effected and allowing the margin of 4,721 mixers sold from January to March, 1987, the Revenue believed that the total number of mixer grinders that appeared to have been sold during the period April to December, 1987 works out to be 18,988. By taking the price of the said products as Rs.900/-, the total aggregate value was arrived at Rs.1.89 crores in respect of clearances from M/s Hindustan Machines. As such, it was alleged that in as much as the total clearances during the year 1987-88 was more than Rs.1.50 crores for the year 1987-88, the said M/s Hindustan Machines was not eligible for the benefit of exemption in the succeeding financial year, i.e., 1988-89 onwards. If they were not entitled to the said SSI exemption Notification, the other manufacturing units also become disentitled. Apart from above, duty also stands confirmed against them on the findings of excess clandestine removal of goods during the period 1987-88 as also the subsequent period.

DENIAL OF SSI EXEMPTION; NOTIFICATION NO.175/86-CE

10. Dealing first with the issue of availability of Notification No.175/86-CE in respect of M/s Hindustan Machines, we find that the total clearances declared by them during 1986-87 were to the tune of Rs.9 lakhs approximately. As a result of search made in the business premises of M/s Technocrat Marketing P.Ltd., a sale statement of 1987-88 was recorded. The said statement reflected upon the clearances of various goods to the dealers in Andhra Pradesh and other Southern States. The reliance on the said sales statement recovered from the premises of M/s Technocrat Marketing P.Ltd. stands strongly challenged by the appellants on the ground that the said M/s Technocrat Marketing P.Ltd. came into existence in the month of May, 1988 as itself accepted by the Revenue in the SCN as also in the impugned order and as such, it is unconceivable that the said M/s Technocrat Marketing P.Ltd. would be having alleged sale figures for the year 1987-88, when the same was not in existence. Reliance on the said statement recovered from the premises of a company which was not even in existence during the relevant period is wholly unjustified and unwarranted. The said document was neither seized from the premises of M/s Hindustan Machines nor from the custody of any of their authorised representative. As

such it stands strongly argued that to connect the said statement with the goods manufactured by M/s Hindustan Machines is neither proper nor appropriate.

11. We find that there is no dispute about the fact that the said marketing firm was started in May, 1988. The sale statement recovered from its premises showing clearances from April, 1987 to July, 1987 in respect of 18,988 pieces. The appellants contention that when company itself was not in existence, any document recovered from its premises pertaining to past period would have no bearing, seems to carry weight. There is no denial of the fact that the said sale statement showing the clearance of goods was recovered from the premises of M/s Technocrat Marketing P.Ltd.. Apart from above, we have seen said statement appearing at page 1104-1105 and form Annexure-IV of paperbook filed by the appellants. In this document, there is no description of the goods and no name of the manufacture is appearing. The said statement only shows some figures of clearances made in 1987. We really fail to understand as to how the Revenue has connected the figures as available in the statement to the clearances effected by M/s Hindustan Machines. There is virtually no evidence on record to show that the said document relates to sale of finished goods manufactured by M/s Hindustan Machines. There is no indication in the said statement to show that the goods were toasters, irons or mixer grinders which are manufactured by M/s Hindustan Machines. There is also nothing on record to reveal the author of the said sale statement.

12. It is also seen that the said sale statement of 1987 recovered from the premises of M/s Technocrat Machines mentioned the names of the dealers. No effort stands made by the Revenue to approach the said dealers and to record their statement. In our views if the Revenue entertained a belief that the said sale statement dealt with the clearance of goods manufactured by M/s Hindustan Machines, the proper course of action was to approach the dealers whose names are appearing in the said sale statement and to record their statements to establish the fact that the goods mentioned in the said statement were manufactured by M/s Hindustan Machines and cleared by them without reflecting in their records.

13. Not only that we also note that in the statement of Shri Harish Kumar, Partner of M/s Hindustan Machines which was recorded on 16.02.91, he was not confronted with the said statement recovered from M/s Technocrat Marketing P.Ltd.. No questions as regards the total clearances for the year 1987-88 was put to him. No statement of any other authorised representative of M/s Hindustan Machines was recorded in respect of the said sale statement. We agree with the Id. Advocate that there is no indication in the said sale statement to show that the goods reflected therein as having been sold to various dealers are the goods manufactured by M/s Hindustan Machines. In the absence of any evidence to the contrary, we hold that the said sale statement documents cannot be related to M/s Hindustan Machines.

14. The appellants have also argued that while calculating the total said sales in the clearance figures of M/s Hindustan Machines, Revenue has taken a higher price of Rs.900 placing reliance upon the balance sheet of earlier marketing company Maharaja Kitchen Aid P.Ltd., the said value adopted by the Revenue is on the higher side, thus resulting in crossing the eligibility criteria of clearance limit of Rs.1.5 crores. It stands argued before us that such assumption as regards the value of Rs.900 per piece is without any basis, in the absence of any clarification as to what were the goods actually sold as reflected in the sale statement. Further, while calculating the duty demand, the Revenue in Annexure-D-IV(i) has itself adopted value of the said appellants goods as Rs.800 per piece. The appellants contention is that such adoption of enhanced value of Rs.900 per piece is admitted on the higher side and without any basis in the absence of any indication of the description of the goods. As we have already held that the sale statement recovered from M/s Technocrat Marketing P.Ltd. cannot be related to M/s Hindustan Machines for reasons recorded in the relevant paragraphs, we find that the said plea of the appellants as regards adoption of higher value of the goods become redundant.

15. Further, it is seen that M/s Hindustan Machines have taken a stand before the adjudicating authority that they do not have capacity to manufacture such huge quantity of finished goods. The said plea of the appellants does not stand either considered or rebutted by the lower authorities. There is also nothing on record to show that the said appellants were in a position to manufacture such excess quantity of finished goods than what stands reflected in their statutory records. Tribunal in the case of Chandan Tobacco Co. reported in 2011(270)ELT87(Tri.-Ahmd.) as also in the case of Jindal Nical & Alloys Ltd. vide final order No.904-908/2011 has held that when the appellants do not have installed capacity to manufacture the alleged excess goods, the demand of duty cannot be confirmed by observing that the said goods stands clandestinely removed by the assessee. The findings of the Commissioner that the total clearance for the M/s Hindustan Machines was to the tune of Rs.1.80 crores approx. as against declared value of Rs.9.19 lakhs approximately, which is around 18 times more, is required to be established by production of evidence. When the appellants have taken a stand that their installed capacity cannot result in production of huge quantity of alleged final product, it was obligatory on the part of the Commissioner to examine the said dispute by giving reasonable finding with reference to evidences. Failure on the part of the officers to examine the said aspect tilts the matter in favour of the appellants.

16. We also note that the Commissioner in his impugned order has held that all the units were created by Shri Harish Kumar under the brand name of Maharaja with a view to illegally avail the SSI exemption and to evade duty of tax. He observed in the order that in as much as all the units were manufacturing the household goods with brand name Maharaja, the same were floated within mala fide intention. However, we also note it stands observed and a finding stand arrived at by the Commissioner that all the units were separately registered under the Factories Act, separate registration of sales tax

etc. As also with excise. He has, however, observed that all the units are deemed to be interconnected in terms of 2(g) of the Monopolies and Restrictive Trade Practices Act, 1969.

17. We fail to appreciate the above reasoning of the adjudicating authority in as much as it was not the case of the Revenue in the SCN to club the clearance of the units. In fact the demand stands confirmed against each unit separately by the adjudicating authority himself. Thus establishing their separate identity. Reference to the said provision is not appropriate in terms of section 4 of the Central Excise Act or in terms of Notification No.175/86-CE. In any case, we find that all the units being registered separately, manufacturing different goods though identical and located at different places, having complete machinery to manufacture goods cannot be held to be related parties, merely because the Directors or partners or proprietors are relative of each other.

18. We also note that the Commissioner has relied upon the Honble Supreme Courts judgement in the case of Modi Alkalies & Chemicals Ltd. reported in 2004(95)ELT617(SC) as also in the case of Rukmani Packwel Traders reported in 2004(165)ELT481(SC). However, we are of the view that the ratio of law declared in the said judgements are not applicable to the facts of the instant case. In the case of Modi Alkalies, the clearances of various units were to be clubbed by the Revenue when there was evidence showing creation of front companies by the Directors of Modi Group of Companies by appointing their employees as Directors of front companies. The fact that the profit earned by these front companies was going back to M/s Modi Alkalies was also taken into consideration. It was in these circumstances, clearance made by all the companies were clubbed and the benefit of SSI exemption was denied. In the present case, there is no clubbing of clearance sought to be done by Revenue. All the units are enjoying the benefit of SSI exemption Notification independently, and it is not even the Revenue's case that they are facade companies. As such they have to be held as independent units. Even the SCN does not propose clubbing of clearances of all the units.

19. Similarly, Honble Supreme Courts decision in the case of Rukmani Packwel relied upon by the Revenue is in respect of Notification No.1/93 and not Notification No.175/86. It may be observed here that clause-IV of the said Notification disentitled an assessee to the benefit of the said Notification, if he was using the brand name of another person. Such debarring was without any reference to the fact as to whether the brand name owner was availing the benefit of SSI exemption or not. We find that the wordings of the Notification No.1/93 which was the subject matter of the dispute before the Honble Supreme Court are entirely different from wordings of para 7 of earlier SSI exemption Notification No.175/86. As already observed, Notification No.175/86, denied the benefit of SSI exemption to a manufacturer using the brand name of another person only when the brand name owner was not entitled to the benefit of SSI Notification. If brand name owner was enjoying the benefit of SSI Notification, the same was available to the other manufacturers manufacturing the goods with his brand

name. As such we find that the Commissioners reliance on the decision of Rukmani Packwel is not appropriate.

20. M/s Hindustan Machines had declared the value of clearances in the year 1987-88 as Rs.9.50 lakhs approximately. There being no evidence to show that the said figure of clearance was not correct, we hold that the same has to be hold as the correct clearance value. If that be so, he was entitled to SSI exemption Notification No.175/86-CE during the succeeding financial year, 1988-89 and thereafter.

21. In as much as the brand name owner M/s Hindustan Machines has been held to be entitled to the benefit of Notification, the other units using the said brand name would become entitled to the benefit of SSI exemption Notification as they are not hit by para 7 of the Notification. As such we hold that the conformation of demand against the M/s Hindustan Machines as also other manufacturing units by denying them the benefit of SSI Notification is unsustainable. The said part of the demand is accordingly set aside along with setting aside of the penalties on the said ground.

Clandestine Removal

22. As regards the finding of clandestine removal of the goods by the four manufacturing units, we find that the Commissioner in his impugned order has not dealt with the various issues raised by the appellants, as also the various evidences relied upon in the SCN stands. He has, in a very generic term observed that documents recovered from the marketing company M/s Technocrat Marketing P.Ltd. and the role of Shri Hariom Bhatia in the affairs of the company have specifically established the fact of clandestine removal and lead to the indication of clandestine clearances of the manufacturing units.

23. After hearing both the sides, we find that the charges of clandestine removal are based upon the sale statement of 1986-87 recovered from the premises of M/s Technocrat Marketing P.Ltd.. In addition a letter dtd. 30.08.88 stands recovered from the said premises. The letter was addressed to Shri R.K.Arora who was Partner/Director of the marketing company along with Smt. Sunita Bhatia, w/o Shri Hari Om Bhatia. In addition, some papers were recovered from the marketing company wherein sale of the goods was shown under the code name OGL or 091. In addition, some documents were recovered from the residential premises of Shri Hari Om Bhatia, h/o Smt. Sunita Bhatia, Partner of the marketing company.

24. It is seen that the appellants in their reply to the adjudicating authority strongly contested the allegation of clandestine removal of the goods on the basis of the documents allegedly recovered from the premises of third person. As we have already discussed effect of sale statement recovered from M/s Technocrat Marketing P.Ltd. while discussing the total clearance of M/s Hindustan Machines, we do not feel it necessary to deal with relevance of the said document again for the purposes of clandestine removal. The said document has again been made the basis for alleging clandestine removal on the part of all the units. As we have already held that the said document does not relate to the sale of goods manufacturing by M/s Hindustan Machines, confirmation of demand of duty on the basis of the same cannot be upheld.

25. We, further note that either the above sale statement or some correspondence addressed by some unknown person to Shri R.K.Arora, recovered from the premises of marketing company or some despatch plans recovered from Shri Hari Om Bhatia have been made the basis for demand against all the units. The appellants have strongly contested that said documents recovered from third person cannot be made the sole basis for arriving at a finding of clandestine activities in the absence of any corroborative evidence. Reliance have been made on the following Tribunals decisions:

- (i) 2009(243)ELT154(Tri.-Ahd.) - Rutvi Steel & Alloys
- (ii) 2009(245)ELT613(Tri.-Mum.) - Bhandari Industrial Metals P.Ltd.
- (iii) 2008(230)ELT240(All) Kumar Trading Co.
- (iv) 2005(186)ELT465(Tri.-Del.) Rawalvasia Ispat Udyog Ltd.

We find that the decisions relied upon by the appellants, as referred (supra) are to the effects that the documents recovered from the third partys possession or premises cannot be made the sole proof for alleging clandestine removal. The same may be starting point of an investigation but based upon the said documents recovered from the third party, no demand can be confirmed on the findings of clandestine removal. We have also taken into account the latest decision of the Tribunal in the case of Kuber Tobacco wherein by majority of decision, it was held that even when the documents are

recovered from the guesthouse of the company, when the same are of doubtful nature, demand of duty on the findings of Clandestine removal cannot be upheld against the assessee.

Apart from the sale statement recovered from marketing company, a reference stands made to a letter dtd. 30.08.88 recovered from the marketing company. The said letter is addressed to Shri R.K.Arora, Director of the company and refers to sale figures from January to June, 1988.

26. M/s Technocrat Marketing P.Ltd. came into existence in May, 1988, the document referring to the sale figures prior to date of birth cannot be taken into account for upholding the finding of clandestine clearance of manufacturing units. The identity of the person who has authored the said letter is not available. There is no reference to the goods manufactured by the manufacturing unit in as much as the same only mentions the sale figures without any reference to any goods or manufacturer. There is nothing in the said letter to indicate that the same relate to clearance figures of Maharaja Appliances. No authorised representative of any of the manufacturing units stands confronted with the said letter during the course of investigation. Shri R.K.Arora to whom the said letter is addressed has also denied the knowledge of the same. As such we note that said letter cannot be considered to be piece of evidence so as to conclude against the appellants.

27. Further a despatch plan for December, 1990 was recovered from the premises of Shri Hari Om Bhatia and related to his marketing company, M/s Technocrat Marketing P.Ltd. The Revenue by taking into account the said despatch plan has arrived at a conclusion that in as much as the actual clearance figures as reflected in the statutory records of the appellants are less than the figures reflected in the despatch plan, it has to be concluded that the differential number stands manufactured by the appellants clandestinely and cleared without reflecting the same in the records. The Revenue has further presumed that since 1990, the despatch plan showed the marketing company planning to sell at least 50% of their goods in the Southern States. Even in 1987 they sold 50% of goods in Southern States, the assumptive calculation for total sales in the country stand arrived at by the Revenue. We are of the view that the mere despatch plan of the marketing company, without any other independent corroboration cannot be made the basis for arriving at the findings of the clandestine clearance.

28. Apart from this, we also note that the marketing company was dealing in the goods manufactured by the other manufacturers also. It stands specifically brought to the notice of adjudicating authority that M/s Technocrat Marketing P.Ltd. was engaged in trading of the goods manufactured by other persons like : Candy Home Appliances, Western Engineers and Konark Industries (India). Above fact become clear from the balance sheet of the marketing company. Further they were also purchasing packing material from various suppliers. The said material was being purchased by the

marketing company for the trading in the triple jars sold directly to its customers who already possess Maharaja brand of mixers. Shri P.Satish in his statement dtd. 11.04.91 has deposed that the sales referred in his letter dtd. 01.12.89 are the sales of triple jars sold to consumers of mixers, Revenue has interpreted that the said statement as if the same are sales of triple jar mixers of the said company, whereas according to the deponent, same is sale of triple jars to the consumers of Maharaja brand mixers who already have the brand mixers with them. Candy Home Appliance and Western Engineers with whom the marketing company was dealing were the manufacturer of the said jars.

29. The appellants have also contended that they never had the facility to manufacture such huge quantity of goods. Their factory was located in a residential area operating in two shifts and was working from first floor of the building measuring around 990 sq.ft. Total number of workers were 20 and electricity bill was only Rs.1,013/- He also produced a certificate of Shri S.K.Bansal, Engineer who studied the installed capacity of the noticee with the available finance. After studying the process of manufacture, he certified that during the relevant time, the appellants were not having the production capacity to produce the alleged manufactured clearance of goods.

30. Apart from above, we note that M/s Hindustan Machines have made a police complaint as regards some scrupulous manufacturers making goods with their brand name. As a result, 32 units manufacturing household appliances were put to search and it was found that they were manufacturing goods under the brand name of Maharaja. The appellants have produced copies of FIR lodged and facts covering it. An order was also obtained from the Honble Delhi High Court directing Police to arrest the people dealing with the duplicate goods of manufacturers using appellants brand name. It is seen that while dealing with said plea of the appellants, Commissioner has simplicitor observed that such details are not before him and the noticee could not prove that the goods alleged in the SCN were in fact duplicate goods. We really fail to understand that when specific plea was taken before the adjudicating authority along with the copy of the FIRs, the fact of raids by the appellants and a copy of the Honble Delhi High Courts order, how an observation was made to the effect that the appellants had not proved that the goods alleged to be removed were duplicate goods. It has to be kept in mind that it is Revenue who is making the allegations of clandestine removal, based upon some documents recovered from third persons premises which documents even do not clearly relate to the sale figures mentioned therein to the goods manufactured by the noticees under the brand name Maharaja. The fact that some of the manufacturers were misutilising the appellants brand name is indicative of popularity of the said brand name and the fact that some of them were raided and found to be using the said brand name only indicates that the sales to various dealers in the market may belong to such dubious manufacturers.

31. Further, we note that a very novel method stands adopted by the Revenue for appropriating the total clearance figures to three manufacturers. Admittedly, sales shown in the statement recovered from the marketing company does not reveal either the name of the goods or the name of the

manufacturer. Whereas the sale statement for the year 1986-87 stands attributed to M/s Hindustan Machines, the apportionment of duty in respect of other documents is made on the basis of RG-I figures recorded in the statutory records of said three units. The alleged clandestine clearances have been apportioned to the three manufacturing units in proportion to the RG-I clearances. We really fail to understand the basis of such apportionment.

32. At this stage, we also note that a part of the demand stands confirmed against the appellants on the basis of some documents seized from the premises of M/s Dynamic Engineers. Such documents are in the shape of production targets, Production Managers report etc. When the entries made in the said documents were compared with the entries made in RG-I register, there were differences which have been held to be on account of clandestine clearances.

We find that the said documents were signed by one Shri N.S.Sohal whose statement was recorded on 05.02.91 and 07.02.91. On being queried about these documents, he deposed that no records for maintaining day-to-day production are being maintained by them. The various documents seized from the premises were the only records which were being made by him in his personal capacity so as to exercise some sort of control over the workers. Shri Sohal clearly deposed that such figures in the documents do not reflect the actual production of the goods but the same refers to the number of pieces handled by the workers at various stages of manufacture. The documents are for internal use and do not reflect upon a days production. As regards production target, he clarified that the same are only targets and has no relevance or relation to the actual production. In fact, he felt sorry that these targets could never been achieved by the appellants.

33. It is seen that the said statement of Shri Sohal does not stands controverted or rebutted by the adjudicating authority. Apart from the statement of Shri Sohal, who was the author of the said document, neither the Partner of the said M/s Dynamic Engineers nor any other responsible person was examined and his statement recorded. In fact, no inquires were conducted even from the buyers of the allegedly clandestinely removed goods.

34. Reference stands made to goods received register of one transporter by the name of M/s Bajaj Road Carriers. Some of the GRs issued by the said carrier revealed movement of goods to Baroda from Ahmedabad. Revenues contention is that goods were originally cleared by the appellants under the fictitious names such as Janta Enterprises, Ramlal & Co. etc. to various consignees at Ahmedabad from where they moved to the original dealers at various places in Gujarat. Wherever the consignments were being transported by the said company, the clear description of the goods were mentioned and relevant corresponding excise document were also mentioned. In the said documents, where no description was

given and the buyers names were either Janta Enterprises and Ramlal & Co. or N.D.Sales, Revenue entertained a view that in as much as these companies were found to be fictitious, goods were cleared clandestinely.

At this stage, we find that the statements of three dealers, i.e., M/s Panchsheel Agency, Rajkot; M/s Ideal Home Appliances, Surat; and M/s N.D.Sales, Baroda were recorded. The Partners / representative of these dealers in their statements recorded during investigation have denied having received any goods from the above manufacturers under fictitious names or without payment of duty. Apart from these dealers, there is no investigation at the end of other regular dealers of the manufacturing units. As such we are of the view that confirmation of demands against said units are wholly in the arena of surmises & conjectures in as much as there is no evidence reflecting upon such clandestine activities except the unwarranted inference by the Revenue based upon some documents recovered either from third partys premises or documents recovered from M/s Dynamic Engineering which are in the nature of production target etc.

35. We find that the duty demand also stands confirmed against M/s Asiatic Engineering P.Ltd. (AEPL) on the basis of some documents seized from their premises, the said documents are in the nature of internal GRs, daily performance report, security register etc. On comparison of the figures appearing in the said documents with the entries made in the RGI-I register revealed that the excess figure in the documents related to centrifugal dryers and washing machine manufactured by M/s AEPL. The security register also seized showed clearances of these products. The appellants have contended that the duty of Rs.14,97,576/- stands confirmed against the said unit on the ground that they have clandestinely removed 1674 number of washing machines and 67 number of centrifugal dryers during the period 1989-90 and 1990-91. Our attention stands drawn to a chart appended as annexure-A to the SCN. According to the Id. Advocate, perusal of the said chart show, a difference of 42 number of products whereas the duty stands confirmed on much higher number of washing machines and centrifugal dryers. Even this 42 number of goods, there is no clarity as to whether the same relates to the clearances of washing machines or centrifugal dryers. On going through the said chart, we find that the same relates to details of clearances effected by M/s AEPL as reflected in Challans, internal gate passes, daily performance report and security register for which central excisable passes and GP-I were issued. There is no detail as to how the figure of 1674 number of washing machines and 67 number centrifugal dryers stands arrived at by the Revenue. It is also seen that in case of clandestine removal, same number of goods would find mention in the challan as also in gate passes or daily performance report or security register. The goods which stands cleared clandestinely would find its place in all the internal private records. Duty cannot be confirmed on each and every private record with the RG-I register. The same would definitely lead to higher number then the actual clandestine clearances effected by the manufacturer, if any.

36. The Works Manager and Director of the Company, Shri J.C.Gupta and Shri Bhaskar were made to give statements but the above documents reflecting upon clandestine activities were never put before them so as to seek their clarification on the same. In the statement of Shri Bhaskar, Director recorded on 28.07.91, it stands clarified that every washing machine is numbered which can neither be erased nor washed. The Revenue has not advanced any evidence to show that duplicate number was being given on the washing machines cleared by them clandestinely. The clearances as reflected in the security guard register have been pleaded to be in respect of the clearances of washing machines, which may be defective and are being cleared after removing defects. There were also machines which were being repaired or reassembled or reworked, the same would admittedly not find any place in RG-I register and such movement of goods was done under the cover of internal gate passes only. Similarly, the appellants' plea that in some cases invoices were made earlier and the entries in security register was made at a later date is required to be accepted as the justifiable ground in the difference in the number of goods. They have also taken a categorical stand that a new technology of twin tub washing machine was developed by them which resulted in high defects and the same were dismantled or assembled or repaired in which case of all the documents showing internal movement of the goods would be available in the factory. We find that presence of said documents does not positively reflect upon the fact of clandestine clearance of the final product. They may relate to internal movement of goods, invoices may belong to repairing of the goods. Such documents cannot be held as the basis for concluding the allegation of clandestine removal against the appellants.

37. While dealing with the various contentions raised by the appellants, we find that Commissioner has dismissed the same by making very general observations that there is no rebuttal or proof submitted by the assessee by which they can negate the department's allegation of clandestine clearances by the manufacturing units. He has simpliciter observed that the recovery of incriminating documents showing clearances of Maharaja brand goods from the persons/premises concerned with the manufacturing units is sufficient to hold that the appellants have been engaged in actually manufacturing the goods in excess of recorded and clearing the same clandestinely.

38. It is a well settled law that charges of clandestine removal are required to be arrived at by production of positive and sufficient tangible evidences. It does not need the authority of judicial pronouncement to support the above legal issue. It is the Revenue who is making the allegation. Such allegations are being made only on the basis of some documents recovered from third persons' premises. Even the author of such documents does not stand identified by the Revenue. The marketing company from whose premises the said documents stand recovered was itself not in existence during the relevant period. The Director of the company when confronted with the said documents has denied any knowledge of the same. The documents recovered from the premises of Shri Bhatia is only a despatch plan which indicate a target to be achieved and does not relate to actual manufacture and clearance. It has also come on record that marketing company was dealing with the goods of other manufacturers also. In the absence of any indication about the nature of the goods in the said document

to hold that the same belongs to appellants goods, reliance on the same would be crossing all the limits of law of evidence. Having already held that the insufficient, incomplete documents, mentioning no details, having no reference to the appellants name or the goods manufactured by them and recovered from third persons premises cannot be made the basis for arriving at a finding of clandestine removal, we are of the view that the conformation of demand of duty against the manufacturing units cannot be upheld. In as much as we have already held in favour of the appellants on the above ground their other incidental submissions as regards duplication of the demand and adoption of higher value for the purpose of calculation of duty are not being advert. At this stage, we may deal with some of the precedent decisions relevant for the purposes. It stands held in many decisions that charges of clandestine removal cannot be upheld on the basis of collateral evidences like transporters documents or other file records, without bringing on record, the evidence of procurement of raw materials, the actual manufacture of goods and the actual clearance of same and the identify of buyers.

39. In the present case, we find that there is no recovery of any incriminating document from the appellants premises. The said documents which have been made basis for confirmation of demand stands recovered from the third party and cannot be made the basis part for clandestine removal. The authenticity of said document is in doubt as nobody has confirmed the same. Further, even though the names of the buyers were mentioned in the said documents, no efforts have been made by the Revenue to carry on the investigation at their end and to record their statements. In the absence of investigation said conducted from the buyers end, even though their names are available in the documents relied upon by the department, the charges of clandestine removal cannot be upheld. There has to be some corroboration to the allegations of clandestine removal. Admittedly, onus of proof is on the Revenue and can be shifted to assessee only when the assessee is confronted with such documentary evidences which indicate the clandestine activities on his part. We note that even the theory of preponderance of probability is not applicable in the present case in as much as we have virtually not found any document reflecting upon any clandestine activity on the part of the manufacturing unit. This has been the ratio of the various decisions relied upon by the appellants. In as much as it is established legal issue, we are not referring to such precedent decisions. In as much as in the present case, entire evidences relied upon by the Revenue is in the nature of unreliable documents not corroborative by any evidence material, we hold that the findings of clandestine removal cannot be upheld against the appellants.

40. The appellants in support of their submissions have relied upon following decisions to advance their pleas on each issue.

41. Though we find that the appellants have referred to various decisions of the judicial as also quasi judicial, we instead of referring to all of them, would like to refer the latest majority decision of the Tribunal in the case of M/s Kuber Tobacco Product P.Ltd., Final Order No.A-83/110/2010-EX(Br.), dtd. 03.02.12. While dealing with difference of opinion between two Members, the Id. third Member has taken into consideration the various decisions of the courts, including the effects of evidences collected from the third persons premises, the other documentary evidences collected during the course of investigations. It stands observed by the Id. third Member as under :-

26. It would be necessary to analyze whether the evidences, other than the retracted oral evidences, are credible for being used as corroborative evidence. The Honble Supreme Court in case of Sitaram Sao v. State of Jharkhand - (2007) 12 SCC 630, pithily encapsulated the idea of corroborative evidence, in the following words :

34. The Word corroboration means not mere evidence tending to confirm other evidence. In DPP v. Hester - (1972) 3 All ER 10.16, Lord Morris said:

The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible.....

There can be, therefore, no corroboration of evidence, which is itself unworthy of credence.

27. That, apart from these retracted oral evidence, the main evidence on which reliance is placed by the Revenue are the loose sheets, Hisaba books and Kaccha Challans. It is undisputed facts that any author of these records was not traced and made available for cross-examination. Moreover, these documentary evidence were not recovered from the office or factory premises of the appellant manufacturer company, and there is no tangible evidence on record to conclusively relate the same with the appellant manufacturer company, except the retracted oral evidence. There is any untainted, undisputed admission by the concerned Director of the company that these records relied by the department were of company's unaccounted production and removal thereof. The entire accounted production of the appellant manufacturer for the relevant period is not recorded in these Kachha records besides the alleged unaccounted production. The Honble Member (Technical) was persuaded to assume that Shri Bothra would have keys to premises at 4130, Gali Barna, Sadar Bazar, Delhi, and although Panchnama drawn at this premises nowhere records the name of the appellant company, he was persuaded to further assume that it was a guest house of the appellant company. Although the names of the consignors on GR/RR were found fictitious, the Honble Member (Technical) was persuaded to assume that the same related to the Appellant company. As rightly observed by the Honble President, even the panchnama did not describe or identifies in its annexure which enlists the documents stated to

have been recovered from the premises, recovery of any hisaba book or Kachha Challans or loose sheets with written pages. I agree with the findings of the Honble President that entire proceedings have lost credibility and serious doubt arises about the credibility of the materials stated to have been collected by Revenue in the course of proceedings.

29. In the entire records of proceedings, there is no evidence to indicate that there was clandestine manufacturing. There is no independent tangible evidence on record of any clandestine purchases or receipt of the raw materials required for the manufacturing of the alleged quantity of finished goods for its clandestine removal from the factory. In the entire notice and the order there is no satisfactory and reliable independent evidence as regards the unaccounted manufacture and or receipt of the huge quantities of raw materials. The quantities of the alleged bags dispatched from the factory would require some transportation arrangement for delivery from the factory. However, any reliable evidence about any vehicle coming to or going out of the factory without proper entries is not forthcoming. There is also no cogent evidence about any freight payment for any such movement.

30. I do not find cogent evidence of disproportionate and unaccounted receipt and consumption of the basic raw materials and packing material, required for manufacturing alleged quantity of unaccounted finished goods. I do not find tangible proof of unauthorized payment for procuring such unaccounted raw material and packing material. I do not find cogent evidence of disproportionate power consumption, capacity utilization and labour employed, or any cogent evidence of clandestine manufacture of unaccounted quantity alleged as clandestinely removed. I find that unaccounted production in the factory of the appellant company has not been established. In *Ruby Chlorates (P) Ltd. Versus Commissioner Of C. Ex., Trichy*, 2006 (204) E.L.T. 607 (Tri. - Chennai), it was held that:-

21..The settled legal position is that when several raw materials are involved, when a case of clandestine production and clearance is built on clandestine use of raw materials, the same should be proven with reference to unaccounted use of all such major raw materials.

22. In a case of clandestine removal the department should produce positive evidence to establish the same. In the absence of corroborative evidence, a finding cannot be based on the contents of loose chits of uncertain authorship. Department has not produced evidence of use of inputs to prove that there was manufacture of unaccounted finished product. ...

Moreover, in the case of Atlas Conductors (supra), this Tribunal has taken a clear view that the demand cannot be on presumption of manufacture but on the basis of actual manufacture which is the basis to come to conclusion as recorded by Honble President in para 47 onwards that the findings of the adjudicating authority are without any evidence and is not correct view and is liable to be set aside.

31. My above views are fortified by a recent case in the case of Viswa Traders Pvt.Ltd. & others Vs. CCE Vadodara being Final Order No.A/1846-1851/WZB/AHD/2011, dt.01.11.2011, a similar issue of clandestine removal was decided by co-ordinate Bench of Tribunal in Ahmedabad, wherein it is held that unless clandestine manufacturing is brought on record, there cannot be any allegation of clandestine clearances, un-corroborated with evidences. I was one of the Members in that Bench and while coming to the conclusion, the Bench had relied upon the judgment of Hon'ble High Court of Gujarat in the case of Nissan Thermoware Pvt. 2011 (266) ELT 45 (Guj.) I am reproducing the relevant portion of the said order, which is fortifying my view in this case also.

15. We find that Hon'ble High Court of Gujarat, in the case of Nissan Thermoware Pvt.Ltd 2011 (266) ELT 45 (Guj), has specifically held as under:

7.?Thus, on the basis of findings of fact recorded by the Tribunal upon appreciation of the evidence on record, it is apparent that except for the shortage in raw material viz., HD which was disputed by the assessee and the statement of the Director, there was no other evidence on record to indicate clandestine manufacture and removal of final products. On behalf of the revenue, except for placing reliance upon the statement of the Director recorded during the course of the search proceedings, no evidence has been pointed out which corroborates the fact of clandestine manufacture and removal of

final products. In the circumstances, on the basis of the material available on record, it is not possible to state that the Tribunal has committed any legal error in giving benefit of doubt to the assessee.

(Emphasis supplied)

The above ratio, as laid down by Hon'ble High Court of Gujarat, would squarely cover the issue before us.

16. In the absence of any tangible evidence which would indicate that there was clandestine manufacture and clearance of the goods from the factory premises of M/s VTPL, in the peculiar facts and circumstances of this case, we hold that the impugned order which confirms the demand on the appellant M/s VTPL and imposes penalty on them is not sustainable and is liable to be set aside and we do so.

32. I also do not find tangible evidence of removal from factory, of unaccounted goods so manufactured, by loading from factory and transportation therefrom, of alleged clandestinely removed goods. I do not find any reliable evidence of the actual customer/recipient of the clandestinely removed goods with their confirmation of unauthorized payment towards unaccounted purchase of goods allegedly manufactured and removed in a clandestine manner from the factory of the appellant. There was no recovery of any unaccounted sales proceeds in substantial cash in the factory or office premises or anywhere else in the control of the appellant company, backed by any confirmation oral or written from the person giving such cash against goods removed in clandestine manner without payment of duty from the factory of appellant company.

42. The entire law on the issue of clandestine removal stands discussed in the above paragraphs and it stands concluded that charges of clandestine removal cannot be made on the basis of assumptions and presumptions and on the basis of documents recovered from third persons premises, without their being any evidence of actual manufacture of the excess quantity, which required corroboration of procurement of raw material, the labour as also electricity consumption etc. No efforts stands made by the Revenue to establish the excess manufacture of the goods in the present case. Having already discussed the various evidences relied upon by the Revenue as not being relevant and sufficient for the purpose of upholding the findings of clandestine removal and by following the above majority decision of the Tribunal in the case of M/s Kuber Tobacco Products P.Ltd., we hold that the confirmation of demand against the appellants on the allegation of clandestine removal is unsustainable.

UNDER VALUATION

43. Another issue required to be decided is as to whether the advertisement and publicity expenses incurred by M/s Technocrat Marketing are required to be added in the assessable value of the appellants final product or not? We find that though the issue stands decided by the Honble Supreme Courts decision in the case of M/s Phillips India reported in 1997(91)ELT540(SC), Commissioner has distinguished the same on the ground that it is only the legitimate business consideration, which should be excluded whereas expenses incurred by the marketing company on advertisement and publicity cannot be termed as legitimate. We do not find any justification in the above reasoning of the adjudicating authority. The marketing company was undertaking advertisement expenses on their own behalf and as such the issue is duly covered by the order of the Honble Supreme Court in the case of M/s Phillips India. The adjudicating authority had not at all dealt with the appellants plea that the expenses incurred by the marketing company was on its own account in as much as all the manufacturers were selling the goods to the marketing company at the factory gate sale price. Apart from the clearances to the marketing company, 20% of their sales were to the other independent buyers where the price was the same at which the goods were being sold to marketing company. In this scenario, we find that the advertisement expenses or publicity charges incurred by the marketing company cannot be included in the assessable value of the goods manufactured by the respective manufacturing units.

CONFISCATION OF SEIZED GOODS

44. Apart from above, we find that during the course of visit of officers in the factories of manufacturing units, various goods were also seized on the ground of their non-entry in the RG-I register. The details of the same are as under:-

Name of Co.

Description of goods

No. of goods

Value

(Rs.)

AEPL

Washing machine

De-hydration tank

115

386

3,85,078

34,740

DE-I

Electric motors

Mixer grinder

456

401

1,30,480

3,64,760

DE-II

Motors 500 watts

Motors 450 watts

226

75

84,290

KI

Juice Extractor 450 watts

Blender/ Grinder

369

2,72,840

8,899

KI

Mixers

261

14,440

45. The appellants have taken a specific stand before the adjudicating authority that the said goods were in semi-finished condition and were yet to be recorded in the RG-I register, that is why some of the goods were only detained and not seized. We find while dealing with the said issue, the adjudicating authority has not dealt with the above plea of the appellants. He has accordingly confiscated the said goods seized from the premises of various manufacturers with an option to them redeem the same on payment of redemption fine. We find that the order of the Commissioner is very cryptic and does not taken into consideration the various pleas raised by the appellants. It seems that the order has been passed with pre-determined mind to confiscate the goods. The statements of various authorised representatives of the manufacturing units are only to the effect that the said goods were in excess than the recorded balance in the RG-I register. There is no statement appearing that the same were meant for clandestine removal. As such, we are of the view that the confiscation of the said goods is not warranted.

PENALTY

46. As we have held in favour of the manufacturing units on the ground of availability of benefit of Notification No.175/86-CE as also on the allegation and findings of clandestine removal and the inclusion of advertisement expenses in the assessable value, we set aside the demands confirmed against them on the said grounds. In as much as the demands have been set aside, the penalties imposed upon them under various provisions of Central Excise Act, 1944 and the Central Excise Rules are also set aside. Further in as much as the appeals of manufacturing units stands allowed, the

imposition of penalties upon individuals, who are either Directors/Partners of the said units or Shri Hari Om Bhatia, C.A. and the dealers of the appellants company located at various places, is not called for, the same are also set aside.

47. In a nutshell, all the appeals are allowed with consequential relief to the appellants.

(Pronounced in the open Court on 04.05.2012)

(Archana Wadhwa) Member(Judicial)

(Mathew John)

Member(Technical)

RK-I

48. I have gone through the records of the case, considered the submissions at the time of hearing and the order recorded by Ld. Member (Judicial).

49. I am not in agreement with the main argument of the Member (Judicial) that since some main pieces of evidence were recovered from the premises of M/s Technocrat Marketing Pvt Ltd, which is a marketing company for the products of the manufacturing concerns involved in this case and from the residence of Shri. Hari Om Bhatia Chartered Accountant and director of M/s Technocrat Marketing Pvt Ltd, these records cannot be accepted as evidence. The argument that M/s Technocrat Marketing Pvt. Ltd (TMPL) came into existence only on 09-05-1988 and hence they could not have had records of HM prior to that date is not a sound argument, according to me, considering the fact that this company was constituted in 1988 to separate the marketing functions of HM into another company. It is very clear that this company did not come up from scratch on 09-05-1988. It is not as if HM did not have marketing arrangement prior to 09-05-1988. One of the allegations in the SCN is that the goods were cleared at lower values to TMPL and they were allowed to collect additional charges which they incurred for advertising of products. The question whether the value can be increased on account of margin received by TMPL and spent by this marketing company for advertising the products is a separate question to be examined, but such facts prove the purpose of spinning of the marketing operations to a new entity and thus the fact that TMPL is a successor of part of the operations conducted earlier by HM employing the same set up. Further it can be seen that the directors of the previous marketing company Maharaj Kiitchenaid Pvt were Harish Kumar, the brand name owner and Shri R.K. Arora. The directors of the TMPL were Shri. R. K. Arora and Mrs. Sunita Bhatia W/o Shri. H. O. Bhatia indicating that the new company is a continuation of the earlier marketing set up. The share holding pattern of the TMPL may throw further clarity on the matter. However this information has not been placed by either side. But from available facts itself it is clear that TMPL was a new company constituted to continue earlier

operations. That being the case the evidence cannot be rejected for the reason that TMPL came into existence only with effect from 09-05-08. At any rate for the period after 09-05-08 such documents cannot be rejected. Once it is appreciated that it was the marketing set up of HM in existence up to 09-05-1988 which was spun off as the new company namely TMPL it will be very clear why this documents can be accepted in evidence.

50. It is also to be noted that Shri. Hari Om Bhatia is a Chartered Accountant and the Director of the said marketing company and not a third party to the whole matter. So I do not agree with the arguments that these evidences should in the first place be thrown out and then the case should be examined with reference to the rest of the evidence. I also do not accept the argument that the records should be thrown out since Revenue has not proved who has written the records seized from these places. Since the records were seized from the possession of these persons the burden of proving who wrote the records is on these persons and not on the Revenue. Revenue cannot prove all facts which the appellants only are privy to. So I am of the view that the records seized from these two places are acceptable evidence.

51. Because of the above reason and the facts of the case like evidences showing clandestine removal with codes like OGL, 091 etc and many other collateral evidences like production slips, evidence of transport of unaccounted goods, evidence of un-accounted goods handled by dealers, arrangements

for realization of sales proceeds of unaccounted goods through Kaveri Shilpa Kala Ltd etc given in para 19.3 to 19.5 of the SCN, I am of the view that the case of clandestine clearance made by Revenue is proved though there is need to further examine the quantum of clearance by each manufacturing unit.

52. The structure of the Order-in-Original made the job of appreciating the evidence rather difficult. The SCN was found to be better structured, at least the annexures to SCN give clarity about the different components of duty demanded and the evidence relied upon for each such component of duty demanded.

53. The factual matrix about the entities to whom notice was issued in this case are jotted down in the following table.

S. No

Name of the appellant

Legal Constitution and date from which operational wherever available

Activity

Commodity manufactured/ handled; Duty demanded

1

Hindustan Machines

(HM)

Partnership-

Started in 1975

Manufacturer

Mixer-grinders, Toasters, Irons, Duty demanded is 1,91,25,623

2a

Dynamic Engineers Unit-I

(DE-I)

Partnership -

Started in 1986

Manufacturer

Mixer-Grinder- Duty demanded for Unit-I and II together is Rs. 1,17,66,754

2b

Dynamic Engineers-Unit-II

(DE-II)

Partnership registered with excise since April 1990

Manufacturer

Electric Motors, parts of electric motors; Duty demanded for Unit-I and II together is Rs. 1,17,66,754

3

Konark Industries

(KI)

Partnership- registered with excise since 1988

Manufacturer

Mixer-grinders, Juicers and Jar attachments; Duty demanded is Rs.6175574.

4

Asiatic Engineers (P) Ltd

(AEPL)

Private Ltd Company-a

Started from 27-06-1988

Manufacturer

Washing machines and Centrifugal driers-Duty Demanded is Rs. 36,74,847.

5

Konark Industries India

(KIL)

Partnership firm

Manufacturer

TJ Mixer grinders and juicers

6

Technocrat Marketing Pvt. Ltd

(TMPL)

Private Ltd

Started on 09-05-1988

Marketing concern

Marketing of products of the above firms-

Rs.50,00,000/-penalty.

7.

Kaveri Shilp Kala Ltd

(KSKL)

Limited Company

Dummy stated to be receiving unaccounted money

Rs. Five lakhs penalty

8

Harish Kumar

Individual

Brand Name holder of Maharaja-Also partner in HM, AEPL

Held to be the mater mind of operations of Maharaja Group Companies-Rs. 5,00,000/ penalty

9

R. K Arora

Individual

Director of TMPL

Rs. 10,00,000 penalty

10

H. O Bhataia

Individual

Proprietor of United Engineers, Director of KSKL

From whose residence critical evidences were seized-Rs. 5,00,000/ penalty

11

N. D. Sales,

Baroda

Partnership

Dealer

Selling products of Maharaja group companies-

Rs. 50,000/-penalty

12.

Panchsheel Agencies, Rajkot

Not clear

Dealer

Selling products of Maharaja group companies- Rs. 50,000/-penalty

13.

Ideal Home Appliances

Proprietorship

Dealer

Selling products of Maharaja group companies- Rs. 50,000/-penalty

54. The manufacturing units are owned by different entities formed by different combinations of about 10 closely related persons as detailed in SCN. The marketing concern, TMPL, which is a limited company, is also controlled by persons among these. For this reason there is a statement in para 9.1 of the impugned order that these entities are inter-related. But nothing turns out legally on account of this in the matter of clubbing of the clearance of the manufacturing concerns, though the matter may be relevant while appreciating the evidence. No clear proposal to club the clearance of the various units in the hands of any single entity, stating why these units, some of which are Partnership firms and

proprietorship concerns of different persons should be clubbed together is seen the Show Cause Notice or the adjudication order.

55. Though there is no proposal for clubbing the clearances of the various manufacturing concerns, according to Revenue HM crossed the value of clearances of Rs. 1.50 crores in the year 1987-88 and they were not eligible for that exemption from 1988-89 onwards. So it is argued that HM and other manufacturing concerns which were using the same brand name were not eligible for exemption under notification considering clause 7 of the notification reading as under:

7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification

56. So there are two dimensions to the case at hand, as already recorded by Member (Judicial). If it is proved that HM exceeded the value limits permissible under Notification 175/86-CE in 1987-88, then the other units which were manufacturing excisable goods with the brand name of Maharaja may not be eligible for the exemption. This position is applicable from 22-09-87 the date from which original notification was amended by Notf. 223/87-CE to add clause 7 as reproduced above. But this is not the only aspect to be looked into. It is also to be seen whether the other units on their own exceeded the different slabs of clearances for the purpose of rate of duty specified in the notification after considering the evidences regarding clandestine removals.

57. As per Annexure-D to the SCN the demand is made under various headings as under:

S.No.

Ref.No.

Description of the goods

Period

Name of Appellant

Total duty payable

1.

D-1

Differential duty payable on account of wrong availment of exemption under Notification No. 175/86

1988-89 to 1990-91 upto Nov. 1991

H.M.

23,71,955-58

2.

D-II

-do-

1988-89

1989-90

DE-I

18,19,312-32

3.

D-III

-do-

1989-90

1990-91

K.I.

28,48,195-38

4.

D-IV (1 to V)

Details of goods allegedly clandestinely removed

(i) T/J mixers

(ii) Med. Mixer

(iii) Eco. Mixer

(iv) Small Mixer

(v) V/J attachment

1987-88

March, 90

Sept. 88 to Nov. 90

Nov 90 to Sept. 89 to

Oct. 90

Sep 88 to Dec.90

HM

-do-

-do-

-do-

87,10,822-00

5,09,414-00

41,664-00

1,37,340-00

74,449-00

5.

DV

Details of goods allegedly clandestinely removed

April 90 to Nov. 90

DE

33,87,216-00

6.

D-VI

-do-

Sep. 88 to Dec. 90

K1

1,62,009-03

7.

D-VII

Chart showing goods allegedly removed clandestinely on the basis of the average sale figures contained in file No. C-3

1987-88 to

8/89

-do-

-do-

HM

DE-I

KI

71,01,972-00

40,39,059-00

38,57,261-00

8.

D-VIII

Chart showing the differential duty payable on account of service charges

1990-91

D-I

9,59,679-00

9.

D-II

Differential duty payable on account of detail of exemption availed under Notification NO. 175/86

1988-89 to

1990-91

AEPL

10,77,456-43

10.

D-X

Chart showing duty payable on account of goods allegedly removed clandestinely

1989-90 to

1990-91

AEPL

14,97,576-00

11.

D-XI

Chart showing the duty liability on account of advertisement and publicity expense incurred by M/s TMPL on mixer grinder & square juicers.

1988-89 to

1990-91

HM

DE

KI

1,78,007-00

15,61,488-00

3,07,319-00

12.

D-XII

Chart showing the duty liability on account of advertisement and publicity expenses incurred by M/s TMPL on washing machines

1990-91

10,99,815-00

Total

4,17,41,999-74

58. It is necessary to find out what was the value clearance of each unit for each year based on evidence unearthed. If it is proved that HM had clearances more than 1.50 crores in 1987-88 or later then none of the unit may be eligible for the said exemption. If any unit crossed the clearance of Rs. 1.5 crores in any financial year, the unit would not be eligible for small scale exemption for the next financial year.

59. Now let me come back to facts and evidences.

60. The following are the evidences relied upon by Revenue:

(a) Searches conducted at eight different units manufacturing different parts for final products of the goods bearing the brand name Maharaja. It was seen that daily production registers were not being maintained properly and shortage in some cases and excesses in other cases were noticed and goods found in excess were seized;

(b) Internal production records of the manufacturing units;

(c) Documents recovered from the residence of Hari Om Bhatia;

(d) Documents seized from the premises of Technocraft Marketing Pvt. Ltd (TMPL);

(e) Statement of various persons connected with manufacturing of the impugned products and its marketing;

(f) Evidences collected from dealers;

(g) Evidences collected from the goods transport agencies that transported the goods;

(h) Enquiries conducted with a firm called M/s Kaveri Shilpa Kala Ltd which was used as a conduit for collecting sale proceeds of the goods sold by the various companies.

61. Now I would like to record major evidences appearing against each of the manufacturing units.

62. Hindustan Machines

62.1. During search shortage of 400 pcs of centrifugal juicer attachment was noticed.

62.2. Records relating DE-I, DE-II and KI were seen at the premises, of HM.

62.3. The value of clearances of this unit for the period under reference is shown in Annexures D-(IV) (i) to Annexure D-(IV) (v). From these annexures, I have reproduced the period, evidence relied and the value estimated. That is three columns from these annexures are extracted and re-arranged to put figures from different annexures for the same financial year together:

S.

No

Annexure to SCN

Financial Year

Period

Evidence based on which unaccounted production is assessed*

Value of goods Removed*

Annexure-D(IV) (i)

1987-88

Mar 87 to April 88

Document at C-20 of panchnama dt 11-12-90 at TMPL being Sales Statement of dealers for including 1987 APMI

17465600

2

Annexure-D(IV) (i)

1988-89

Sep08 to Feb 89

F. No. 23 (HOB)

1294200

3

Annexure-D(IV) (i)

1988-89

Mar 89

F. No. 23 (HOB)

234975

4

Annexure-D(IV) (ii)

1988-89

Sep 88 to Mar 89

F. No. 23 HOB

180670

5

Annexure-D(IV) (iv)

1988-89

Sep 89 to

Mar 89

F. No. 23 HOB

84000

6

Annexure-D(IV) (i)

1989-90

Apr 89 to

Jul 89

F. No. 23 (HOB)

1031550

7

Annexure-D(IV) (i)

1989-90

Aug 90 to Nov 90 to

F. No. 5 (DE) and RG-1

17813250

8

Annexure-D(IV) (i)

1989-90

Dec 90

A-85 (TMPL)

391950

9

Annexure-D(IV) (i)

1989-90

Jan 90

F. No. 5 (DE)

4833000

10

Annexure-D(IV) (i)

1989-90

Feb 90 to Mar 90

B-17 (TMPL) & RG1

3533000

11

Annexure-D(IV) (ii)

1989-90

Apr 89 to

Nov 89

F. No. 23 (HOB)

180880

12

Annexure-D(IV) (ii)

1989-90

Dec 89

A-85 (TMPL)

248640

13

Annexure-D(IV) (ii)

1989-90

Jan 90 to

Mar 90

B-17 (TMPL)

& RG-1

626400

14

Annexure-D(IV) (iii)

1989-90

Apr 89 to

Dec 89

F. No. 23 (HOB)

160000

15

Annexure-D(IV) (iii)

1989-90

Jan 90 to

Mar 90

A-85 (TMPL)

38400

16

Annexure-D(IV) (iv)

1989-90

Apr 89 to

Dec 89

F. No. 23 (HOB)

111000

17

Annexure-D(IV) (iv)

1989-90

Jan 90 to Mar 90

B-17 (TMPL) and

RG-1

267750

18

Annexure-D(IV) (ii)

1990-91

Apr 90 to May 90

B-17 (TMPL)

638400

19

Annexure-D(IV) (ii)

1990-91

June 90

F. No. 21 & RG1

261000

20

Annexure-D(IV) (ii)

1990-91

Jul 90 to

Oct 90

B-17 (TMPL)

163800

21

Annexure-D(IV) (ii)

1990-91

Nov 90

F. No. 27 (HOB)

126000

22

Annexure-D(IV) (iv)

1990-91

Apr 90 to

May 90

B-17 (TMPL)

41650

23

Annexure-D(IV) (iv)

1990-91

June 90

B-17 (TMPL) and RG-1

33575

24

Annexure-D(IV) (iv)

1990-91

Jul 90 to

Oct 90

B-17 (TMPL)

116025

* Following notes are relevant.

* Certain Abbreviations are used in this column. APM India was a concern marketing products of HM in Andhra Pradesh.

* F. No. 23 (HOB) would mean file No seized at F. No. 23 of panchnama drawn at residence of H. O. Bhatia

* F. No. 5 (DE) would indicate file No. 5 seized in mahazhar at the premises of Dynamic Engineers.

* A-85 (TMPL) would mean File 85 in Annexure A of seizure Memo at the premises of TMPL.

* The value indicated in the last column is value taken from the files like 17, 21, 23, 27 etc seized from the residence of HO Bhatia. Revenue has a case that this value is a suppressed value and true value is higher. The Appellants have a case that this value is on the higher side and actual value is lower.

62.4. Most of the entries in the above tabulation are dependent on records seized from the residence of Shri. H. O Bhatia and office of TMPL. This shows the importance of the documents received from these premises as evidence. If they are rejected the demands will get dropped substantially, though not wholly.

62.5. Out of the entries in the above table entry at S. No. 1 and 7 are very important because if these entries are proved, the other manufacturers may not be eligible for small scale exemption. There is also a matter to be examined why the items at S. No. 7 and 9 based on documents related to DE is to be added in the clearance of HM and not in the clearance of DE. These issues are not adequately

dealt with in the order and there were no arguments raised on these issues during hearing because both the parties were arguing on admissibility of evidence rather than of the details of effect of each evidence. So depending on how the difference in view between the two Members is settled this should be remitted to the adjudicating authority for re-determination of quantum of duty and other liabilities if the need arises.

63. Dynamic Engineers-Unit-I and Unit-II (DE-I and DE-II)

63.1. Search at Unit-II on 11 -12-90, 226 motors of 500 watts suitable for use in Mixers and 75 motors of 450 watts suitable for use in washing machines were seen in a form ready for despatch at the premises though their RG-1 showed the stock to be nil. The goods were seized.

63.2. Scrutiny of their internal production records showed that during the period 01-08-90 to 09-12-90 the said unit had manufactured 54,857 motors of 500 watts and 7064 Numbers of Triple Jar Mixers whereas RG-1 showed production of 46,171 and 4932 respectively, thus showing that substantial numbers of motors were removed to Unit-I without documentation without proper documentation.

63.4. The Unaccounted clearance from Dynamic Engineers is shown as D (V) as under:

Financial Year

Period

Evidence based on which unaccounted production is assessed*

Value of goods Removed*

1990-91

Apr 90 to

May 90

B-17 (TMPL)

3014000

1990-91

June 90

B-17 (TMPL) and RG1

2539000

1990-91

Jul 90 to

Nov 90

B-17 (TMPL)

10576600

* Notes below the table relating to HM are relevant to this table also.

64. Konark Industries (KI)

64.1. 117 Assembled bodies of Maharaja Brand Mixer were seized from its premises and 244 Maharaja Mixer bodies duly fitted with motor and power supply chords but without control knobs were found.

Financial Year

Period

Evidence based on which unaccounted production is assessed*

Value of goods Removed*

1988-89

Sep 88 to

Mar 89

F. No. 23 (HOB)

17000

1989-90

Apr 89 to

Dec 89

F. No. 23 (HOB)

142800

1989-90

Jan 90 to

Mar 90

B17 (TMPL)

and RG1

51000

1990-91

Apr 90 to

May 90

B-17 (TMPL)

91800

1990-91

June 90

B-17 (TMPL) and RG1

270000

1990-91

July 90 to

Oct 90

B-17 (TMPL)

162900

1990-91

Nov 90

F. No. 27 HOB

21600

1990-91

11-12-90

Goods seized

18181

* Notes below the table relating to HM are relevant to this table also.

65. Asiatic Engineers Pvt Ltd. (AEPL)

65.1. 115 washing machines in excess of the stock recorded valued at Rs. 3,85,078 and 386 numbers of Hydration tanks valued at Rs. 34740 were seized.

Financial Year

Period

Evidence based on which value is assessed*

Value of goods Removed

1989-90

Pre-budget (Washing Machines)

Records seized from AEPL Snos. 25, 27, 35, 100, 101

71445

1989-90

Post Budget (Washing Machines)

Records seized from AEPL Snos. 25, 27, 35, 100, 101

64950

1990-91

1990-91

(Washing Machines)

Records seized from AEPL Snos. 25, 27, 35, 100, 101

5467768

1990-91

1990-91

(Centrifugal Drier)

Records seized from AEPL Snos. 25, 27, 35, 100, 101

83858

1990-91

1990-91

(Washing and Spinner Motors)

Records seized from AEPL Snos. 25, 27, 35, 100, 101

67860

* Here the demands are worked out on the basis of documents recovered from the premises of AEPL itself. So the rejection of documents received from HO Bhatia and TMPL is not relevant to determining value of unaccounted clearance from this unit.

66. Evidences collected from Shri Hari Om Bhatia

It can be seen from tables in paras 62.3, 63.4, 64.1 that the duty evaded is worked out mainly relying on the records received from the residence of Shri. Hari Om Bhatia. So it becomes very necessary to decide whether these records are to be taken as acceptable evidence or not.

67. Evidences Collected from TMPL

67.1. The importance of records recovered from the premises of TMPL is evident from the Tables in para 62 to 64 because they form the basis for quantification of demand. But apart from that

some of the records clearly demonstrate the clandestine manufacture and clearance if not the quantity. For better appreciation of facts paras 14.2 to 14.7 of SCN are re-produced below:

14.2 The manufacturing units of Maharaja brand household appliances in active collusion with M/s TMPL, the marketing company of Maharaja brand appliances, have devised a surreptitious method of selling the clandestinely removed goods in the market under the Code name OGLbusiness. Existence and continued adoption of such an unscrupulous business practice is borne out from a document available in F.No. C20, seized from the premises of M/s TMPL. This document is a letter addressed to Sh. R.K. Arora, Director of the company wherein the then Branch Manager of the said marketing company has, interalia, communicated as under :

Since the company is in need of funds and faster rotation alone would make the company sale smoothly, I would like to bring to your kind notice that OGLbusiness has become a matter of no secret in A.P. All the dealers and other products distributors and some companies are in a position to know total how much quantity of stocks are sold in OGLby our distributors.

I am afraid if this trend continues, it would be detrimental to us. I came to understand from certain tax officials of A.P. and Karnataka that they had recruited some dealers as informers to pass on details of companies and traders who are dealing in number two transactions. Therefore, I would like to caution you in this regard, for your information, I am enclosing herewith one letter received from our Hyderabad sales officer, Mr. Y.S. Anantn on this subject which would give you an idea.

14.3 In the letter said to be annexed with the above communication, Shri Y.S. Ananth, Sales Officer, Hyderabad has outlined the price structure of OGLas under :

Dealers price Rs. 1,350/-

Less : Cash discount Rs. 40/-

Rs. 1,310/-

Less : Half Maruti car scheme

on 504 pcs. Rs.45,000/- Rs. 85/-

Rs. 1,225/-

Less : OGL commission Rs. 75/-

Rs. 1,150/- Net rate

14.4 In the said letter, there appears an endorsement to Sh. R.K. Arora, Director which is as under :

On receipt of this letter, I have contacted Mr. Chauhan over telephone, since I smelt something fishy in the transactions and cautioned him not to further the contract. He also agree with my suspicion.

14.4 From a letter dated 15.7.88, addressed by Sh. K. Anjaneyulu, the then Branch Manager, to Sh. R.K. Arora, which has been duly acknowledged by Sh. R.K. Arora with an endorsement to be discussed with K.A. on 22/8 at Delhi, the term OGL has been discussed as under :

As decided by us on 25.6.88 at Bangalore, I had been to Bangalore on 4.7.88 to assess the intensity of infiltration of our product from neighbouring state and distributors of Belgam.

From Belgam the following dealers are suspected by me as those who are getting material on OGL for Rs.1,050/- and with taxes Rs.1,160/-. The same material is offered to dealers of Mysore, Madhya and Bangalore local retailers. They are M/s Kamal Agencies, Novalites, B.M. Metals.

The retailers being chosen by the above dealers are both authorised dealers of Maharaja (under Rajalakshmi Agencies) and also other than authorised dealers.

By keeping a margin of Rs.50/- to Rs.8/- the retailer, in turn are offering to consumers for Rs.1,250/-or Rs.1,300/-. The difference between our suggested retail price and price available in the market to consumers is between Rs.143/- to Rs.93/-.

On OGL Rs.1,050/- was quoted to me being a dealer, with bill Rs.1,204/- is the final rate after bargaining by me. The above information was given by Mr. Narayanbhang himself over telephone from Pune on 8.7.88 at 2.30 P.M. Meanwhile, I have sent Mr. Uday Mehtha and his Sales Representative to market to find out the prevailing price in the market. I have joined them at M/s Navrang Steels and had a chat with Mr. Naryan, the Proprietor of M/s Navrang Steels. It is confirmed by him that he is getting Maharaja from M/s Venkatesh Agencies for Rs.1,050/- plus taxes (i.e.) Rs. 1,187. I have called on other three dealers of Maharaja as follows :

M/s Mulls & Co., M/s Shanthi Steels, M/s Revankar Electricals.

I have confirmed the above details to your good selves and also to Sh. P. Satish. I suggest the following remedial steps.

- 1) Termination of M/s Ventakesh Agencies.
- 2) Hiking up our prices to Pune distributors and stop supplying materials in OGL to them.

14.6 Shri R.K. Arora, Director, M/s TMPL, when confronted with the above said documents on 25.4.91 stated as under :-

As far as I am concerned, I do not know the full form of OGL. However, this terms is quite often used by shop-keepers. The suggestion of our ex. Regional Marketing Manager is not understood by me and I do not understood in what context he had used this term.

14.7 Further, in an inter-office memo dated 1.12.89, Sh. P. Satish has communicated to Sh. R.K. Arora, Director as under :-

It is observed that there is a growth of only 17.5% in the T/J figures as compared to the figure for 1988. the average T/J sales to the trade during 1988 was 5,974 pcs. Per month; whereas in 1989 it has been 7,023 per month till September..

68 Now I would like to make my observations on some of the findings given by Member (Judicial).

68.1. In para 11 it is mentioned that the sales statement relied upon does not have the name of the product and the name of the manufacturer. It is in this context that Revenue is relying on the despatch plan which is a separate document. The co-relation between the documents would establish the products. The name of the manufacturer is not quite evident. It is for the appellants to show evidence on this this issue. Appellants cannot claim benefit by arguing that they did not maintain records giving all information and how can Revenue demand duty form them. This argument is applicable for findings in para 27 also.

68.2. In para 12 it is mentioned that the statements of the dealers who bought the goods should have been recorded to find out who manufactured the goods and if the goods were manufactured by HM, the goods were manufactured without reflecting in the records of the of HM. Dealers are not privy to such practices of a manufacturer and hence no purpose will be served by recording the statements of dealers in this regard. It is for the person from whose custody the records are seized to explain the contents of the records and not anybody else.

68.3. In para 13 it is observed that during investigation questions were not asked about the contents of the statements. But opportunity is given through the SCN to explain the records. If the Revenue thought that the contents are evident there was no need to ask questions earlier. The appellants are denied the opportunity to explain the contents because such opportunity is given through SCN. This argument is applicable for finding in para 26 also.

68.4. In para 15 there is an issue raised about the production capacity of HM. It appears that the argument is based on capacity of HM only and ignoring the manufacturing facilities which were being operated in the name of DE, KI. Though the units were registered with excise from 1986 and 1988 the fact when they started manufacturing is not clear. This issue once clarified will remove this confusion created by the appellants. This argument is applicable to finding in para 29 also.

68.5. When all the facts are considered together the claim that turnover of HM during 1987-88 was only Rs. 9.50 lakhs is incorrect. The question whether it was more than Rs. 1.5 crores need further examination and can be done only after deciding which evidences are to be accepted. Even if the value of clearance is below Rs. 1.5 crores there will be duty demand that will arise, except that the demand will be for reduced amounts. Depending on how the difference in views between the two Members gets decided, the matter can be remitted to adjudication authority for re-determination of the quantum of duty and other liabilities.

68.6. In para 25 it is observed that the demand is solely based on documents recovered from third parties. I do not agree with this argument. In the first place the so called third party was a part of HM itself till 09-05-88 and at any rate the third party is a marketing concern of the products in question and not a stranger to the scene with any malice towards the appellants. Secondly there are other collateral evidence supporting the fact of clandestine removal though quantification is based mainly on such documents.

68.7. Para 28 of the order deals with the claim that TMPL were also selling products manufactured by Western Agencies, Candy Home Appliances, Konark Industries (India). If that be the case there should not be any difficulty for TMPL to produce documents to support such claim. No such documents appears to be submitted and the adjudicating authority cannot be faulted for giving detailed finding on such claim. It is also to be noted that these concerns also are entities of closely related persons. Data as to when these were set up and when they got license from Central Excise authorities etc..

68.8 The argument in para 30 above about police complaint about goods manufactured by spurious companies with the brand name of Maharajadoes not appear to be relevant because there is no chance such goods would be reflected in the records seized from the appellants. Further there is no specific details are given about the nature of complaint and what turned out from the investigation.

68.9. In para 31 an issue is raised about the apportionment of unaccounted clearance between the different manufacturers. Here there is an issue which needs to be looked into. But that does not mean that there were no clandestine removals. This is an information the appellants are privy to. They should disclose. In the absence of such disclosure the basis adopted by Revenue is reasonable.

68.10. The issue raised in para 35 that duty demand in respect of AEPL is confirmed with reference to each private record without ensuring that demand for the same goods is duplicated. I have scrutinised the work sheet attached after Annexure-H to the SCN (seen at pages 195 to 199 of Vol-I of paper book submitted) in this regard. Basically in this annexure demand is made for cases where delivery challans are seen or where entries are seen in security register without corresponding excise gate pass. For most of the entries both these match and there is demand for the same quantity only once. There can be dispute only in a few entries relating to 08-09-90 and 04-12-90 where there are slight differences in quantities reflected in different registers, 17-11-90 where demand is based only on internal performance report and 04-12-90. Even in these cases there is no demand for the same goods many times as argued by appellants. At any rate such discrepancy in one or two entries cannot wipe off the entire demand.

68.11. In para 36 above the claim of the appellant that some of the removals were of repaired washing machines is dealt with. If that be the case it is for appellants to prove the claim. It is not for Revenue to prove that the entries were not of repaired washing machines. Further repairs in the normal course is expected to be isolated events and cannot be of 10 to 50 pieces in one consignment. Further during the relevant time there was strict procedure prescribing that intimation of goods returned for repair should be given to the department. No such intimations were given. So I feel this is just an argument for creating confusion.

69. I am not in agreement with the argument that clandestine removals are decided by the adjudicating authority based on despatch plans only. I have seen paragraph 11.6 which reproduces despatch plan for Dec 90. This information is used to co-relate the goods referred to 11.3 and 11.4 are of T/J Mixies and Washing Machines and are consistent with each other. I have not seen any duty demand based on despatch plan only.

70. On the whole dropping the demand in this case amounts to reaching a conclusion that clandestine removals cannot be established unless there are documents signed by authorized representatives of the company proving facts from procurement of raw materials to realization of sales proceeds and unless the records are kept in the factory or residence of the owners. When somebody tries to avoid law, the effort is not to leave trails. So such exhaustive evidence signed by representative of persons avoiding law kept at their premises cannot be produced. Even for proving criminal cases such standards are not adopted. Dropping the demand for clandestine removals in this case, in my view amounts to lay down a law that in no case clandestine manufacture can be proved. In my view no such position emerges from the dozens of decisions quoted by the appellants. IN this context the following decisions which explains the standard of proof required in such cases need to be taken into account:

(i) CCE Vs. International Cylinders Pvt. Ltd 2010 (255) ELT 68 (H.P.)

(ii) D. Bhoormull, 1983 (13) ELT 1546 (SC), Paras 30,31

(iii) Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Indore as reported in AIR 1973 SC 2266 also at (1973) 90 ITR 271 (SC),

(iv) T. Shankar Prasad Vs. State of Andhra Pradesh as reported in 2004 (164) E.L.T. 143 (S.C.), Paras 11 to 15.

(v) Maharashtra State Board of Secondary and Higher Education Vs K.S. Gandhi & Ors (1991) 2 SCC 716, Para 37.

71. There are other two counts on which duty is demanded these are discussed below.

72. The marketing company was charging extra amount from dealers and the amount was spent on advertising expense. It is argued that the marketing concern was doing advertisement for the manufacturing concern and so the additional monies realized should for part of assessable Value. I do not find any merit in this argument because the marketing company will be interested in promoting its business and money which has not reached the manufacturer cannot be treated as consideration received. There is nothing unusual about marketing firm charging more than the price at which goods were sold by the manufacturing unit to them. Though Revenue argues that the manufacturers and the marketing company are concerns of the same group of persons, legally these are different entities the marketing company being a Limited company and the manufacturing firms being partnership concerns with different combinations of persons, though the persons are closely related.

73. The next issue is that Revenue argues that the manufacturing concerns gave quantity discounts ranging from 2.5% to 3.5% to TMPL which cannot be allowed as deduction for arriving at assessable value because such quantity discounts were not given to other distributors who lifted comparable quantum of materials. As already explained TMPL is a marketing concern and others were distributors. Since these are different classes of buyers a separate scheme of discounts for the former cannot be rejected as per the provisions of Act and Rules then in force.

74. On the matter of the above two points on valuation I agree with the finding of Member (Judicial).

75. In the matter of confiscation, I find that the appellant firms were not maintaining records to show daily production correctly. However only certain goods at DE-II (226 motors of 500 watts capacity and 75 Motors of 450 watts capacity), KI (39 wooden boxes containing 4 maharaja juicers each) and AEPL (115 washing machines) were in fully finished form. I am of the view that the adjudicating authority was correct in confiscating the goods as per provisions of Rule 173 Q. In the case of other goods like goods in the shop floor fully assembled Mixi Body etc were not marketable goods I do not find any merit in the argument of Revenue that they should have accounted these goods in RG-1 at intermediate stage. Consequently the quantum of redemption fine and penalty on this count may need re-determination by the adjudicating authority.

76. Thus the case of clandestine removal has to be examined with reference to the various evidences available and quantification of duty is a very time consuming exercise and also depends on which piece of evidence is accepted and which is rejected. The major evidences are the records seized from the office of the TMPL and those from the residence of the HO Bhatia. First a decision is to be taken whether these evidences are to be accepted. Since there is no agreement on this issue between the two Members first this issue needs to be decided before detailed quantification can be done. Without deciding on this issue embarking on a quantification exercise will amount to wasting time and resources of the Tribunal. Even if these evidences are rejected there will be some portion of demand that will get confirmed on the basis of other evidence. In the circumstances I am of the view that the admissibility of these evidences should be decided first by referring the matter to a third Member.

77. So I record my finding only to the extent that the records seized at the residence of H. O. Bhatia and at the Office of TMPL should be admitted as evidence and then duty liability worked out. Depending on the decision of the third Member, the adjudicating authority is to be asked to re-determine the quantum of duty and other liabilities, since there are a few issues relating to calculation of duty liability and quantum of redemption fine and penalty which need to be re-examined as recorded by me.

(Mathew John)

Member (Technical)

78. POINTS OF DIFFERENCE IN OPINION

(a) Whether the evidences seized from the residence of HO Bhatia and that seized from the office of TMPL is to be rejected for reason recorded by Member (Judicial) and the demands are to be dropped because these are the main evidences and for other reasons as recorded by Member(Judicial);

(b) The unaccounted goods seized need not be confiscated

OR

(a) Whether the records seized from the residence of HO Bhatia and that seized from the office of TMPL are to be admitted as evidence and duty liability worked out accordingly and also whether there is a case subsisting if at all these evidences are rejected?

(b) The unaccounted goods in finished form not accounted in RG-1 are to be confiscated.

(Pronounced on _____)

(Archana Wadhwa)

Member (Judicial)

(Mathew John)

Member (Technical)

79. The Registry is directed to place the matter before the Hon. President of CESTAT for resolving the above difference in opinion between Members.

(Archana Wadhwa)

Member (Judicial)

(Mathew John)

Member (Technical)

RM

Per. Rakesh Kumar :-

79. Before coming to the points of dispute, it would be worthwhile having a look at the facts of this case.

79.1 M/s Hindustan Machines (hereinafter referred to as HM) is a partnership firm with Shri Harish Kumar, son of Shri Om Prakash and his mother Mrs. Raksha Devi as its partner. This firm, constituted in 1975, is engaged in manufacture of mixer-grinders, toasters and electric irons under brandname Maharaja. The brandname Maharaja is registered in respect of mixer-grinders for kitchen use in the name of Shri Harish Kumar, Mrs. Raksha Devi and Mrs. Radha Devi, mother-in-law of Shri Harish Kumar and this brandname in respect of washing machine is registered in the name of Shri Harish Kumar and Mrs. Raksha Devi. HM were availing SSI exemption notification since 1984-85.

79.2 M/s Dynamic Engineers, Unit I (hereinafter referred to as DE-I) is a partnership firm of Shri Ram Swaroop and Shri Om Prakash, Father of Shri Harish Kumar. This firm came into existence in 1986 and is engaged in manufacture of mixer- grinders of Maharajabrand. This firm was also availing SSI exemption.

79.3 M/s Konark Industries (hereinafter referred to as KI) is a partnership firm of Mrs. Anita, wife of Shri Harish Kumar and Shri Mohan Lal. This firm, engaged in manufacture of mixer-grinders, Juicers and jar attachments came into existence on 1988 and was availing SSI exemption. This unit was also using Maharajabrandname on its products.

79.4 M/s Asiatic Engineer (P) Ltd. (hereinafter referred to as AEPL) is a partnership concern of Shri Harish Kumar, Shri B.B. Bhaskar and Mrs. Madhu Bhatia (sister of Shri H.O. Bhatia). This firm, started in 1988 was manufacturing washing machines and centrifugal dryers with Maharaja brandname. This unit was also availing SSI exemption.

79.5 M/s Dynamic Engineers, Unit II (hereinafter referred to as DE-II) started in 1990 for manufacture of Motors of 300W, 450W and 500W motors and parts of motors for mixer-grinders. This unit was also availing SSI exemption.

79.6 M/s Maharaja Kitchen Aids Pvt. Ltd. with Shri R.K. Arora and Shri Harish Kumar as Directors came into existence in 1983 as a marketing company for marketing of the products of Maharaja group of companies. However this company closed its operations and as such during the period of dispute i.e. 1987-1988 to 1990-1991, this company was not in operation.

79.7 M/s Technocrat Marketing P. Ltd. (hereinafter referred to as TMPL) with Shri R.K. Arora and Shri Sunita Bhatia, wife of Shri Hari Om Bhatia, C.A. as Directors, came into existence on 9/5/88 for marketing of house hold appliances and it is alleged that they were marketing only the goods manufactured by Maharaja group of companies.

79.8 M/s Kaveri Shilp Kala Ltd., a company with Shri A.S. Verma, Shri Suresh Palta, Shri B.B. Bhaskar and Shri H.O. Bhatia as Directors, deals in house hold appliances and is alleged to have dealt with the goods cleared clandestinely by HM, KI, DE-I and AEPL.

79.9 M/s Panchsheel Agencies, M/s N.D. Sales and M/s Ideal Home Appliances are the dealers in Gujarat who are alleged to have received and sold the non-duty paid goods manufactured and cleared by HM, KI, DE-I & AEPL.

79.10 As mentioned above, while HM is the owner of the brandname Maharaja in respect of Mixer grinders and Washing machines, other group units KI, DE-I, DE-II and AEPL were using this brandname on their products. During the period of dispute, all these units including HM were availing SSI exemption. There is no dispute that during the period of dispute in this case, benefit of SSI exemption to a unit using the brandname of another person could be denied only if the brandname owner unit was not eligible for SSI exemption.

79.11 The premises of HM, DE-I, DE-II, KI, AEPL, TMPL and its Directors and some of the dealers of Maharaja brand goods were searched by the officers of DGCEI, on 11/12/90 in course of which

- (a) there was shortage of 400 pieces of juicer attachments v/a Rs. 9,04,977/- in the premises of HM;
- (b) 39 boxes each containing four Maharaja brand juicer were found in the premises of KI which were not entered in the RG-1 register ;
- (c) in the premises of AEPL, 115 washing machines v/a Rs. 3,85,078/- were found in excess of the balance in the RG-1 register; and beside this, some documents like GRs, daily performance reports etc. were recovered;
- (d) in course of search of the factory premises of DE-II, besides certain stock of motors not accounted in RG-1 register, certain internal records regarding production of mixer-grinders were recovered ; and
- (e) from the office premises of TMPL and residential premises of Shri H.O. Bhatia, a number of documents were recovered which appeared to be pertaining to sale of Maharaja brand goods

manufactured by HM, DE-I, KI and AEPL, one of which was titled sales statement of 1987 containing dealerwise details of sale of goods and also the average sales per month during the year 1987 total sales during 1987 according to this paper were 23709.

79.12 The department treating the figures in the document Sales statement of 1987 as the figures of Maharaja brand mixer grinders manufactured by HM during 1987 and on this basis, estimating that during April December 1987 HM have cleared 18988 Maharaja brand mixer grinders and taking their value as Rs. 900/- per mixer-grinder, has alleged that during 1987-1988, value of their actual clearances was Rs. 1.89 crores as against declared value of Rs. 9,49,096/-, during 1988-1989, they were not eligible for SSI exemption, and for this reason the other units M/s DE-I, DE-II, KI and AEPL were also not eligible for SSI exemption, as they were using Maharaja brand of HM on their products. The duty demands totalling Rs. 81,16,918/- in Annexure D-I, D-II, D-III and D-IX of the show cause notice against HM, DE-I, KI and AEPL respectively for 1988-1989 to 1990-1991 period are on this basis.

79.13 In addition to above duty demands from HM, DE-I, KI & AEPL on the basis of denial of SSI exemption in respect of the clearances recorded in their respective RG-1 register, the Department, on the basis of -

- (a) sales statement of 1987, recovered from premier of TMPL ;

(b) letter dated 30/8/88 recovered from TMPL, addressed to Shri R.K. Arora; and

(c) some other documents recovered from TMPL and residential premises of Shri H.O. Bhatia ;

has alleged clandestine clearances without payment of duty by HM during 1987-1988 to December 1990 as detailed in Annexure D-IV to the show cause notice. Total duty demands on this basis are Rs. 94,73,689/-.

79.14 Duty demands of Rs. 33,87,216/-, Rs. 1,62,009/- and Rs. 14,97,576/- against DE, KI and AEPL for period from September 1988 to March 1991 are based on some documents recovered from the factory premises of these companies. These duty demands are detailed in Annexure D-V, D-VI and D-X of the show cause notice.

79.15 The duty demands of Rs. 71,01,972/-, Rs. 4,39,059/- and Rs. 38,57,251/- against HM, DE-I and KI have been confirmed for 1987-1988 to August 1989 period in respect of alleged clandestine clearance by these units based on average sale figures contained in File No. C-3 recovered from the premises of TMPL. These duty demands are detailed in Annexure D-VII.

79.16 Duty demands in Annexure D-XI and D-XII for Rs. 20,46,814/- and Rs. 10,99,815/- respectively are based on addition of advertisement and publicity expenses incurred by TMPL on promoting the sales of mixer-grinders and washing machines.

79.17 While Honble Member (Judicial) holding that the documents recovered from the office premises of TMPL, residential premises of Shri H.O. Bhatia (husband of Mrs. Sunita Bhatia, Director of TMPL) and the factory premises of DE-I, DE-II, KI and AEPL are not sufficient to confirm the demands against them and the documents recovered from TMPL and residence of Shri H.O. Bhatia cannot be treated as pertaining to clearances made by HM, DE-I, KI and AEPL, has dropped the duty demands and has also set aside the confiscation of the seized goods, Honble Member (Technical) has held that the documents recovered from the office premises of TMPL and residential premises of Shri H.O. Bhatia should be admitted as evidence and duty liability on the basis of those documents should be worked out.

79.18 Accordingly the following points of difference have been referred to third member for decision

(a) whether the evidences seized from the residence of H.O. Bhatia and that seized from the office of TMPL is to be rejected for reason recorded by Member (Judicial) and the demands are to be dropped because these are the main evidences and for other reasons as recorded by Member (Judicial) ;

(b) the unaccounted goods need not be confiscated ;

or

(a) Whether on the records seized from the residence of H.O. Bhatia and that seized from the office of TMPL are to be admitted as evidence and duty liability worked out accordingly and also whether there is a case subsisting if at all these evidences are rejected.

(b) The unaccounted goods in finished form not accounted in RG-1 register are to be confiscated.

80. Heard both the sides on the points of difference on 1/11/12 and 20/12/12.

81. Shri K.K. Anand, Advocate, the learned Counsel representing HM, AEPL, DE and KI and Shri Bipin Garg, Advocate, the learned Counsel representing other appellants, made the following submissions :-

(1) The duty demands based on denial of SSI exemption notification No. 175/86-CE to HM, DE-I, KI and AEPL are mainly based on the document regarding Sales statement for 1987 recovered from the premises of TMPL. The figures in this statement cannot be treated as the figures of sale of Maharaja brand mixer-grinder cleared by HM during January-December 1987 period, as there is nothing in this document, or any other document recovered from the premises of TMPL or Shri H.O. Bhatia to arrive at this conclusion. No inquiry has been conducted with the dealers whose names are figuring in this statement to ascertain as to whether the items purchased by them were Maharaja brand goods and if so whether the goods were mixer grinders or other items like steam press or toasters, as HM during the period of dispute were manufacturing these items also. In any case, since TMPL had come into existence from 9/5/88, it is inconceivable that TMPL would be having alleged sales figure for the year 1987-1988 when it was not in existence.

(2) There is absolutely no indication either in the show cause notice or in the order-in-original as to who prepared the purported sale statement of 1987. There is absolutely no evidence to show that the figures in this sale statement of 1987 recovered from the premises of TMPL were the figures of sale of mixer-grinder of Maharaja brand manufactured and cleared by HM during the year 1987. Even the average price of each piece has been arbitrarily taken as Rs. 900/- while the department in Annexure D-IV (I) to the show cause notice has adopted the value of mixer- grinder manufactured by HM as Rs. 800/- per piece. Even otherwise there is absolutely no justification for adopting the value of Rs. 900/- per piece as assessable value of mixer- grinder on the basis of sales reflected in the balance sheet of Maharaja Kitchen Aid Pvt. Ltd., which was marketing the goods manufactured by HM upto 1984-1985 and thereafter the same had closed down.

(3) When the figures in the document titled sales figures of 1987 recovered from the premises of IMPL cannot be treated as figures of clearances of mixer-grinders by HM during 1987 and when the declared value of clearances of excisable goods by HM during 1987-1988 was Rs. 9,19,270/-, the benefit of SSI exemption under Notification No. 175/1986-CE cannot be denied to HM and hence the other units DE-I, DE-II, KI and AEPL, who were using the Maharaja brandname on their products, also cannot be denied the benefit of SSI exemption. Thus, the duty demands in Annexure D-I, D-II, D-III and D-IX against HM, DE-I, KI and AEPL, based on the document called sales statement of 1987 recovered from the premises of TMPL are not sustainable, as this document cannot be linked to HM.

(4) The duty demands against HM in Annexure D-IV to the show cause notice and against HM, DE-I and KI in Annexure D-VII to the show cause notice are also based on the documents recovered from the premises of TMPL and the residential premises of H.O. Bhatia which besides the document called sales statement of 1987, are file No. C-3 seized from the premises of H.O. Bhatia, files seized from the premises of TMPL, B-17 register seized from the premises of TMPL etc. There is nothing in these documents on the basis of which these documents can be linked to the clearances made by HM, DE-I/DE-II, KI or AEPL. None of the Directors/partners or employees of the manufacturing unit were either confronted with the documents seized from the premises of TMPL and the residence of H.O. Bhatia, even though their several statements have been recorded. Even Shri Harish Kumar, Partner of HM, has not been confronted with the documents recovered from the premises of TMPL or H.O. Bhatia, specifically document titled sales statement of 1987, which department seeks to link with HM.

(5) Though the department seeks to rely upon the statements dated 11/12/90, 26/2/91 and 4/4/91 of Shri Shyam Kumar, the Despatch Clerk of TMPL, his cross examination has not been allowed. Even the statement of Shri Shyam Kumar stating that TMPL was dealing only in Maharaja brand goods does not help, as the documents recovered from the premises of TMPL or H.O. Bhatia do not indicate the nature of the goods and the unit by which the same had been manufactured.

(6) Just on the basis of internal correspondence among the employees of TMPL referring to OGL sales, it cannot be inferred that those sales pertain to clandestine clearances without payment of duty made by HM or by their group units DE-I, DE-II, KI and AEPL, as nobody in his statement has stated as to what the words OGL means.

(7) There is absolutely no justification for imposition of penalty on Shri R.K. Arora, TMPL, M/s Kaveri Shilpkala Ltd., Shri Hari Om Bhatia, M/s Panch Sheel Agencies, M/s N.D. Sales and M/s Ideal Home Appliances. The impugned order does not even discuss as to how these parties are liable for penalty under Rule 209A of the Central Excise Rules, 1944.

(8) When the duty demands against HM, and its other group units, are not sustainable, there is no question of imposition of penalty on them. Even confiscation of goods alleged to be finished goods not accounted in for the RG-1 register is without any basis, as the goods were not in fully finished stage.

82. Shri R.K. Verma, the learned Departmental Representative supporting the order recorded by the learned Member (Technical) made the following submissions :-

(1) Shri R.K. Arora and Ms. Sunita Bhatia (wife of Shri H.O. Bhatia), the Directors of TMPL, were associated with Maharaja group of companies prior to 1988 also. TMPL established in May 1988 was marketing the goods manufactured by the Maharaja group of companies namely HM, DE-I, DE-II, KI and AEPL. Just because prior to 9/5/88, TMPL did not exist, it does not mean that Shri R.K. Arora and Shri H.O. Bhatia were not associated with marketing of the goods manufactured by these units. In this regard, it must be kept in mind that Shri R.K. Arora, Director, TMPL was also the Director of M/s

maharaja Kitchen Aids Pvt. Ltd. the predecessor company of TMPL. Therefore, the documents regarding sale of various domestic appliances recovered from the premises of TMPL and the residential premises of H.O. Bhatia are very much relevant for proving that the allegation of duty evasion against HM, DE-I, DE-II, KI and AEPL.

(2) The figures in para 11.3 of the show cause notice, reproduced from document titled sales statement of 1987 recovered from the premises of TMPL are the figures of the sale of mixer-grinder of Maharaja brand manufactured and cleared by HM during 1987, as it is the mixer-grinder which was the most popular and fast selling product of Maharaja group of companies during that period. Since, during 1987-1988, the mixer- grinder were being produced mainly by HM, the figures in the sales statement of 1987 are the figures of mixer- grinders manufactured and cleared by HM during that period.

(3) Shri Shyam Kumar, a Despatch Clerk of TMPL, in his several statements has stated that all the goods purchased by TMPL and sold by them bear the brand name Maharaja and M/s TMPL are not purchasing or selling the goods of any other company. This statement of Shri Shyam Kumar has not been retracted by him and it clearly shows that the figures of sale reflected in various documents recovered from the premises of TMPL and the residential premises of Shri H.O. Bhatia, husband of Ms. Sunita Bhatia, Director of TMPL, pertain to the goods manufactured and cleared by the Maharaja Group of companies only.

(4) The internal correspondence recovered from the premises of TMPL and residential premises of Shri H.O. Bhatia indicates that the term OGL means the sales without bills. The sales made by TMPL without bills are obviously of the goods which have been manufactured and cleared by HM, DE-I, DE-II, KI and AEPL in a clandestine manner and without payment of duty.

(5) On the question of liability of the goods under seizure for confiscation, Shri Verma pleaded that the seized goods were in fully finished condition and since the same had not been accounted for in the RG-1 register, the same would be liable for confiscation.

83. I have considered the submissions from both the sides and perused the records.

84. Coming to the first point of difference as to whether the records seized from the office premises of TMPL and residence of Shri H.O. Bhatia are to be adopted as evidence of duty evasion against HM, DE-I, DE-II, KI and AEPL and duty liability worked out accordingly, I find that the duty demands based on the documents recovered from the premises of TMPL and residential premises of Shri H.O. Bhatia are those detailed in Annexure in D-I, D-II, D-III, D-IX, D-IV and D-VII of the Annexure to the show cause

notice. The duty demands in Annexure D-I, D-II, D-III and D-IX against HM, DE-I, DE-II, KI and AEPL respectively are based on denial of SSI exemption of these units during 1988-1989 to 1990-1991 period in respect of their admitted production. During this period, all these units were availing of SSI exemption under Notification No. 175/1986-CE, and all of them were using the brand name Maharaja on their products which is owned by HM. During the period of dispute, for denial of SSI exemption in respect of goods affixed with the brand name of another manufacturer, it was necessary that the brand name owner is not eligible for SSI exemption. Though during 1987-1988 the declared value of clearances of HM was Rs. 9,19,270/-, the department, on the basis of a document called sales statement of 1987 recovered from the premises of TMPL, alleges that this statement pertains to the clearances of Maharaja brand mixer-grinders manufactured and cleared by HM during 1987 and taking the value of each mixer-grinder as Rs. 900/-, the department alleges that the total clearances of HM during 1987-1988 were about Rs. 1.89 crores, far in excess of threshold limit for SSI exemption and hence neither HM were eligible for SSI exemption nor the other units - DE-I, DE-II, KI and AEPL using the brand name of HM were eligible for this exemption. Thus, the key question to be decided is as to whether the document sales statement of 1987 recovered from TMPL and which contains the dealerwise details of the sale of some goods, can be treated as statement of sale of Maharaja brand mixer-grinders manufactured and cleared by HM during 1987.

84.1 The above document does not mention the nature of the goods whether mixer-grinder, electric press or toasters, while during that period, HM in addition to mixer-grinders, were manufacturing toasters and electric irons also. There is nothing in this document or any other document recovered from TMPL to indicate that these sales figures pertain to mixer-grinders manufactured by HM. On this point, even the statement of Shri Shyam Kumar does not help, as all he has stated is that TMPL were purchasing and selling the goods of Maharaja brand only and from his statement it cannot be inferred that the figures in the document called sale statement of 1987 are the figures of mixer-grinder and that too manufactured by HM. Since it is also on record that DE-I was also manufacturing mixer-grinders since 1986 and, therefore, even if the figures in the statement are treated as of mixer-grinders, the same cannot be attributed to HM alone. No inquiry has been made with the dealers about the nature of the goods purchased by them. In view of these circumstances, I hold that the document called sales statement of 1987, in absence of any other evidence, cannot be treated as containing the figures of sale

of Maharaja brand mixer-grinders manufactured and cleared by HM during 1987 as while this document may arise doubts about claim of HM regarding their eligibility for SSI exemption during 1987-1988, it is not sufficient to establish preponderance of probability, which is the standard of proof required for establishing the allegation of duty evasion against an assessee. Once this document is discarded, the duty demands in Annexure D-I, D-II, D-III and D-IX against HM, DE-I, DE-II, KI and AEPL based on denial of SSI exemption become unsustainable.

85. As regards the duty demand against HM in Annexure D-IV based on sales statement of 1987 and some other documents recovered from the premises of TMPL and residence of Shri H.O. Bhatia F. No. 23 (HOB), F. No. 27 (HOB), B-17, A-85, etc. and the duty demands detailed in Annexure D-VII against HM, DE-I and KI based on File No. C-3, I am of the view that none of these documents can be said to be containing the figures regarding sale of the excisable goods manufactured by HM, DE-I and KI, as there is absolutely no evidence to indicate that these documents pertained to these manufacturing units. When the documents have been recovered from a third place, other than the manufacturing premises, there must be clear cut evidence linking those documents with the manufacturing unit before any duty demand is made against the manufacturing unit on the basis of those documents. Such demand against the manufacturing units cannot be made just on the basis of suspicion. Though there is reference to OGL sales in internal correspondence between the officials of TMPL, there is absolutely no evidence to indicate as to what this term meant or to prove that OGL sales were the sales of goods cleared clandestinely by HM, DE-I and KI. Therefore, the duty demands in Annexure D-IV and D-VII are also not sustainable.

86. In view of the above discussion, I hold that the duty demands confirmed against HM, DE-I/DE-II, KI and AEPL, based on the documents recovered from the office premises of TMPL and residential premises of Shri H.O. Bhatia are not sustainable for the reason that there is no evidence to link these documents with the manufacturing units HM, DE-I/DE-II, KI and AEPL.

87. As regards, the duty demands based on the documents recovered from the factory premises of DE-I/DE-II, KI and AEPL, since this question has not been referred I am not going into the same.

88. As regards the question of liability of seized goods for confiscation under Rule 173Q (1) (d) of the Central Excise Rules, the question of confiscation will come only if the goods under seizure are fully finished goods and had not been accounted in for the RG-1 register. The appellants plea on this point is that the goods were not in fully finished condition. On going through the impugned order, I find that the Adjudicating Authority without considering this plea of the appellant, has simply ordered confiscation of the seized goods and, as such, I agree with the finding of the learned Member (Judicial) that the order of the Commissioner is very cryptic and, as such, is not sustainable. Therefore on this point also, I agree with the findings of learned Member (Judicial).

89. In view of the above discussion, I agree with the findings of learned Member (Judicial) on both the points referred to the third Member.

(Rakesh Kumar)

Member (Technical)

PK

Final Order

In view of the majority order, the impugned orders are set aside and all the appeals are allowed with consequential relief to the appellants.

(Archana Wadhwa)

Member(Judicial)