



2024:DHC:1959-DB



*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 13 December 2023
Judgment pronounced on: 11 March 2024

+ CEAC 40/2012

COMMISSIONER OF CENTRAL EXCISE Appellant
 Through: Mr. Harpreet Singh, Senior
 Standing Counsel with Mr. Jatin
 Kumar, Advocate

versus

KUBER TOBACCO PRODUCTS PVT. LTD.
& ANR. Respondents
 Through: Mr. Karan Bharihoke & Mr.
 Wattan Sharma, Advocates

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. The present appeal has been filed under Section 35 (G) of the Central Excise Act, 1944 against Order No. A/83-110/2012 Ex (DB) dated 03.02.2012 passed by the Central Excise Sales Tax Appellate Tribunal [hereinafter referred to as “CESTAT”], Principal Bench, New Delhi, whereby, the appeal of the respondents herein was allowed vide Appeal No. E/560/06-574-06, 902/06, Ex (DB) & E/2039-2050/06-Ex dated 14.02.2012.

BACKGROUND

2. M/s. Kuber Tobacco Products (P) Ltd. (hereinafter referred as “KTPL”) were engaged in the manufacture of Gutkha/Pan Masala bearing the brand name “Kuber Moolchand etc.”. M/s. Kuber



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International (India) Ltd. [hereinafter referred as “KTIL”] were engaged in the manufacture of chewing tobacco and Khaini.

3. Pursuant to the information received that the respondents were indulging in clandestine removal of goods and evasion of duty, the Investigating Agency of the Revenue Department conducted a search at six different places on 09.10.1998 namely, 30-31-K, Siraspur, Delhi, office premises of respondents at 4130, Gali Barna, Sadar Bazar, Delhi, 6041-42, 2nd Floor, Basti Harphool Singh, Delhi, 5987, Plot No. 83, South Nawab Road, Basti Harphool Singh, Delhi and 463, Pocket-A (GF) Sarita Vihar, Delhi. As a result of search, various materials were seized and the same included 57 bags of Moolchand brand Gutka, weighing 877.800 kgs. valued at Rs. 3,76,000/-, being excess in stock of the balance recorded in statutory record at 31-K, Siraspur, Delhi; cash of Rs. 1.90 lakhs at 3909, Gali Barna, Sadar Bazar, Delhi; duplicate note books, Kacha challans, Hisaba book, photocopies of passbooks at 4103, Gali Barna, Sadar Bazar, some Kachcha documents and cash of Rs. 7.36 lakhs from Gangu Foods (P) Ltd., a sister concern of KTPL at 6041-42, 2nd Floor, Basti Harphool Singh, Delhi; blank invoices/bill books of four firms namely, M/s. Rishi Trading Co., Gali Pahar, Sadar Bazar, Delhi-110006, M/s. Swastik Trading Co., 1464, Qutab Road, Delhi-6, M/s. Shyam Tobacco Co., 6468-B, Basti Harphool Singh, Sadar Bazar, Delhi-6, M/s. Shukla Enterprises, 2861, Bagichi Raghunath, Sadar Bazar, Delhi-6 and 5987, Plot No. 83, South Nawab Road, Basti Harphool Singh, Delhi.

4. On 15.10.1998, 8 bags of Moolchand Super Gutka bearing Batch No. 012, manufactured in September, 1998, valued at Rs. 52,000/- were



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seized along with some documents from Mahamaya Trade Agencies, C/o Pawan Kkumar, Narbadpara, Gudiari Road, Raipur. On 16.10.1998, 31 packets of Kuber branch Gutka bearing Batch No. 013, manufactured in October, 1998, valued at Rs. 2015/- along with certain records were seized from M/s. Dalip Traders at Shop No. 23, Soot Market, Gandhi Bagh, Nagpur. On 27.10.1998, 30 bags of Moolchand Super Gutka bearing Batch No. 012, manufactured in September 1998, valued at Rs. 1,58,000/- along with certain records were seized from Bikaner Assam Roadlines, Gauhati. On 17.11.1998, 5200 pouches of Moolchand brand Gutka, valued at Rs. 3380/- as well as 49230 pouches of Gutka branch Khaini, valued at Rs. 52,184/- along with certain documents were seized from Mookambica Agencies, Shop No. 14, Bandi Madhu, Avenue Cross Road, Bangalore.

5. Show Cause Notice dated 31.07.2000 was issued to KTPPL and others for:-

- (a) Recovery of alleged short paid central excise duty amounting to Rs. 11,99,33,571/- from KTPPL chargeable on the goods valued at Rs. 29,95,79,744/- cleared clandestinely without payment of duty during the period from 01.08.1995 to 28.02.1997 along with interest and for appropriation of an amount of Rs. 2 Crore already paid by them voluntarily;
- (b) Revision and enhancement of the assessable value of the goods cleared during the period from 01.08.1995 to 28.02.1997, as detailed in the show cause notice and recovery of differential duty amounting to Rs. 45,45,084/- in respect of these clearances along with interest;



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- (c) Confiscation of land and building, plant and machinery of KTPPL used in connection with manufacture of branded goods;
 - (d) Imposition of penalty on KTPPL;
 - (e) Imposition of penalties on Shri Mool Chand Malu, Shri Vikas Malu, C.S. Baid, Shri Shubh Karan Bothra, Shri Mukesh Kapoor of M/s. Ganpati Agencies and M/s. Ganpati Mktg., Shri Gauri Shankar Khattar of M/s. Delhi Marketing Co. & M/s. New Delhi Mktg. Co., Shri Jarnail Singh of M/s. RKRT Goods Carrier Shri Harmit Singh of M/s. RKRT Goods Carrier, Shri Harpal Singh of M/s. RKRT Goods Carrier, Shkri Devji Bhai of M/s. Diamond Transport Corporation, Sh. Vijay Singh Daga of M/s. Bikaner Assam Roadlines, Shri Pawan Kumar Karnani of M/s. Mahamaya Trade Agencies, Shri Dilip Ram Vallabh Sarda of M/s. Dilip Traders, Shri Bhim Karan Jain of M/s., Snow View Exports Pvt. Ltd., Shri Akhay Chand Kothari of M/s. Kothari Agencies and Shri Ashok Chaudhary of M/s. Chaudhary Sales Corporation, Guwahati.
6. Show Cause Notice dated 23.11.2000 was issued to KI and other for:-
- (a) recovery of central excise duty allegedly short paid central excise duty amounting to Rs. 3,47,22,118/- from KI in respect of the clearance of branded Khaini valued at Rs. 6,94,44,235/- during the period 11.12.1995 to 05.10.1998 along with interest;
 - (b) recovery of differential duty amounting to Rs. 1,06,61,306/- in respect of the consignments of branded Khaini cleared during 01.12.1996 to 31.03.1999 period, which was allegedly short paid along with interest;



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- (c) Confiscation of land and building and plant and machinery of KI used in the manufacture of goods;
 - (d) Imposition of penalty on KI;
 - (e) Imposition of penalty on Shri Vikas Malu, Mool Chand Malu, Shri C.S. Baid, Shri Subh Karan Bothra, Shri Mukesh Kapoor of M/s. Ganpati Agencies and M/s. Ganpati Mktg. Co. Shri Gowri Shankar Khattar of Delhi Mktg. Co. and M/s. New Delhi Mktg. Co., Shri P. Vishwanath of M/s. Mookambica Agencies, Shri Akhay Chand Kothari of M/s. Kothari Agencies and Shri Jarnail Singh, Shri Harmit Singh, Shri Harpal Singh of M/s. RKRT Goods Carriers.
7. Show Cause Notice dated 31.07.2000 issued to M/s. KTPPL was adjudicated by the Commissioner of Central Excise, Delhi vide Order-in-Original No. 59/05 dated 30.12.2005 by which:-
- (a) total duty demand of Rs. 12,05,40,439/- on account clandestine removal and undervaluation was confirmed against M/s. KTPPL under proviso to Section 11 A (1) of the Central Excise Act, along with interest on this duty at the applicable rate under Section 11 AB *ibid*, and an amount of Rs. 2 Crores already paid during investigation was appropriated towards this demand;
 - (b) penalty of Rs. 12,05,40,439/- was imposed on KTPPL under Section 11 AC *ibid*;
 - (c) plant and machinery used by KTPPL, whose book value was Rs. 86,07,501/-, was ordered to be confiscated under Rule 173Q (2) of Central Excise Rules, 1944 with option to be redeemed on payment of redemption fine of Rs. 10 Lakh and;



(d) penalty under Rule 209 A of Central Excise Rules, 1944 was imposed on various noticees as under:-

(i) Shri Mool Chand Malu	Rs. 4 Crores
(ii) Shri Vikas Malu	Rs. 4 Crores
(iii) Shri C.S. Baid	Rs. 50 Lakhs
(iv) Shri Subh Karan Bothra	Rs. 30 Lakhs
(v) Shri Mukesh Kapoor	Rs. 20 Lakhs
(vi) Shri G.S. Khattar	Rs. 20 Lakhs
(vii) Shri Jarnail Singh, Harmit Singh & Sh. Harpal Singh of M/s. RTRK Good Carriers	Rs. 10 Lakhs on each
(viii) Shri Devji Bhai M/s. Diamond Transport Co.	Rs. 20 Lakhs
(ix) Shri Pawan Kumar Karnani of M/s. Mahamaya Trade Agencies	Rs. 30 Lakhs
(x) Shri Vijay Singh Daga of M/s. Bikaner Assam Roadlines	No penalty
(xi) Shri Dilip Ram Vallabh Sarda of M/s. Dilip Traders, Nagpur	Rs. 05 Lakhs
(xii) Shri Bhim Karan Jain of M/s. Snow View Exports Pvt. Ltd.	Rs. 20 Lakhs
(xiii) Shri A.C. Kothari of M/s. Kothari Agencies, Delhi	Rs. 05 Lakhs
(xiv) Shri Ashok Chaudhary Proprietor of M/s. Chaudhary Sales Corporation, Guwahati	Rs. 03 Lakhs

8. Against this order of the Commissioner, Appeals Nos. E/560-574/2006 and E/902/2006 were filed.

9. Show Cause Notice dated 23.11.2000 was adjudicated by the Commissioner of Central Excise, Delhi vide Order-in-Original No. 30/06 dated 03.01.2006 by which:-



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- (a) total central excise duty demand of Rs. 4,18,29,655/- (Rs. 3,47,22,118 + Rs. 71,07,737/-) on account of clandestine removal and undervaluation of goods was confirmed against KI under proviso to Section 11 A (1) of the Central Excise Act, 1944 along with interest on this duty at the applicable rate as per the provisions of Rule 11 AB *ibid*;
- (b) land, building and plant and machinery, etc., of the KI was ordered to be confiscated under Rule 173Q (2) of the Rules, 1944 with option to be redeemed on payment of redemption fine in lieu of confiscation of Rs. 3 Lakhs;
- (c) Penalty of Rs. 4,18,29,655/- was imposed on KI under Rule 173 Q read with Section 11 AC; and
- (d) Penalty under Rule 209 A of Central Excise Act, 1944 was imposed on various noticees as under:-

(i) Shri Mool Chand Malu	Rs. 4 Crores
(ii) Shri C.S. Baid	Rs. 50 Lakhs
(iii) Shri S.K. Bothra	Rs. 40 Lakhs
(iv) Shri Mukesh Kapoor	Rs. 50 Lakhs
(v) Shri G.S. Khattar	Rs. 50 Lakhs
(vi) Shri Akhay Chand Kothari	Rs. 20 Lakhs
(vii) Shri Jarnail Singh, Harmit Singh & Sh. Harpal Singh of M/s. RTRK Good Carriers	Rs. 2 Lakhs on each
(viii) Shri Devjee Bhai	Rs. 20 Lakhs
(ix) Shri P. Vishwanath of M.K. Agencies	No penalty

10. Against the above order of the Commissioner, Appeals No. E/2039 to 2050/2006 were filed by the respondents before CESTAT.

Two Dissenting Opinions of the Members of CESTAT



11. In the appeals filed by the respondents before the CESTAT, there was difference of opinion between Justice R.M.S. Khandeparkar, President (Judicial) and Mr. Rakesh Kumar, Member (Technical), who heard the appeals. The findings of President (Judicial) are as under:-

“The entire evidence sought to be relied upon in support of the allegations against the appellants, being unreliable and uncorroborated, and unsustainable to establish the charge of clandestine removal of goods, it is not necessary to deal with other grounds of challenge in the matter. Suffice to observe that in the absence of cogent evidence on record, the charge of clandestine removal against the appellants cannot be said to have been proved and hence the appeals are liable to be allowed.

In the result, the appeals are bound to succeed. The impugned orders are liable to be set aside with consequential relief. Accordingly, I allow the appeals and set aside the impugned orders.”

12. In his dissenting opinion, the Member (Technical) held as under:-

“The impugned orders are, therefore, upheld except for modification of quantum of penalty as mentioned above and interest on duty under Section 11 AB which shall be chargeable only in respect of clearances w.e.f. 28.09.96. The penalty on KTPPL and KI under Section 11 AC of Central Excise Act, 1944 shall be requantified by the Commissioner as per the directions in para 6 above for which the matter is remanded to the Commissioner. The appeals stand disposed of as above.”

Opinion of the third Member on reference:

13. In view of the above difference, the matter went before the third Member (Judicial) Mr. M.V. Ravindran. Mr. Ravindran agreed with the opinion of the President (Judicial) Justice R.M.S. Khandeparkar and disagreed with Mr. Rakesh Kumar, Member (Technical).

14. The resultant position was that by majority of 2:1, the appeals were allowed.



15. Present appeal has been filed against the majority view of the Tribunal. The following substantial question of law was framed:-

“Whether the majority opinion is right in accepting the appeal and deleting the entire addition and whether the majority opinion is perverse?”

SUBMISSIONS:

16. Arguments have been heard at length from Sh. Harpreet Singh, Senior Standing Counsel, appearing for the appellant/department as also Sh. Karan Bharihoke & Mr. Wattan Sharma, Advocates, appearing for the respondents.

17. The main pieces of evidence relied upon by the Excise Department to support the demand of excise duty in respect of alleged clandestine removal of the goods may be summarized as under:-

- “i) Statements dated 17.11.1998 of Mool Chand Malu and Vikas Malu, wherein, they had stated that about 50% of the production of branded Gutkha and branded Khaini was being cleared without payment of duty and that this was being done on account of stiff competition and that Kachcha Challan Books and Hisaba Books recovered from premises No. 4130, Gali Barna, Sadar Bazar, Delhi pertained to KI and KTPPL and contained the details of all the clearances during the clearances made without payment of duty;*
- ii) Statements of Shubh Karan Bothra, C.S. Baid and other persons;*
- iii) Contents of the loose sheets, Kachcha challans, books and Hisaba Books seized from premises No. 4130, Gali Barna, Delhi;*
- iv) Seizure of 57 bags of Mool Chand brand Gutkha, valued at Rs. 3,73,500/- from the factory premises of KTTPL on 09.10.1998.”*

18. Learned Senior Standing Counsel appearing on behalf of the Revenue has argued that the Panchnama explicitly enumerates the recovered documents including the Hisaba Books, Kachcha Challans and loose sheets, establishing a clear link to the premises under



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scrutiny. It is argued that the ownership of the documents is convincingly tied to Mool Chand Malu and Vikas Malu as evidenced by the recovery of the bank passbooks belonging to them and their family members from the premises. Additionally, it is also argued that matching entries in these documents with statutory records and transporter documents further solidify the connection of these documents to KTPPL & KI. It is also submitted that the assertion that the authenticity of the seizure documents/memos are compromised due to the non-appearance of the makers Shri Krishan Sharma and Umed Jain is unfounded. It is submitted that Mool Chand Malu and Vikas Malu have affirmed that the said persons were the primary authors, maintaining the credibility of the recovered document. It is also argued that despite being summoned by the Investigating Officer, both the aforesaid persons did not appear before the Officers, may be under pressure, and just because their statements could not be recorded, authenticity and recovery of the loose sheets, Kachcha Challans Books and Hisaba Books from the premises belonging to the respondents cannot be doubted.

19. It has been further argued that the entries in the resume and statutory record provide robust evidence that the documents recovered indeed pertain to KTPPL & KI. It is also argued that the unopposed opening of the premises by Mr. Bothra and the absence of any subsequent protest indicates his control over the keys and therefore the assertion by respondents disowning the premises and the recovered documents are to be discarded as an afterthought, given the lack of objection at the initial stage. It is also the argument of the learned



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Senior Standing Counsel that the recovery of 57 bags from the premises of the respondents KTPPL is a substantive piece of evidence and even though the physical verification did not reveal excess stock, the loose papers detailing clearance and the raw material purchases during the specific period constitute complete evidence of clandestine clearances. It is further argued that the absence of tangible evidence does not diminish the weight of the substantial information contained in the recovered documents. It is thus submitted that the cumulative evidence including the statements, document correlations and physical findings form a robust case against the respondents. It is stated that the authenticity of the recovered documents holds firm and attempts to discredit them, lack merit.

20. Per contra, the learned counsel of the respondents has supported the majority view of the CESTAT, arguing that Revenue has failed to prove the allegations and consequently the demand of dues and penalties. It has been argued that the statements recorded under Section 14 of the Central Excise Act are not voluntary. The statements were later retracted by the respondents and therefore prudence demands that such retracted statements should not be accepted without independent corroboration. His challenge to the minority view is essentially because of the absence of cogent evidence in support of charge against the respondents relating to clandestine removal of the goods, failure on the part of the department to adduce satisfactory evidence in support of such charge and the findings arrived at by the Adjudicating Authority in the absence of evidence in support thereof. His main grievance is that the findings are not borne out from the records but are merely



assumptions and presumptions sought to be drawn even in the absence of clinching material on record, even remotely suggesting such findings. It is argued that there is no evidence regards the purchase of raw material required in the manufacture of Pan Masala/Gutkha/Khaini. With regard to the recovery of Kachcha Chits/Hisaba Books, it has been argued that the same was not from the factory of the respondents but from the third party's premises, and in any case they cannot be relied upon, as there is no indication as to who is the author of such Chits/Hisaba Books. It is his submission that in the absence of any evidence, either regarding the authorship of the Chits or of excess procurement of raw material or removal of final product. According to the learned counsel, it is a case of no evidence and therefore the majority view of the CESTAT is logical and as per law.

ANALYSIS & CONCLUSION

21. The charges of clandestine removal of goods connotes accusations of serious nature. If the charges are of serious nature, evidence should also be equally strong to substantiate the charges, and therefore, the evidence needs careful scrutiny and appreciation.

22. Learned Senior Standing Counsel, appearing for the appellant, has argued that the majority view of the learned CESTAT has appreciated the evidence by applying the standard of proof as required to prove the charges in a criminal trial i.e. "proof beyond doubt", whereas, the adjudication proceedings are in the nature of civil proceedings and not criminal proceedings and therefore, the standard of proof of civil proceedings i.e. preponderance of probability is applicable in the adjudication proceedings. In this regard, the learned



counsel relied upon the decision in the case of **Commissioner of Police, New Delhi Vs. Narender Singh reported in (2006) 4 SCC 265**, wherein, it has been held as under:-

“12. It is not in dispute that the standard of proof required in recording a finding of conviction in a criminal case and in a departmental proceeding are distinct and different. Whereas, in a criminal case, it is essential to prove a charge beyond all reasonable doubt, in a departmental proceeding preponderance of probability would serve the purpose.

13. It is now settled by reason of a catena of decision of this Court that if an employee has been acquitted of a criminal charge, the same by itself would not be a ground not to initiate a departmental proceeding against him or to drop the same in the event an order of acquittal is passed.”

23. There is no dispute that in adjudication proceedings to establish the charge of clandestine removal and undervaluation, Revenue is not required to prove the case with mathematical precision. Such charges are to be established on the basis of preponderance of probabilities. However, the conclusions to be arrived at are necessarily to be logical and not on the basis of presumptions and assumptions. Suspicion, howsoever grave, cannot replace the test of proof.

24. Admittedly, the statements recorded under Section 14 of the Central Excise Act are admissible in evidence and can be used against the maker. Mool Chand Malu and his son Vikas Malu in their statements have stated that about 50% production of the branded Gutkha and branded Khaini were being cleared without payment of duty and that the Kachcha Challan Books and Hisaba Books recovered from 4130, Gali Barna, Sadar Bazar, Delhi pertains to KI & KTPPL. Such statements were retracted on 17.11.1998. While dealing with the confessions of Mool Chand Malu and Vikas Malu and the retractions



made by them, Sh. M.V. Ravindran, Member (Judicial) observed as under:-

"23. The Ld. Representatives for the Revenue have drawn my attention to the fact that Ld. Member (Technical) considered the depositions of Shri Moolchand Maloo in his statements dated 17.11.1998, and found that the same corroborated the statement recorded on the same date of Shri Vikas Malu. Statements of Shri Shubh Karan Bothra were also considered by him. Even retractions filed by them were considered by the Hon'ble Member (Technical).

*24. However while the Ld. Member (Technical) has recorded that each of them retracted their statements, the retractions are brushed aside by holding that the same were not only belated but were bald retractions without any evidence from which it can be inferred that there was any threat, coercion or inducement used in recording the same. I am unable to agree with this proposition. It is contrary to the law laid down by the Hon'ble Supreme Court in **Vinod Solanki vs Union of India, 2009 (233) ELT 157 (SC)**, wherein while considering various judgments of the Hon'ble Supreme Court, on which reliance has been placed by Revenue, it was held that-*

"34 Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such."

"35 It is one thing to say that a retracted confession is used as a corroborative piece of evidence to record a finding of guilt but it is another thing to say that such a finding is arrived at only on the basis of such confession although retracted at a later stage."

"37 The inference that burden of proof that he had made those statements under threat and coercion was solely on the proceedee does not rest on any legal principle. The question of the appellant's failure to discharge the burden would arise only when the burden was on him. If the burden was on the revenue, it was for it to prove the said fact. The Tribunal on its independent examination of the factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions of Section 24 of the Indian Evidence Act."

Therefore, burden was not on the deponents to prove that statements were obtained by threat and coercion. Moreover, had



the statements been voluntary and the retraction of statement dated 17.11.1998 been a bald retraction, there was no need to write 'Under Protest' on the TR-6 Challans, while depositing the total amount of Rupees Two Crores. These statements were not only retracted by them, but Shri Vikash Malu also submitted duly affirmed affidavit dated 3.9.2002, and offered himself for examination before the adjudicating authority in presence of officer of the department. Despite this, opportunity of his cross examination was not availed by Revenue, which lends credence to the retraction affidavits. As per ratio laid down in **Parle Beverages Pvt Ltd vs CCE, Bombay, 1998 (98)ELT 585 (SC)**, affidavit cannot be brushed aside solely on account of delay without going into the genuineness of the evidence adduced, and in case of doubt deponent can be cross-examined by the Revenue. In the affidavit filed by Shri Vikas Malu, he has not only stated that he was not the Director during the relevant period, but has also submitted the documentary evidence to that effect. Moreover, as evident from the impugned Order Shri Mool Chad Malu also sent a letter dated 4.12.1998 to the Commissioner alleging harassment of officials of the company, and that their Manager was detained continuously for more than 30 hours. Thereafter, he again sent a letter dated 5.8.1999 to the Chief Commissioner, wherein he reiterated that the officials of the appellant company were being subjected to unlawful harassment by the officers. The fact that they were not directors since September, 1998 was also corroborated from the depositions of Shri C.S. Baid in his cross examination held on 28.1.2005. Further, Shri Bothra not only backed out from his statement in his cross-examination, even in his immediate retraction dated 10.10.1998, his deposition that he was employed with M/s Kusum Trading Company since five to six years and there will not be his signature in any documents pertaining to KTPPL has not been rebutted by the Revenue by producing reliable evidence to the contrary. Statement of Shri C.S. Baid was also retracted by him. Shri Baid not only alleged that he was detained for 30 hours and that third degree methods were used against him, he also addressed a complaint to the Deputy Commissioner of Police, and submitted medical evidence indicating "Swelling face Lt. Side / Dep Psychosis I do not find any reason to accept the finding of the adjudicating authority that he may have slapped himself to obtain the medical evidence, or that the medical evidence ought to have been only from a Government Hospital. Shri Mukesh Kapoor and and Shri Gauri Shanker, in their cross-examination conducted on 31.1.2005, said that they have not seen 'hisaba books, and that they were not aware who has written the same. I find that these material aspects



have escaped the attention of the Hon'ble Member (Technical). In the above background the sound legal proposition that what is admitted need not be proved, is not applicable in the instant case. For the same reasons, I find that it would not be justified to rely on these oral testimonies in the peculiar facts of the case.

25. I find that the Hon'ble President has correctly relied on the judgment of Hon'ble Supreme Court in the matter *Nagubai Ammal and Others- vs B. Shama Rao*, AIR 1956 .se 593 wherein it was held that- "an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which matters depends on the circumstances under which it is made. I am unable to find these retracted oral testimonies as credible piece of evidence to sustain the charge against the Appellant Company.

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 Hon'ble Supreme Court in case of **Sitaram Sao v. State of Jharkhand - (2007) 12 see 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."

25. In our view, the majority view of the Tribunal rightly did not accept the retracted oral testimonies as credible piece of evidence based on the principles of law and sound reasoning. While dealing with the recovery of loose sheet, Hisaba Books, Kachcha Challans and the seizure of 57 bags from the factory premises of KTPPL, the majority view represented by Mr. M.V. Ravindran, Member (Judicial) observed as under:-



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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 isn't 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 Hon'ble 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 Hon'ble Member (Technical) was persuaded to assume that the same related to the Appellant company. As rightly observed by the Hon'ble 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 Hon'ble 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.

28. Physical verification conducted at the factory premises of the appellant company did not reveal any excess stock of raw material as such. There is evidence of seizure of 57 bags weighing 87.8 Kgs valued at Rs. 3,76,200/- from the factory premises of KTPPL during the visit of the officers, however I agree with the finding of the Hon'ble President that same could have been recorded in the course of the day and before their clearance, and even otherwise the seizure of 57 bags by itself cannot be a substitute for the proof of clandestine removal of goods.”



26. It is a settled law that there cannot be clandestine removal of the goods unless the assessee manufactures the same clandestinely and for that purpose, procures raw material clandestinely and uses it without disclosing its utilization. Admittedly, there is no evidence of purchase of major raw material like supari, tobacco etc even in the loose sheets/Hisaba Books recovered in the search. Revenue has not produced any evidence about the procurement of raw material which may be regarded as sufficient for the manufacture of the final product, which is alleged to have been clandestinely removed.

27. Member (Judicial), in Para No. 30, observed that there is no 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. He found no tangible proof of unauthorized payment for procuring such unaccounted raw material and packing material and also did not find any 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 and therefore came to a finding that unaccounted production in the factory of the respondent company has not been established. In **Commissioner of Central Excise Vs. Shakti Zarda Factory (I) Ltd. 2015 (321) ELT 438 (Del.)**, the Court declined to frame a question of law in a reference made to it from an order of a Tribunal on the issue of clandestine removal. In that case, it was found the CCE had relied upon evidence that was either inadmissible or lacked corroboration from other reliable concrete documentary evidence. It was pointed out that



“the initial burden was on the Department to prove the allegations of the clandestine receipt of raw material or manufacture and removal of the final products.” The Special Leave Petition filed by the Department against the said order being SLP (Civil) No. 6594 of 2004 was dismissed by the Supreme Court on 16th August, 2004.

28. **Commissioner of Central Excise Vs. Saakeen Alloys Pvt. Ltd. (2014) 308 ELT 655 (Guj.)** was again a case of alleged clandestine removal. The High Court pointed out that there needed to be positive evidence to establish the evasion. It was observed as under:-

“In absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross examination was also not made available so as to bring to the fore the true picture and therefore, it concluded against the Revenue observing that not permitting the cross examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below.”

29. The Special Leave Petition filed by the Department against the said order being SLP (Civil) (CC No. 19304-07 of 2014) was dismissed by the Supreme Court on 01.12.2024.

30. In the case of **Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II 2014 (311) ELT 529 (Tri.-Ahmd.)**, the learned CESTAT discussed the entire law concerning clandestine removal and enumerated the legal position as under:



- “(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
- (ii) Evidence in support thereof should be of:*
- (a) raw materials, in excess of that contained as per the statutory records;*
 - (b) instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*
 - (c) discovery of such finished goods outside the factory;*
 - (d) instances of sale of such goods to identified parties;*
 - (e) receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;*
 - (f) use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;*
 - (g) statements of buyers with some details of illicit manufacture and clearance;*
 - (h) proof of actual transportation of goods, cleared without payment of duty;*
 - (i) links between the documents recovered during the search and activities being carried on in the factory of production; etc.”*

31. Dealing with the aforesaid aspect, the observation of the learned Member (Judicial), CESTAT in Paras No. 29 & 30 is reproduced below:-

“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.



*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 Hon’ble President in para 47 onwards that the findings of the adjudicating authority are without any evidence and is not correct view as is liable to be set aside.”*

32. In the present case, there is no evidence to show that the basic raw material required for the manufacture of huge quantity of Gutkha and Khaini was procured by the respondents. Tribunal also found no tangible evidence of removal from the factory of unaccounted goods allegedly manufactured by loading from factory and transportation there from. Tribunal found no 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 clandestinely manner from the factory of the respondents. Tribunal also found no recovery of any unaccounted sale proceeds or substantial cash in the factory or office premises or anywhere else in control of the respondent company, backed by any confirmation, oral or written, from the person giving such cash against the goods removed in clandestine manner without payment of duty from the factory of the respondents.

33. The Commissioner in his impugned order answered the charge of clandestine removal of goods against the respondents on the basis of capacity of machines installed in the factory of the respondents, the electricity generated by gen-sets, number of labourers employed by them in the factory and the raw materials consumed during the relevant period. All these findings were arrived at essentially on the basis of statement of the witnesses read with contents of Hisaba Books, Kachcha Challans, loose sheets and G.Rs of the transporters stated to have been recovered during the course of investigation. While basing his findings, Commissioner took note that the total number of machines was 137 and as per the letter of the Chairman of the Board, each machine could manufacture 200 pouches per minute and therefore 137 machines could manufacture 277425000 pouches per month and if all the machines are utilized in three shifts for 25 days in a month, the total production would be 832275000 pouches per month. On the basis of the same, Commissioner made an estimate that for the period of 14 months from 07.05.1997 to 30.06.1998, the total production of KTPPL ought to have been 1165 crores of pouches i.e. 882575 bags and for the period of three months from 01.07.1998 to 05.08.1998 considering the



capacity production, it would be 525523 crore pouches i.e. 193356 bags, while the accusation has been restricted to 69551 bags. As regards the electricity consumed, the view of the Commissioner was that the loose sheets disclose that during the period of 20 days i.e. from 11.06.1998 to 30.06.1998, the appellants had purchased 29600 litres of diesel. The DG set consumes 55 liters per hour and therefore there was sufficient diesel to manufacture the high quantity of the goods by the respondents. Since at least two labourers were required to operate each machine, besides other labourers would also be required for packing, crushing of Supari, Kattha, mixing of compound and other ingredients, the respondents ought to have employed sufficient number of employees. The balance sheets of the respondents during the relevant years disclose employment of 50 to 60 labourers but the Commissioner disbelieved the same to be true on the ground that the number of employees must have been shown less to avoid provident fund liability and other complications and therefore the record in that regard must have been manipulated. Though, the suppliers disputed the supply of raw material to the respondents, the Commissioner was of the view that the same stands established by the contents of the loose sheets. Even though, the alleged supplier M/s. Isha Plastics denied supply of goods as described in the loose sheets but in the absence of details of supply being submitted by them, the Commissioner was of the view that they must have supplied the required number of bags. Similarly, the other supplier M/s. Alliance Overseas also denied the supply of liquid Paraffin and Glycerin but Commissioner took the view that the six invoices clearly disclosed the sale of liquid Paraffin which was



arranged by him through a dealer to the respondents. He was also of the view that as regards tobacco, the loose sheets refer to 37330 kgs tobacco which was sufficient to manufacture lakhs of pouches of Gutkha.

34. Learned CESTAT (majority view) took the view that working of the machines in the respondents' factory was not tested or certified to ascertain the production capacity of the machines. There is no Panchnama drawn to ascertain as to how many machines in the factory of the respondents were in working condition or were actually working and what was the production capacity of each of those machines. No records were available to hold that respondents were working in three shifts. It was for the department to ascertain and establish the same. The burden in this regard was on the department to prove the allegations with cogent material but the finding in this regard has been arrived at by the Commissioner essentially on assumptions and without any basis. There is no evidence of respondent employees having been employed to enhance the production nor is there any evidence of excess wages having been paid to the listing employees. The CESTAT (majority view) rightly observed that the letter of the Chairman about the normal rule of production cannot be a proof of the actual production capacity of the machines in the respondent's factory.

35. CESTAT ruled that Hisaba Book makes reference to various firms and persons as the buyers of the quantity mentioned therein. However, no attempt was made to record the statement of any such person at all. Member (Judicial) recorded in Para 33 of his order that



for confirming charges and for accepting the evidence adduced, a series of assumptions and presumptions are to be made, viz:

- (i) *The total number of machines installed was intimated on 11.8.97, which was not found incorrect by visiting Central Excise Officers or in Audit inspection by CERA and internal audit and there is no evidence of working for more than one shift a day. As per the appellant, the production capacity with such machines, in one shift, is not sufficient to manufacture the alleged huge quantity alleged to be removed in clandestine manner, and moreover, the duty fixed by the Board per machine, if taken into account would also indicate much less production than alleged in the Notice. As rightly observed by the Hon'ble President, the working of the machines in the appellant's factory was not tested or certified to ascertain the production capacity of the machines installed. Even number of machines installed in working condition was not recorded in panchnama drawn at factory. There is no record to show that the appellants were working for three shifts. Panchnama regarding the production capacity of the machines at totally different factory of a stranger could not have been applied to decide production capacity of the machines in the appellant's factory, as has been sought to be done in the impugned Orders. There is no evidence of additional employees having been employed to enhance the production, nor is there any evidence of excess wages having been paid to the existing employees. However, it is to be assumed that the factory was continuously running for three shifts, more machines than declared were installed, and that the actual production was grossly suppressed.*
- (ii) *Although, the stock of raw material found on physical verification at factory at 31-K, Siraspur, under panchnama dated 9.10.1998 'was found as per record, and there is no evidence of purchase of main raw materials 'Betel Nuts' (which constitutes 85% of the raw materials), Catechu, Perfume and Lime, it is to be assumed that all these raw materials were purchased in cash, brought to factory, and used in unaccounted manufacture of Pan Masala / Guthka in the factor premises.*
- (iii) *Despite the fact that the panchnama do 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', it is to be assumed that the same were recovered under the panchnama drawn at Premises 4130, Gali Barna, Delhi.*
- (iv) *It is to be assumed that Shri Bothra would have keys to the*



- said premises, although not recorded in the Panchnama.
- (v) Although the alleged supplier of paraffin, Shri Rajiv Gulati stated that he issued invoices only if he sells the goods and denied the contents of loose sheets, it is to be assumed that he had supplied paraffin,
 - (vi) Although Shri Bhikam Chand Chaudhary in his statement, when confronted with loose sheets for alleging supply of Tobacco to the assessee by Mis Shambhu Dayal Kaushal & Sons and Mis Shiv Devi Enterprises showed his unawareness about the same, it is to be assumed that unaccounted Tobacco as mentioned in the loose sheets was supplied by them to the appellant company.
 - (vii) Although Shri Chetan Kanodia of M/s Kanodia Technoplast Pvt Ltd, in his statement denied the contents of loose sheets and denied having sold laminations without invoices or having received payments in cash against any such sale, it is to be assumed that the alleged unaccounted laminations were sold by him to the appellant company.
 - (viii) There is no evidence of any fruitful inquiry from any Courier services, despite allegation of dispatch of Kachha Challans by the appellant company through any Courier Service, however it is to be presumed that the same were sent through Courier by the appellant company.
 - (ix) It is to be assumed that huge quantity of 91445 bags was removed from factory in a clandestine manner.
 - (x) Although the amount of Rs. Two Crores deposited during the investigations was clearly deposited by recording on the Challans 'Duty under protest', it is to be assumed that the said payment was voluntary with acceptance of the clandestine removal.
 - (xi) It is to be assumed that Original Kachha Challans must have been destroyed by all of the alleged distributors/dealers.
 - (xii) It is to be assumed that 'packet' mentioned on Kachha Challans, is actually 'bag',
 - (xiii) It is also to be assumed that the appellant manufacturer was the actual consignor although the name of the consignor in the GRs /RRs relied by Revenue are other than that of the appellant manufacturer;
 - (xiv) It is also to be assumed that although the description of goods on GR /RR were 'Chewing Tobacco', 'Tobacco', 'Supari', 'Garments, Shoes, Handloom Cloth etc', 'Gum Powder', 'Rakhi', the same actually were 'Branded Guthka' manufactured and clandestinely cleared by the appellant company.
 - (xv) It is to be assumed that there must be receipt of cash amount over and above the sale amount recorded in statutory records to sustain the charge of under-valuation.



(xvi) Despite retractions having been filed, and the veracity of alleged voluntary statements was effectively assailed in cross-examination, it is to be assumed that all the statements relied by the Revenue were voluntary.”

36. The burden of proving the clandestine removal was on the Revenue. The credibility of the documentary evidence i.e. seizure memos, the loose sheets, Hisaba Books for proving the involvement of respondents in the clandestine activities was required to be duly established. The authors of the loose sheets and the Hisaba Books were not examined. The main evidence relied upon by the Revenue consisting of Hisaba Book, Kachcha Challans and loose sheets are duplicate copies, raising questions about their authenticity. There is no proof that the contents of the documents are accurate. Further, the proper procedures for the seizure of the documents to ensure the authenticity and integrity of the seized material has also not been followed by the Revenue and this includes the proper sealing and protection from tampering.

37. The allegations of clandestine removal and under valuation as brought-forth by the Revenue were required to be substantiated with tangible evidence rather than being sought to be supported merely on the basis of assumptions and presumptions. Revenue has not presented any direct evidence that unequivocally establishes the respondent's involvement in clandestine removal and under valuation of the goods. The charges are heavily reliant on a series of assumptions, such as factories operating in three shifts and unrecorded production and sales without complete evidence to back such claims. There is also no verified assessment of the production capacity of the installed machines



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in a single shift operation nor any evidence to suggest that the factory was operating beyond the stated capacity. Assertions by the Revenue about the production capacities are speculative without testing or certification by the competent authority.

38. The physical verification of the stocks and the absence of discrepancies in the recorded quantity of the raw material as well as the lack of evidence regarding the purchase of significant quantities of raw materials and cash undermine the presumption of unaccounted manufacture. Furthermore, the recovery of documents from the premises unrelated to the respondents and reliance of such documents to establish clandestine operations are found to be procedurally flawed and legally untenable by the learned CESTAT. The reliance by the Revenue on the statements that have been retracted or challenged in cross-examination, without corroborating evidence weakens the credibility of such testimonies as the basis for establishing the guilt. Based upon above, learned Tribunal (Majority view) has rightly concluded that the evidence sought to be relied upon in support of allegations against the respondents are unreliable, uncorroborated and unsustainable to establish the charge of clandestine removal of goods.

39. The charges of clandestine removal and under valuation against the respondents in this case cannot be sustained merely on the basis of assumptions and presumptions. The absence of direct, credible evidence linking the respondents to the alleged offences necessitate the dismissal of the charges. The decision is grounded on the principles of justice and the requirement for the burden of proof to be satisfactorily met by the party alleging the wrong doing. There is no dispute with



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regard to the principle of law laid down in the authority cited by the learned Standing Counsel on behalf of the appellant. However, they are distinguishable and applicable in the facts and circumstances of the said cases.

40. On a careful perusal of the reasons assigned and the case law relied upon in the impugned order, it is evident that learned President (Judicial) and Member (Judicial) conducted a meticulous exercise to examine and appreciate the evidence on record in the light of the settled principles and came to a categorical finding that in the absence of cogent evidence on record, charges of clandestine removal against the respondents cannot be said to have been proved.

41. 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 the respondents, in the facts and circumstances of this case, we hold that the impugned majority order of the CESTAT does not suffer from serious error and does not merit any interference. The appeal is therefore dismissed.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

11 March, 2024

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