

(2015) 09 DEL CK 0061

In the Delhi High Court

Case No : CEAC 6 of 2013

Flevel International

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 17-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35G, 9D

Citation : (2016) 332 ELT 416 : (2015) 52 GST 827

Hon'ble Judges : S. Muralidhar, J;Vibhu Bakhru, J

Bench : Division Bench

Advocate : C. Hari Shanker, Senior Advocate, Rajesh Mahna and Ruchir Bhatia, for the Appellant; Satish Kumar, Senior SC, Advocates for the Respondent

Judgement

Dr. S. Muralidhar, J—This appeal under Section 35G of the Central Excise Act, 1944 ("CE Act") is directed against an order dated 22nd November, 2012 passed by the Customs Excise Service Tax Appellate Tribunal ("CESTAT") by the majority of 2:1.

2. By the order dated 22nd July, 2014 while admitting this appeal, the following substantial question of law was framed by this Court:

"Whether the decision of the Customs, Excise and Service Tax Appellate Tribunal upholding demand of Rs. 58,54,825/- and confiscation of 24 air-conditioners along with duty and penalty demand of Rs. 3,16,800/- is perverse and contrary to the facts on record?"

Background facts

3. The Appellant, a proprietary concern of which Mrs. Neera Khanna is the sole Proprietrix, was engaged in the manufacturing of air-conditioners. The Appellant is also stated to be engaged in the trading of compressors, water coolers, transformers etc. It was a small scale unit and registered as such with the Central Excise Department. It was exempted from payment of excise duty on that basis.

4. On 28th February, 1992, the officers of the Central Excise Department (hereafter "Department") visited the factory premises of the Appellant. They found 36 air-conditioners (ACs) valued at Rs. 7,92,000/-, 281 compressors valued at Rs. 47,77,000/-, 4 deep freezers valued collectively at Rs. 41,500/- and 4 fan motors collectively valued at Rs.1,600/-.

5. On the same day, the officers of the Department visited the residence of Mr. Pradeep Khanna, the husband of Mrs. Neera Khanna. He was the Proprietor of M/s. Thermoking. The officers seized 24 ACs from the residence of Mr. Khanna.

6. According to the Appellant, immediately thereafter she appeared before the officers of the Department, produced the RG-1 Register and claimed that 36 ACs were duly accounted for therein. The Appellant states that on that very date the 36 ACs, 4 fan motors and 24 ACs seized were released provisionally on 13th April 1992, after the Appellant furnished a bond and bank guarantee.

The show cause notice

7. During the investigation statements were recorded by the officers of the Department of some of the persons who purportedly purchased ACs from the Appellant as well of the representatives of M/s. Sri Ram Refrigeration, Hyderabad ("SRR") and M/s. Kirloskar Brothers Ltd., Pune ("KBL"). The Department served the Appellant with a Show Cause Notice (SCN) dated 27th August, 1992 calling upon the Appellant to show cause why:

(a) 36 ACs valued at Rs. 7,92,000/-, 4 deep freezers valued at Rs. 41,500/- and four fan motors valued at Rs. 1,600/- seized from their factory premises should not be confiscated under the provisions of Rule 173Q and 226 of Central Excise Rules, 1944 (CE Rules).

(b) Central excise duty amounting to Rs. 3,16,800/- on 24 ACs cleared by them on 27th February 1992 without payment of central excise duty should not be demanded and recovered from the under provisions of Rule 9 (2) read with Section 11A of CE Act.

(c) Duty leviable on ACs amounting to Rs. 58,44,825/- as worked out in Annexures XXVIII for the period from 88-89 to 89-90 in addition to duty on 36 ACs amounting to Rs. 3,53,640/- show in para 17(i) to 17(xx) should not be recovered under the provisions of Rule 9(1) read with Section 11A of the CE Act by invoking extended period upto 5 years on the grounds mentioned above.

(d) Duty amounting to Rs. 12,80,542.50 as shown in para 13 of the SCN should not be recovered and benefit of concessional rate of duty under Central Excise Notification No. 75/87 dated 1st March 1987 as amended should not be denied.

(e) Penalty should not be imposed on them under Rule 9 (2), 173Q and 226 of the CE Rules.

8. It was, inter alia, stated in para 17 of the SCN that 3 ACs had been found installed in the houses of various persons, the details of which were listed out in

sub-paras (i) to (xx). Further in para 18, it was stated as under:-

"(i) M/s. Flevel International removed 36 air- conditioners from its factory without following Central Excise Procedure and payment of excise duty. They adopted following modus operandi for evasion of excise duty.

(ii) From point No. iii, iv, vi, ix, xv above, it appears that they were clearing goods without raising any bill and gate pass. (iii) From point No. ii, iii, xvi, xvii and xviii above, it appears that they have been manufacturing and removing A.C. in the guise of gas compressors and extra payments were reflected in the ledgers without corresponding bills.

(iv) From point No.i, vii, viii, xi, xiv, xv, xiv, xx, it appears that they had been raising invoices but no corresponding excise gate passes were issued.

(v) Point No. viii reveals that they even issued bills in triplicate sets bearing the same serial number."

9. The show cause notice also alleged that although the Appellant had supplied and installed ACs, in some instances, the invoices showed the sale of compressors. The scrutiny of the ledger for the years 1988-89 and 1989-90 showed that certain payments had been made and credited in the books but no bill numbers have been mentioned against such receipts and the debit column of the ledgers also reflected the conversing position. The SCN also referred to the statement of one Mr. K.V. Subba Rao, Deputy Manager (Marketing) of SRR recorded on 24th June, 1992 regarding supply of compressors to the Appellant, which was registered as an Original Equipment Manufacturer (OEM) to enable them to use the said compressors to manufacture ACs. Reference was also made to statement of one Mr. Pradeep Bhargava who stated that he had joined M/s. Thermoking in July, 1998 and had been looking after its accounts, excise, banking and other matters and had been reporting both to Mr. Pradeep Khanna as well as Mrs. Neera Khanna. Inter alia, a reference was also made to the statement recorded of Mr. Shiv Prasad, Manager (Marketing) of KBL on 4th June, 1992 regarding supply of compressors to the Appellant as an OEM. It was suggested that the Appellant being an OEM of ACs could not have traded in compressors without KBL and its other dealers coming to know of it.

Replies to the SCN

10. In the interim reply dated 31st January, 1995 to the SCN, the Appellant, inter alia, sought the cross-examination of the persons whose statements were referred to therein. It was stated with reference to para 17 and para 18 of the SCN as under:

"In para 17 from page 10 to 16, a number of inquiries been referred to level allegations contained in para 18. In this regard, it is submitted that all these enquiries are misleading. This will be proven by us when each of the persons cited in para 17 is allowed to be cross-examined by us. Explanation against each sub-para under para 17 shall be submitted only after the cross-examination is

over. We could have attempted to give explanations for each of sub-paras but let the true fact first emerge during the cross-examination. Therefore, we reserve full right to tender explanation in respect of each incident contained in para 17, only after the completion of the cross-examination & not before."

11. It was further stated as under:-

"However, it is necessary to cross-examine Shri P.K. Tyagi as well as Shri Ram Singh to prove this fact. It is also necessary to also allow cross-examination of the officers who had visited 439, DESU Colony, Shalimar Bagh. At the same time, it is also necessary to be provided with the photocopies of the DESU records showing that this house had not been allotted to anyone after 4.10.91."

12. The Appellant also asked for cross-examination of certain others including the officers of the Department including Mr. Subba Rao of SRR. A specific request to cross-examine Mr. Pradeep Bhargava was made in the subsequent reply dated 3rd February, 2002.

13. In the reply dated 3rd February 2002, the Appellant inter alia pointed out that apart from manufacturing ACs, washing machines and geysers, it was also trading in such items as well as compressors, water coolers, heat convectors etc. It was asserted that during the year 1988-89 for all such sales the Appellant had raised proper invoices copies of which were enclosed with the reply. Reference was also made to the statement of Mrs. Neera Khanna before the sales tax authorities and to the fact that the Appellant had a sales tax registration for selling compressors. A copy of the sale tax registration certificate was enclosed. It was also stated that the Appellant was allowed to retain the Central Excise registration for ACs and for other items which were exempt from payment of duty under Notification No. 175/87. The Appellant maintained separate "simplified registers" for such items and those registers were pre-authenticated by the officers of the Department. The Appellant offered to produce such registers at the time of hearing. It was submitted that the figures appearing in the ledger for the year 1988-89 and 1989-90 accounted for sale of goods other than ACs. It was pointed out that ACs required use of components like compressors, cooling coil, condensers, motors, capacitors, sheet metal bodies, plastic grill, filters, fans, blowers, copper tubing, thermostat, gas etc. There was nothing to show that such goods were found in excess or any such quantity was not properly accounted for so as to infer the manufacture of such a huge quantity of ACs as alleged in the SCN.

14. The Appellant pointed out in the reply that there was nothing on record to show if the statement of any worker or supervisor or any document recovered from the premises of the proprietor which could show clandestine clearance of 606 ACs as alleged in the SCN. Neither the raw material for manufacture of such a huge quantity was established by the Department nor any statement recorded of any worker or supervisor to confirm the monthly sale of such a large number of ACs for the years 1988-89 and 1989-90. It was further pointed out that as per

the SCN, the Appellant was supposed to have sold ACs in the price range of Rs. 12,000 to Rs. 18,000 per piece whereas at such price it is not possible to sell ACs. Therefore, the sale of compressors could not be connected with the alleged sale of ACs. The conclusions in the SCN were purely on the basis of surmises and conjectures.

15. The Appellant also furnished for each of the year 1988-89 and 1989-90 statements showing item wise sale proceeds receipts in respect of heat convectors, coolers, geysers, water coolers, washing machines and ACs. It was asserted that the figures mentioned were "duly supported by the detailed statements prepared for each year showing reference of bill number, the person to whom goods sold, ledger folio number including the amount charged and also appearing in the ledger." The statements prepared and enclosed were said to completely tallying with the details of bills indicated in the ledger thus explaining the nexus between the entries and figures with the goods sold. The Appellant pointed out that there was no basis for concluding that 606 ACs had been sold by the Appellant and, therefore, the demand raised in that behalf was unsustainable in law.

16. The allegation in the SCN that 1022 compressors received by M/s. Thermoking had been diverted to the Appellant was denied. It was pointed out that the SCN did not disclose the source on the basis of which the said allegation was being made. It was further submitted that the statements of Mr. Shiv Prasad, Manager (Marketing) of KBL and of Mr. K.V. Subba Rao, Deputy Manager (Marketing) of SRR did not establish that the compressors purchased by the Appellant had not been sold by it. It is pointed out that as far as Mr. Pradeep Bhargava was concerned, by his letter dated 2nd May 2002, he had retracted the statement earlier made by him. It was stated that Mr. Bhargava had been removed from service as he was caught for stealing Rs. 50,000 and for which an FIR was also registered in 1989. Therefore, his statement that the compressors received from M/s. Thermoking were used for all the ACs manufactured by the Appellant was incorrect and unreliable. It was stated that "my clients are prepared to cross-examine him for establishing of such details and thereby further establish that the statements of Shri Pradeep Bhargava are not correct on facts and should not be used against my clients."

17. It was pointed out that there was no basis for clubbing the Appellant's business with that of M/s. Jass Kann and M/s. Thermoking and thereby denying the benefit of Notification No. 85/87.

Adjudication order

18. The Commissioner of Central Excise ("CCE") passed the adjudication order on 4th January 2014. According to the CCE, it transpired during investigation that the Appellant was not eligible for exemption under Notification No. 75/87 CE dated 1st March 1987 on the ACs as the aggregated value of clearances of all excisable goods from Thermoking, Jass Kann and Thermotech had exceeded the

laid down eligibility limit.

19. Further from the scrutiny of records and random enquiries it had been found that the Appellant had manufactured and removed clandestinely 36 ACs illicitly without following the Central Excise procedure. The Appellant had cleared goods without bills/gate passes ("GPs"); they had been manufacturing and removing ACs in the guise of gas compressors and extra payments had been reflected in the ledger without the corresponding bills; the Appellant had been raising invoices but no corresponding excise GPs were issued and the Appellant even issued bills in triplicate sets bearing the same serial number. Reference was made to the statements of Mr. Shiv Prasad of KBL, Mr. Subba Rao of SRR and Mr. Pradeep Bhargava.

20. The CEE concluded that the Appellant had contravened the provisions of Rules 9(1), 52A, 53, 173B, 173F, 173G and 226 in as much as it did not record the correct production of ACs in the excise records and cleared the same without payment of excise duty leviable thereon.

21. The further findings rendered by the CCE in the order-in-original were as under:

(i) There was no requirement in law for production of any RG1 register to the jurisdictional Central Excise Office and, therefore, the explanation given by the Appellant regarding such production was not accepted.

(ii) The entries pertaining to the seized ACs in the RG1 were not in existence at the time of the visit of the Officer. The 36 ACs found on 28th February 1992 were not accounted for in the statutory records. The said records were not produced before the officers till they completed their operation i.e. upto 2000 hrs. on 28th February 1992.

(iii) As regards the seized deep freezers, the statement that they were manufactured in the basement of the Appellant by M/s. Thermoking after informing the Central Excise Officer was factually incorrect and legally untenable. The 36 ACs and 4 deep freezers and 4 fan motors were, therefore, liable for confiscation.

(iv) As regards the 24 ACs it was held that the retraction by Mr. Pradeep Khanna who had initially admitted that he had cleared the said quantity of ACs without payment of duty and gate passes was not acceptable since it was not shown to be obtained by inducement, threat or promise. However, it was held that his statement was corroborated by the fact that neither any evidence showing clearance of the said ACs on payment on demand of dues or issue of GPs nor any record by the manufacturer has been produced either by the Appellant or M/s. Thermoking. Therefore, the contention that the ACs were manufactured on behalf of M/s. Thermoking was held not to be convincing.

(v) As regards the clubbing of the Appellant with M/s. Jass Kann and M/s. Thermotech, the CCE held that since Ms. Neera Khanna was proprietor of the

said two concerns there could not be any dispute about clubbing of the clearance of the excisable goods from the said two units. Therefore, the value of the goods cleared by the Appellant had been clubbed with those cleared by the said two concerns for determining the Appellant's liability to the benefit of excise exemption. The combined value of the clearances for the years 1988-89, 1989-90 and 1990-91 was in excess of the liability criterion for availing exemption under Notification No. 75/87/CE. Consequently, the Appellant was held liable to pay duty amounting to Rs. 12,80,542.50 on this score.

22. On the aspect of cross-examination, the CCE referred to the decision in *Kanungo & Co. v. C.C. Calcutta* 1983 ELT 1486 (SC) to hold that there was no provision in the Central Excise law for providing opportunity to cross-examine a witness. It was held that if the Appellant's request for cross-examination of a large number of persons was granted it "would have taken the case to an unending process." According to CCE, the Appellant had by its letter dated 3rd February 2002 "short listed the number of persons and named specific witnesses for the cross-examination." It was held that under Section 9D of the Act, a statement made before a Central Excise Officer would be admissible under certain circumstances. According to the CCE, the statement of a person who had not been produced for cross-examination did not lose evidentiary value if the content thereof is supported by other corroborative evidence. In the present case the statement of Mr. Pradeep Bhargava about the diversion of the compressors of M/s. Thermoking to the Appellant "even if retracted is corroborated by the fact that an independent case has been made out against Thermoking, which undoubtedly is not solely on Shri P. Bhargava's statement simply because it was retracted when the facts stated therein are corroborated by other evidence."

23. The statements of the representatives of KBL and SRR made it evident that the Appellant was registered with them as OEM and was not permitted to trade in compressor as that could have been against the overall marketing and distribution arrangement which could have adversely affected the interests of their appointed dealers. The Appellant had produced no evidence to show when permission was granted to it by the Department to maintain a separate register. There was no evidence whether the goods displayed in the bills were actually delivered and there was also no evidence of mode of payment.

24. In para 42 of the order-in-original, the CCE listed the names and addresses of the buyers as furnished by the Appellant and, therefore, concluded that "these bills were in the names/surnames of the persons whose very existence is, ex facie, doubtful. Hence, I am not inclined to give any credence to them or the arguments advanced on the basis of same." As regards the 606 ACs, the Appellant had not given any detail i.e. GPs, name of the parties and corresponding details as per the ledger to verify and adjudge its veracity. It could, therefore, be inferred that the entries in the ledger were not in respect of the ACs cleared over and above the ones in the statutory documents.

25. As regards the clandestine removal of 36 ACs involving dues amounting to

Rs. 3,53,650 during the period 1987-88 to 1990-91, the CCE concluded that the field enquiries conducted revealed that the Appellant were clearing the ACs without raising bills and GPs and in the guise of compressors. No satisfactory explanation had been offered by the Appellant. The statement of one Mr. R.K. Sharma revealed the modus operandi of ACs of the Appellant being sold by M/s. Thermoking. Consequently, it was held that the case of the Department regarding clearance of the 36 ACs without payment of duty stood established and the duty demand was confirmed. The Appellant was held liable to pay Rs. 77,95,808 for contravening the statutory provisions as well as for penalty.

Two dissenting opinions of the Members of CESTAT

26. In the appeal filed by the Appellant before the CESTAT there was a difference of opinion between Ms. Archana Wadhwa, Member (Judicial) and Mr. Rakesh Kumar, Member (Technical) who heard the appeal.

27. The findings of the Member (Judicial), Ms. Wadhwa were as under:

(i) The entire demand on account of allegation of clandestine removal was made on the basis of entries in the ledger account. The price range of the goods reflected in the ledger account was that of compressors. Apart from the retracted statements of Mr. Bhargava and the statements of the representatives of KBL and SRR there was no direct evidence of manufacture of such huge quantities of ACs in the Appellant's factory. The mere fact of non-obtaining of a permission could not lead to a conclusion that the goods traded in the market were not compressors but the ACs which were manufactured and clandestinely removed by the Appellant.

(ii) The list of buyers provided by the Appellants could not have been rejected merely because the details of the buyers' addresses were not given or that the bills were in the names and surnames of persons.

(iii) There was no evidence on record to establish that there was clandestine manufacture and clearance of the ACs. There was no evidence of procuring excess raw material required for production of such a huge number of ACs. No statement of any employee had been recorded. There was no incriminating evidence of the proprietor of the unit or any of the authorised representatives. No buyer stood identified by the Department. The entire case was made out on the basis of doubts and not on evidence. Consequently, the demand could not be confirmed.

28. In his dissenting opinion, Mr. Rakesh Kumar, Member (Technical) held as under:

(i) Although Mr. Pradeep Khanna on 8th March 1992 retracted his statement made on 28th February 1992 in which he had claimed that 24 ACs had been manufactured by Thermoking through a contractor out of the compressors purchased from SRR and KBL, no evidence had been produced to show that his statement had been obtained under threat, coercion or inducement. Therefore, it

could not be presumed that Mr. Khanna's statement was not voluntarily given.

(ii) The statement of Mr. Shiv Prasad, Manager, KBL and Mr. Subba Rao, Deputy Manager, SRR established that the Appellant was engaged in the manufacture of ACs.

(iii) Regarding the 606 ACs clandestinely cleared, the entries in the ledger accounts, the statements of Mr. Pradeep Bhargava and statements of Mr. Subba Rao and Mr. Shiv Prasad were sufficient to prove the allegation. Since no complaint had been made by KBL and SRR it had to be presumed that the Appellant had not traded the compressors received from both of them and this in turn pointed out the fact that they had been illicitly diverted by M/s. Thermoking to the Appellant who manufactured ACs and cleared them clandestinely.

(iv) On two aspects, therefore, i.e. confiscation of 24 ACs and corresponding duty demand of Rs. 3,16,800 and the clearance of 606 ACs with the corresponding duty demand of Rs. 58,44,825, Mr. Rakesh Kumar, Member (Technical) differed with the Member (Judicial) and confirmed the demand.

29. As a result of the above two opinions, the position that emerged was that in respect of two of the points of charge in the SCN i.e. confiscation of 24 ACs, 4 deep freezers and 4 fan motors with corresponding duty demand of Rs. 3,53,640 and the clubbing of clearance of the Appellant with M/s. Thermotech and M/s. Jass Kann there was no disagreement among the two Members that the case of the Department was not made out. The said two demands were accordingly held to be unsustainable.

30. The two issues on which there was a difference of opinion was, therefore, (i) regarding clandestine removal of 24 ACs with the duty demand of Rs. 3,16,800 and (ii) the duty demand of Rs. 58,44,825 for the clandestine clearance of 606 ACs. It was on the above two aspects that reference was made to the third Member.

31. At this stage it requires to be noticed that in the SCN as part of the charge concerning the clandestine removal of 606 ACs, the Department had also clubbed another duty demand in the sum of Rs. 3,53,640 on which no finding was rendered by the Member (Technical). Nevertheless, since he agreed with the Member (Judicial) that none of the charges in this regard were made out and the Department has not carried said matter further, it must be taken that the SCN as regards this part of the demand was also not sustained.

Opinion of the Third Member on reference

32. On the point of the above difference, the matter went before the third Member (Technical), Mr. Mathew John. In his order dated 15th November 2002 Mr. John agreed with Mr. Rakesh Kumar, Member (Technical) and disagreed with Ms. Wadhwa, Member (Judicial).

33. The resultant position was that by a majority of 2:1, two issues were decided

against the Appellant viz., the clandestine removal of 606 ACs with a corresponding duty demand of Rs. 58,44,825 and the clandestine removal of 24 ACs with a corresponding duty demand of Rs. 3,16,800.

Preliminary objection as to maintainability

34. At the outset, Mr. Satish Kumar, learned Senior Standing counsel for the Respondent, raised a preliminary objection concerning the maintainability of this appeal. He pointed out that the Department's appeal against same impugned order of the CESTAT on the issue of the clubbing of the liability of the Appellant with that of M/s. Jass Kann International and M/s. Thermotech was dismissed by this Court on the ground of maintainability since it involved an issue of exemption which in turn had a relation to the rate of duty of excise. He accordingly submitted that the present appeal also had to be dismissed likewise. He also relied on an order dated 28th January 2015 passed by this Court in CEAC No. 106/2014 (Commissioner of Central Excise v. Vijay Kumar Arora).

35. The Court finds that the two issues that arise for determination in the present appeal do not touch upon the aspect of any grant of exemption having a bearing on the rate of duty or value of goods. Moreover when the appeal was admitted by the Court and question of law framed by the order dated 28th January 2014, no question was framed as regards the maintainability of the appeal. Consequently, the preliminary objection as regards the maintainability is hereby rejected.

Demand in relation to 24 ACs not challenged

36. As far as the merits are concerned, at the outset Mr. C. Hari Shanker, learned Senior counsel appearing for the Appellant, submitted on instructions, that the Appellant seeks to urge only one part of the question framed by the Court concerning the alleged clandestine clearance of 606 ACs with the corresponding duty demand of Rs. 58,44,825. He stated that the Appellant was not pressing the appeal as regards the clandestine removal of 24 ACs and the corresponding duty demand.

37. Consequently, while affirming the impugned order of the CCE as regards the duty demand of Rs. 3,16,800 corresponding to the clandestine removal of 24 ACs, the Court proceeds to examine the appeal only as regards the issue of the clandestine removal of the 606 ACs with the corresponding duty demand of Rs. 58,44,825.

Reasons

38. On the above surviving question, the Court has heard at length the submissions of Mr. Hari Shanker, learned Senior counsel appearing for the Appellant and Mr. Satish Kumar, learned Senior Standing counsel for the Department and has examined the documents on record and the impugned orders.

39. The facts of the cases have been discussed in detail hereinbefore. The reasons that weigh with the Court in overturning the impugned order of the CCE rendered by a majority of 2:1 on the issue of the alleged clandestine removal of 606 ACs by the Appellant without payment of duty, are set out hereafter.

40. The main pieces of evidence relied upon by the Excise Department to support the demand of excise duty in respect of the alleged clandestine removal of the 606 ACs are as under:

(a) The statements made by some of the persons to whom the compressors were sold as listed out in para 17 ii, iii, xvi, xvii and xviii of the SCN

(b) The ledger entry discrepancies.

(c) The statements of Mr. Pradeep Bhargava, Mr. Shiv Prasad of KBL and Mr. Subba Rao of SRR.

41. As regards the statements of the alleged buyers, as noted in the aforementioned sub-paras of para 17 of the SCN, as well as the statements of Mr. Bhargava and Mr. Subba Rao, the Appellant had by its replies dated 31st March 1995 and 3rd February 2002 made a specific request for their production for cross-examination. This was rejected by the CCE on the ground that it would undoubtedly delay the adjudicating process and on an incorrect understanding that it was not the requirement of the law. A reference was also made to Rule 9D of the CE Act.

42. It is settled law that the denial of an opportunity of cross-examination of a witness whose statements have been relied upon in the adjudication order would vitiate the order of adjudication. In *Basudev Garg Vs. Commissioner of Customs*, (2013) 294 ELT 353 : (2014) 43 GST 566 : (2013) 21 GSTR 12 : (2013) 3 ILR Delhi 2269 , this Court referred to Section 9D of the CE Act and noted that even while upholding its constitutional validity in *J and K Cigarettes Ltd. and Others Vs. Collector of Central Excise and Others*, (2009) 242 ELT 189 : (2010) 1 ILR Delhi 293 : (2011) 22 STR 225 , a Division Bench of this Court had observed that the circumstances under which the right of cross-examination can be taken away would have to be "exceptional". This would include circumstances where the person who had given the statement was dead or cannot be found or is incapable of giving evidence or is kept out of the way by adverse party or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances, the Court considers unreasonable. It was held by the Court in *Basudev Garg (supra)* that "it is clear that unless such circumstances exist the noticee would have a right to cross-examine the person whose statements are being relied upon even in quasi judicial proceedings."

43. In the present case, the Court finds that despite a specific request made by the Appellant for cross-examination of the witnesses whose statements were recorded and were being relied upon by the Department, no serious attempts were made to secure their presence in the adjudication proceedings. A perusal of

the adjudication order of the CCE shows that as far as Mr. Pradeep Bhargava is concerned, the summons issued to him were returned with the remarks "left without address" by the postal authority. No further attempt appears to have been made to secure his presence. After simply noting the above fact the CCE in the order-in-original dated 14th January 2004 observed that "hence no purpose was going to be served by sending a fresh summons to him."

44. To say the least, this was the most perfunctory way of dealing with the request, particularly since the statements made by Mr. Pradeep Bhargava, a former employee of M/s. Thermoking, to the effect that 1022 compressors had been diverted by M/s. Thermoking to the Appellant, formed one of the strong pieces of evidence with the Department to conclude that they had been used for manufacture of ACs. The Department failed to show the existence of any of the extraordinary circumstances under Section 9D of the Act to justify the denial of right to cross-examine Mr. Pradeep Bhargava. In the considered view of the Court, this was a serious infraction which vitiated the adjudication order.

45. As regards the request for cross-examination of the other witnesses, the adjudication order again dealt with this perfunctorily. It simply stated in para 36 that if the request made by the Appellant in the letter dated 31st January 1985 for cross-examination of "such a large number of persons was granted it would have take the case to a non-ending process." This cannot be a justified reason within the meaning of Section 9D of the Act to deny that opportunity to the Appellant. Further the CCE proceeds to observe that in their reply dated 3rd February 2002 the Appellant had somehow shortened the list of persons it wanted to cross-examine. This is not borne out from the reading of the reply dated 3rd February 2002.

46. The CCE also wrongly proceeded on the basis that there was no right of cross-examination overlooking the fact that Section 9D of the Act restricts the grounds on which the cross-examination can be denied. It also overlooks the decision of the Supreme Court in *Swadeshi Polytex Ltd. v. Collector of Central Excise* (2000) 122 ELT 641 (SC) and *Lakshman Exports Limited Vs. Collector of Central Excise*, (2002) 143 ELT 21 : (2005) 10 SCC 634 to the effect that when a statement is used against an Assessee an opportunity of cross-examining the persons who made those statements ought to be given to the Assessee.

47. In *GTC Industries Limited Vs. Collector of Central Excise, New Delhi*, (1997) 92 ELT 9 : (1997) 7 JT 37 : (1997) 5 SCALE 86 : (1997) 6 SCC 655 : (1997) 3 SCR 10 Supp , the Supreme Court has frowned upon the practice of the adjudicating authority looking into allegations contained in another SCN to return a finding against the Assessee. In the present case, the CCE has opined that Mr. Pradeep Bhargava's statement could not be ignored in view of the SCN issued to M/s. Thermoking. The Court is informed that the SCN issued to M/s. Thermoking is still pending consideration and, therefore, this is yet another reason why it could not have been relied upon in the adjudication order.

48. Turning to the issue of ledger entries, the Court finds that barring the Member (Judicial) neither the CCE nor the Member (Technical) who differed with the Member (Judicial) have dealt with the explanations offered by the Assessee in the replies to the SCN. The Court's attention has also been drawn to the detailed submissions made by the Assessee in writing on 28th December 2003 before the CCE. On the aspect of clandestine removal of 606 ACs, in para 19-B(iii) of the submissions, the Appellant offered the following explanation:

"The sale figures in respect of compressors for the year 1988-89 is Rs. 14,81,300/- and towards other goods Rs. 23,25,256/-. For the year 1988-89 the total sale value comes to be Rs. 38,06,556/-. For the year 1989-90 the sale value of compressor has been Rs. 642400/- and other items has been Rs. 14,60,957.54 and thereby making the total sale figures to Rs. 21,03,357.54. All such figures were verifiable from the ledgers seized by the Department.

19-B-IV) As per Annexure-XVIII of SCN it is alleged that for the year 1988-89, the appellants sold 356 numbers of air conditioners. This means that the average sale price of each air conditioner should be Rs. 38,06,556/- divided by 356 and this brings the figure on an average to be Rs. 10,692/- per air conditioner, as per the show cause notice."

49. Likewise a detailed explanation was offered by the Appellant for each of the sales figures in the ledger accounts. These were not discussed in any of the above orders except that of the Member (Judicial). The non- consideration of the Appellant's plausible explanation also seriously vitiates the said orders.

50. The Court also finds that no attempt has been made to undertake any serious investigation even as regards the details furnished by the Appellant or those gathered in the course of investigation. In cases of clandestine removal a certain standard is expected of the Department before a finding can be reached against an Assessee. In *Oudh Sugar Mills Ltd. v. Union of India* 1978 (2) ELT (J 172) (SC), the Supreme Court pointed out that the inference drawn by the authorities only on the basis of the entries in the ledgers would be insufficient. It was pointed out that in the factory where the turnover was considerable and the operations conducted involved a human element in a significant way it would not be right to base the conclusions only on surmises.

51. In *Commissioner of Central Excise v. Shakti Zarda Factory (I) Ltd.* 2015 (321) ELT 438 (Del) , this 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 that 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." That burden was not discharged by the Department. 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.

52. In Commissioner of C. Ex., Cus. and Service TAX Vs. Vishwa Traders P. Ltd., (2013) 287 ELT 243 : (2013) 21 GSTR 569 , the High Court dealt with the case of an alleged clandestine removal. The Court again insisted that there should be tenable evidence to show that there was large scale manufacture of the commodity in order to substantiate the allegation of clandestine removal. The Court in para 7 referred to the findings of the Tribunal in the said case as under:

"7. The Tribunal in Paragraph Nos. 12, 13 and 16 has recorded clear finding that when the premises of the respondent were visited, the stock of raw-material and finished goods were tallying with the recorded goods. Further, nothing on record was found by the authority, which showed that unrecorded raw-materials were purchased or consumed by the respondent or that the respondent had clandestinely manufactured or removed the goods. It is necessary to extract Paragraph Nos. 12, 13 and 16 of order of the Tribunal, which reads as under:-

12. Be that as it may be, it is to be noted that there is no dispute that to manufacture of said final product "Frit" requires the use of Quartz, Feldspar, Zinc, Borax Power, Calcium and Dolomite as inputs/raw material. On the date of visit of the officers to the factory premises of the appellant, it is undisputed that the stock of raw materials as well as finished goods was tallying with recorded balances. This conclusion can be reached from perusal of records, as there is nothing on record to indicate otherwise.

13. On careful perusal of the entire records of the case, we find that there is nothing on record as to unrecorded purchases or consumption of various other raw material in the manufacture of Frit, there is also nothing on record to indicate that the appellant had purchased the Quartz, Feldspar, Zinc, Borax Powder, Calcium and Dolomite and without accounting them used for the manufacture of Frit for clandestine removal. There is also nothing on record nor there is any statement of the suppliers of other raw materials, which would indicate that the appellant had received unaccounted raw material from the suppliers of these raw materials. There is a solitary evidence in the form of statement of supplier of one of the raw material i.e. Borax Powder, who indicated that the appellant had procured Borax Powder and not accounted the same in his record; and the said entries and information were deduced from the documents of the premises of Shri Anil jadvav and whose evidence has been discarded for having not been produced for cross examination; in the absence of any other tangible evidence to show that the appellant had been procuring the other major raw materials required for manufacture of Frit without recording in books of accounts, we are unable to accept the contentions of the Id. AR appearing for the Revenue and the findings of the adjudicating authority, that there was clandestine manufacture and clearance of the finished goods. The investigation has not proceeded further to bring on record unaccounted purchases of all the raw materials required for manufacturing of "Frit".

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."

53. Commissioner of Central Excise Vs. Saakeen Alloys (P.) Ltd., (2014) 308 ELT 655 : (2014) 45 GST 723 was again a case of alleged clandestine removal. The High Court pointed that there needed to be positive evidence to establish the evasion. It was observed:

"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."

54. The above order has been affirmed by the Supreme Court by the dismissal of SLP (Civil) (CC Nos. 19304-07 of 2014) on 1st December 2014.

55. Mr. Hari Shanker, learned Senior counsel for the Appellant, has also drawn the attention of the Court to a decision of the CESTAT in Arya Fibres Pvt. Ltd. v. CCE, Ahmedabad-II 2014 (311) ELT 529 (Tri.-Ahmd.) where the entire law concerning clandestine removal has been discussed and the legal position has been summarised 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."

56. In the present case, there is no attempt made by the Department to substantiate the allegation of manufacture of as many as 606 ACs by the Appellant. No evidence has been produced to show that the basic raw materials required for manufacturing such a large number of ACs was procured by the Appellant.

57. For all of the aforementioned reasons, the Court is satisfied that the impugned majority order of the CESTAT on the issue of clandestine removal of 606 ACs by the Appellant without payment of duty suffers from serious errors and, therefore, cannot be sustained in law.

58. The Court is not inclined to consider the plea of the Respondent that the matter should be remanded for a fresh consideration by the CESTAT. In the first place, it must be remembered that the search operation in this case took place way back in 1992. The long drawn process of adjudication over a period of 12 years was followed by the judicial review process for another 10 years. Sending the case back to the CESTAT for a fresh determination would prolong the case interminably. The question of now producing persons whose statements were recorded 23 years after the event for cross-examination is impractical and not feasible. Secondly, no fresh material has to be brought on record to warrant a re-look. The Court is satisfied that the existing material is insufficient to sustain the adjudication order of the CCE on the issue.

Conclusions

59. For the aforementioned reasons, the Court set aside the impugned majority order of the CESTAT on the issue concerning the alleged clandestine removal of the 606 ACs by the Appellant and hereby quashes the corresponding demand of Rs. Rs. 58,44,825.

60. The question framed by the Court in regard to the removal of 606 ACs is accordingly answered in favour of the Assessee and against the Revenue.

61. However, the impugned majority order of the CESTAT as regards the issue of the clandestine removal of 24 ACs with the corresponding duty demand of Rs. 3,16,800 is hereby affirmed.

62. The appeal is disposed of in the above terms but in the circumstances with no order as to costs.