

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

**Excise Appeal No.70747 of 2019**

(Arising out of Order-in-Appeal No.NOI-EXCUS-002-APP-950-19-20 dated 12/09/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

**M/s Shree Shyam Pipes Pvt. Ltd.** .....Appellant  
(Plot No.D-3, E-59-60, Site-B, Industrial Area, Surajpur  
Noida, (Gautam Budh Nagar), U.P.-201306)  
VERSUS

**Commissioner of Central Excise, Noida** ....Respondent  
(C-56/42, Sector-62, Noida, U.P.-201301)

**APPEARANCE:**

Shri D. K. Tyagi, Advocate for the Appellant  
Shri Sandeep Pandey, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO.- 70090/2023**

DATE OF HEARING : 22 September, 2023  
DATE OF DECISION : 22 September, 2023

**SANJIV SRIVASTAVA:**

This appeal is directed against Order-in-Appeal No. NOI-EXCUS-002-APP-950-19-20 dated 12.09.2019 of the Commissioner (Appeals) Central Goods and Service Tax, Noida. By the impugned order, Commissioner (Appeal) has in remand proceedings upheld the Order-in-Original No.10/AC/D-III/N-II/2016-17 dated 31.01.2017 holding as follows:-

*"Order*

- (i) *I order to confiscate the finished goods valued Rs.25,85,613/- (involving duty Rs.3,23,202/-) under Rule 25 of the Central Excise Rules, 2002 found excess as per detailed discussed above. I impose redemption fine of Rs.5,20,000/- (Rupees Five Lacs Twenty Thousand Only)*

on M/s Shree Shyam Pipes Ltd, in lieu of confiscation of aforesaid goods totally valued Rs.25,85,613/- under Section 34 of Excise Act, 1944. Further, I order to appropriate the Bank Guarantee of Rs.81,000/- (Rupees Eighty One Thousand Only) which was furnished by the noticee, against said redemption fine.

- (ii) I confirm demand of Rs.5,263/- (Rupees Five Thousand Two Hundred and Sixty Three Only) on the shortages of finished goods on the party, under Section 11A of the Central Excise Act, 1944.
- (iii) I confirm the Interest, on demand confirmed above at (ii) above, at the applicable rates from the party, under Section 11AA of the Central Excise Act, 1944.
- (iv) I impose penalty of Rs.3,28,465/- (Rupees Three Lacs Twenty Eight Thousand Four Hundred and Sixty Five Only) upon M/s Shree Shyam Pipes Ltd in terms of Rule 25 of Central Excise Rules,2002 read with section 11Ac of the Central Excise Act, 1944.
- (v) I order to confiscate the vehicle (truck bearing No HR 55P 4363) found to be carrying goods found in excess as per detailed discussed above. I impose redemption fine of Rs.20,000/- (Rupees Twenty Thousand Only) upon M/s Hari Cargo Movers, Randhir Yadav Compound, Sihi Sikdapur, Kherki Daula, Gurgaon, in lieu of confiscation of aforesaid truck under Section 34 of Excise Act, 1944. Further, I order to appropriate the Bank Guarantee of Rs.20,000/- (Rupees Twenty Thousand Only) which was furnished by the noticee, against said redemption fine.
- (vi) I impose penalty of Rs.5000/- (Rupees Five Thousand Only) upon M/s Hari Cargo Movers, Randhir Yadav Compound, Sihi Sikdapur, Kherki Daula, Gurgaon in terms of Rule 26 of Central Excise Rules, 2002."

2.1 Appellant is manufacturer of copper tubes and installation kits falling in Chapter 74 & 84 of the First Schedule to Central Excise Tariff Act, 1985.

2.2 During the visit by the officers of Central Excise to the premises of the appellant, on physical verification of stock and examination of the records, finished goods valued at Rs.25,85,613/- involving duty of Rs.3,23,202/- were found excess whereas stock of finished goods valued at Rs.42,105/- involving duty of Rs.5,263/- were found short. Alleging clandestine production and removal of the goods a show cause notice dated 30.10.2015 was issued to the appellant asking them to show cause as to why:

(i) *"Finished goods valued at Rs.25,85,613/- involving Central Excise duty of Rs.3,23,202/- as detailed in Para 4 above found excess of the recorded balances on 12.05.2015 should not be confiscated under Rule 25 of Central Excise Rules, 2002.*

(ii) *Central Excise duty amounting to Rs.5,263 (Rupees Five Thousand Two Hundred and Sixty Three Only) involved on the shortages of 84.70 Kgs of finished goods valued at Rs.42,106/- should not be recovered from them under Section 11A of the Central Excise Act,1944.*

(iii) *Interest under Section 11AA should not be demanded in respect of the demand at para 13 (ii) above.*

(iv) *Penalty should not be imposed upon them under Rule 25 of Central Excise Rules, 2002 read with section 11Ac of the Central Excise Act, 1944 for the alleged contravention as narrated above at Para 13 (i) and (ii) above."*

2.3 The show cause notice was adjudicated as per the Order-in-Original referred in para 1 above. The appeal filed by the Appellant was dismissed as per Order-in-Appeal No. NOI-EXCUS-002-APP-1924-17-18 dated 26/03/2018 of the Commissioner (Appeal) for want of pre-deposit. Tribunal vide order No.70545/2019 dated 14.03.2019 allowed the appeal observing as follows:

*"Nobody appeared for the appellant. On going through the impugned order, I find that the appeal stands rejected for non-deposit of 7.5% of the confirmed demand in terms of provisions of Section 35F of the Central Excise Act. I find that appellant has*

*now deposited 10% of demand at the time of filing of appeal before Tribunal. As such, I set aside the impugned order and remand the matter to Commissioner (Appeals) for decision on merits.*

*2. Appeal is thus allowed by way of remand."*

2.4 Commissioner (Appeal) has vide the impugned order referred in para 1, dismissed the appeal. Aggrieved appellant have filed this appeal.

3.1 I have heard Shri D. K. Tyagi, Advocate for the appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

- Shortage of 84.7 Kgs found on physical stock verification is due to human error in identifying the exact size of pipes since weighed in small quantity on a kanta of 1 MT capacity. The shortage of 84.7 kgs in available stock of 2530 Kgs cannot be on account of clandestine clearance. Reliance is placed on the decisions reported at [2015 (325) ELT 193 (T-Del)], [2015 (321) ELT 330 (T-Del)], [2015 (316) ELT 497 (T-Del)], [2013 (298) ELT 117 (T-Del)], [2015 (317) ELT 298 (T-Del)], [2011 (274) ELT 180 (ALL)];
- Excess was due to eye estimation of various sizes of pipes. The alleged excess was lying on the manufacturing floor in unpacked condition. This stock would have been entered in the books of account on 12.05.2015 as the same was production of 10.05.2015 and 11.05.2015 was holiday. The production on the day of visit has not been considered.
- Stock of scrap of defective pipes lying on the floor and also found loaded in truck standing in the factory premises has been confiscated and allowed to be redeemed on a redemption fine of Rs.5,20,000/-
- The truck by which the said goods were to be transported HR 55 N 5117, for which the job work challans were also prepared was not provided by the transporter, but truck

bearing no HR 55P 4363 had been provided. Accordingly appellants were awaiting the fresh inward e-challan for the new truck by which these goods were to be transported. It is not even the case of revenue that the truck had moved out of their premises.

- It is settled law that no confiscation is warranted when the goods were found in the factory premises. Reliance is placed on the decisions reported at [2013 (321) E.L.T. 231 (AP)], [2015 (319) E.L.T. 263 (P & H)], [2013 (298) E.L.T. 730 (T-Del)], [2014 (308) E.L.T. 421 (T-Del)], [2006 (193) E.L.T. 566 (T-Del)], [2015 (324) E.L.T. 727 (T-Del)].

3.3 Arguing for the revenue learned authorized representative reiterated the findings recorded in the impugned order.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner (Appeal) has in the impugned order recorded following findings for dismissing the appeal filed by the appellant:

*"5.1 The original authority has determined the shortages as well as excess in stock of different goods during physical verification. The sole defence canvassed by the appellant is that the difference was due to human error in identifying the size of copper pipes, that is why the pipes were found to be in excess in some cases and short in other during stock verification.*

*5.2 I note that, - (i) the search was carried out on 12/13.05.2015, (ii) the panchnama proceedings were carried out and recorded in the presence of independent witnesses, (iii) panchnama records physical verification of stock and stated shortage/ excess of stock, (iv) the appellants admitted the difference in stock in statements recorded on 28.05.2015 (v) the panchnama was not questioned at any point of time and (vi) the statements have not been retracted at any point of time.*

5.3 Further, I observe that during search operation, the departmental officers have found that un-accounted goods are lying in the factory premises and the appellant is not maintaining any requisite records of purchase, production and sale of finished goods as well as raw material, shortage of finished goods and a truck loaded with scrap without documents. The search proceedings do not suffer from any infirmity, the statements are recorded in conformity with law and not retracted. The panchnama proceedings of search process were carried out in accordance with the relevant statutory provisions in the presence of independent witnesses.

5.4 Further, I find that the difference (shortages/excess) in stock, recorded in the presence of the independent witnesses has been supported by the statement of the authorized signatory, who have accepted the discrepancy both shortage and excess, found in stock. Non recording of correct quantity of goods in the book of accounts maintained by the appellant establishes the case for demand of duty.

5.5 I find that the appellant has not presented any credible defense for not maintaining any statutory records. I hold that the objection regarding manner of stock verification is superfluous and doesn't hold good.

5.6 I understand that the law recognizes well settled principle of "administrative inconvenience" especially under tax statutes. The Apex Court has referred to the principle of "administrative inconvenience" in its decision in *Indian Aluminum Company Ltd. Vs Thane Municipal Corporation* reported in 1991 (55) E.L.T. 454. Hon'ble CESTAT in *Satyabrat Swain vs. CCE, Meerut* reported in 2015 (316) E.L.T. 106 held as under:-

"Similarly, in the case of *Indian Aluminum Company Ltd. v. Thane Municipal Corporation* reported as 1991 (55) E.L.T. 454 (S.C.), it was observed that non-observance of even a

*procedural condition not to be condoned if likely to facilitate commission of fraud and introduce administrative inconveniences. Admittedly, if the condition is so important that non-observance of the same may result in fraudulent activity, such condition cannot held to be an empty formality.”*

5.7 *In my understanding of Central Excise and Service tax statutory regime, undermining of relevance and requirement of proper documents and accountal thereof would very likely facilitate commission of fraud and introduce in surmountable inconvenience for tax administration. The appellant fails to record the goods in the proper documents viz RG1 etc.*

5.8 *As regards the allegation and finding of clandestine removal I place reliance of the case of Dasani Electra (P) Ltd. Vs CCE Calcutta I [2000 (125) E.L.T. 646 (Tribunal)*

*Clandestine removal – it was held that the initial onus cast upon the department by showing that the goods manufactured had not been accounted for gets shifted to the appellant. It is now onus of the appellants to prove it beyond doubt by production of sufficient legal evidence that such missing serial numbers were in fact not removed by them but was on account of damaged and rejected alternators. The said case has been maintained by the Hon’ble Supreme Court.*

*Further in the case of Indian Cork Mills Ltd vs. CCE, Bombay 1984 (17) E.L.T. 513 9 Tri), it was held that non accounting of goods cannot be technical breach and the department is not required to prove guilt beyond doubt.”*

4.3 I am constrained to observe that the findings recorded by the Commissioner (Appeal) in the impugned order, to the effect that the appellants were not maintaining statutory records etc is contrary to the provisions of Rule 22 of Central Excise Rules, 2002 and the panchnama itself. Rule 22 of Central Excise Rules, 2002 provide as follows:

*"22. Access to a registered premises.-*

*(1) An officer empowered by the Commissioner in this behalf shall have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue.*

*(2) Every assessee shall furnish to the officer empowered under sub-rule (1), a list in duplicate, of all the records prepared or maintained by the assessee for accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods.*

*...."*

As per the above rule there are no separate statutory records prescribed under the Central Excise laws but the records maintained by the assessee in normal course of his business are considered as statutory for the purpose of Central Excise Law. Panchnama records as follows:

*"On being asked to produce the records/ Registers maintained by them in respect of Finished goods and raw material, and other records such as Cenvatable invoices, sale invoices etc., Shri Krishna Kumar Sharma informed that they are maintaining the stock of Finished goods manually in Register RG 1. The stock of raw material was being maintained by them in computer. Shri Sharma provided the RG-1 register showing the closing balances as on 10.05.2015. On being asked whether the entries in RG-1 are complete and also about the details of production and clearance of 11.05.2015, if any which have not been entered in RG-1, Shri Sharma informed that their factory was not operational on 11.05.2015 and the entries in RG 1 register were complete irrespective of the date being shown in the RG 1 register against the finished goods. Shri Sharma also informed that entries in RG-1 register were actually the opening balance of the products on*



12.05.2015. Shri Sharma also clarified that they were not making any entries of all the goods on daily basis. The daily entry is made in the goods which are running products. On being asked about the last sale invoice number issued by them, Shri Sharma informed that the last invoice issued was 115 dated 10.05.2015. The computerized stock sheet of raw material/ input has also been submitted duly signed by Shri Krishna Kumar Sharma. The officers scrutinized the documents regarding sale and purchase provided by the party.

..

On being asked to depute some responsible person to get the stock of finished goods and main raw material/ input physically verified. Shri Krishna Kumar Sharma deputed Shri Mohd. Abdul, Packing in charge in M/s Shree Shyam Pipes Pvt Ltd. D-3 & E 59-60 Surajpur Industrial Area, Greater Noida GB Nagar for getting the stock of finished goods and raw material physically verified. No stock of main raw materials/ inputs i.e. copper pipe was available in the records but was being unloaded from one vehicle bearing Registration No HR 74 9551. The total quantity received on 12.05.2015 under invoice No 67 dated 08.05.2015 of M/s RHJ Industries Pvt Ltd., Daman was 10.00 MT (16 mother tubes). The details of the vehicle and details of the goods were found to be in order. The stock of finished goods was verified on the basis of the agreed upon method i.e. adding the weight after weighing all the goods. The weighing of stock of finished goods was done on the weigh bridge installed in the unit having capacity to weigh 1.00 MT. The stock position of Finished goods so obtained were compared with the Book Balance maintained by the party and is reflected in Annexure A to this Panchnama.

On comparing the physical stock of finished goods as verified by the officers with the Book Balance i.e. RG

*1register maintained by the party certain differences (shortage/ excess) were noticed. Further while taking round of the factory and conducting the physical verification of the stock of finished goods a truck bearing Registration No HR 55 P 4363 was found inside the factory loaded with copper scrap. On being asked whether any document such as invoice/ challan has been prepared in respect of the goods loaded in the truck, Shri Sharma informed that no document has been prepared till the time of visit of the officers. On being asked about the quantity of copper scrap loaded in the said truck Shri Mohd Abdul informed that 5002.025 Kgs of Copper scrap has been loaded in the truck. He also produced the slips showing the weighment details which were prepared by him when the goods were being physically weight on the weigh bridge installed in the unit (having capacity of 1.00 MT) at the time of loading. As the truck was inside the factory, therefore, the quantity of scrap loaded in the said truck has also been taken in the total stock of scrap physically verified. On being asked to explain the reasons for shortages and excesses detected as detailed in Annexure A to this panchnama, Shri Sharma could not give any plausible reason for the differences. Thus the officers on having the reasonable belief that excess quantity of finished goods namely copper tubes of various sizes and copper scrap (including the quantity loaded in the truck) which were complete in all respect and were in ready to dispatch condition, were stored unaccounted in the factory for removal without payment of duty. Therefore the officer have placed the entire excess quantity of finished goods (pipes) and copper scrap as detailed in Annexure A to this panchnama valued at Rs.25,85,614/- under seizure under Rule 24 of the Central Excise Rules 2002 framed under Central Excise Act, 1944."*

Further Annexure C to Panchnama provides the details of the documents that were resumed from the premises of the

appellant at the time of stock verification. Annexure C to panchnama is reproduced below:

S No	Description
1	RG 1 2015-16
2	RG 1 2014-15
3	Challan File
4	Loose File
5	Loose File
6	Outward Register
7	Testing Register
8	Job Work Challan Book
9	Sale Invoice File (April 15 to May 15)
10	Testing Register
11	Testing Register
12	Testing Register
13	RG 1 2014-15
14	Testing Register
15	Testing Register
16	Testing Register
17	Testing Register
18	Testing Register
19	Testing Register
20	Stock register for job working (2013-14 & 2014-15)
21	Annealing process file
22	Inward Register
23	Inward Register
24	Loose paper.

The observations made in the impugned order to effect that the appellants were not maintaining the record is contrary as the entire case of the department is based on the Book Balance in the book of accounts and physical stock found at the time of visit. Further department itself has resumed these documents as seen by the above Annexure. Thus the decisions relied upon by the Commissioner (Appeal) in the impugned order for invoking the concept of administrative inconvenience etc., would not apply to the present case. In any case when the entire case is based on the records maintained by the appellant I do not find any justification in such observations which have been reproduced by the Commissioner (Appeal) in routine and stereotype manner without even examining even the panchnama.

4.4 Relevant extract of the Annexure A to Panchnama dated 12/13/05.2015 is reproduced below:

Copper Pipe		Quantity in Kgs			Amount in Rs		
S NO	Description	Book Balance	Physical Verified	Difference	Rate/kg	Value	Duty
1	¼"x23-24 SWG	220.20	220.20	0.0		0	0
2	¼"x22 SWG	1.6	1.60	0.0		0	0
3	1/4" x 16-21 SWG	406.40	491.00	84.6	516	43654	5457
4	1/2" x 23-24 SWG	23.00	21.60	-1.4	511.03	-715	-89
5	½" x 22 SWG	114.10	113.80	-0.3	506	-152	-19
6	½" x 16-21 SWG	389.40	371.20	-18.2	481.03	-8755	-1094
7	3/8" x 23-24 SWG	0	51.00	51	500.84	25543	3193
8	3/8" x 22 SWG	0	0	0		0	0
9	3/8" x 16-21 SWG	143.30	131.20	-12.1	487.03	-5893	-737
10	5/8" x 23-24 SWG	62	62.00	0		0	0
11	5/8" x 22 SWG	0	0	0		0	0
12	5/8" x 16-21 SWG	0	20.60	20.6	487.03	10033	1254
13	3/4" x 16-26 SWG	212.00	413.00	201	487.03	97893	12237
14	7/8" x 16-26 SWG	137.90	127.80	-10.1	481.03	-4858	-607
15	1 <sup>1/8</sup> " x 16-26 SWG	26.70	10.20	-16.5	487.03	-8036	-1004
16	1 <sup>3/8</sup> " x 16-26 SWG	0	10.20	10.2	514	5243	655
17	1 <sup>5/8</sup> " x 16-26 SWG	248.00	255.80	7.8	514	4009	501
18	5/16" x 16-26 SWG	0.0	0	0.0		0	0
19	3/16" x 16-26 SWG	0.0	0	0.0		0	0
20	31.8 mm x 16-26 SWG	68.50	66.00	-2.5	494.18	-1235	-154
21	38.1 mm x 16-26 SWG	73.80	50.20	-23.6	528	-12461	-1558
22	25.4 mm x 16-26 SWG	79.90	113.80	33.9	504	17086	2136
23	Scrap	2105.10	8308.625	6203.525	384	2382154	297769

On the basis of the above annexure two tables determining excesses and shortages have been prepared in para 4 & 5 of the show cause notice which are reproduced below:

S NO	Name of goods	Description	Excess stock (in Kgs)	Rate/kg	Value	Duty
1	Copper Pipe	1/4" x 16-21 SWG	84.6	516	43654	5457
2		3/8" x 23-24 SWG	51	500.84	25543	3193
3		3/8" x 22 SWG	0		0	0
4		5/8" x 16-21 SWG	20.6	487.03	10033	1254
5		3/4" x 16-26 SWG	201	487.03	97893	12237
6		1 <sup>3/8</sup> " x 16-26 SWG	10.2	514	5243	655
7		1 <sup>5/8</sup> " x 16-26 SWG	7.8	514	4009	501
8		25.4 mm x 16-26 SWG	33.9	504	17086	2136
9	Copper Scrap	Copper scrap lying in factory & loaded in Vehicle No HR-55P 4363	6203.525	384	2382154	297769
		Total	6612.625		2585615	323202

S NO	Name of goods	Description	Shortage in stock (in Kgs)	Rate/kg	Value	Duty
1	Copper Pipe	1/2" x 23-24 SWG	1.4	511.03	715	89
2		½" x 22 SWG	0.3	506	152	19
3		½" x 16-21 SWG	18.2	481.03	8755	1094
4		3/8" x 16-21 SWG	12.1	487.03	5893	737
5		7/8" x 16-26 SWG	10.1	481.03	4858	607
6		1 <sup>1/8</sup> " x 16-26 SWG	16.5	487.03	8036	1004
7		31.8 mm x 16-26 SWG	2.5	494.18	1235	154
8		38.1 mm x 16-26 SWG	23.6	528	12461	1558

			84.7		42105	5263
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4.5 From the figures as indicated in the tables above it is observed that the quantum of excess and shortages determined by the exercise of stock taking is negligible in all cases except for the scrap. The stock taking errors and the weighing scale errors etc could have accounted for the shortages and excesses. The decision relied upon in the impugned order, the will not support the case of department without any explicit and conclusive evidence in respect of the clandestine clearance being alleged. Further the goods which were still in the factory premises of the appellant have not been cleared. Hence there cannot be any charge of clandestine clearance made against the appellant in respect of these goods. Officers could have asked the appellants to rectify their book balance and got them tallied with the physical stock determined by them. Similar view has been expressed in case of Koch Rajes C D Industries Pvt. Ltd. [2006 (193) E.L.T. 566 (T-Mum)]

"3 (b) *The law on confiscation of goods, in the factory and not entered in RG -1 production record is well settled. From the following decisions of the Bombay & Andhra Pradesh High Courts & of this Tribunal.*

- (i) *Southern Steels Ltd. v. U.O.I. - 1979 (4) E.L.T. (J 402) (A.P.)*
- (ii) *Kirloskar Brothers - 1988 (34) E.L.T. 30 (Bom.)*
- (iii) *Nalanda Tobacco - 1997 (91) E.L.T. 275 (A.P.)*
- (iv) *Bhilai Conductors Pvt. Ltd. - 2000 (125) E.L.T. 781 (Trib.)*

*It is very clear that mere non-entry of the productions in the RG-1 will not bring in the liability to confiscation under provision of the Central Excise Rules if there is no corresponding material of clandestine clearance also available. Unaccounted production goes in tandem with clandestine removal and evidence of both has to be present in a given case to avoid the charge to be determined on an assumption/presumption. Applying the tab for liability to confiscation in this case under Rule 173Q(1), we find*

*the test to be not positive. The confiscation arrived is to be not upheld & is to be set aside."*

In case of Vijayanand Textiles Milles 9P) Ltd. [2015 (3210 E.L.T. 231 (AP)] Hon'ble High Court of Andhra Pradesh held as follows:

*"4. There is no dispute that the goods manufactured by the respondent are subjected to levy of central excise duty. It was not even alleged that the respondent has removed any manufactured goods, without payment of excise duty. The only allegation against the respondent is that it did not account for 28,781.67 LMtrs of cloth. The plea of the respondent was that the cloth was manufactured in the late hours of 12-8-1993 and early hours of 13-8-1993 and that when hardly before the occasion arose for making entry, the search was made. It was also stated that the relevant particulars were effected in the prescribed form.*

*5. Assuming that there was some delay in making entries in the relevant form, the goods were not liable for confiscation. Rule 173Q of the Rules no doubt empowers confiscation of the goods on the ground that the entries are not properly made. However, every failure to make the entry or every defect therein does not constitute the basis for confiscation of the goods, as long as they are not removed from the premises. It is too fundamental to be reaffirmed that the liability to pay the excise duty arises only when the manufactured goods are removed from the premises. The rest of the measures are only regulatory in nature. Confiscation of goods that are not removed from the premises can be done, only when clear evidence exists to the effect that the goods were not manufactured but were stored with an oblique motive. No such grounds are even pleaded in the instant case. The Commissioner as well as CEGAT took note of the judgment of this Court in M/s. Southern Steel Ltd. v. Union of India and others - 1979 (4) E.L.T. (J402) (A.P.). We are of the view that no*

*case is made out for directing CEGAT to refer the questions to this Court."*

Hon'ble Punjab and Haryana High Court has in case of AAR Kay Industries [2015 (319) ELT 263 (P & H)] held as follows:

*"2. Delhi-II v. M/s. Mico Glass Industries Private Limited [2010 (254) E.L.T. 254 (P & H)], wherein it has been held that the penalty would be leviable only on the goods, which were being clandestinely removed in a vehicle outside the factory premises and no penalty would be leviable on the goods, which were still lying in the factory premises and have not been removed and only shortage was detected in the stock verification."*

In case of Oudh Sugar Mills Ltd. [1978 (2) E.L.T. (J 172) (S.C.)] a constitutional bench of Hon'ble Supreme Court stated as follows:

*"14. The other finding that the registers were not properly maintained as required by Rule 83 is also an inferential finding based upon the calculations made by the Assistant Chemical Examiner. As we have already held those calculations being based upon unwarranted assumptions cannot form legal basis for a finding that more juice than what was recorded in the register had gone into the production of sugar."*

4.6 Even in respect of the scrap, which was generated during the course of manufacture and was sent for recovery of metal to job workers for being further use in the process of manufacture of copper pipes, the allegations made cannot be upheld. Tribunal has in case of Annapurna Industries Pvt. Ltd. [2015 (324) E.L.T. 727 (T-Del)] held as follows:

*"4. We have considered the submissions from both the sides and perused the records. Coming first to the question of non-accountal of 780 kg of plastic scrap found in the premises of M/s. Annapurna Industries, there is no dispute that the same was not accounted for in the RG-1 Register."*

*However, we are of the view that the appellant's plea that the same being intermediate product was meant for recycling and was exempted from duty under Notification No. 67/95-C.E. and for this reason, the same was not accounted for in the RG-1 Register is acceptable. Accordingly, we hold that the confiscation of 780 kg of Plastic Scrap under Rule 25(1) of Central Excise Rules, 2002 and imposition of penalty on M/s. Annapurna Industries on that account is not sustainable and has to be set aside."*

In case of Marigold Paints Pvt. Ltd. [2014 (308) E.L.T. 421 (T-Ahmd), Ahmadabad bench held as follows:

*10.1 Similarly in the case of Commissioner of Central Excise & Customs v. Resham Petrotech Ltd. [2010 (258) E.L.T. 60 (Guj.)], cited by the Ld. Advocate, the Hon'ble High Court of Gujarat held as under :*

*"3. As can be seen from the impugned order of Tribunal and the record, the respondent has tendered explanation as to why the necessary entries were not made in the statutory records. The said explanation has not been disproved by any evidence to the contrary. The Tribunal has found that the explanation tendered is reasonable and does not warrant any confiscation of goods.*

*4. It is an accepted position that the liability to pay duty arises at the point of time when the goods are to be removed from the factory premises. Admittedly, the goods were found lying in the factory premises. Therefore the occasion to pay duty had not arisen. In other words, the liability to pay duty had not accrued in law. In the circumstances, it is not possible to accept the contention of the appellant that an inference should be drawn that the goods were to be clandestinely removed and hence confiscation was permissible. Such an inference should be possible if there are other surrounding or attendant circumstances. In the present case, no such evidence*



*exists on record. The Tribunal was, therefore, justified in coming to the conclusion that the confiscation of goods was not justified."*

*10.2 Further, in the case of Commissioner of Central Excise, Chandigarh v. Sadashiv Ispat Ltd. [2010 (255) E.L.T. 349 (P & H)], cited by the appellant's advocate, the Hon'ble High Court of Punjab and Haryana held as under :*

*"8. A perusal of the impugned order shows that no evidence has been produced by the Revenue that the respondent had cleared the goods unaccounted and the goods were kept for clandestine clearance. In the present case, even if the goods had not been entered in the RG-1 register, yet the same cannot lead to the conclusion that the goods were meant for clandestine removal. Both the Commissioner as well as the Tribunal have returned a concurrent finding of fact that there was no mens rea on part of the respondent to clandestinely remove the goods.*

*9. The appellant had formulated the following question of law for adjudication by this Court :-*

*"Whether "mens rea" is a pre-condition for confiscation of unaccounted exciseable goods under Rule 173Q(a), (b), (c) of erstwhile Central Excise Rules, 1944 and present Rule 25(a), (b), (c) of Central Excise Rules, 2002?"*

*10. This question has squarely been answered by a Division Bench of this Court in Commissioner of Central Excise, Jalandhar. v. Indo German Fabs reported as 2007 (209) E.L.T. 184 (P & H), wherein while relying on the judgement of Hon'ble Supreme Court in Hindustan Steel Ltd. v. State of Orisa, reported as 1978 (2) E.L.T. (J159) (S.C.), it was held that element of mens rea is normally required to be shown for imposition of penalty. Same view was taken in The Commissioner of Income Tax, West Bengal v. Anwar AH, reported as AIR 1970 S.C. 1782.*

11. In the present case, the Department has failed to prove the element of mens rea for imposition of penalty. It has been so held by the Commissioner as well as the Tribunal that no case was made out to impose penalty. The finding recorded that no case was made out for imposition of penalty is not shown in any manner to be perverse.

12. In view of the above, we find no merit in this appeal and the same is accordingly dismissed.”

10.3 In the case of Commissioner of Central Excise, Hyderabad v. Srinivasa Frozen Foods Ltd. [2010 (262) E.L.T. 594 (Tri. - Bang.)], cited by the Advocate for appellants also, CESTAT held as under :

“5. I have considered the submissions made at length and perused records. The issue involved in this case is regarding the confiscation of the goods which were found unaccounted in the RG-1 of the respondent. It is undisputed that these goods were found in the factory premises of the respondent. The allegation in the show cause notice that these goods were kept without entering in the records, with an intention to clear the same without payment of excise duty, is not supported by any evidence. Further, it is also seen that as regards the allegation of the clandestine removal in respect of other show cause notice, which also was issued based upon the very same investigations and visit by the officers, the respondent had settled the issue before the Settlement Commission. The proceedings which were settled by the respondent before the Settlement Commission cannot be brought into play for holding against the respondent in another show cause notice.

6. Be that as it may, I find that the goods once they are in the factory premises, no penalty can be imposed on the respondent under the provisions of Rule 173Q, as has been held by the majority decision of the Tribunal in the case of Bhillai Conductors (P) Ltd. (supra). In view of this, I hold

*that the goods which were found in excess in the factory premises are not liable for confiscation and the adjudicating authority's order of dropping the issue under the show cause notice is correct and does not require any interference on this count."*

*11. In the light of the above settled law on the issue it is observed that in the present case also the goods were lying within the appellant's factory. There was no evidence on record to show that there was any attempt to remove those goods clandestinely without payment of duty. Appellant has given reasons as to why according to them the entries are required to be made in the statutory records only when goods are in a condition of finishing as available in the market. In view of the above decisions on the issue, we hold that the goods in question were not liable to confiscation under Rule 173Q of the erstwhile Central Excise Rules, 1944. Accordingly, we set aside the confiscation of the goods.*

*12. As regards the sixth issue of seizure of goods valued at Rs.88,800/- in the factory of the appellant on 22-10-1997, we find that there was no intent to evade duty as the goods were covered by regular challans of Sab-Chem Division and the goods remained the property of the appellants and since the duty paid by Sab-Chem Division would have been available as Modvat Credit to the appellant leading to a revenue neutral situation. We, therefore, set aside the confiscation of the seized goods in question."*

4.7 Demand made in respect of shortages which are in range from 0.3 kgs to 23.60 kgs cannot be justified, without any evidence of any clandestine clearance or without any investigation also being made in this respect. In case of M.S.P. Steel & Power Ltd. [2017 (357) E.L.T. 275 (Tri. - Del.)] Delhi bench has held as follows:

"8. The said issue stands considered by the Commissioner (Appeals), who has observed that the statement of Shri Saibal Banerjee, Senior Manager (Accounts) had given an explanation to the purported aberration noticed during the course of investigation. For better appreciation, the reasoning adopted by the Commissioner (Appeals) in Para 18 of his judgment is reproduced below :-

"18. As regards the method for determination of shortage of 1,236.240 MT of Sponge Iron is concerned, I find in a perusal of Para 3 of panchanama dated 2-9-2005/3-9-2005 that the capacity of the 5 Hoppers (bins) were clearly not determined by the officers following metric system but were accepted as declared by Shri Sunil Kumar Bhoyar, and on that assumption the stock was determined by taking a dip reading. Such method have not found approval for determining the stock, especially the dipreading method may not result in correct stock determination. The appellant has supported this contention by placing reliance on the decision in the case of Orient Cement v. CCE - 1995 (79) E.L.T. 643 (T) and IOD v. CCE - 2003 (158) E.L.T. 49 (T) referred to at Para 3.15 supra. The shape of a Hopper and the submission that the storage capacity would not be uniform are factors which would compel one to arrive at a finding that the dip reading method applied cannot determine the actual quantity of stock. The acceptance of Shri Sunil Kumar Bhoyar ought not to have been taken as confirmatory unless such declaration relating to the stock position was confirmed by physical verification merely because the stock taking method has been objected to at a later date is no ground or evidence to render the stock arrived at by a doubtful method to be acceptable. The Original Authority's finding in this regard therefore cannot be upheld. Moreover, it is in record that the quantities lying in shed were assessed on pure guess work/eye estimate. Therefore, reliance in the case of CCE v. Steel Compels Ltd. - 2006 (197) E.L.T. 512 and other cases by the appellant is well founded in not accepting the shortages arrived at in the panchanama and in the Original

*Authority's order; when no shortage could be arrived at the question of its removal does not arise."*

*Revenue in their Memo of Appeal have not advanced any valid reasons or evidence to contradict the above findings of the appellate authority. It is well settled law that mere shortages detected at the time of visit of the officers, that too which are being assailed as being incorrect, cannot be made the basis for upholding the activities of clandestine removal by the assessee. Revenue based upon such shortages is alleging that the same have been removed by the respondent in a clandestine manner without leading any evidence on record. Though both the authorities have relied upon number of decisions in support of their submissions, note can be taken off on the recent decision of Hon'ble Punjab & Haryana High Court in the case of CCE, Ludhiana v. Anand Foundaries and Engineers [2016 (331) E.L.T. 340 (P&H)], wherein it was held that the charges of clandestine removal based upon the alleged shortages of stock are not enough to up hold the charge of clandestine removal. Similarly in the case of CCE, Kanpur v. Minakshi Castings [2011 (274) E.L.T. 180 (Allahabad)], Hon'ble Allahabad High Court rejected the Revenue's appeal by observing that the shortage in the stock, without evidence of clandestine removal cannot lead to finding of evasion of duty. Reference can be made to Tribunal's decision in the case of Sangemermer India Pvt. Ltd. v. CCE, Jaipur [2003 (158) E.L.T. 703 (Tri.-Del.)].*

*9. Admittedly in the present case, apart from shortages, the investigators have not gone ahead to find out the evidences to corroborate the charge of clandestine removal with positive and tangible evidences. The Tribunal in the case of CCE v. Sai Iron (India) Ltd. [2005 (67) RLT 97 (Tri.)] held that even if the assessee fails to explain the shortages themselves, the charge of clandestine removal cannot be imputed in absence of independent investigation to corroborate the allegation. As rightly observed by the Commissioner (Appeals), the investigations have failed to*

*bring the charge of clandestine removal by leading evidences in the form of statement of buyers, transporters, flow back of funds, extra use of electricity, etc. He has rightly concluded that huge quantity of sponge iron would require a large fleet of lorries/trucks for their transportation and in the end in the absence of any such evidence on record, the findings of clandestine removal cannot be upheld. I also note that the Revenue has not produced any evidence for procurement of such a huge raw material to manufacture the said quantum of assessee's final product. Before the final product is removed, the same is required to be manufactured. As such, heavy onus is placed upon Revenue to establish the manufacture of the said goods. There are no statements on records, either admitting the manufacture of the said goods or removal of the same in clandestine manner. As such, I fully agree with the Commissioner (Appeals) that the findings of clandestine removal based solely on the shortages detected by the officers cannot be upheld."*

4.8 In view of the discussions as above, I do not find any merits in the impugned order, which in any case is completely vague as having failed to consider any of the issues that are involved in the matter and has gone on only to invoke the principle of "administrative inconvenience", without even establishing the relevance of the same.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

**Sd/-**  
**(SANJIV SRIVASTAVA)**  
**MEMBER (TECHNICAL)**

LKS