

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.213 OF 2007

M/s Santogen Textile Mills Ltd.	... Appellant
v/s	
The Commissioner of Central Excise, Navi Mumbai 400 614	... Respondent

WITH
CENTRAL EXCISE APPEAL NO.105 OF 2010

The Commissioner of Central Excise, Mumbai-II	... Appellant
v/s	
M/s Santogen Textile Mills Ltd. and others	... Respondents

WITH
CENTRAL EXCISE APPEAL NO.263 OF 2007

Manikchand G. Sharma	... Appellant
v/s	
The Commissioner of Central Excise, Mumbai-II	... Respondent

*Mr D.B. Shroff, Sr. Counsel with Mr Prakash Shah and Mr Jas Sanghavi i/b
M/s PDS Legal for Appellant in CEXA Nos.213/2007, 263/2007 and for
Respondent in CEXA No.105/2010.*

*Mr Swapnil Bangur with Mr Sham V. Walve for Respondents in CEXA
No.213/2007 and 263/2007 and for Appellant in CEXA No.105/2010.*

**CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.**

**Reserved On : 24th October, 2016
Pronounced On : 25th January, 2017**

JUDGMENT [PER B. P. COLABAWALLA J.] :-

1. All these three Appeals have been filed assailing a common order dated 28th May, 2007 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, the **“CESTAT”**). Under the impugned order, the CESTAT upheld the demand of duty amounting to Rs.5,26,56,632/- alongwith interest. In addition thereto, the penalty imposed on Santogen Textile Mills Ltd. (for short, **“STML”**) was reduced to Rs.25,00,000/- and the penalty imposed on Mr Manikchand G. Sharma (a Director of STML) was reduced to Rs.10,00,000/-.

2. Central Excise Appeal No.213 of 2007 has been filed by STML whereas Central Excise Appeal No.263 of 2007 has been filed by Mr Manikchand G. Sharma (a Director of STML). These Appeals assail the impugned order in so far as they have confirmed the demand of duty as well as imposition of penalty. Central Excise Appeal No.105 of 2010 has been filed by the Revenue in so far as

the penalty was reduced not only against STML but also against Mr Manikchand G. Sharma. Since all these three Appeals assail the common impugned order dated 28th May 2007, they all are being disposed of by this common judgment.

3. As far as Central Excise Appeal No.213 of 207 is concerned, the said Appeal was admitted on 17th March, 2009 on the following substantial questions of law:-

- (1) Whether in the facts and circumstances, the Tribunal is right in sustaining the duty demand from the Appellant and imposition of penalty on the Appellant?**
- (2) Whether the Appellant as buyer of the goods is liable to pay duty or the duty is payable by the manufacturer EOUs?**
- (3) Whether in the facts and circumstances, the Tribunal is right in holding that the goods after taking delivery are not brought into 100 % EOU export and not used in the manufacture of export?**
- (4) Whether the Tribunal was right in not following the judgment passed by the co-ordinate benches of the Appellate Tribunal passed in the case of Carrier Aircon Ltd. v/s CCE, New Delhi, reported in (144) ELT 170, Delhi and in the case of CCE v/s Godrej and Boyce Manufacturing Co.Ltd., reported in 2004(175) ELT 656 ?**
- (5) Whether in the facts and circumstances of the present case, duty will be payable by the consignor or the consignee, in terms of Notification No.1/95 dated 4th January 1995?"**

4. Similarly, Central Excise Appeal No.263 of 207 was

admitted on 12th November, 2009 on the following substantial question of law:-

- (1) Whether the Tribunal was right in imposing the penalty on the Appellant under rule 209A of the Rules in spite of the fact that none of the ingredients of offence under rule 209A exists?**

5. Central Excise Appeal No.105 of 2010 is filed by the Revenue. This appeal was admitted on 17th March, 2010 on the following substantial questions of law:-

- (1) Whether the CESTAT has jurisdiction to reduce the mandatory penalty imposed under section 11AC and Rule 209 of Central Excise Act without assigning any reason?**
- (2) Whether the CESTAT is justified in waiving the penalty on the Managing Director and Director of the Assessee under Rule 209A even though they were incharge of the illegal activity of the Assessee?**
- (3) Whether the CESTAT is justified in reducing the penalty on the Executive Director of the Assessee under Rule 209A even though it has held that there is enough material to show that he was involved in illegal activity?**

6. Since there is a common thread running in all these three Appeals and a common order of the CESTAT has been impugned, for the sake of convenience, we shall refer to the facts and submissions canvassed in Central Excise Appeal No.213 of 2007 filed by STML. Our decision in this Appeal will govern the

outcome of the other two Appeals as well.

7. The brief facts giving rise to the present controversy are as under:-

- (a) The Appellant - STML is a company incorporated under the provisions of the Companies Act, 1956 and is a 100% Export Oriented Unit (for short, **"EOU"**). The Appellant was inter alia engaged in the manufacture of processed fabrics of wool, terry wool, polyester viscose, 100% polyester/acrylic/cotton original and ready-made garments. The Appellant has also obtained Central Excise Registration and is having a Private Bonded Warehouse, operating under the provisions of sections 58, 65 and 67 of the Customs Act, 1962. The Appellant has also executed a legal undertaking with the Development Commissioner, SEEPZ in accordance with the provisions of the Handbook of Procedures 1.4.1992 - 31.3.1997. Pursuant to the aforesaid, the Ministry of Commerce, Secretariat of Industrial Approval has granted the Appellant permission to operate as a 100%

EOU and export its entire production excluding rejects not exceeding 5% for a period of ten years. The Appellant, being a 100% EOU, are allowed to import / indigenously manufactured yarn for use in manufacture of the final products. For these purposes, and the Appellant being 100% EOU, claimed exemption under Notification No.1/95-CE dated 4th January, 1995.

- (b) On the strength of the aforesaid Notification, during the course of their business, the Appellant procured yarn from 14 suppliers for manufacturing its final products without payment of duty. The particulars of these procurements have been set out in paragraph 9 of the Memo of Appeal. It is the case of the Appellant that in most of the cases, the Appellant handed over the relevant copies of the Re-warehousing Certificate duly signed by the Jurisdictional Excise Authorities, having jurisdiction over the aforesaid 14 suppliers. Thereafter, for the period between 1st November 1995 to 2000-01, the clearance from the Appellant's unit has been set out in paragraph 11 of the Memo of Appeal.

- (c) Pursuant to certain intelligence regarding purported diversion by the Appellant of the aforesaid duty free yarn to the Domestic Tariff Area (for short, **“DTA”**), the Officers of the Director General, Central Excise, Intelligence, Mumbai (for short, **“DGCEI”**) visited the factory of the Appellant on 9th July, 1998. Thereafter, the said DGCEI Officers once again visited the factory of the Appellant on various dates in July and August 1998 and conducted a stock search of the goods lying in the factory premises. During this time and even thereafter, the statement of Mr Manikchand G. Sharma, Executive Director of the Appellant, was recorded under section 14 of the Central Excise Act, 1944 on 9th July 1998, 6th January 1999, 5th June, 1999 and 6th March, 2000 respectively. Similarly, on 17th September, 1998, the statement of Mr Rajesh Agrawal, Export Executive of the Appellant, was also recorded. During the search conducted, samples were drawn and were sent to Silk and Art Silk Mills Research Association, Mumbai for ascertaining the blend composition and denierage of the yarn contained in the fabrics. The result of the ten

samples sent to the said Association was communicated to the Department vide a letter dated 30th December, 1998. Thereafter, further statements of the suppliers (other EOUs) alongwith the representatives of the transporters [transporting the yarn (raw material) from the suppliers' premises], were recorded under section 14 of the Central Excise Act, 1944 from time to time. The details of when these statements were recorded have been set out in paragraph 17 of the Memo of Appeal.

- (d) Since the Revenue was of the opinion that the Appellant had evaded duty, 14 show cause notices were issued to the Appellant and the suppliers (EOUs). The first of the show cause notice is dated 5th December, 2000 and the last is dated 30th May 2003, the details of which have been set out in paragraph 22 of the Memo of Appeal. By the aforesaid show cause notices, the Appellant and the suppliers were called upon to show cause as to why (i) the Central Excise Duty leviable on the main goods and which were allegedly diverted into the local market for purposes other than for which they were procured (i.e.

for manufacture of export goods), should not be demanded and recovered jointly and severally from all of them; (ii) interest @ 24 % p.a. be not levied and recovered under section 11AB of the Central Excise Act, 1944; (iii) why mandatory penalty equal to the said duty amount not be imposed under section 11AC; (iv) why penalty should not be imposed under Rules 9(2), 173Q and 126 of the Central Excise Rules and (v) why penalty should not be imposed under section 117 of the Customs Act, 1962.

- (e) After giving a personal hearing to the Appellant and considering their representations / replies dated 19th February 2005, 21st February 2005, 15th March 2005 and 18th March 2005, the Commissioner of Central Excise, by his order dated 31st March 2005, inter alia (a) confirmed the demand of duty of Rs.5,26,56,632/- under section 11A(1) of the Central Excise Act, 1944 read with Rules 156B and 196 of the Central Excise Rules 1944; (b) imposed penalty of Rs.5,26,56,632/- under section 11AC on the Appellant; (c) ordered the Appellant to pay interest on the above duty amount

under section 11AB; (d) imposed penalty of Rs.50,00,000/- each, on Shri Vinod Kumar Deora, Suresh S. Deora and Manikchand G. Sharma, (Executive Director of STML) respectively, under Rule 209A of the Central Excise Rules.

- (f) Being aggrieved by the said order, the Appellant along with others approached the CESTAT invoking its appellate jurisdiction under section 35B of the Central Excise Act, 1944. The CESTAT, by its order dated 28th May 2007, (a) upheld the demand of duty of Rs.5,26,56,632/- alongwith interest on the Appellant; (b) set aside the penalty of Rs.50,00,000/- each on Shri Vinod Kumar Deora and Suresh S. Deora; (c) reduced the penalty imposed on the Appellant to Rs.25,00,000/- and (d) reduced the penalty on Mr Manikchand G. Sharma to Rs.10,00,000/-.

- (g) As mentioned earlier, being aggrieved by this order, the Appellant – STML as well as Mr Manikchand G. Sharma (a Director of STML) is before us in Appeal under section 35G of the Central Excise Act, 1944. The

Revenue is also in Appeal before us in so far as the penalty was reduced not only against the Appellant – STML but also against Mr Manikchand G. Sharma.

8. In this factual backdrop, Mr Shroff, learned Senior Counsel appearing on behalf of the Appellant, submitted that in the present matter, it is the case of the Revenue that not a single piece of raw material (i.e. yarn of different qualities purchased by the Appellant from 14 suppliers) came into the Appellant's EOU for manufacture of fabric during the period 1995-1998. Mr Shroff submitted that according to the Revenue, the entire quantity of yarn (raw material) was diverted and that was supported by the fact that there was no evidence of transportation of the yarn from Bhiwandi to the Appellant's factory. He submitted that the Revenue as well as the CESTAT came to the aforesaid conclusion based on certain oral statements recorded of the estranged brother of one of the Appellant's Directors as well as the transporters who transported the raw material (yarn of different qualities) upto Bhiwandi.

9. Mr Shroff submitted that in coming to this conclusion, the Revenue as well as the CESTAT totally ignored all the

documentary evidence which clearly established that not only the yarn reached the factory of the Appellant but was in fact used for the manufacture of final products that were eventually exported. To substantiate this argument, Mr. Shroff submitted that all the statutory registers maintained by the Appellant in the usual course of business and as required by law were countersigned by the Excise Inspectors. Further, the detailed Panchanama drawn up at the time of stock verification done during the raid, showed that there was no discrepancy between the stock and the statutory registers and that all the goods shown to be in stock at the time of the raid had been exported. Mr Shroff submitted that the CESTAT accepted that the documentary evidence was in favour of the Appellant but yet ignoring the same, purported to rely upon certain oral statements that were recorded under section 14 of the Central Excise Act, 1944.

10. The further submission of Mr Shroff was that apart from the documentary evidence, the CESTAT totally ignored the statements of the Excise Inspectors recorded under section 14 who categorically stated that they had verified that the raw materials were received in the factory; that some goods were sent for job work as per the standing practice and were duly received back; that

the fabrics were exported; and that all the statutory registers were signed by them. He submitted that instead of relying upon this material, the CESTAT purported to rely upon the statement of the Appellant's Director's brother who was an estranged relative. The statement given by the said brother was to the effect that his firm never carried out any job work for the Appellant. However, the Tribunal totally ignored the fact that his own employee had given a statement to the effect that they did carry out the job work for the Appellant.

11. Mr Shroff next submitted that the CESTAT relied upon the statements of the transporters (not booked by the Appellant but by their suppliers) who stated that they did not transport any of the raw materials to the Appellant's EOU factory. However, what the CESTAT ignored was the fact that there was evidence that these transporters transported the raw materials from the respective suppliers to the Appellant's godown at Bhiwandi and from there it was transported by the Appellant's own transport vehicles. He submitted that the contention of the Revenue that not a single piece of raw material purchased from the 14 suppliers came into the Appellant's EOU for manufacture of fabric during the period 1995-1998, is manifestly untenable in view of the following facts:-

- (i) The Appellant's factory was under physical control at all times by the excise authorities and their representatives were always stationed at the factory premises.
- (ii) All receipts and dispatches have been countersigned by the Central Excise Inspectors.
- (iii) Re-warehousing Certificates were filed, all of which have been countersigned by the relevant Central Excise Inspectors.
- (iv) Statements of 3 Central Excise Inspectors who have signed the D-3 intimations as also the Re-warehousing Certificates during the aforesaid period were recorded by the Department. In all these statements, and which are unrebutted, the Inspectors of Central Excise have categorically stated:-
 - (a) that they used to visit the Appellant's unit and had checked and verified each and every D3 intimation filed by the Appellant;
 - (b) that they verified the receipt of duty free raw materials so received as intimated by the D3;
 - (c) that the Appellant submitted copies of the AR-3

and Central Excise Invoices alongwith the D3 intimations;

- (d) that some of them had supervised the export of finished products;
- (e) that they had signed the D3 intimations and AR3A's;
- (f) that they weighed the packages at the time of verification;
- (g) that the goods were checked and tallied as per the documents accompanied with them;
- (h) that the registers were also signed by them;
- (i) that the Annexure II Challans (permitting removal of raw materials for job work) were signed by them; and
- (j) that as regards the allegation that there was no permission granted for removal of goods for job-work, they stated that the Assistant Commissioner had reported that the Appellant's file was not traceable and that now it is only inferred that there was no such permission, but there was a practice to allow the Appellants to clear the raw materials for job work.

12. Mr Shroff submitted that these statements of the Excise Inspectors recorded under section 14 made it absolutely clear that they had signed these documents because the Appellant had received the raw materials from their EOU suppliers; that the Appellant had sent the goods out of the factory for converting the yarn into fabric and it received the fabric back into the factory which was then exported. All this material was ignored and brushed aside by the CESTAT, was the submission of Mr. Shroff.

13. Over and above this, Mr Shroff submitted that there was further documentary evidence to show that there was no merit in the contention of the Revenue that not a single piece of raw material (yarn of different qualities) was received in the Appellant's factory. In this regard, he submitted the following:-

- The yarn was received in the factory alongwith an invoice and AR 3A form. This form was signed by the Excise Officer as also the Appellant's authorised signatory. One copy was kept with Appellant. One copy was sent to the Range Jurisdictional Officer in charge of the suppliers' factory. Within 24 hours of receipt of the goods the Appellant intimated the Department through a D3 Intimation, i.e. the document showing the receipt of raw materials of

their arrival. The Excise Officer came and verified the AR 3A, D-3 Intimation and Bond Register and signed the same.

- The D-3 Intimations that were regularly filed by the Appellant, recording the receipt of material into the factory from each of the 14 suppliers are contemporary documents. These D-3 Intimations have been duly verified and signed by the Central Excise Inspectors.
- When the yarn is removed for manufacture, the Appellant issued slips and issued the yarn for manufacture. This is recorded in the Issue Slip Register, which is signed by the Excise Officer. The yarn is knitted and stitched and then exported.
- Some yarn was sent for job work. For that purpose a delivery challan is issued, which is signed by the Appellant's Range Excise Officer and the entry is made in the Job Work Register. This register was countersigned by the Excise Officer. The delivery challan was sent in quadruplicate. One is kept by the job worker and three are sent back with a rubber stamp showing the quantity of job work material sent back. On receipt of the same the Appellant intimated the Excise Officer, who came and signed the job work register.

- The goods were then exported. The Excise Officer signed the Export Register.
- There were audits conducted, both prior to and during investigation, which showed that there was no discrepancy in the stock whatsoever.
- The receipt and issue registers were all signed by the Excise Inspectors.
- The entire stock of raw materials was physically tallied and verified by the anti-evasion wing.

14. Looking to all these facts, Mr Shroff submitted that considering all the statutory documents alongwith the statements recorded of the Central Excise Inspectors, clearly established that there was no evasion of duty whatsoever. The Appellant received the raw materials, converted it into fabrics and thereafter completed their export obligation. Furthermore, Mr Shroff submitted that during the investigation and raids, the Department conducted a complete and thorough stock taking of the Appellant's factory between 17th July 1998 to 8th August 1998. During the stock taking, each and every package of fabric in the Appellant's 20,000 sq.ft. storage area was weighed, verified and recorded in the annexures to the Panchanama. No discrepancy was found between

the huge stock of 4.66 lac kgs. of fabric of different quality physically found in the factory and the Receipt and Issue Register which shows the quantity of yarn sent to job workers and receipt of fabric manufactured therefrom. So also, the Receipt Register showed the quantity of yarn received by the Appellant during the aforesaid period. Mr Shroff submitted that this huge quantity of finished goods weighing approximately 4.66 lac kgs could not have arrived at the Appellant's factory unless the yarn had not been transported to the factory. Mr Shroff submitted that the transportation of yarn upto Bhiwandi was through the suppliers' transporters and thereafter, from Bhiwandi to the factory of the Appellant, was done by the Appellant by their own transport vehicles for which there were no bills. This alone, with nothing more, could not have led the CESTAT to come to the conclusion that not a single piece of raw material reached the Appellant's factory. When this fact is taken into consideration and it is admitted that the transport of raw materials was done by the Appellant's suppliers upto Bhiwandi, then the statements recorded of the suppliers' transporters, does not carry the case of the Department any further. This is more so when one takes into consideration the voluminous documents that clearly establish that the raw materials reached the Appellant's factory which was thereafter used for the

manufacture of final products and which were then exported, was the submission.

15. Mr Shroff further submitted that what is also important to note is that the entire export obligation of the Appellant was completed by them and no dispute in that regard has been raised by the Development Commissioner of the EOU. If in fact, the yarn that was bought by the Appellant from their suppliers was diverted, as alleged by the Department, it would have been impossible for the Appellant to complete their entire export obligation in view of the fact that no raw materials would have been available for them to manufacture fabric which was finally exported. This is another factor, according to Mr Shroff, which clearly goes to establish that the contention of the Revenue as well as the finding of the CESTAT that not a single piece of raw material reached the factory of the Appellant is totally baseless and wholly without any merit.

16. Lastly, Mr Shroff submitted that it is well settled that documentary evidence has to prevail over oral statements, especially when they are inconsistent with the documentary evidence. In this regard Mr Shroff relied upon the following decisions:-

- R.P. Industries v/s Collector, reported in (82) ELT 129(T);
- Raj Petroleum Products v/s CCE 2005, reported in (192) ELT 806 (T);
- Satosh Tobacco v/s CCE, reported in 2014 (311) ELT 465(T);
- CCE v/s Vishnu Co. Pvt. Ltd., reported in 2016(332) ELT 793(Del).

17. Mr Shroff submitted that all these decisions, and which were binding on the CESTAT, were ignored by them and instead it relied upon the shoddy oral evidence produced by the Department viz. the statements of the suppliers and other persons, which at the highest, only establish that the raw materials were supplied upto Bhiwandi. The fact that the raw materials were supplied by the suppliers' transporters upto Bhiwandi was not a fact that was disputed by the Appellant. It was the Appellant's case that these raw materials were thereafter transported from Bhiwandi to the Appellant's factory by their own transport vehicles. This is established by the fact that all this material was found not only during the raid conducted by the Department but also evidenced by the stock registers and other documents maintained by the Appellant and which were countersigned by the Central Excise Inspectors. For all the aforesaid reasons, Mr Shroff submitted that

the impugned order of the CESTAT was wholly untenable in law, was perverse and ought to be set aside by us in our appellate jurisdiction.

18. On the other hand, Mr Bangur, learned counsel appearing on behalf of the Revenue, submitted that the Revenue's contention is based on the following:-

- Statements of the 14 suppliers who have stated that the duty free yarn was supplied by them upto Bhiwandi as per the request of the Appellant. In fact, in two cases yarn was picked up from the premises of the supplier by the Appellant.
- Statement of transporters who stated that they have delivered the duty free goods upto Bhiwandi, at the transporters/suppliers premises or claimed to be that of the Appellant.
- The vehicles in which yarn is said to have been transported from Bhiwandi to Mumbai are not corroborated by the octroi records, nor there are any records to show the delivery of the goods at the premises of the Appellant.
- The Appellant did not have any machinery installed for weaving of fabrics and claimed to have permission for sending yarn for job work to Bhiwandi.

- The Appellant had claimed that the duty free yarn in question was sent for weaving on sub-contract basis to four job workers. Investigations conducted revealed that one unit was not in existence. The Director of two units denied of having done any job work on behalf of the Appellant. The fourth unit claimed to have done job work for the Appellant, but the transporter by whom the goods were claimed to have been transported denied the transportation of the same.
- The Appellant claimed to have permission of job-work issued by the jurisdictional Assistant Commissioner, but could not produce the same. Further the jurisdictional assistant Commissioner has denied giving any permission of job work to the Appellant.
- The composition of fabrics declared in the shipping bills as well as those ascertained from the samples drawn during the course of investigation from the Appellant's premises did not co-relate to the amount of PTY and PV yarn procured by the Appellant.

19. Looking to this, Mr Bangur submitted that the Commissioner held that the raw material was never supplied under CT-3 Certificate and never used in the manufacture of exported products and accordingly, duty of Rs.5,26,56,632/- on the Appellant was confirmed and equal penalty was also levied under

section 11AC of the Central Excise Act, 1944. Further, the Commissioner also levied a penalty of Rs.50,00,000/- each, on Shri Vinod Deora, Shri Suresh Deora and Shri Manik Sharma respectively, under Rule 209A. All the aforesaid persons preferred an Appeal to the CESTAT. The CESTAT vide its order dated 28th May, 2007 considered all the facts tendered by the Appellant as well as the Revenue and confirmed the duty amount of Rs.5,26,56,632/-. However, it reduced the mandatory penalty to Rs.25,00,000/- and further reduced the penalty imposed on Shri Manik Sharma to Rs.10,00,000/-. As far as the penalty imposed on Shri Vinod Deora and Shri Suresh Deora is concerned, the same was set aside. It is in these circumstances that STML as well as Shri Manik Sharma have filed Appeals challenging the impugned order dated 28th May, 2007 and the Revenue has filed an Appeal in so far as there is a reduction / setting aside of the penalty. As far as the Appeals of STML and Mr Manik Sharma are concerned, Mr Bangur submitted that the facts mentioned earlier, have been considered at length by the authorities below and a reasoned order has been passed covering all the facts brought out by the show cause notice. Further, the Appellant was given all the record and an opportunity to defend themselves, which is clear from the order passed by the Commissioner. The fact that the Appellant was not

given an opportunity to cross-examine Mr N.P. Deora was also considered by the Commissioner in his order and the same was also upheld by the CESTAT. He therefore submitted that there is no merit in the contention of the Appellant that there is any denial of the principles of natural justice.

20. Mr Bangur submitted that the Appellant has repeatedly contended that they have received all the raw materials in their factory and used the same for manufacture of exported goods. In support of their contention, the Appellant has referred to the Re-warehousing Certificates duly signed by the jurisdictional Central Excise Officers; D-3 Intimation filed with the Department; documents regarding removal of yarn and receipt of ready-made fabrics from job workers which were countersigned by the Central Excise Officers and shows that the goods were received and duly consumed within the factory for discharging the export obligation. In this regard, Mr Bangur submitted that the Commissioner has opined that though the unit was supposed to be in physical control of the Excise Officer, no Excise Officer was stationed in the unit. No Officer was appointed to exclusively look after the work of STML. The Officers were given charge of many units and the verification done was only on the basis of intimation given by the unit.

Whenever these Officers visited the factory to verify the goods, certain goods were produced before them. Since the Officers could verify the goods only after receipt of intimation from the unit, there was no possibility of them seeing the goods tendered for inspection being unloaded from or loaded into the vehicles. The Commissioner has further opined that neither the Officer nor their superiors ever felt any need of drawing samples and getting the same tested. The Commissioner therefore concluded that in retrospect it was apparent that if testing was done, the same might have given some early clues to the fraudulent activities of M/s STML. The Commissioner finally concluded that the Re-warehousing Certificates and the signatures in various records were obtained by recourse to fraud and therefore, cannot come to the aid of M/s STML. These findings of the Commissioner have been considered by the CESTAT and have in principle, been upheld, according to Mr Bangur. Reading the order of the CESTAT as a whole, Mr Bangur submitted that the same cannot be termed as perverse and/or suffering from any error of law apparent on the face of the record which would require our interference in appellate jurisdiction. The order of the CESTAT is a reasoned one and after considering all the facts and circumstances of the case, was the submission of Mr Bangur. Consequently, the Appeals filed by STML and Mr Manik

Sharma have not merit and ought to be dismissed with costs was the concluding argument on behalf of the Revenue.

21. In support of his submissions, Mr Bangur relied upon the following decisions:-

- (1) Sneh Enterprises v/s Commissioner of Customs, New Delhi, reported in 2006 (202) ELT 7 (SC);
- (2) CCE, Cochin v/s BPL System and Projects, reported in 2002 (144) ELT 437 (Tri.);
- (3) CCE, Madras v/s Madras Radiators and Pressing Ltd., reported in 1994 (69) ELT 409 (Tri.);
- (4) Synthetic Chemicals Ltd. v/s DC.C.E. (1988(33) ELT 62 (All.);
- (5) Siemens Ltd. v/s CCE, reported in 1994 (701) ELT 305 (T);
- (6) Maya Spinner Ltd. v/s CCE (2001(44) RLT 518 (CEGAT).

22. We have heard the learned counsel for the parties at length and perused the papers and proceedings in the above Appeals. We have also carefully gone through the impugned order. In the present case, it is the case of the Revenue that no raw material (i.e. yarn of different qualities purchased by the Appellant from 14 suppliers) came into the Appellant's EOU for manufacture of fabrics during the period 1995-1998. According to the Revenue,

the entire quantity of raw material was diverted as there was no evidence of transportation of raw material from Bhiwandi to the Appellant's factory. To come to the aforesaid conclusion, the Revenue and the CESTAT purported to rely upon the statement of a brother of one of the Appellant's Director who stated that his firm never carried out any job work for the Appellant. Over and above this, the Revenue and the CESTAT also relied upon the statements made by the transporters of the suppliers that they did not transport any of the raw material to the Appellant's EOU factory but the same was done only upto Bhiwandi. It is basically on these oral statements recorded under section 14 of the Act that the Revenue and the CESTAT came to the conclusion that the raw materials purchased by the Appellant from the 14 suppliers never reached the factory of the Appellant but in fact were wrongly diverted.

23. We find considerable force in the argument of Mr Shroff that the Revenue and the Tribunal have totally ignored and/or brushed aside all the documentary evidence that was produced by the Appellant to negate the aforesaid contention. On carefully going through the documentary evidence, we find that all the statutory registers which were maintained by the Appellant, were countersigned by the Excise Inspectors. Further, when a detailed

panchanama was drawn up at the time of stock verification (during the raid conducted), the same indicates that there was no real discrepancy between the stock and the statutory registers. As rightly submitted by Mr Shroff, the matter does not rest here. Apart from the voluminous documentary evidence which clearly indicated, at least prima facie, that the raw materials were in fact received at the factory premises of the Appellant and which fact is even recorded in the impugned order, there have been statements that have been recorded of the Excise Inspectors under section 14 of the Act who have categorically stated that they have verified the raw materials received in the factory, that some goods were sent for job work as per standing practice, that the fabrics were exported and that all the statutory registers were duly signed by them. In this regard, it would be apposite to refer to some of the statements of the concerned Excise Inspectors and which have been produced before us. The first is the statement of Shri G.B. Moholkar, Inspector, Central Excise, Mumbai – II recorded on 17th September, 2001:-

“Q.2 What work you were required to do in connection with M/s Santogen Textile Mills Ltd 100% EOU? When was this unit licensed?”

Ans. The unit M/s Santogen Textile Mills Ltd., a 100% EOU was licensed somewhere in November 95. Since M/s Santogen Textile Mills Ltd. was a 100% EOU (Export Oriented Unit)

they used to procure raw materials such as Polyester Yarn and Cotton Yarn from other 100% EOU, they used to procure these raw materials duty free under CT3/AR3 procedure. After receipt of such goods, they used to file D3 intimation and I used to visit the unit and verify the goods so received, I have also supervised export of finished products such as bed covers etc.

Q.4 M/s Santogen Textile Mills Ltd. 100% EOU were granted licence for private bonded warehouse under section 58 of the Customs Act 1962 and permission for carrying on manufacture in bond under section 65 of the said Act. Please state what kind of control your were exercising on the said unit, with whom keys of bonded warehouse were kept?

Ans. Though the unit was granted licence for private bonded warehouse and permission for manufacturing in bond as stated in the question above, I was posted to the range wherein I was allotted other units too, and I used to visit the factory of M/s Santogen Textile Mills Ltd. 100% EOU in verification of receipt of duty free raw material as intimated by D-3 filed by them. I have also attended to exports of the above said party as and when intimated to me. Within the premises of M/s Santogen Textile Mills Ltd. 100% EOU a small portion was kept under lock and key wherein one set of keys were kept in the range office.

Q.6 What documents you used to receive alongwith D-3 intimations? How D-3 was handed over to you? Had you kept any D-3 Register in range office?

Ans. The party M/s Santogen Textile Mills Ltd. 100% EOU, used to submit 3 copies of AR3 and Central Excise Invoice alongwith the D3 intimation. D3 intimation used to be sent to the range office through the messenger of the party and thereafter I used to go to verify the goods received. I do not remember whether any D3 register was maintained or otherwise.

Q.7 Have you verified receipt of goods for each and every D3 intimation received by you from - u/s same 100% EOU ? please produce the list of D3 verified ?

Ans. Yes I have verified and checked the receipt of goods in the factory premises of M/s Santogen Textile Mills Ltd. a 100% EOU. I have checked and verified each and every D3 intimation filed by the party. I have prepared a list of D3 intimations received and verified by me on the basis of the records shown to me. I am producing the said list (3 pages)."

24. Thereafter, a further statement of the said Shri Moholkar was recorded on 20th September, 2001 wherein he stated as under:-

"Q.1 Please confirm whether signatures appearing on D3 intimations AR3A's as per list produced by you, are your own signatures?"

Ans. Yes the signatures appearing on D3 intimations and AR3A's are my own signatures.

Q.2 At the time of verification did you take weighting of all packages received by M/s Santogen Textile Mills Ltd. 100% EOU from their suppliers?"

Ans. Yes I have weighed the packages received by M/s Santogen Textile Mills Ltd. 100% EOU at the time of verification of the same.

Q.3 Did you check the Denier of yarn received by M/s STML and tallied with receipt documents?"

Ans. The goods received were checked and tallied as per the documents accompanied with them."

25. A further statement was again recorded of the said Shri Moholkar on 21st September, 2001 wherein he stated as under:-

“Q.3 In respect of goods said to have been checked and verified by you covered under D3 nos.60/31.3.97, 59/27.3.97, 61/17.4.97, 60/23.4.97, 64/30.4.97, 65/2.5.97 & 63/24.4.97, please peruse the Deputy Director, Vadodara's letter no.V/15-16/26AE/BRU/98 dated 2.2.99 under which it has been reported that the vehicle NO.GJ 11 7407 was Dumper, Vehicle No.G3 21 3198 was Rickshaw and were not capable to transport these goods upto Powai Mumbai. Now you have also been shown statement dt. 21.7.95 of Shri Prahaladbhai Patel owner of vehicle no.GJ TT-2407, statements of Shri Gopalbhai Patel, wherein we have stated that they have not delivered the goods upto factory of M/s STML 100% EOU, but goods were delivered upto Bhiwandi. In light of these evidences, please explain how you have checked and verified receipt of goods, in factory of M/s STML ?

Ans. Whenever I used to visit the factory to verify the receipt of goods under D-3, the goods used to be unloaded in the factory premises and I have never seen the vehicle in which they were delivered. I would once again like to state that whatever D-3's and AR3A's rewarehousing certificates which have been signed by him are in token of physical checking and verifying the material so received and whenever any discrepancies were noticed, I had made it a point to mention in AR3A'2 rewarehousing certificates.”

26. Similar evidence was given by Shri Ashok Kumar Karan. In his statement dated 8th August, 2000, He has stated as under:-

“Q.6 Have you verified every D3 intimation received from Santogen (100% EOU) ?

Ans. I have verified every D-3 intimation received from Santogen (100% EOU).

Q.8 Give a list of D-3s verified by you as per the Proforma shown to you?

Ans. I have prepared a statement showing details of D-3s verified by me, I am producing the same before you."

27. Thereafter, a statement of Shri Arvind Rabhaji Said, Inspector, Central Excise, Bhandup Division, Mid-town Plaza, Mulund Check Naka, Mulund (West) was recorded on 9th August, 2000. His evidence also corroborates the case of the Appellant as can be discerned on the following questions:-

"Q. Apart from the purpose of D-3 verification for what other purposes you visited STML factory ?

Ans. I visited factory also for clearance of yarn for job work. For this purpose I used to get oral communication from the factory over telephone.

Q. Pl. peruse job work register shown to you and state as to which dates you have given clearances for removal of yarn to Sub-contractor's premises for weaving ?

Ans. I have gone through the said register. I have put my signature on page 1 thereof. I have allowed clearance of yarn to sub contractors as mentioned in the said register vide challan nos.35 to 61 and 68 to 70. I have put my signature in the said register against relevant entries.

Q. You have allowed clearance of yarn for job work as permitted by Ac division vide letter no.C.Ex/Santogen/EOU/95-96 dt. 22.1.96. Pl. state whether you have seen this permission letter? Pl. also produce a copy thereof.

Ans. I have not seen such a letter. A copy is not available with me. I allowed the clearance as per practice followed by the earlier officers."

28. Lastly, the statement of Shri Sanjay Raghunath Shinde, Central Excise Inspector, posted in Range VII, Powai Division, Mumbai II was recorded under section 14 of the Act on 6th January, 1999. In his evidence, Shri Shinde has stated as under:-

“On being specifically asked regarding issue of the material outside the factory premises for weaving, I want to state that M/s Santogen Textile Mills Ltd. (100% EOU) are sending the yarn for weaving to M/s Santogen Silk Mills Ltd. and M/s Deora Silk Mills Ltd., MIDC, Murbad. For this movement of raw material, they are preparing annexure to challans. For this clearance also I have attended factory of M/s Santogen Textile Mills Ltd. (100% EOU) each and every time when they have intimated the clearance. I have countersigned Annexure II challans, as well as issue register at the time of delivery to the job worker. Now you have shown me the file containing pages 1 to 288 having delivery challan/annexure II challans and Part C challans to be filled by the contractors / job workers and asked to be identified my signature appearing on the said document. I have seen and perused file having page no.1 to 288 tendered by M/s Santogen Textile Mills Ltd. I have signed first and last page of the said file in token of having seen and perused the same. I wish to state that signatures appearing on pages nos.211 to 287 of the said file as the Central Excise Officer in charge of (100% EOU) are my own signatures. The signatures appearing on part C (to be filled by sub-contractor) have been made after verifying the receipt of process goods and waste shown in the respective Part C challan. I have also countersigned the production register after verifying processed goods received in the factory premises of M/s Santogen Textile Mills Ltd. (100% EOU).”

29. Looking at all this evidence that has been recorded of the Excise Inspectors themselves, what is clear is that the same is in tune with the documentary evidence. The preponderance of

probabilities is therefore in favour of the Appellant. Looking to these facts and evidence, we find it difficult to sustain the conclusion of the CESTAT that not a single piece of raw material (yarn) reached the Appellant's factory, which in turn was a violation of the provisions of the Central Excise Act, 1944 and/or Notification No.1/95-CE dated 4th January, 1995. We find that no person has given any statement under section 14 of the Act that the goods were diverted nor any such duty free goods were seized by the Revenue outside the factory of the Appellant. In fact, during stock taking, the Officers of the Revenue found goods in different form lying in the factory in various stages. This would further caste grave doubts on the allegation of diversion. In fact, there was no dispute that the supplier had supplied the goods and its receipt by the Appellant. Further, there was no dispute on payment for the transportation of the said goods from the supplier to Bhiwandi. All this clearly establishes that the allegation of diversion was not based on any concrete material but rather only on suspicion and without any real basis. In light of this oral and documentary evidence, we find that the allegation / contention of the Department that the raw materials bought by the Appellant from 14 suppliers was diverted and never brought to the Appellant's factory, cannot be sustained.

30. It appears that the conclusion arrived at by the CESTAT is solely on two factors: (i) on the basis of a statement of the estranged brother of one of the Directors of the Appellant who stated that his firm never carried out any job work for the Appellant; and (ii) on the basis of the statements recorded of the transporters of the 14 suppliers who stated that they had transported the raw material only upto Bhiwandi. We find that the heavy reliance placed on these statements, and ignoring everything else, is wholly incorrect and erroneous for more than one reason. Firstly, it is not in dispute and in fact even admitted by the Appellant that the transporters of the suppliers had transported the raw materials only upto Bhiwandi. It is the specific case of the Appellant that this raw material was thereafter transported by the Appellant to their factory in their own transport vehicles and this is why there is no proof regarding transport of the said raw materials from Bhiwandi to Appellant's factory. However, the voluminous documentary evidence read with the statements of the Excise Inspectors referred to by us, clearly indicates otherwise. Secondly, the evidence (documentary and oral) would clearly go to indicate that the stand of the Revenue that no raw material ever reached the Appellant's factory cannot be sustained. It is not the case of the

Revenue that the Excise Inspectors who were in-charge of the Appellant's factory and who have signed the various statutory registers and documents in anyway connived with the Appellant. Neither is it the case of these Officers that they were misled in putting their signatures on various documents that indicate that the raw materials reached the Appellant's factory, and were not diverted. In view of this voluminous documentary evidence read with the statements of the Excise Inspectors recorded under section 14 of the Act, we are clearly of the view that the reliance placed by the CESTAT as well as the Revenue only on the oral statements of an estranged brother of one of the Directors of the Appellant as well as the transporters of the suppliers (to come to the conclusion that the raw material – yarn had been diverted), was wholly erroneous and contrary to all well known settled legal principles. It is now trite law that documentary evidence has far greater weightage against oral evidence especially when the oral evidence is contrary to the documentary evidence. This position in law is very well settled but if one needs to refer to any authority on the subject, it would be apposite to refer to a decision of the Privy Council in the case of **Ramdhandas Jhajharia v/s Ramkisonadas Dalmia and Others [AIR 1946 Privy Council page178]**, wherein

Their Lordships have inter-alia held that in a case where oral testimony is of an unreliable and untrustworthy character, the safest policy would be to let the documents speak for themselves. Where the oral evidence is unreliable and contradictory, the Court cannot safely depart from the written evidence of the documents.

31. This being the position emanating from the record before us, and looking to the totality of the facts of the case, we have no hesitation in setting aside the impugned order.

32. Lastly we must state that considering the view that we have taken, we feel that no useful purpose will be served in individually dealing with the decisions cited by Mr Bangur. They are wholly inapplicable to the facts before us. None of these decisions lay down any law which would enable the CESTAT or the authorities below to ignore documentary evidence and only rely upon the oral statements made by the transporters of the 14 suppliers as well as the estranged brother of one of the Directors of the Appellant.

33. In light of above discussion, the questions of law as framed for our consideration are answered in the following

manner:-

CENTRAL EXCISE APPEAL NO.213 OF 2007 [Filed by STML]

Sr.No	Questions	Answers
1	Whether in the facts and circumstances, the Tribunal is right in sustaining the duty demand from the Appellant and imposition of penalty on the Appellant ?	In the negative and in favour of the Appellant and against the Revenue.
2	Whether the Appellant as buyer of the goods is liable to pay duty or the duty is payable by the manufacturer EOUs ?	In the negative and in favour of the Appellant.
3	Whether in the facts and circumstances, the Tribunal is right in holding that the goods after taking delivery are not brought into 100% EOU export and not used in the manufacture of export?	In the negative and in favour of the Appellant and against the Revenue.
4	Whether the Tribunal was right in not following the judgment passed by the co-ordinate benches of the Appellate Tribunal passed in the case of Carrier Aircon Ltd. v/s CCE, New Delhi, reported in (144) ELT 170, Delhi and in the case of CCE v/s Godrej and Boyce Manufacturing Co.Ltd., reported in 2004(175) ELT 656 ?	In the negative.
5	Whether in the facts and circumstances of the present case, duty will be payable by the consignor or the consignee, in terms of Notification No.1/95 dated 4th January 1995 ?	Does not survive

CENTRAL EXCISE APPEAL NO.263 OF 2007 [Filed by Manikchand
G. Sharma]

1	Whether the Tribunal was right in imposing the penalty on the Appellant under rule 209A of the Rules in spite of the fact that none of the ingredients of offence under rule 209A exists?	In the negative and in favour of the Appellant and against the Revenue.
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CENTRAL EXCISE APPEAL NO.105 OF 2010 [Filed by The
Commissioner of Central Excise, Mumbai-II]

1	Whether the CESTAT has jurisdiction to reduce the mandatory penalty imposed under section 11AC and Rule 209 of Central Excise Act without assigning any reason ?	In view of the fact that the duty itself could not have been imposed on STML, the question of imposing any penalty did not arise
2	Whether the CESTAT is justified in waiving the penalty on the Managing Director and Director of the Assessee under Rule 209A even though they were incharge of the illegal activity of the Assessee ?	In view of the fact that the duty itself could not have been imposed on STML, the question of imposing any penalty on its Executive Director (Manikchand G. Sharma) cannot and does arise.
3	Whether the CESTAT is justified in reducing the penalty on the Executive Director of the Assessee under Rule 209A even though it has held that there is enough material to show that he was involved in illegal activity?	Same as answer to Question No.2 above.

34. All the three Appeals are accordingly disposed of in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)

(S. C. DHARMADHIKARI J.)