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HIGH COURT OF CHHATTISGARH, BILASPUR**TAXC No. 164 of 2017**

M/s Prakash Industries Limited P. O. Champa, District Janjgir Champa,
Chhattisgarh Pin Code No. 495671 ---- **Appellant**

Versus

Commissioner Central Excise, Central Excise And Service Tax, Dhamtari
Road, Tikrapara Raipur Chhattisgarh 492001 ---- **Respondent**

And**TAXC No. 165 of 2017**

N. K. Gupta, Vice President, S/o Shri M. L. Gupta Aged About 62 Years
M/s Prakash Industries Limited, P.O. Champa, District Janjgir Champa,
Chhattisgarh Pin Code 495671 ---- **Appellant**

Versus

The Commissioner Central Excise, Central Excise And Service Tax Raipur
Chhattisgarh 492001 ---- **Respondent**

And**TAXC No. 167 of 2017**

M/s Prakash Industries Limited Post Office Champa, District Janjgir-
Champa, Chhattisgarh. Pin Code No. 495671 ---- **Appellant**

Versus

The Commissioner Central Excise, Central Excise And Service Tax Raipur,
Chhattisgarh. 492001 ---- **Respondent**

For Appellant : Mr. B. Adinarayan Rao, Senior Advocate with Mr.
Rohit Choudhary and Mr. Prasoon Agrawal, Advocates

For Respondent : Mr. Vinay Pandey, Advocate

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Judgment On Board****09/08/2018****Per Manindra Mohan Shrivastava, J.**

Heard.

1. This appeal was argued in detail by learned Senior Counsel

Mr. B. Adinarayan Rao, assisted by Mr. Rohit Choudhary, Advocate on 08.09.2018. The matter remained part heard as learned counsel for the respondent could not complete his argument. Today, learned counsel for respondent has concluded his argument.

2. This order shall dispose off three appeals TAXC No.164 of 2017, TAXC No.165 of 2017 & TAXC No.167 of 2017.

3. These appeals have been clubbed together as identical questions of law were framed in all the appeals and heard analogously as all these appeals arise from the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (CESTAT) in three appeals, two of them filed by Assessee and one by the Revenue in the matter of challenge to order dated 31.03.2006 passed by the Commissioner (Adjudication) Raipur, in proceeding initiated against the Assessee under show cause notice dated 18.10.2002/21.11.2002.

4. The Revenue issued a show cause notice dated 18.10.2002/21.11.2002 to the Assessee (appellant in two of the appeals herein) as well as two other entities of the assessee as also to Shri Bal Kishan Gupta and Shri Naresh Kumar Gupta, both being Vice President in M/s. Prakash Industries Ltd. Champa, District Champa-Janjgir (CG) proposing recovery of Central Excise Duty as also recovery of interest and imposition of penalty. The notice also proposed confiscation of land, building, plant and machinery. In reply to the show cause notice, the assessee filed its reply and the Commissioner acting as Adjudicating authority, after enquiry, passed an order on 31.03.2006 confirming demand of duty amounting to Rs.1,51,44,426/- along with interest. The Commissioner, however, dropped the demand of Rs.9,94,65,997/-.

5. The Assessee went up the appeal before the CESTAT challenging the part of the order passed by the Commissioner in so far as it confirmed demand of duty amounting to Rs.1,51,44,426/-. An appeal against penalty was also filed by one of its Vice President. The Revenue also filed an appeal, aggrieved by the part of the order of the Commissioner, by which, demand of Rs.9,94,65,997/- was dropped.

6. In so far as the order of the Adjudicating authority in dropping demand of duty of Rs.9,94,65,997/- is concerned, the Tribunal was of the view that a case of remand was made out as material on record was not properly scrutinized by the Adjudicating authority. In so far as confirmation of demand of Rs.1,51,44,426/- is concerned, the Tribunal upheld the said confirmation and dismissed the appeal of the Assessee. The appeal against the imposition of penalty was partly allowed by reducing the amount of penalty from Rs.50,00,000/- to Rs.5,00,000/-.

7. In TAXC No.164 of 2017, the part of the order of the Tribunal, by which, demand of duty amounting to Rs.1,51,44,426/- has been upheld is under challenge. In the other appeal TAXC No.167 of 2017, the Assessee has raised grievance in so far as the Tribunal has remanded the matter for reconsideration in the matter of demand of duty of Rs.9,94,65,997/-. The third appeal TAXC No.165 of 2017 filed by the Vice President of the Assessee is against the Tribunal's order to the extent it upholds the penalty imposing liability for penalty, though reducing the amount of penalty from Rs.5,00,000/- to Rs.1,00,000/-

8. For the sake of convenience, all the appeals were clubbed together and following two questions of law were framed by this Court :

“(1) Whether the Tribunal has committed an error of law by remitting the matter back to the Commissioner for *de novo* inquiry on the issue concerning evasion of duty amounting to Rs.9,94,65,997/- without discussion of evidence available on record which prevailed upon the Commissioner to drop this part of the demand ?

“(2) Whether the Tribunal is justified in relying upon the admission made by the AGM of the assessee company to sustain the order of imposition of duty to the tune of Rs.1,51,44,426/- more so when this part of the demand was also based on the same set of evidence on which the demand of Rs.9,94,65,997/- was dropped by the Commissioner ?”

9. Learned Senior counsel appearing for the appellant-assessee contended before us that the learned Tribunal was not justified in remanding the matter for reconsideration of the Adjudicating authority in the absence of there being any ground for remand made out. According to learned Senior counsel for the appellant, though there exists a power of remand with the Tribunal, remand could be justified only in circumstances warranting consideration of new evidence or

fresh opportunity of hearing or for the like reason necessitating examination of material which was not before the Adjudicating authority. It has also been contended that present is not a case where the Tribunal formed an opinion that entire enquiry is required to be reopened either because it was completely misdirected or because any relevant clinching evidence which ought to be collected, was not collected or produced by the respective parties and the interest of justice required granting them opportunity to produce such oral or documentary evidence. Taking further his argument, learned counsel for the appellant argued that it is not even a case where any other party has alleged that they were not afforded proper opportunity of hearing. It is not even a case where the parties sought to lead additional evidence by placing before the Tribunal, any new evidence which necessitated any *de novo* inquiry. The adjudicating authority had afforded opportunity to all the parties and upon assessment of oral and documentary evidence on record, recorded its finding. Those findings were challenged by the Assessee on various grounds. It is argued that in such a situation, the Tribunal ought to have examined all the grounds raised by the Revenue against the order of the Commissioner dropping demand of duty amounting to Rs.9,94,65,997/- and come to its own conclusion rather than sending the matter back to the Adjudicating authority. To support the submission, reliance is placed on the judgment of the Hon'ble Supreme Court in the cases of **Ashwinkumar K. Patel Vs. Upendra J. Patel and Ors., (1999) 3 SCC 161, Syeda Rahimunnisa Vs. Malan Bi (Dead) by L.Rs. and another, etc., AIR 2016 SC 4653. and I.T.C. Limited Vs. Commissioner of Central Excise, Bangalore, 2002(140) ELT 4(S.C.).**

10. On the other hand, learned counsel for the respondent/Revenue argued that the Tribunal while examining various grounds raised by the Assessee in appeal before it, found that various oral and documentary evidence led by the Revenue were not properly examined and appreciated. Therefore, in such a circumstance, the Tribunal could have passed an order of remand which it is possessed of under the provision of Section 35-C of the Central Excise Act, 1944 (for short 'the Act of 1944'). According to him, the power of remand in appropriate circumstances is available with the CESTAT and it cannot be said to be beyond jurisdiction.

11. As far as the second substantial question of law framed by this Court is

concerned, the argument of learned counsel for the appellant is that the statement of the Assistant General Manager of the Assessee company was recorded under duress and these two officers of the Assessee company retracted from the said statement by filing affidavit before the Adjudicating authority and they were also subjected to examination. The statements alleged to have been obtained under duress by investigation officers, exercising police powers, the statement were not relevant and by no stretch of imagination, it could be treated as an admission of clandestine removal. The Adjudicating authority, swayed by so called admission, which were otherwise not admissible and relevant, confirmed demand under various heads, amounting to a total of Rs.1,51,44,426/-. It was contended that in order to receive such statements in evidence, a satisfaction is required to be recorded under the law. It has also been argued that in any case, even if it is treated to be relevant, the statement could not be used as an admission. As the findings with regard to confirmation of demand of Rs.1,51,44,426/- are mainly based on so called admission, the entire demand of duty of Rs.1,51,44,426/- is liable to be set aside.

12. In reply, learned counsel for the Revenue argued that present is not a case where the persons whose statements were recorded during investigation wherein clandestine removal was admitted, were not examined before the Adjudicating authority, even though, they had retracted their statement earlier made then examined before the Adjudicating authority and the Adjudicating authority assessed the evidence on record and while carrying out such an assessment, whether the statement recorded during investigation were to be relied upon and if so, to what extent, was also taken into consideration. It is next contended that the demand of duty of Rs.1,51,44,426/- has been confirmed not only on the basis of the admission alone but on many other incriminating evidence and therefore, even if the statements recorded during investigation are not treated as admission, there is overwhelming evidence available to uphold and sustain the demand and it is not a case of no evidence nor a case where demand is based on inadmissible or irrelevant evidence. According to learned counsel for the Revenue, once it is found that there were other material to sustain the demand, the question of law whether the Tribunal was justified in relying upon admission made by the AGM of the assessee company, would not be a substantial question of law. He would submit that the aspect of enquiry into clandestine removal and adjudication in respect thereof is based on relevant and admissible evidence as

also based on reasonable inference drawn from proved facts and circumstances, upon due scrutiny not only by the Adjudicating authority but also by the Tribunal. Therefore, the appeals have no merit and are liable to be dismissed. Learned counsel places reliance on the decision of the Hon'ble Supreme Court in the case of **Collector of Customs, Madras and others Vs. D. Bhoormall, (1974) 2 SCC 544** as also an order passed by the Tribunal in the case of **Gulabchand Silk Mills Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad-II, 2005 (184) E.L.T. 263.**

13. Finding on Substantial Question of Law No.1 :

The Adjudicating authority, before coming to the conclusion that demand of duty amounting to Rs.9,94,65,997/- was liable to be dropped, has undertaken detailed scrutiny of oral and documentary evidence on record. In this regard, the considerations made by the Adjudicating authority in para 5.8 of its order dated 31.03.2006 is relevant. After posing itself to the issue raised, the Adjudicating authority, taking into consideration the broad submission made by the respective parties firstly examined the legal position with regard to requirement of law to prove and establish a case of clandestine removal. After having examined the series of decisions, it was observed thus :

“In view of above decisions, it is observed that the allegation of clandestine manufacture and clearance has to be established with the evidences relating to clandestine receipt of raw materials, extra consumption of energy, transportation of the goods, receipt of the goods by the buyers, receipt of sale proceeds etc. In a nutshell, suppression of production is required to be established first to establish clandestine removal of goods as production is first step for removal.”

13.1. The Adjudicating authority, thereafter, examined in great details, the material on record before it, which not only runs into several paragraphs but several pages. It has taken into consideration the evidence relied upon by the investigators for alleged evasion of duty which include statements of the officers of the Assessee company, the invoices, registers recovered from the transporters including statement of some other persons. The Adjudicating authority then recorded that no other evidence in the form of clandestine receipt of raw material, consumption of electricity, manufacture of goods, transportation of goods, receipt

of the goods by the consignees or receipt of sale proceeds etc. has been brought on record. It further recorded that there was no evidence of clandestine purchase or receipt of raw material and consumption of electricity or receipt of sale proceeds brought on record. It was observed that the investigation lacked on most vital aspects. It was also observed that the records reveal that searches were carried out in the premises of two transporters namely; M/s. Kamal Transport and M/s. Bajrang Transport but the investigators failed to conduct searches at other transporters' offices. Eventually, invoices said to be prepared on computer, were also assessed. A panchnama under search dated 30.04.2002 and material collected upon search in the premises of transporters, recovery of bilty books, bilty nakal register were all taken into consideration but doubt was raised by holding that the entries made in the bilty nakal registers were not corresponding with the bilties issued by M/s. Bajrang Transport creating doubt about the authenticity and correctness of entries made in the bilty nakal register. The Adjudicating authority minutely scrutinized not only the documents collected during search but also various circumstances and it held that all the entries made in various registers, records though verifiable but no efforts was made to check the same. It was also recorded that various records pertaining to raw materials, finished goods, sales, marketing, computer floppies containing back up etc. were withdrawn but no discrepancies have been found in those records as no such evidence has been brought on record. A conclusion was thus arrived as below :

“In such circumstances, 'bilty nakal registers' of Kamal Transport and M/s. Bajrang Transport and some bilties of Kamal Transport which are third party documents and maintained without any authority are not evidence of clandestine removals because they are not supported by corroborative evidences in view of CEGAT's decision in the cases of Kothari Pouches Ltd. Vs. CCE [2001(135) E.L.T. 531 (T)] holding that “documents of transporters relied on by no department to prove clandestine removal without any independent corroborative evidence no evidence found during search of appellant's premises by Central Excise Officers statements of branch incharge of transporter and authorised signatory of company not prove the charge of clandestine removal”. In the case of Sober Plastic Pvt. Ltd. Vs. CCE [2002(139) E.L.T. 562(T) it was held that “demand based on weighment slips, slips recovered from Dharamkanta etc. relied upon for raising demand not verified with reference to transactions is not sustainable. Further, it is settled position of law that proof and evidence of purchase of raw materials and sell of final product clandestinely is

necessary in to establish the allegation of suppression of production and clandestine removal of goods and that the allegations are to be proved with affirmative evidences." Further, it was held in the case of *Brim Products Vs. CCE* [2001(130) E.L.T. 719(T)] that "revenue is to prove charge of clandestine removal beyond doubt." The CEGAT also held that "no positive evidence to establish clandestine removal adduced by department-Quantity of alleged removal calculated on basis of transport company's records-Demand based on presumptions and assumptions not sustainable". Similarly, the statements are not acceptable as conclusive evidence as narrations made therein are not supported by corroboratory evidences in view of CESTAT's decision in the case of *Pioneer Industries Vs. CCE* [2006(193) ELT 506 (T)] holding that "clandestine removal based merely on alleged confessional statements without corroborations by any document is not sustainable."

It was further observed :

"The allegation of clandestine removal on the basis of 'bilty nakal registers' and some bilties of transporters is not conclusively established because neither the suppression of production is investigated or established nor corroborative evidences showing clandestine removal of goods are brought on record as discussed above. The investigation totally failed to bring on record, cogent, tangible and conclusive evidence to sustain the allegations of suppression of production and clearance. Transporter's documents itself are not conclusive evidence of evasion of duty as they are third party's record and cannot be applied to the party without corroborative evidences. Confessional statements of the persons also are not supported by corroborative evidences. In the light of above discussion clearly bringing out the evidence relied upon by the investigators and investigations which must have gone into by the investigators, various case law, I find that the proposed demand of duty is not sustainable due to improper investigation and lack of evidences. This finding also gets support from the following cases."

13.2. Relying upon several decisions of the Tribunal that suspicion howsoever, grave cannot take place of legal proof and that the allegations of clandestine removal of the goods will not stand established when based only on the entries made by the assessee's employee in a diary or on the basis of third party's record in the absence of any corroborative evidence and further that the finding could not be based on assumption and presumption, without any tangible

evidence, it finally concluded as below :

“5.9.....However, the allegation of evasion of duty amounting to Rs.9,94,65,997/- based on bilty nakal registers of Kamal transport and Bajrang transport and some bilties of Kamal Transport is not established due to improper investigation and lack of evidence. The proposed demand of duty is, therefore, liable to be dropped.”

13.3. It would, thus, be seen that the Adjudicating authority had minutely scrutinized the entire material on record, oral and documentary both, to reach upon its own finding that allegation of evasion of duty amounting to Rs.9,94,65,997/- based on bilty nakal register of Kamal transport and Bajrang transport and some bilties of Kamal Transport is not established due to improper investigation and lack of reliable evidence.

13.4. When the said order of the Adjudicating authority was challenged by the Revenue before the Tribunal, the Tribunal, as we see, to some extent, went into the merits of the case but then without recording its own finding on facts, upon consideration of entire material on record, justified the order of remand. The Tribunal's finding to justify remand are as below :

“14. Revenue is also in appeal against the same Order-in-Original No.38/2006 dated 31.03.2006. The Id. AR for the Revenue, based on appeal memorandum mainly contends that the impugned order has erred in dropping the demand of Rs.9,94,65,997/- on 67,170,156 MTs of final goods cleared without payment of duty on the basis of bilties recovered from the premises of various transporters. The Id. Counsel for the Department submits that the respondent assessee, M/s. PIL evaded Central Excise duty and it has been admitted by AGM of PIL and the case is also based on Bilty Nakal Register.

14.1 Revenue also contends that the penalties imposed are not commensurate with the level of duty evasion confirmed.

15. On behalf of the respondents, Ld. Advocate during the hearing, in addition to the submissions made for their appeals Nos. 2287 & 2292, submit that the department in their appeal did not effectively rebut and controvert of the findings of the Commissioner given in the impugned order. Bilty Nakal Register recovered from third party itself is not an evidence but only a source of suspicion.

16. It may be mentioned that the Tribunal's decision in the case of **Gulabchand Silk Mills Pvt. Ltd. Vs. CCE – 2005 (184) ELT 263** and Hon'ble Supreme Court's decision in the case of **Collector Vs. D. Bhoormull – 1983 (13) ELT 1546 (SC)** needs to be referred to. The CESTAT in the decision **Gulabchand (supra)** observes that clandestine activity at best can be established only by circumstantial evidence. The Hon'ble Supreme Court in the case of **D. Bhoormull (supra)** has observed that the department is not required to prove its case with mathematical precision; the case is required to be established with such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. After careful consideration of the facts of the case and submissions of both sides, we are of the view that in the light of above observations the evidence in the form of Bilty Nakal Register needs proper examination afresh by the Adjudicating authority. The contents of such Bilty Registers, which were recovered from the transport company and when they are related to the goods manufactured and cleared by the respondent assessee, need proper examination and more so when there are statements available on record of the concerned persons viz. Shri R.K. Bhadoria, AGM (Logistics) and Shri S.N. Jha, AGM (Excise) of the assessee company. These statements give credence to the contents of the said Bilty Register. These aspects were not examined in the impugned order. When it is so then in the interest of justice, we are of the view that the same need to be examined in depth specially when there are transporter's documents along with confessional statements of the concerned persons, the adjudicating authority is required to examine the same *de novo* in the light of above discussion with the reference to the charges levelled against the respondent in the Show Cause Notice issued to them."

13.5. After going through the aforesaid order of remand, we find that the Tribunal having broadly considered the nature of evidence brought before the Adjudicating authority, decided to remand the case. There is nothing in those finding that any of the parties were not afforded opportunity of proper hearing to lead oral or documentary evidence. The Tribunal also directed towards necessity of collection of new evidence by granting opportunity to the parties before the Adjudicating authority. We also do not find that an occasion for remand arose because before CESTAT, either the assessee or the Revenue came out with some new relevance in the form of oral and documentary evidence necessitating, in the interest of justice, a *de novo* inquiry. What, in fact, the Tribunal has done is to remand the case with the direction to the Adjudicating authority to review its

own order and nothing else. In our considered opinion, this course of action, in the facts and circumstances of the present case, was not available under the law, even assuming that in view of provision contained in Section 35-C of the Act of 1944, the Tribunal has implicit power and jurisdiction to remand the case for afresh adjudication. The relevant statutory provision in this regard needs to be taken notice of which reads as under :

“S.35-C(1) Orders of Appellate Tribunal – The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.”

13.6. The Tribunal while hearing an appeal against an order of Adjudicating authority, no doubt is empowered to confirm, modify or annul the decision or order appealed against. It is also empowered to refer the case back to the authority which passed order with such directions as the Tribunal may think fit. However, such power has to be exercised on satisfaction that a case of remand is made out. The power of remand cannot be taken recourse to only for the purposes of directing the Adjudicating authority to review its own order by entering into re-appreciation of oral and documentary evidence which was already appreciated by it, followed by findings thereon.

13.7. In the matter of exercise of powers of appeal, the Tribunal, no doubt, is not circumscribed by the rules relating to remand in civil cases which are governed by the provision contained under Order XLI Rule 23-A, 24 & 25 CPC. Nevertheless, remand would be permissible only when it has become necessary to do so. There may be cases where the parties had complained of violation of principle of natural justice or that it was not allowed to lead any oral and documentary evidence which, in the opinion of the Tribunal, was relevant. There may be other cases where the Tribunal forms an opinion that the matter required further enquiry by the Adjudicating authority. These, instances are not exhaustive but only indicative as regards the circumstances when an order of remand may become necessary.

13.8. In the matter of **I.T.C. Limited (supra)**, their Lordships in the Supreme Court found that the Tribunal, ignoring the matter for detailed study, remanded the case on the finding that detailed study should have been made as also a careful analysis of the discrepancies said to be found in the assessee's explanation. It was held that :

“3. It is submitted before us on behalf of the assessee that relevant material was before the Tribunal and, if required, it could have asked for more but it should have disposed of the appeal itself instead of making the order of remand. The learned Attorney General has agreed that this is the appropriate course to follow. If the Tribunal required more evidence, it could have called for the same.”

13.9. It has to be seen that even in a case where the Tribunal required more evidence, it could have called for the same. The Appellate Authority was the Tribunal constituted under Section 35-C of the Act of 1944.

13.10. The broad principles warranting remand to be taken recourse to, though with reference to the provision contained in Order XLI of CPC were considered by the Hon'ble Supreme Court in the case of **Syeda Rahimunnisa (supra)**, as below:

“35. It is a settled principle of law that in order to claim remand of the case to the trial Court, it is necessary for the Appellate to first raise such plea and then make out a case of remand on facts. The power of the appellate Court to remand the case to subordinate court is contained in order XLI Rule 23, 23-A and 25 of Code of Civil Procedure. It is, therefore, obligatory upon the Appellant to bring the case under any of these provisions before claiming a remand. The appellate Court is required to record reasons as to why it has taken recourse to any one out of the three Rules of Order XLI of Code of Civil Procedure for remanding the case to the trial Court. In the absence of any ground taken by the Respondents (appellants before the first appellate court and High Court) before the first appellate court and the High Court as to why the remand order in these cases is called for and if so under which Rule of Order XLI of Code of Civil Procedure and further in the absence of any finding, there was no justification on the part of the High Court to remand the case to the trial Court. The High Court instead should have

decided the appeals on merits. We, however, do not consider proper to remand the case to High Court for deciding the appeals on merits and instead examine the merits of the case in these appeals.”

13.11. In another decision in the case of **Ashwinkumar K. Patel (supra)**, again being a matter where power of remand was regulated by the provision contained under Order XLI of CPC. It was held as below :

“8. In our view, the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower Court merely because it considered that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreement of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.”

13.12. In the aforesaid two decisions, while examining the scope of remand, broad principles have also been taken into consideration as to when remand could be made.

13.13. In view of aforesaid considerations, we are of the view that though the Tribunal had power to remand the case, in the circumstances, exercise of power was not justified in law as the Adjudicating authority had elaborately examined the issue by taking into consideration the entire material on record. It was for the Tribunal to examine the legality and validity of such finding on the grounds raised by the Revenue and arrive at its own finding as to whether the Adjudicating authority was correct in law and on fact in reaching upon the conclusion that demand of duty of Rs.9,94,65,997/- was liable to be dropped. We accordingly set aside the part of the order of the Tribunal to the extent it directs remand of the case in the matter of consideration of leviability of demand of

Rs.9,94,65,997/-.

14. **Finding on Substantial Question of Law No.2**

The issue with regard to admissibility of a statement recorded during investigation was examined by this Court in the case of **TAXC No.54 of 2017 (M/s. Hi Tech Abrasives Limited Vs. the Commissioner, Central Excise and Customs, Raipur)**. In that case, an issue was raised as to whether statement recorded during investigation was admissible in evidence so as to constitute admission of clandestine removal when the person whose statement is said to be taken was not examined before the Adjudicating authority. Upon examination of the said issue in the light of provision contained in Section 9-D of the Act of 1944, this Court held that unless the person whose so called admission is said to be recorded during investigation is examined by the Adjudicating authority and Adjudicating authority forms an opinion that the statement should be admitted in evidence, in the interest of justice, such a statement would not be admissible. In the present case, however, the admitted facts are that the statements of two Assistant General Managers of the Assessee company namely: Shri R.K. Bhadoria, AGM (Logistics) and Shri S.N. Jha, AGM (Excise) which were recorded during investigation and which the investigator used as their admission of clandestine removal, had retracted their statement by filing their respective affidavit also. The order passed by the Adjudicating authority shows that both of them were cross-examined also. However, we do not find any satisfaction recorded by the Adjudicating authority in terms of statutory requirement of Section 9-D (1)(b) of the Act of 1944. The relevant provision is extracted herein below :

“S.9-D(1)(b). When the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.”

14.1. Interpreting the aforesaid provision, this Court in the case of **M/s. Hi Tech Abrasives Limited (supra)**, held as below :

“On scanning the anatomy of the said provision, we find that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the

purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b). While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court.”

14.2. Therefore, the twin requirement before the statement become admissible as relevant pieces of evidence where they are used as corroborative piece of evidence or as admission, are that the person who made the statement is examined as witness before the Adjudicating authority and secondly, that the Adjudicating authority forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice. No doubt, two persons had filed affidavit and they were also examined two Assistant General Managers but there is no satisfaction recorded by the adjudicating authority that in the circumstances of the case, it should be admitted in the interest of justice. We find that the Adjudicating authority and the Tribunal both have proceeded to take such statement as admission of clandestine removal. Therefore, we are of the view that the statement of two Assistant General Managers namely : Shri R.K. Bhadoria and Shri S.N. Jha could not be treated as admission of clandestine removal.

14.3. However, we find that the finding recorded by the Adjudicating authority and confirmed by the Tribunal is not solely based on the so called admission but based on other evidence on record which we were taken through during the course of argument, as contained in paras 5.4, 5.5, 5.6, 5.7 & 5.8. Though, it was strenuously urged before us that once statements recorded during investigation are excluded from consideration as admission of clandestine removal, the matter would further require a relook as to whether on the basis of the remaining evidence, the finding could be sustained in law, after giving our anxious consideration, we are unable to accept the submission.

14.4. We find that apart from the statement recorded during investigation, there were other incriminating evidence and circumstances relied upon by the Adjudicating authority as well as the Tribunal to confirm demand of duty of

Rs.1,51,44,426/- and it is not a case that once the statement is excluded from consideration as admission of clandestine removal, the conclusion of clandestine removal, would fall to the ground.

14.5. Learned counsel for the Revenue appears to be correct in submitting that decision on the questions of law will not have material bearing on the ultimate conclusion and finding recorded by the Adjudicating authority and the Tribunal.

14.6. In the result, the appeal (TAXC No.164 of 2017) is allowed in part.

14.7. We accordingly answer the first substantial question of law against the Revenue and in favour of the Assessee. Further, we accordingly answer the second substantial question of law against the assessee and in favour of the Revenue.

14.8. The Vice President of the Assessee company filed a third appeal raising only an issue of levability of penalty, on which, no substantial question of law as such has been framed. Perhaps in the event of assessee having been granted relief as prayed for, it would have an impact on the sustainability of the order of penalty. As we have not interfered with the finding of the Adjudicating authority and the Tribunal in so far as confirmation of demand of Rs.1,51,44,426/- is concerned, the appeal of the Director Mr. N.K. Mehta (TAXC No.165 of 2017 must also fail).

14.9. In the result, Assessee's Appeal (TAXC No.164 of 2017) is allowed and the order of the Tribunal to the extent it directs remand is set aside and the appeal of the Revenue before the Tribunal is restored to its original number. The Tribunal shall consider all the grounds raised by the Revenue to assail the order of Adjudicating authority in dropping demand of Rs.9,94,65,997/- and decide the same on its own merits.

14.10. TAXC No.165 of 2017 and TAXC No.167 of 2017 are dismissed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MCC No. 236 of 2019

- M/s Prakash Industries Limited Post Office Champa, District Janjgir Champa, Chhattisgarh

---- Applicant

Versus

- Commissioner Central Excise Central Excise And Service Tax, Dhamtari Road, Tikrapara, Raipur, Chhattisgarh

---- Respondent

For Applicant	:	Ms. Ruchi Nagar, Advocate
For Respondent	:	Shri Vinay Pandey, Advocate

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Rajani Dubey

Order On Board

18/03/2019

Heard learned counsel for the applicant and the respondent.

Learned counsel for the applicant pointed out certain typographical mistake which the learned counsel for the respondent does not object to.

Accordingly, it is ordered that in common order dated 09/08/2018 passed in three tax matters i.e. TAXC No.164/2017, TAXC No.165/2017 and TAXC No.167/2017 in last line of para 6, in place of "Rs.50,00,000/- to Rs.5,00,000/-" it shall be read as "Rs.5,00,000/- to Rs.1,00,000/-"

In paras 14.6 and 14.9, in place of "TAXC No.164 of 2017", it shall be read as "TAXC No.167 of 2017".

In para 14.10, in place of "TAXC No.167 of 2017", it shall be read in substitution as "TAXC No.164 of 2017".

MCC is accordingly disposed off.

This order shall be produced by the parties along with the main order referred to above.

Sd/-

**(Manindra Mohan Shrivastava)
Judge**

Sd/-

**(Rajani Dubey)
Judge**