

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

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 86076 of 2015

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Arvind N. Patel

.... Appellant

5- Nagrani Building, Nr. Jalaram Temple,
Hariyanawala Lane, Kurla (W), Mumbai- 400 07.

Versus

Commissioner of Central Excise, Mumbai-II

.... Respondent

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

WITH

Excise Appeal No. 86077 of 2015

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Mahendrabhai C Patel

.... Appellant

08- Rainbow Park, Karamsad,
Vidyanagar, Dist- Anand, Gujarat- 388 120.

Versus

Commissioner of Central Excise, Mumbai-II

.... Respondent

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

WITH

Excise Appeal No. 86078 of 2015

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Smt Kailashben M. Patel

.... Appellant

Shop No.3, Pocketwala Building,
Ground Floor, Station Road, Kurla (W),
Mumbai- 400 070.

Versus

Commissioner of Central Excise, Mumbai-II

.... Respondent

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

WITH**Excise Appeal No. 86079 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Rahul M Patel

08- Rainbow Park, Karamsad,
Vidyanagar, Dist- Anand, Gujarat- 388 120.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86080 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Arvind N. Patel

5- Nagrani Building, Nr. Jalaram Temple,
Hariyanawala Lane, Kurla (W), Mumbai- 400 07.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86081 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Shri Krishna Traders

Godown No.6, LBS Road, Near Patel Products,
Unit No-III, Kurla (W), Mumbai- 400 070.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH**

Excise Appeal No. 86082 of 2015

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Shri Gajanan Agency

5- Nagrani Building, Nr. Jalaram Temple,
Hariyanawala Lane, Kurla (W), Mumbai- 400 07.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86083 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Ashokbhai S. Patel

5- Nagrani Building, Nr. Jalaram Temple,
Hariyanawala Lane, Kurla (W), Mumbai- 400 07.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86092 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Mahendrabhai C Patel

Unit No. 1-4, Flat No-A/2, Ground Floor,
Mansi Apartment, New Mill Road, Kurla (W),
Mumbai- 400 070.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86100 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated 30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Patel Product

Plot No. 36, Anand Sojitra Road,
Anand, Gujarat- 388 340.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86101 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated
30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Patel Product Unit No-III

Plot No. 36, Anand Sojitra Road,
Anand, Gujarat- 388 340.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**WITH****Excise Appeal No. 86102 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated
30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Patel Product Unit No-II

Plot No. 36, Anand Sojitra Road,
Anand, Gujarat- 388 340.

....**Appellant**

Versus

Commissioner of Central Excise, Mumbai-II

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

.... Respondent**AND****Excise Appeal No. 86103 of 2015**

(Arising out of Order-in-Original No. 16/RN/COMMR/M-II/2014-15 dated
30.01.2015 passed by the Commissioner of Central Excise, Mumbai-II)

Patel Product Unit No-I

Plot No. 36, Anand Sojitra Road,
Anand, Gujarat- 388 340.

.... Appellant

Versus

Commissioner of Central Excise, Mumbai-II Respondent
9th Floor, Piramal Chambers,
Jijibhoy Lane, Lalbaugh, Parel
Mumbai- 400 012.

APPEARANCE:

Shri Devashish K. Trivedi, Advocate for the Appellant

Shri Shambhoo Nath, Special Counsel for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86115-86127/2024

Date of Hearing: 18.06.2024

Date of Decision: 04.10.2024

Per: S.K. MOHANTY

Brief facts of the case, leading to these appeals are that M/s Patel Product is a proprietorship firm of Shri Mahendrabhai C. Patel. It is having its head office at Khandhali (a place near Anand), Gujarat. It was having four different units viz. Unit-I, II, III and IV in Kurla (West), Mumbai. All the four units were having different registration numbers issued by the jurisdictional Central Excise authorities. Those units manufacture 'Unmanufactured Branded Tobacco' and after packing the same in printed pouches bearing a brand name of 'Om Special Pandharpuri Tambakoo No. 1', were sold in the market. All the above four units discharged their Central Excise Duty liability on removal of the said products and also maintained statutory records and filed their statutory returns separately. Those units were also separately audited under the provisions of the Central Excise statute. Shri Mahendrabhai C. Patel was a Power of Attorney Holder of two firms viz. (a) M/s Shree M.C. Patel & Sons, a proprietorship firm of his wife Smt. Kailashben M. Patel and (b) M/s Shree Krishna Traders, a partnership firm of his sons Shri Neeraj M. Patel and Shri Rahul M. Patel. Both these firms were engaged in manufacture and sale of 'Unbranded Unmanufactured Loose/Bulk

Tobacco'. Both these firms were having their respective head offices at Khandali, Gujarat and were having shop at Kurla (W), Mumbai. As Unbranded Unmanufactured Tobacco did not attract any Central Excise Duty, both these firms were not registered with the Central Excise Department. The respective head office of Patel Product, Shree M.C. Patel & Sons and Shree Krishna Traders at Khandali used to purchase raw tobacco leaves from various middle men (dalals) of tobacco as well as farmers of tobacco. They used to sieve and remove the twigs, stems, veins of the raw leaf and size the same. The quality of raw tobacco purchased by Patel Product was superior as the same was required for manufacturing 'Unmanufactured Branded Tobacco', whereas quality of raw tobacco purchased by the other two firms was inferior, when compared with the raw tobacco purchased by Patel Product, as it was to be used for sale of loose / bulk tobacco without any brand name. All the three firms at Khandali used to pack their respective leaves in sacks of 40 kgs. each. Thereafter, 250 sacks used to be loaded in a transport vehicle in one trip and were transported from Khandali to Kurla respectively. The tobacco leaves of Patel Product were received by the four units of Patel Product at Kurla, where they used to pack 'Unmanufactured Branded Tobacco' viz. '*Om Special Pandharpuri Tambakoo No. 1*' and sell the same on payment of Central Excise Duty. Whereas, the remaining two firms received their respective tobacco leaves and sold them in loose/bulk viz., packed in sacks without any brand name. No Central Excise Duty was payable by these firms in regard to the same loose/bulk tobacco. In order to pack 'Unmanufactured Branded Tobacco' bearing a brand name '*Om Special Pandharpuri Tambakoo No. 1*', Patel Product used to get the pouches printed with the said brand name. The printed pouches were supplied to Patel Product mainly by M/s Montage Enterprises (P) Ltd. In the four different units of Patel Product, the labourers were employed. These labourers used to manually pack tobacco into pouches bearing brand name and used to seal the said pouches with the help of hand sealing machine. M/s Jalaram Traders, proprietorship firm of Arvindbhai N. Patel and subsequently M/s Shree Gajanan Agency, partnership firm of Arvindbhai N. Patel and Ashokbhai S. Patel used to purchase respective tobacco from the said three firms and sell the same to various buyers, situated within the municipal limits of (i) Kalyan –

Dombivli – KDMC, (ii)Thane – TMC, (iii) Pune – PMC, (iv) Bhiwandi – Nizamura – BNMC and (v) Ulhasnagar – UMC. They also sell these products to various outstation buyers. Delivery of tobacco to the buyers situated within the aforesaid municipal limits was made in their own vehicles and delivery to outstation buyers were made through various transporters situated at Sakinaka, Mumbai.

2. During the course of searches conducted at the premises of the appellants as well in other places, the Central Excise officers have recorded statements of various persons. In his statement dated 10.06.2013, Shri Mahendrabhai C. Patel, proprietor M/s Patel Product had stated that raw tobacco used for production of 'Om Special Pandharpuri Tambakoo No. 1' is Grade-I quality and raw tobacco which is used for retail/bulk sale from M/s Shree Krishna Traders and M/s Shree M.C. Patel & Sons is Grade-II and III quality tobacco. All these bulk tobaccos are purchased at Khandhali, Gujarat in respective firm's name and thereafter, those were stock transferred to Kurla (West), Mumbai through All India Road Transport Company, wherein each consignment consisted of 250 bags, each of 40 kgs. During the course of investigation, the department had alleged that at the time of stock transfer, from Khandhali to Kurla of Grade-II / III raw tobacco of M/s M.C. Patel & Sons, Kurla and M/s Shree Krishna Traders, instead of 250 bags of Grade-II and III quality, raw tobacco about 50 to 75 bags of Grade-I quality tobacco, which is required in production of 'Om Special Pandharpuri Tambakoo No. 1' were also transferred from Khandhali to Kurla, under the guise of Grade-II/III bags of raw tobacco of M/s Shree M.C. Patel & Sons and M/s Shree Krishna Traders in respect of each consignment. It was further alleged that the said 50 – 75 bags of Grade-I quality tobacco were procured under guise of Grade- II / III quality tobacco in the account of M/s Shree M.C. Patel & Sons, Kurla and M/s Shree Krishna Traders, Kurla and subsequently diverted to M/s Patel Products, Kurla for suppression of production and clandestine clearance of 'Om Special Pandharpuri Tambakoo No. 1'. On the basis of sales bill / delivery memos issued by M/s Shree M.C. Patel & Sons, Khandali and M/s Shree Krishna Traders, Khandali, the total number of deliveries were arrived at. As per the aforesaid statement of Shri Mahendrabhai C. Patel, for one delivery 250 bags of 40 kgs. each were considered.

The total quantity of raw tobacco transported by both these firms to Kurla was worked out at the rate of 10,000 kgs. of tobacco per trip. Diversion of 75 bags per trip was taken into consideration. This is how number of bags of raw tobacco procured in the name of M/s Shree M.C. Patel & Sons and M/s Shree Krishna Traders and diverted to M/s Patel Product, Kurla for suppressed production and clandestine clearance of '*Om Special Pandharpuri Tambakoo No. 1*' were arrived at.

3. On the basis of detailed investigation, Show Cause Notice (SCN) dated 08.07.2013 was issued, taking into consideration the aforesaid diversion of raw material i.e., superior grade tobacco in guise of inferior grade tobacco at the rate of 75 bags per trip, in regard to the period from June, 2008 to August, 2012, the alleged clandestine clearance of packed '*Unmanufactured Branded Tobacco*' by M/s Patel Product was worked out. The assessable value of bags of '*Om Special Pandharpuri Tambakoo No. 1*' cleared clandestinely was considered as Rs.58,46,35,230/-. Basic excise duty @ 42% upto 28.02.2010 and 50% w.e.f. 01.03.2010 along with Additional Duty of Excise @ 4.2%, Education Cess and Secondary & Higher Education Cess were accordingly worked out. A demand of total Central Excise Duty payable on such clandestine clearance of '*Om Special Pandharpuri Tambakoo No. 1*' was worked out to be Rs.31,11,78,562/-. The SCN alleged that M/s Jalaram Traders and M/s Shree Gajanan Agency were controlled by Shri Mahendrabhai C. Patel and therefore, the price at which these two firms used to sell the said branded tobacco of M/s Patel Product in the open market, should be considered as assessable value, for the purpose of demanding Central Excise Duty from M/s Patel Product. On that basis, a demand of differential Central Excise Duty on account of under valuation during the period from June, 2008 to July, 2012 of Rs.3,67,06,613/- was made. The total demand of Central Excise Duty of Rs.34,78,85,175/- was proposed for recovery from M/s Patel Product, Unit-I-II-III-IV, jointly and severally. It had also proposed for imposition of personal penalty on (a) Shri Mahendrabhai C. Patel, proprietor of M/s Patel Product [Unit-I-II-III-IV], (b) M/s Jalaram Traders, M/s Gajanan Agency, (c) Shri Arvindbhai N. Patel, proprietor/partner of M/s Jalaram Traders/ M/s Shree Gajanan

Agency, (d) Shri Ashokbhai S. Patel, partner, M/s Shree Gajanan Agency, (e) Shree M.C. Patel & Sons, proprietor of Smt. Kailashben M. Patel, (f) M/s Shree Krishna Traders, (g) Shri Neeraj M. Patel, Partner, M/s Shree Krishna Traders (h) Shri Rahul M. Patel, partner, M/s Shree Krishna Trader, (i) Shri Mahendrabhai C. Patel, Power of Attorney Holder, M/s Shree Krishna Traders and M/s Shree M.C. Patel & Sons. Out of the aforesaid demand on clandestine clearance amounting to Rs.31,11,78,562/-, some evidences were gathered by the investigation to support the demand of Rs.10,78,00,874/-. The officers of Central Excise Department had found out that M/s Jalaram Traders / M/s Gajanan Agency were selling tobacco in the Municipal Corporation limits in their own vehicles. The officers had requested the municipal authorities for providing the data pertaining to transportation of tobacco into the respective municipal limits in the vehicles of M/s Jalaram Traders / M/s Gajanan Agency. The respective authorities in the (a) KDMC Municipal Corporation, (b) Thane Municipal Corporation and (c) Pune Municipal Corporation, had provided details of tobacco transported into the respective municipal limits in the vehicles of M/s Jalaram Traders / M/s Gajanan Agency. Based on the said detail, a Central Excise Duty calculation in respect of clearance of bags of tobacco in the municipal limits of said three municipal corporations were worked out. Accordingly, it was calculated that total duty payable in regard to the clearances made inside the municipal limits of (a) Kalyan - Dombivli Municipal Corporation was Rs. 5,28,85,631/- (Rs.4,50,56,544/- + Rs.78,29,087/), (b) Thane Municipal Corporation was Rs.1,81,55,891/- (Rs.1,06,25,446/- + Rs.75,30,445/-) and (c) Pune Municipal Corporation was Rs.2,31,16,900/.

4. Investigation was also carried out at the end of 14 (fourteen) numbers of transporters. On the basis of statements of the said 14 transporters, the department had made out a case that 6415 bags of '*Om Special Pandharpuri Tambakoo No. 1*' were cleared without payment of Central Excise Duty by M/s Jalaram Traders / M/s Gajanan Agency. The total assessable value of the said tobacco was calculated as Rs.2,49,10,908/- and the Central Excise Duty payable in regard to the same was calculated as Rs.1,36,42,451/-. This is how, on the basis of the said letters provided by the aforesaid three

Municipal Corporation offices and investigation conducted at the end of fourteen (14) transporters, a total Central Excise Duty of Rs.10,78,00,874/- was worked out. This demand was a part of total demand of Rs.31,11,78,562/-, being worked out on the basis of diversion of raw material i.e. superior grade of tobacco in guise of inferior grade of tobacco at the rate of 75 bags per trip from M/s Shree Krishna Traders, Khandali and M/s Shree M.C. Patel & Sons, Khandali to M/s Patel Product, Kurla. The SCN had also recorded that Shri Mahendrabhai C. Patel, Proprietor of Patel Product was arrested on 13.06.2013 and was granted bail by the Chief Metropolitan Magistrate Court. He appeared before the investigation on 17.06.2013, when his statement was recorded under Section 14 of Central Excise Act. It is also mentioned in the SCN that Mahendrabhai C. Patel had retracted his statement dated 17.06.2013 vide affidavit dated 18.06.2013 and had also submitted a copy of said affidavit before the investigation and in response thereto, rejoinder letter of even number dated 26.06.2013 was sent by the investigation to Mahendrabhai C. Patel. Likewise, the SCN had also recorded further statement of Shri Mahendrabhai C. Patel under Section 14 of Central Excise Act, 1944 on 20.06.2013. It is mentioned in the SCN that Shri Mahendrabhai C. Patel, subsequently vide his affidavit dated 21.06.2013, had retracted his said statement dated 20.06.2013 and that a copy of the same was given to the investigation and that a rejoinder letter dated 26.06.2013 was sent by the Investigation to Shri Mahendrabhai C. Patel, rebutting the retraction affidavit.

5. The SCN issued by the department was adjudicated by the learned Commissioner of Central Excise, Mumbai-II vide Order-in-Original No. 16/RN/COMMR./M-II/2014-15 dated 30.01.2015 (for short, referred herein as 'the impugned order'), in confirming the proposals made therein. The following order was passed by the learned adjudicating authority:

"ORDER

(i) I confirm the demand of Rs. 34,78,85,175/- [Rupees Thirty Four Crores, Seventy Eight Lakhs Eighty Five Thousand One Hundred seventy five] and order its recovery from Shri Mahendrabhai. C. Patel, Proprietor of M/s Patel Product [Unit-1-II-III-IV], under sub-section (4) & (10) of Section 11A of the

Central Excise Act, 1944 [erstwhile proviso to Section 11A(1)] of the Central Excise Act, 1944];

(ii) I appropriate the amount of Rs.5,00,00,000/- (Rupees Five Crore) paid by M/s. Patel Product, during the course of the case investigations, vide its GAR-7 challans No. 04/2012 dated 12.11.2012 [Rs 75,00,000/-], Challan No. 10/2012 dated 27.11.2012 (Rs 2,50,0000/-); Challan No. 22/2013 dated 22.01.2013 [Rs 50,00,000/-]; Challan no. 74/2013 dated 23.03.2013. Rs 2,50,00,000/-], Challan No.11 dated 25.04.2013 [Rs 50,00,000/-]; and Challan No. 12 dated 29.04.2013(Rs 50,00,000/-), against the demand confirmed in para above;

(iii)I order recovery of interest at appropriate rate from Shri Mahendrabhai C.Patel, proprietor, M/s. Patel Product, Unit I-II-III-IV, under provisions of Section 11AA (erstwhile Section 11AB) of the of the Central Excise Act, 1944, read with rule 8 of the Central Excise Rules, 2002;

(iv)I refrain from ordering confiscation under Rule 25, of the CER 2002, the excisable goods total valued at Rs 65,39,86,112/-(Rs. Sixty five Crores Thirty Nine lakhs eighty six thousand, one hundred, twelve) as the same are not available for confiscation;

(v) I impose a penalty Rs. 34,78,85,175/- [Rupees Thirty Four Crores, Seventy Eight Lakhs Eighty Five Thousand One Hundred seventy five] under the provisions of Section 11AC of the Central Excise Act, 1944, on Shri Mahendrabhai C. Patel, proprietor of M/s. Patel Product [Unit-I-II-III-IV];

(vi)I impose a penalty of Rs. 1,00,00,000/- (Rupees One crore only) on Shri Mahendrabhai Patel, under the provisions of Rule 26 of the Central Excise Rules, 2002;

(vii) I impose a penalty of Rs. 25 lakhs on Shri Arvindbhai N. Patel, proprietor of M/s Jalaram Traders (Noticee No 6) under Rule 26 of the Central Excise Rules 2002;

(viii) I impose a penalty of Rs. 10,00,000/- (Rupees Ten lakhs only)under Rule 26 of the Central Excise Rules 2002, on M/s Shree Gajanan Agency (Noticee No.7), which devolves on Shri Mahendrabhai Patel, the defacto owner of M/s Shree Gajanan Agency;

(ix) I impose a penalty of Rs. 10,00,000/- (Rupees Ten lakhs only) on Shri Arvindbhai N Patel & Rs. 10,00,000/- (Rupees Ten lakhs only) on Shri Ashokbhai S Patel, (Noticee No 8 & 9) under Rule 26 of the Central Excise Rules 2002;

(x) I impose a penalty of Rs. 20,00,000/- (Rupees Twenty lakhs only) on Smt Kailashben M Patel, Proprietor, M/s. Shree M.C. Patel & Sons (Noticee No. 10), under Rule 26 of the Central Excise Rules 2002;

(xi)I impose a penalty of Rs. 20,00,000/- (Rupees Twenty lakhs only) on M/s. Shree Krishna Traders (Noticee No.11), which

devolves jointly and severally on Shri Neeraj M Patel & Shri Rahul M Patel, partners of M/s. Shree Krishna Traders, (Noticee No.12 & 13) under the provisions of Rule 26 of the Central Excise Rules, 2002;

(xii) I impose a penalty of Rs. 50,00,000/- (Rupees Fifty lakhs only) on Shri Mahendrabhai C Patel, Power of Attorney Holder of M/s Shree M.C. Patel & Sons and M/s Shree Krishna Traders, (Noticee No. 14), under the provisions of Rule 26 of the Central Excise Rules, 2002."

6. Feeling aggrieved with the impugned order dated 30.01.2015, the appellants have preferred these appeals before the Tribunal.

7.1 Learned Advocate Shri Devashish K. Trivedi, appearing for the appellants, at the time of hearing of appeals and in the written submissions has submitted as follows:-

7.2 The impugned Order records that during the course of personal hearing, M/s. Patel Products had submitted replies dated 20.12.2013 for all the four units of M/s. Patel Products. Further written submission dated 03.03.2014 was also submitted by the said four units of M/s. Patel Products. Entire reply dated 20.12.2013 as well as further written submission dated 03.03.2014 of M/s. Patel Products are reproduced in the impugned order, from which it is found that M/s Patel Product had submitted before the adjudicating authority copies of retraction affidavits of all those persons, whose statements were recorded and relied upon for the purpose of SCN. In their reply, the appellants had also submitted before the adjudicating authority (i) affidavit dated 17.02.2014 of one Mr. Deepaq Modgil, Chief Marketing Officer, M/s. Montage Enterprises (P) Ltd., along with copy of his statement, the fact of which though was recorded by the officers but, was not relied upon in the SCN, (ii) affidavits of twenty-five different farmers / middle men (dalals) of raw tobacco, who had supplied raw tobacco to (a) M/s. Patel Products, Khandhali, (b) M/s. Shree Krishna Traders, Khandhali and (c) M/s. Shree M.C. Patel & Sons, Khandhali, (iii) affidavits of Production Supervisor of Unit – I, Unit - II & Unit – IV of M/s. Patel Products, wherein the said supervisors have explained the packing process, affirmed the number of packing labourers employed in respective units, number of working days and also affirmed the number of inner pouches, outer pouches and bags of

`Om Special Pandharpuri Tambakoo No. 1' packed in a month by the respective unit, (iv) affidavits of three buyers of tobacco viz. (a) Jiya Pradeep Jagiasi, Proprietor of M/s. Ekta Traders, (b) Md Anjum Abdul Gafar, Partner of M/s. Haya Traders, Mumbai, and (c) Md Javed Haji Yakub, Partner of M/s. Heena Enterprise, who have affirmed that the officers of Central Excise Department had visited them and tried to threaten them and obtain statements, but failed in their such action. M/s. Patel Products had requested the Adjudicating Authority to afford cross examination / examination-in-chief of:

- 1) Gulammiya Jamalmiya Sekh, Sandhana
- 2) Mahendrabhai Vishnubhai Patel, Ramol
- 3) Dhaneshbhai Manibhai Patel, Sandhana
- 4) Babubhai Valabhai Patel, Godhaj
- 5) Amratbhai Devabhai Patel, Der
- 6) Hirjibhai Narayanbhai Patel, Godhaj
- 7) Mukanji Hirji Patel, Kunda
- 8) Gautambhai Chanciabhai Patel, Maherav
- 9) Kashibhai Lallubhai Solanki, Dedarada
- 10) Maheshbhai Kantibhai Patel, Maherav
- 11) Manojkumar Kantilal & Co., Tundav
- 12) JC Tobacco, Unja
- 13) Kantibhai Mathurbhai Patel, Maherav
- 14) Revabhai Ishwarbhai Patel, Balisana
- 15) Shri Brahmani Tobacco, Hansapur
- 16) Shri Ambica Tobacco, Hansapur
- 17) Bhagwati Tobacco Co, Unja
- 18) Rameshbhai Dahyabhai Patel, Sandhana
- 19) Sureshbhai Gordhanbhai Patel, Sandhana
- 20) Kiritbhai Kanubhai Patel, Sandhana
- 21) Rajnibhai Chandubhai Patel, Sandhana
- 22) Shri Shivaji Dhansinh, Rathore, Production supervisor of Unit-III of M/s. Patel Products.
- 23) Shri Raju Maganbhai Parekh, Production supervisor of Unit-I of M/s. Patel Products,
- 24) Shri Anil Damor, Production supervisor of Unit-II
- 25) Shri Santosh Kantibhai Patel, Production supervisor of Unit-IV
- 26) Shri Vishnudutt Vyas,

- 27) Shri Deepaq Modgil,
- 28) Shri Abdul Razzaq Chouhan of M/s Arco Transport Co.
- 29) Shri Saleem Abdul Kadar Sheikh of M/s Batco Roadlines Corporation.
- 30) Shri Suresh Gopal Suvarna of M/s Sholapur Goods Transport,
- 31) Shri Nagesh Chalak of M/s Jagrut Transport Co.
- 32) Shri Raja Ram K. Katkar of M/s Sachdeva RoadlinesPvt. Ltd.,
- 33) Shri Avinash Subhash Nigadikar of M/s Jyoti Roadlines,
- 34) Shri Mohd. Anis of M/s Panchmahal Transport Co.
- 35) Mahendra K. Thakkar of M/s Satara Koregaon Motors Transport Co.
- 36) Shri Bhupinder Singh of M/s Southern Travel andCarriers
- 37) Shri Raghunath K Panwar, Manager of M/s Milan Logistic,
- 38) Shri Altaf Patni alias Altaf Chand of M/s Anupam Transport Corporation.
- 39) Shri Jayesh Ramanlal Vora of M/s Sapna Roadways,
- 40) Shri Shashi Nair of M/s Maa Annarpurna Transport Agency Ltd.
- 41) Shri Sadik Kapadia of M/s Kapadia Transport Co.
- 42) Shri Arvindbhai Narsinhbhai Patel Proprietor/Partner-M/s Jalaram Traders/ M/s Shri Gajanan Agency-7,
- 43) Shri Ashok S. Patel Partner, Shri Gajanan Agency,
- 44) Shri Pankaj Vithalbhai Patel, Accountant of M/s M.C. Patel & Sons
- 45) Shri Jitendrakumar Vinubhai Patel, Accountant of M/s M.C. Patel & Sons
- 46) Shri Mahendrabhai IshwarbhaiPatel, Proprietor of M/s Shri Durga Tobacco
- 47) Shri Jayesh N. Patel
- 48) Dharmendrakumar Suratwala.
- 49) Mohd Javed Haji Yakub
- 50) Mohd Anjum Abdul Gaffar
- 51) Mrs. Jiya Pradeep Jagiasi
- 52) Authorised signatory of M/s. Konark Infrastructure Ltd. who had issued letter dated 12.10.2012 and letter dated 27.11.2012
- 53) Respective staff of M/s. Konark Infrastructure Ltd. who is said to have physically collected octroi and issued octroi slips to tobacco importers within the limits of Kalyan and Dombivli Municipal Corporation during the period from 25.07.2009 to 24.06.2012 and period from 01.06.2008 to 06.07.2009.

- 54) The Assistant Commissioner of Octroi, The Municipal corporation of the City of Thane, Mahapalika Bhavan, who has issued letter dated 26.09.2012 and 24.12.2012
- 55) Respective staff of M/s. Thane Municipal Corporation of Thane who is said to have physically collected octroi and issued octroi slips to tobacco importers within the limits of Thane Municipal Corporation during the period from 04.07.2011 to 05.08.2012 and period from 26.09.2010 to 23.05.2011
- 56) The Assistant Commissioner of Octroi, Pune Municipal Corporation who has issued letter dated 23.11.2012.
- 57) The Respective Staff of the Pune Municipal Corporation who has collected Octroi in regard to tobacco being imported inside the jurisdiction of Pune Municipal Corporation within the period from 2007 to 2012.

7.3 During the course of investigation, various statements of (a) Arvindhbai N. Patel, Proprietor of M/s. Jalaram Traders and Partner of M/s. Shree Gajanan Agency, (b) Mahendrabhai C. Patel, Proprietor of M/s. Patel Products, (c) Mahendrabhai C. Patel in capacity of Power of Attorney Holder of M/s. Shree Krishna Traders and M/s. Shree M.C. Patel & Sons, (d) Pankaj Vitthalbhai Patel, Counter Salesman (Accountant) of Shree M.C. Patel & Sons, Kurla (W), (e) Ashok Shanabhai Patel, Partner of M/s. Shree Gajanan Agency, (f) Keshar Balkrishna Lokhande, Packing Labourer of M/s. Patel Products, Kurla (West), (g) Shivaji Dhansing Rathod, (h) Mahendra Ishwarbhai Patel, Proprietor of M/s. Shree Durga Tobacco, (i) Jayesh N. Patel of M/s. Ashok Somabhai & Co., Kalyan were recorded. Each of them had retracted their respective statements on the very next day in which those were recorded. Copies of each of the statements and the respective retraction affidavits are annexed in the appeal memorandum filed by M/s Patel Product. The officers of Central Excise department had, during the course of investigation, recorded statement dated 15.04.2013 of Mr. Deepaq Modgil, Chief Marketing Officer, Montage Global Enterprises (P) Ltd. He has also invited attention of the Bench to the said statement, as per which Mr. Modgil was shown statement dated 06.11.2022 of Shri Mahendrabhai C. Patel, stating therein conversion ratio of plastic pouches as 840 per KG. Mr. Modgil had stated that on an average, depending upon GSM variation, the number of pouches per KG would be about 900. It is his submission that since the said statement was of no avail to the officers of the department, they had suppressed the said statement

and not relied on the same. Learned Advocate for the appellants invited attention to affidavit dated 17.12.2014 of Shri Modgil wherein he has affirmed that they supply printed packing pouches and printed packing bags (inner pouches and outer packing bags) to M/s Patel Product. M/s Patel Product is engaged in manufacture of '*Om Special Pandharpuri Tambakoo No. 1*'. Therefore, the printed pouches are printed with said brand. He was called by the Central Excise officer vide summons. He had attended the Central Excise Office on 15/04/2013. When he particularly informed that the printed packing pouches were supplied in kilograms and not on piece basis, the officers wanted him to state more number of pouches were contained in one kilogram, than what was in actual. He had very promptly stated the correct ratio. In case of paper foil pouches, the ratio varies, but it cannot be more than 900 pouches per kilogram. He was shown statement of Mahendrabhai C. Patel, wherein he has stated that in one kg. 840 pouches would be made. He explained that thicker ply of plastic / paper, one kilogram would consist of less number of pouches, whereas thinner ply, one kilogram would consist of more number of pouches. He confirms that what Mahendrabhai C. Patel has stated is correct. Under no specification / size, the yield has gone above 900 pouches per kilogram. Learned Advocate placed reliance on the affidavits of 25 different farmers / dalals of raw tobacco, who had supplied raw tobacco to (a) M/s. Patel Product, Khandhali, (b) M/s Shree Krishna Traders, Khandhali and (c) M/s Shree M.C. Patel & Sons, Khandhali. It is his submission that despite the fact that Shri Mahendrabhai Patel in his statement had categorically said that the quality of raw tobacco purchased by (a) M/s Patel Product, Khandhali, Anand, Gujarat, (b) M/s Shree Krishna Traders, Khandhali, Anand, Gujarat, and (c) M/s Shree M.C. Patel & Sons, Khandhali, Anand, Gujarat are different, inasmuch as, M/s. Patel Product purchased only "A"-Grade i.e., best quality tobacco as they pack branded tobacco and that the remaining two firms does business of unbranded tobacco, therefore, they purchased "B" Grade / "C" Grade tobacco. No investigation was carried out at the end of said Dalals / Farmers of raw tobacco suppliers to find out the veracity of the same. Instead, arbitrarily it was concluded that there was no difference in the quality and therefore, tobacco purchased by the remaining two firms were diverted to M/s. Patel Products. Attention was also invited to the

contents of affidavits, wherein the farmers / dalals who have supplied raw tobacco to all the three firms have clearly affirmed that the quality of tobacco purchased by M/s Patel Product, was superior quality (A Grade); whereas, the quality of raw tobacco purchased by remaining two firms was of inferior quality (B/C Grade). The farmers / dalals have affirmed that the quality depends on the thickness of leaf i.e., thicker the leaf, better the quality. Best quality is used for packing branded tobacco and inferior quality is used for unbranded tobacco. A packer of branded tobacco cannot use the tobacco supplied for unbranded tobacco. Further, reliance was also placed on the affidavits of Production Supervisors of remaining three units of M/s. Patel Product, Kurla (W), viz. Unit – I, Unit – II and Unit – III. It has been submitted that the said three production supervisors as well as Mr. Shivaji Dhansingh Rathod, the Production Supervisor of M/s. Patel Product, Unit – IV, in their respective affidavits have deposed, giving details of the total number of labourers employed in the respective units as well as total number of pouches packed in a day, in the respective units. They have also deposed the number of working days, in which the activities were undertaken during the entire period in dispute. It is the submission of the appellant that if the affidavits are compared with the recorded quantity of production as per statutory returns filed, in Form ER-1 for respective units, the data would match. This means, there is no illicit manufacture over and above the recorded quantity being manufactured and cleared from the four units of M/s. Patel Product. Respective affidavits of production Supervisor of Unit-I, II & IV of M/s Patel Product are annexed with the appeal memorandum of M/s Patel Product. He further submitted that during the course of investigation, although officers of Central Excise Department had visited other three buyers of tobacco and tried to threaten them and obtain their statements as per their requirement, the said three buyers had not agreed to give false statements. Therefore, the officers had not recorded the statements of said three buyers. These three buyers have filed respective affidavits, narrating the whole incident. Copies of the affidavits of (a) Jiya Pradip Jagiasi, Proprietor of Ekta Traders, (b) Mohd. Anjum Abdul Gafar, Partner of Haya Traders, Mumbai, (c) Mohd. Javed Haji Yakub, Partner of Heena Enterprise are annexed with the appeal memorandum filed by M/s Patel Product. He further submitted that if the SCN is referred to, then

as per Annexure MCP 58800 bags of 40 KGs of 'A' grade are alleged to have been diverted. Likewise, as per Annexure SKT 15325 bags of 40 KGs of 'A' grade are alleged to have been diverted. Thus, as per the SCN, Total 74125 bags of 40 KGs of 'A' grade were diverted. This means, $74125 \text{ bags} \times 40 \text{ KGs} = 2965000 \text{ KGs}$, $2965000 \text{ KGs} = 296500000$ inner pouches of 10 gms. and 7412500 outer pouches containing 40 inner pouches each and 185313 gunis (big bags) containing 40 outer pouches each. All these must be in addition to the recorded quantity of finished goods as per ER-1 returns. The recorded quantity of inner pouches during Financial Year 2008-2009 was 51950300, Financial Year 2009-2010 was 43438200, Financial Year 2010-2011 was 39828000, Financial Year 2011-2012 was 29053000 and Financial Year 2012-2013 was 10174400. The total recorded quantity of inner pouches during five years was 174443900. Therefore, if the case of the department is to be believed, then total inner pouches manufactured and cleared during the period in dispute would be $296500000 + 17444390 = 470943900$ inner pouches. It is the submission of the appellant that there is absolutely no evidence of procurement of the packing material i.e., rolls for printed pouches. He further submitted that total number of working days as summarized in a worksheet annexed at Annexure 'D' to the Appeal Memorandum is 4941 days in all five years. Therefore, if the SCN is to be believed, then licit and illicit inner pouches manufactured per day would be $470943900 \div 4941 = 95313.47$. On the other hand, as per ER-1 Return, total inner pouches of 10 gms. manufactured from 2008 - 09 to 2012 - 13 is 174443900, therefore, total KGs of tobacco sold is 17444390 KGs. Total number of pouches purchased is 61462000 inner pouches, 3544050 outer pouches and 155711 bags. It is the submission of the appellant that there is no evidence to show surreptitious procurement of printed pouches for packing and selling clandestinely 2965000 KGs. of tobacco. In order to do so, the appellant would need 348.82 tons (348824 KGs of inner pouches) i.e., 296500000 nos. of inner pouches. Likewise, 44.47 tons (44475 KGs of outer pouches) i.e. 7412500 outer pouches and $(296500000 \div 40)$ large quantity of bag. The weight is calculated based on statement of Mahendrabhai C. Patel dated 06.11.2012, wherein he is said to have stated that 840 printed pouches would be manufactured out of 1 KG of packing material. The said statement is relied upon in the SCN itself.

As regards, statements of Kesar Lokhande and Shivaji Dhansing Rathod, the appellant has stated that same could not be made basis of demand as the same are not reliable. Kesar Lokhande in her statement dated 22.05.2013 is said to have stated total number of inner pouches packed in a day would be 2000 to 3000 (per day per labourer) x 400 to 500 (number of labourers) = 8,00,000 to 15,00,000. Whereas, Shivaji Dhansing Rathod in his statement dated 04.06.2013 is said to have stated that total number of inner pouched packed in a day would be 2700 to 3375 (per day per pair of labourer) x 150 (pair of labourer) = 4,05,000 to 5,06,250. On the other hand, the SCN claims total number of inner pouches manufactured per day is 82,304 (95313.47). According to Kesar Lokhande, she has stated that ratio of work force: number of gunis per day is 400 to 500 workers would pack more than 600 to 750 gunis per day. On the other hand, according Shivaji Dhansing Rahod, he has stated that ratio of work force: number of gunis per day is 300 to 325 workers would pack 187.5 to 203.75 gunis per day. Thus, without prejudice to the retraction affidavits of the said packing labourers and said labour supervisors as well as without prejudice to the affidavits of all other labour supervisors of other units, even otherwise the statements of both these people are not reliable. He further submitted that there is no investigation even in the direction of surreptitious procurement of plastic material / pouch / bag. The officers took a shortcut route and have mentioned in the SCN that a supplier of pouches Mr. Vyas has expired. They had in fact recorded statement of Mahendrabhai C. Patel, wherein they have got wrongly recorded that Mr. Vyas has expired, however, he is very much alive. He used to supply printed plastic bags / pouches to M/s. Patel Product only until the year 2001. Thereafter, he has discontinued supplying the same. The appellant had provided all the details of Mr. Vyas and requested to allow cross examination of Mr. Vyas before the adjudicating authority. However, the learned adjudicating authority failed to allow his cross examination. The appellant had assailed the demand by simply showing a comparison that as per ER-1, the total manufacture and sale is of 173614 KGs during the entire period in dispute and the total duty paid as per ER-1 is Rs.12,19,89,650/-. On the other hand, the SCN alleges procurement of diverted 2778000 KGs for which the duty demanded is Rs.31,11,78,562/-. If the ratio as per ER-1 is

considered, it would have been Rs.19,50,97,103.557 [2778000 KGs x Rs.12,19,29,650/- ÷ 1736164 KGs]. Thus, as per the appellant, the demand is even otherwise is completely unbelievable. In support of above submissions, that in absence of any corroborative evidence supporting illicit manufacture, no demand could be confirmed alleging clandestine clearance of goods, the following orders/ judgements delivered by various judicial forum, were relied upon by the appellant:-

- (i) Sakeen Alloys Pvt. Ltd., versus C.C.E., Ahmedabad - 2013 (296) ELT 392 (Tri.-Ahmd.)
- (ii) Commissioner of Central Excise versus Sakeen Alloys Pvt. Ltd., 2014 (208) ELT 655 (Guj.)
- (iii) Commissioner versus Sakeen Alloys Pvt. Ltd., - 2015 (319) ELT A117 (S.C.)
- (iv) Vishwa Traders Pvt. Ltd., versus Commissioner of C.Ex., Vadodara - 2012 (278) ELT 362 (Tri.-Ahmd.)
- (v) Commissioner of C.Ex.,Cus. & Service Tax v/s Vishwa Traders P. Ltd., - 2013 (287) ELT 243 (Guj.)
- (vi) Commissioner versus Vishwa Traders Pvt. Ltd., - 2014 (303) ELT A24 (S.C.)
- (vii) Commissioner of Central Excise V/s. Kuber Tobacco Products Pvt. Ltd. &Anr. [Judgement dated 11.03.2024 by Hon'ble Delhi High Court in CEAC 40/2012]

7.4 As regards reliance placed on the letters received from the authorities of three Municipal Corporations, and the reliance placed on statements of transporter, out of total demand of alleged clandestine clearance of Rs.31,11,78,562/-, the said so-called supporting evidence is only in regard to the total demand of Rs.10,78,00,873/-. Therefore, demand of Rs.20,33,77,689/- is not supported by even the said so-called evidence. It is also submitted that demand on M/s. Patel Product is based on statement of Mahendrabhai C. Patel dated 10.06.2013, wherein he is said to have stated that 50 to 75 bags of 'A' grade tobacco are diverted per trip in guise of B / C grade tobacco of M C Patel & Sons and Shree Krishna Traders. No investigation at all in regard to purchase of different /similar qualities of tobacco by any of the three firms is made by the officers of Central Excise Department to support the

said allegation. Further, the demand is based on considering diversion of 75 bags per trip although Mahendrabhai C. Patel is said to have stated 50 to 75 bags were diverted per trip. Even otherwise, the reliance placed on the letters along with enclosed data provided by (a) M/s Konark Infrastructure Ltd. i.e. octroi collecting agent for Kalyan and Dombivli Municipal Corporation, (b) Thane Municipal Corporation and (c) Pune Municipal Corporation is not sustainable. It has further been stated that the said worksheet provided by the said authorities to the office of the Central Excise Department were prepared by using computer. However, mandatory provisions of Section 36B of Central Excise Act, 1944 has not been followed. No certificate required under Section 36B(4) has been issued. Therefore, the said worksheets are not reliable. Despite repeatedly requesting for copies of octroi slips i.e. the source document on the basis of which it is alleged that clandestine clearance of '*Om Special Pandharpuri Tambakoo No. 1*' was made inside the municipal limits of respective Municipal Corporations, had also not been provided by the officers of Central Excise Department. The appellant has shown copies of numbers of letters written to the Commissioner of Central Excise, Mumbai-II, requesting him to provide copies of said octroi slips. Response letter received from the Superintendent (Preventive), Central Excise, Mumbai-II was also referred to, wherein he has admitted that the investigation had only obtained concerned information from the concerned Municipal Authorities, attested copies of which were submitted by the respective Municipal Corporations in tabular form. Therefore, the investigating office does not have the original receipts of octroi paid on the basis of which it is alleged that '*Om Special Pandharpuri Tambakoo No. 1*' was cleared into the municipal limits of said Municipal Corporation. It has been contended that no demand of Central Excise Duty could be made without a source document, particularly only on the basis of a data entry worksheet prepared in a tabular form on a computer, in absence of required certificate u/s 36B of Central Excise Act, 1944. In support of such submission, the appellant has relied upon the following judgements:

- a. Commissioner of Customs, Lucknow V/s. Sanjay Soni - 2022 (381) ELT 509 (Tri.-All.)
- b. Anvar P. V. V/s. P. K. Basheer - 2017 (352) ELT 416 (S.C.)

- c. J.P. Iscon Pvt. Ltd. V/s. Commr of Central Excise, Ahmedabad – I, - 2022 (63) GSTL 64 (Tri – Ahmd)
- d. S.N. Agrotech V/s. Commissioner of Customs, New Delhi - 2018 (361) ELT 761 (Tri – Del).

7.5 It was further contended that even otherwise, the said data entry worksheet provided by the respective Municipal Corporations to the investigating officers claiming that '*Om Special Pandharpuri Tambakoo No. 1*' is cleared within the respective Municipal Corporation limits could not be correct. It is so because, the concerned staff of the Municipal Corporation has no business to open the bags of tobacco loaded in a particular vehicle and check whether it is a branded tobacco or unbranded tobacco. The tariff rates of octroi during the period in dispute were the same, irrespective of whether branded or unbranded tobacco, being cleared inside the Municipal Corporation limits. Copies of the respective octroi tariffs of all the three Municipal Corporations in support of said submission were also placed on the appeal records. As the investigation failed to provide copies of the octroi slips, appellant had received the same under RTI from the respective Municipal Corporation. Copies of the said octroi slips are annexed with the appeal memorandum. It is observed from the same that, on none of the octroi slips '*Om Special Pandharpuri Tambakoo No. 1*' is mentioned. What is mentioned in only 'tobacco'. M/s Jalaram Traders and M/s Shree Gajanan Agency used to purchase branded tobacco of M/s Patel Product as well as unbranded loose / bulk tobacco of M/s Shree Krishna Traders and M/s M.C. Patel & Sons. The said octroi slips only mentions 'Tobacco'. Wherever, no corresponding invoice, evidencing clearance of '*Om Special Pandharpuri Tambakoo No. 1*' by M/s Patel Product is found, it is all clearance of unbranded loose / bulk tobacco of M/s Shree Krishna Traders and M/s M.C. Patel & Sons. As regards, the statements of transporters relied upon by the investigation, it has been submitted that, a reading of the said statement would show that on the respective LRs, which were found during investigation, '*Om Special Pandharpuri Tambakoo No. 1*' is nowhere mentioned. It is clear that the LRs only mentioned that 'Tobacco', 'Bag', 'Bulk', 'Tambaku', 'Tambakhu', 'Tabakhu', 'Pan Chatni' on the respective LRs. Further, the appellants have also written various letters to the

Commissioner of Central Excise, Mumbai-II, requesting for supply of copies of LR's, which were reluctantly supplied by the department. The said LR's are also annexed with the appeal memorandum. Even the said LR's show that '*Om Special Pandharpuri Tambakoo No. 1*' is nowhere mentioned on the same. The LR's only show that the respective transporters had transported 'Tobacco', 'Bag', 'Bulk', 'Tambaku', 'Tambakhu', 'Tabakhu', 'Pan Chatni'. The appellants also submitted that wherever corresponding invoice issued by M/s Patel Product evidencing clearance of '*Om Special Pandharpuri Tambakoo No. 1*', the same is clearance of unbranded loose / bulk tobacco by M/s Jalaram Traders or M/s Gajanan Agency. Thus, they pleaded that the demand of Central Excise duty is required to be set aside. Reliance was also placed on the statements of respective persons, which were not admissible in evidence because, despite requesting for cross examination of all those people, in gross violation of Section 9D of Central Excise Act, 1944, the Adjudicating Authority has not afforded opportunity of cross examination. Therefore, it was submitted that all the statements require to be discredited. In support of the said submission, reliance has been placed on following judgements:

- (i) Andaman Timber Industries V/s. Commr. of C.Ex., Kolkata - II, - 2015 (324) E.L.T. 641 (S.C.)
- (ii) Jeen Bhavani International V/s. Commissioner of Customs, Nahva Sheva-III - (2023) 6 Centax 11 (Tri-Bom.)
- (iii) Commr. of C.Ex., Ahmedabad-II V/s. Gujarat Cypromet Ltd. - 2017 (345) ELT 520 (Guj)
- (iv) J & K Cigarettes Ltd. V/s. CCE - 2009 (242) ELT 189 (Del)
- (v) CCE. V/s. Govind Mills Ltd. - 2013 (294) ELT 361 (All).

7.6 Further, appellants have also placed reliance on the following judgments in support of the submission that, even if affidavits were made before Notary public by the respective persons, whose statements are relied upon and copies of the said affidavits were submitted before the adjudicating authority for the first time after issuance of Show-cause Notice, the same is to be considered as a valid retraction:

- (i) Tejwal Dyestuff Industries V/s. Commr of C. Ex. Ahmedabad reported at 2007 (216) ELT 310 (Tri.-Ahmd)

(ii) Commr of C. Ex., Ahmedabad-II V/s. Tejal Dyestuff Industries reported at 2009 (234) ELT 242 (Guj.)

(iii) G. China Yellappa, Nizamabad V/s. Income Tax Officer, Ward – 2, Nizamabad ITTA Nos. 268/2003 dated 06.11.2014 by Hon'ble Andhra Pradesh High Court.

7.7 Without prejudice to the aforesaid submissions, it was further contended that even otherwise, the Show-cause Notice itself was not sustainable. It is so because, vide the Show-cause Notice, all the four units of M/s Patel Product which are separate registered manufacturers under the Central Excise Law, were jointly and severally called upon to show cause as to why Central Excise Duty should not be demanded from them. It is his submission that duty of Central Excise can only be demanded in regard to the goods manufactured. It can only be demanded from a particular manufacturer, who has manufactured the goods. The Show-cause Notice proposed demand of duty for the goods manufactured by one unit from all the four units. This was against the very concept of Central Excise Law. The appellants further submitted that four different units had four separate Central Excise Registration numbers. They were all filing separate statutory returns. They were all separately paying Central Excise Duty. They were all separately audited by the officers of Central Excise Audit. Learned Advocate for the appellants at the time of hearing of appeals has referred to the copies of different audit reports, different ground plans, which were submitted while obtaining separate registration in regard to separate units. In support of the submission that, no demand could be made jointly and severally from four different registered manufacturers and that there can be only one manufacturer of one product, he placed reliance on following judgements:

- (i) Sree Aravindh Steels Limited Vs. Commissioner of C. Ex., Trichy -
2007 (216) E.L.T. 332 (Tri.-Chennai)
- (ii) Famous Textile versus Commissioner of Central Excise – 2005
(191) E.L.T. 592 (Tri.-Mumbai)
- (iii) Rimjhim Ispat Ltd., versus Commissioner of Central Excise,
Kanpur - 2013 (293) ELT 124 (Tri – Del.)

(iv) Rao Industries versus C.C.E. - 2009 (237) ELT 128 (Tri. – Bang.)

7.8 With regard to the demand of Rs.3,67,06,613/- along with interest and imposition of equivalent penalty, the appellants' submissions are that the Adjudicating Authority had applied Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 ("Valuation Rules" for short) and had concluded that the price at which the goods are sold in the open market by M/s Jalaram Traders and M/s Gajanan Agency, shall be considered as the value for the purpose of demanding duty in regard to the said clearances made from M/s Patel Product. The appellant has contended that the transaction value shall be determined under Section 4 of the Central Excise Act, 1944. The Valuation Rules can only be resorted to, if the assessee and the buyer of the goods are related and the price is not the sole consideration for the sale. Thus, the appellants have submitted that related party concept would not be applicable, as per the statements of the partners / proprietors of M/s Gajanan Agency / M/s Jalaram Traders as well as statement of Shri Mahendrabhai C. Patel, proprietor of M/s Patel Product. It was further stated that they have no interest in the business of each other; the sale effected by M/s Patel Product to M/s Jalaram Traders / M/s Gajanan Agency were independent transactions. It has further been submitted that even if it is assumed that they fall under the definition of "related party" as provided in Section 4 of Central Excise Act, 1944, even then while applying the Valuation Rules, first of all Rule 4 contained therein is required to be applied first. As per said Rule, if an assessee is found to be selling identical goods to related buyers as well as unrelated buyers, then for the purpose of charging duty of Central Excise in regard to the goods cleared to the related buyers, the price at which identical goods are cleared to unrelated buyer at the nearest time and place of removal shall apply. In this context, they have relied upon the relevant invoices, evidencing sale of same products by M/s Patel Product to M/s Jalaram Traders / M/s Gajanan Agency as well as to third parties during the same period. It was further contended that the price at which identical goods are sold to third parties, at times, is lower than the price at which said goods are sold to M/s Jalaram Traders / M/s Gajanan Agency. Thus, in that view of the

matter, there cannot be any allegation of under valuation. The demand of Rs.3,67,06,613/- confirmed on the basis of said allegation along with interest is required to be set aside. In support of the said submission, the appellant has placed reliance on following judgements:

- a. Jagajothi Spinning Mills Vs. Commissioner of C. Ex., Salem - 2015 (329) E.L.T. 374 (Tri.-Chennai)
- b. Aquamal Water Solution Limited Vs. Commr of C. Ex., Hyderabad – II - 2005(182) E.L.T. 196 (Tri.- Bang.)
- c. Birdi Steels Vs. Comm of Cent Ex. Ludhiana– 2005(179) E.L.T.82
- d. GKN Sinter Metals Ltd Vs. Commissioner of Central Excise, Pune – I - 2017 (348) E.L.T.583 (Tri - Mum)
- e. Commissioner Vs. H.H. Interior & Auto Components Ltd. - 2018 (360) E.L.T.A312 (S.C.)
- f. Commissioner V/s. Sudarshan Castings (P) Ltd. - 2018 (362) E.L.T.A174 (S.C.)
- g. Jai Corporation Vs. Commissioner of Central Excise & Service Tax, Daman - 2015 (317) E.L.T.353 (Tri – Ahmd)
- h. Ultra Refrigerators Pvt Ltd. Vs. Commissioner of C. Ex., Del-IV - 2004(170) E.L.T. 341(Tri. - Del.)
- i. Commissioner of Central Excise, New Delhi Vs. Kanam Foam Industries - 2004 (170)E.L.T. 237 (Tri. - Del.)
- j. Pepsico India Holdings (P) Ltd. Vs. Commissioner of C.Ex., Mumbai - 2004 (163) E.L.T.478 (Tri. - Del.)
- k. Commissioner of C. Ex, Pune Vs. Arfoline Polymers Limited - 2007 (214) E.L.T. 241 (Tri. – Mumbai)
- l. Oswal Wollen Mills Limited Vs. Commissioner of Cen. Exc. Ludhiana - 2012 (282) E.L.T. 547 (Tri. - Del.)

7.9 Reliance has also been placed on the Notification No. 14/2013 – C.E. (N.T.) dated 22.11.2013, whereby Rule 9 and Rule 10 of the Valuation Rules were amended. It is the submissions of the appellants that the said amendment came into force w.e.f. 01.12.2013. Prior to the said date, Rule 9 and Rule 10 applied only in case, where 100% of total sales were made by an assessee to related buyer. Only w.e.f. 01.12.2013, the amendment took place in the statute was to the effect that if a part sale is made to related buyer, then for that particular sale only, the amended rules have to be applied. Prior to 01.12.2013, since the amended Rule 9 and Rule 10 were not attracted, then the Rule 4 of Valuation Rules alone were

applicable. As regards the appeal filed by the other co-appellants, it has been stated that when clandestine clearance of branded tobacco had not been substantiated with documentary evidences by the department, confirmation of the adjudged demand fails in respect of the appellant M/s Patel product and consequently, the penalties imposed on the other appellants cannot be sustained.

8.1 Shri Shamboonath, learned Special Counsel appearing for the Revenue has brought to the notice of the Bench the findings recorded at page 175 to 180 in the impugned order, to state that the affidavits were forged by the appellants. Therefore, he submitted that the said affidavits cannot be relied upon to decide the issue differently. In support of the submission that the appeals filed by the appellants are deserved to be dismissed, learned Special Counsel has relied upon the following judgements delivered by the judicial forum:

- a. Shyam Lal Biri Merchant Vs. Union of India - 1993 (68) E.L.T. 548 (All.)
- b. G Guru Instruments (North India) Pvt. Ltd. Vs.C.C.E. Meerut - 1995 (80) E.L.T. 846 (Tribunal)
- c. Collector of Customs, Madras & Others Vs. D. Bhoormull-2002 -TIOL-253-SC-Cus.
- d. C.C. Excise, Surat I Vs. N.D. Textiles - 2004 (168) E.L.T. 381 (Tri. Mumbai)
- e. Judgement of C.C. EX. New Delhi Vs. Modi Alkalies& Chemicals Ltd - 2004 (171) E.L.T. 155 (S.C.)
- f. Judgement of Gulabchand Silk Mills Pvt Ltd. Vs.C.C. E. Hyderabad - 2005 (184) E.L.T. 263 (Tri. Bang.)
- g. Judgement of Commissioner C. Ex. Vs. International Cylinders Pvt Ltd. - 2010 (255) E.L.T. 68 (H.P.)
- h. Judgement of R. Shreekumar Vs. CESTAT, Bangalore - 2014 (306) E.L.T. 531 (Ker.)

8.2 Learned Special Counsel further submitted that from the investigation conducted by the officers of Central Excise Department, it was clear that M/s Jalaram Traders and M/s Gajanan Agency were controlled by Shri Mahendrabhai C. Patel, the proprietor of M/s Patel Product. It is his submission that, since it is so, the price at which the branded tobacco was sold in the open market by the said two firms shall be considered as the assessable value for the purpose of demanding Central Excise Duty in regard to the branded tobacco removed from M/s Patel Product. He has placed reliance on the letters along with attached worksheet received by the investigation wing from the authorities of three municipal corporations viz. Kalyan

and Dombivli, Pune and Thane Municipal Corporation. He submitted that from the details of '*Om Special Pandharpuri Tambakoo No. 1*' brought into the respective municipal corporation limits, as evident from the letters / details sent by said authorities, it is clear that in the absence of corroborative Central Excise Invoices, all such removals should be considered as clandestine clearances of the said branded tobacco. He placed reliance on the statement of the respective transporters as well as LR found during the course of investigation. It is his submission that in all those cases, where no corroborative invoices of '*Om Special Pandharpuri Tambakoo No. 1*' were found, but only the LRs were found, those clearances should be treated as clandestine clearance of the said branded tobacco. He further submitted that Revenue is not required to prove its case of clandestine clearance with mathematical precision. According to him, the evidences unearthed during the course of investigation were sufficient to conclude that clandestine clearance of '*Om Special Pandharpuri Tambakoo No. 1*' were made by M/s Patel Product. It is his submission that the Revenue has successfully proved its case and the adjudicating authority has rightly confirmed the adjudged demands against M/s Patel Product and adjudged penalties against all other appellants.

9. We have heard both sides and examined the case records, including the written submissions filed during the course of hearing of appeals.

10.1 We find from the impugned order that M/s Patel Product in their reply to the SCN filed before the adjudicating authority, had submitted copies of retraction affidavits of the persons, whose statements were recorded under summons during the course of investigation of the present dispute. The department had also conducted an enquiry into the retracted affidavits, the fact of which is evident from the available case records. The department had called for the information about the authenticity and veracity of the stamp papers from the Collector of Stamps (stamp paper issuing authority), Thane, in context with the officially recorded dates, on which the stamp papers were issued by them; the name of the stamp vendor to whom they were issued; the date of subsequent sale by the stamp

vendor and the name of the person to whom such stamps were ultimately sold for actual use by the stamp vendor etc. On the basis of the reply furnished by the said authority, it was observed by the department that the stamp papers were issued between 03.09.2013 and 11.09.2013 to stamp vendor Shri Umar Sharif Mohammad Nawaz and that the statement of said stamp vendor was recorded on 10.03.2014. It was also observed that the stamp papers, on which the retracted affidavits made, were bearing a stamp vendor's registration number issued after April, 2013; although the dates of retractions were prior to the said date. Thus, it was contended by the adjudication wing that the retracted affidavits were back dated, and were made in such a fashion, so as to demonstrate that the persons, whose statements were recorded during the course of investigation, had retracted their respective statements on the very next day. We find from the impugned order that the department had conducted an enquiry of the Notary Public Shri Chowdhary Munir Hussain, who had notarized the affidavits, retracting individual statements. In the statement recorded on 03.12.2014, he had stated that none of the concerned affidavits are recorded / diarized in his prescribed form XV Notarial Register, maintained by him during the relevant period. He also denied that he had not signed the affidavits. The Notary Public had also stated that he had never met the concerned persons i.e., Mahendrabhai C. Patel, Arvindbhai Patel, Ashokbhai Patel, etc., whose affidavits were shown to him. He had also never met the Advocate B.S. Moorzani, who had supposedly identified the said deponents. It was also found from the enquiry into the retraction affidavit that five affidavits of retracting individual statements were notarized by a Notary Public, Shri Ramesh S. Phatarphekar. Although he expired at the age of 87 years on 30.12.2013 i.e., after the dates of disputed affidavits; but from the statement of his daughter-in-law Ms. Charmaine Sanjay Phatarphekar, it was found that the affidavits were not notarized by the said Notary Public. We find from the impugned order that the details of enquiry into the retraction affidavits were communicated to all the fourteen noticees vide letter No.V/Adj(30)HPU-I/CR-44/Commr/M-II/13-14, dated 08.12.2014 and they were requested to make their submission on the enquiry and the findings of the enquiry. In reply to the said letter, M/s Patel Product and Shri Mahendrabhai C. Patel submitted letters dated

30.12.2014 and 02.01.2015, wherein they had disputed the authority to initiate enquiry at the adjudication stage. They had also stated that the statements claimed to have been recorded were not reliable. They requested for cross examination of the stamp vendor (Umar Sharif Mohammad Nawaz), Notary Public (Chowdhary Munir Hussain), daughter-in-law of the deceased Notary (Ms. Charmaine Sanjay Phatarphekar). M/s Patel Product and Shri Mahendrabhai C. Patel had also requested to afford cross examination of the District Revenue Officer, Thane, whose letter dated 12.03.2014 was relied upon. They requested for cross examination of Ajay Chandrakant Parmar, to whom, as per the enquiry, the stamp vendor had sold the stamp papers. In their response letter / reply to enquiry, M/s Patel Product and Shri Mahendrabhai C. Patel have also submitted that when the Notary Public (Chowdhary Munir Hussain) denied his signature on the stamp papers, the same may be verified by a handwriting expert. We find that the learned adjudicating authority had not afforded opportunity of cross examination of any of the said persons viz., (a) the stamp vendor (Umar Sharif Mohammad Nawaz), (b) the Notary Public (Chawdhary Munir Hussain), (c) daughter-in-law of deceased Notary, whose statement was recorded (Ms. Charmaine Sanjay Phatarphekar), (d) the person to whom the stamp vendor stated to have sold the stamp papers (Ajay Chandrakant Parmar) and (e) the District Revenue Officer, Thane, whose letter is relied upon by the learned adjudicating authority in the impugned proceedings. We are of the view that the adjudicating authority was required to afford cross examination of the aforesaid persons inasmuch as their statements and letter(s) were important documents for impleading the appellants, with the serious charge of clandestine removal of the goods. On careful reading of the judgements relied upon by the appellants, as at paragraph 7.5 above, we find that it is the mandate of law, which requires that the adjudicating authority has to afford cross examination of all those persons, whose statements were relied upon for levelling the charge of clandestine removal of goods. In the present case, the facts are not under dispute that the retracted affidavits are completely ignored and not taken into consideration, then in that case, what remains for consideration is mere confessional statements. It is a settled principle of law that demand cannot be sustained, based on stand-alone

confessional statements, in the absence of corroborative evidences. When the officers of the Central Excise Department had failed to carry out any investigation at the end of raw material suppliers and were also unable to have brought out any independent evidence to prove that printed plastic pouches of 'Om Special Pandharpuri Tambakoo No.1' were procured surreptitiously for the purpose of packing the said branded tobacco, it cannot be said that the department has made out a case against the appellants, alleging involvement in the fraudulent activity of clandestine removal of excisable goods. Thus, placing reliance only on the confessional statements, without proper corroboration with the documentary evidences cannot be considered as valid or justified action, which would suffice to prove the charges of clandestine removal of excisable goods. The law is well settled in the cases of *Ghodavat Pan Masala Products Ltd. Vs. Commissioner of Central Excise, Pune- 2004* (175) E.L.T. 182 (Tri. - Mumbai); *Radheshyam Kanoria Vs. Commissioner of Central Excise, Thane-II-* 2006 (195) E.L.T. 130 (Tri.- Mumbai); *Pioneer Industries Vs .Commissioner of Central Excise, Mumbai-II-* 2006 (193) E.L.T. 506 (Tri.- Mumbai) and *Chandan Tobacco Company Vs. Commissioner of Central Excise, Vapi-* 2014 (311) E.L.T. 593 (Tri. Ahmd.), that statements relied upon, which were subsequently retraced in writing, cannot prove the case of clandestine removal, and to make out a case, the department has to bring sufficient corroborative evidence to substantiate such case and that demand confirmed on presumption/assumptions are not sustainable.

10.2 Further, we also find from the impugned order as well as the submissions made by learned Special Counsel, that the retraction affidavits of all those persons, whose statements were recorded during the course of investigation, were backdated. The adjudicating authority at paragraph 12 on internal page 192 of the impugned order had recorded that the copies of statements were not provided to the respective persons immediately after the same were recorded. It is an admitted fact that the statements were provided to the noticees (the appellants, herein) only after issuance of the SCN. Though, it has been admitted by the adjudicating authority that when the statements were not provided to the noticees, it was not possible

for them to retract the same without having benefit of copy of the said statements; but he has drawn an inference that the makers of the affidavit were having benefit of copy of the statements. We find that such logic advanced by the adjudicating authority for holding that the affidavits were backdated cannot be sustained. Further, considering the findings that the makers of affidavit were having prior knowledge about the statements, then there is serious lapse on the part of the department, firstly for the reason that immediately after recording of such statements, copies were not forwarded by the investigating agency to the persons concerned; and secondly, when such statements under official record were kept in custody of the department during investigation, then how and under what circumstances those were accessible to the signatories of the statements. Thus, it has to be construed that the statements were leaked out, in an un-official manner, which is a matter of grave concern for the sustainability of issuance of the notice itself.

10.3 In this context, this Tribunal, in the case of *Jeen Bhavani International* (supra), has held that in a case, where statement recorded by the officers of the department are not provided to the respective person at that very moment and that the same are provided only along with the SCN, in that case, the only opportunity which the deposer of the statement would get for the purpose of retracting the statement is only after the issuance of SCN, when he is handed over with the said statement. In such a case, the Tribunal has held that if a retraction affidavit is made after the issuance of SCN, then the said retraction would be considered as a valid retraction.

10.4 Learned Special Counsel appearing for the Revenue has placed the argument that the affidavits were backdated, and therefore, the same being forged cannot have any evidentiary value. We have perused the impugned order at paragraphs 59, 60 and 61, wherein the learned adjudicating authority has recorded that during the course of investigation, a statement dated 17.06.2013 of Shri Mahendrabhai C. Patel was recorded, and the said statement was retracted, by way of filing an affidavit under the cover of letter dated 18.06.2013, on the ground that it was not voluntarily given and the

statement given thereunder was not true and correct. Moreover, in response to the said retraction affidavit, a rejoinder letter dated 26.06.2013 was also issued by the department, for ascertaining the veracity of the submissions made in the statement dated 17.06.2013. Likewise, statement dated 20.06.2013 of Shri Mahendrabhai C. Patel was also recorded. Same was retracted on the very next date vide affidavit dated 21.06.2013, for which rejoinder dated 26.06.2013 was also issued by the officers of the department. The facts regarding recording of statements, their retractions and subsequent issuance of rejoinders were also recorded in the SCN.

10.5 We find that apart from the said two retraction affidavits, which were made before the Notary Public on the very next day of the said statements, in response to statement dated 10.06.2013 of Shri Mahendrabhai C. Patel, retraction affidavit was made before the Notary Public immediately on 11.06.2013 and the said retraction affidavits were also submitted through Registered Post with Acknowledgement Due (RPAD) to the officers of the department. We have also perused copy of the 'Acknowledgement Card' of the Department of Post, evidencing receipt of the Registered Letter/Parcel by the 'Superintendent (Preventive), Central Excise, Piramal Chamber, 7th Floor, Jijibhoy Lane, Lalbagh, Mumbai - 400 012".

10.6 We find that even if retraction affidavits in regard to all other statements were not taken into consideration, believing the same to be backdated / forged, but with regard to the last three statements, which were recorded by the officers of department just before and after the arrest of Shri Mahendrabhai C. Patel, the retraction affidavits deposed on the very next day of the respective statements cannot be ignored. Thus, there cannot be any dispute that the said last three affidavits were genuine affidavits. We find that unlike other affidavits, the enquiry on the retraction affidavits as recorded in the impugned order also do not dispute the genuineness of the said last three affidavits. That being the case, we are of the view that when number of statements are recorded consecutively and if only the last three statements are retracted, it shall mean that the entire version given in all the statements are retracted. Therefore, we hold that

statements alone, in absence of any evidence of procurement of packing material printed with the brand '*Om Special Pandharpuri Tambakoo No. 1*' would have to be considered as not corroborated and demand of duty on such basis cannot be fastened on the appellants.

10.7 The learned adjudicating authority has based his findings that '*Om Special Pandharpuri Tambakoo No. 1*' has been cleared without invoices inside the jurisdiction of respective municipal corporations, and for that purpose, has referred to the worksheets enclosed with the letters issued by the authorities in the municipal corporations. We find that in absence of the source document i.e., respective octroi slips, the adjudicating authority could not have relied upon the same for confirmation of the duty demand. Further, the said worksheets prepared in a tabular form on a computer, in the absence of required certificate under Section 36B *ibid*, cannot be considered as the basis for confirming the duty demand. We find that the Co-ordinate Bench of the Tribunal, in the case of *Trikoot Iron & Steel Casting Ltd. Vs. Additional Director General (Adjn.) Directorate General of GST Intelligence (Adjudication Cell), New Delhi*, in Final Order No.58546/2024 dated 09.09.2024, upon placing reliance on the judgements of Hon'ble Supreme Court in the case of *Anwar P.V. Vs. P.K. Basheer and Others* – AIR 2015 S.C. 180 and *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal & Others* – AIR 2020 S.C. 4908, has held that a printout generated from the personal computer, that has been seized, cannot be admitted in evidence, unless the statutory conditions laid down in section 36B of the Central Excise Act are complied with. It has also been held that if the data is not stored in the computer, but officers take out a printout from the hard disk drive by connecting it to the computer, then a certificate under section 36B of the Central Excise Act is mandatory. In the present case, admittedly the exercise envisaged under Section 36B *ibid*, has not been complied with by the department.

10.8 The learned adjudicating authority has placed reliance on the statements of various transporters stationed at Saki Naka, Mumbai and has also referred to the copies of Lorry Receipts (LRs), to conclude that '*Om Special Pandharpuri Tambakoo No. 1*' has been

clandestinely cleared through those transporters and that wherever LR's are found without corroborative Central Excise invoices, the same were clandestinely removed by M/s. Patel Product. However, on perusal of the statements of the transporters as well as the LR's (annexed in the appeal memorandum), we find that the description of the goods mentioned therein were `Tambakoo', `Tambakhoo', `Pan Chutney', etc. However, none of these documents described the goods as `Om Special Pandharpuri Tambakoo No. 1'. We accept the submissions of the appellants that in absence of compliance of Section 9D of Central Excise Act by affording cross examination, statements of transporters need to be discarded. Further, we are of the considered opinion that for the same reason, statements of all those persons, whose cross-examination were specifically requested for, but denied by the adjudicating authority, also needs to be discarded and could not be made as the basis for confirming the adjudged demands.

10.9 We find that entire demand of Rs.31,11,78,562/- has been based on the theory that M/s. Patel Product, M/s. Shree M.C. Patel & Sons and M/s. Shree Krishna Traders were having their Head Offices at Khandhali, Gujarat, wherein those firms were purchasing raw tobacco; and undertaking the activities such as, sieving; removing the twigs, stems and veins of the raw leaf; size the same and thereafter, transporting those to Kurla, Mumbai. In the receiving end at Kurla, the tobacco of M/s. Patel Product was used for packing branded tobacco, whereas, the tobacco of the other two firms were sold in loose / bulk without any brand. We find that the officers of the department have relied on the statement dated 10.06.2012 of Shri Mahendrabhai C. Patel, wherein he has stated that the quality of tobacco used for branded and unbranded tobacco are different. However, it has been contended by the department that while transporting tobacco of M/s. Shree M.C. Patel & Sons and M/s. Shree Krishna Traders from Khandhali to Kurla, 50 – 75 bags, for each trip of the said tobacco, were diverted to M/s. Patel Product, Kurla, which were further used for manufacturing `Om Special Pandharpuri Tambakoo No. 1'. It is noticed from the available case records that during the course of adjudication proceedings, the appellants had submitted affidavits of various farmers / dalals of raw tobacco, who

had supplied tobacco to the said three firms at Khandhali; that the said farmers have deposed that the quality of tobacco supplied to M/s. Patel Product was superior (A' grade) and the quality of tobacco supplied to the other two firms was inferior ('B' grade) and that such 'B' grade tobacco could not be used for packing branded tobacco i.e., '*Om Special Pandharpuri Tambakoo No. 1*'. It has further been observed that though the appellants had requested the adjudicating authority to afford examination of the said farmers/dalals, but such requests made was turned down by him. In such scenario, we are of the considered view that allegation of diversion of tobacco of M/s. Shree M.C. Patel & Sons and M/s. Shree Krishna Traders for packing '*Om Special Pandharpuri Tambakoo No. 1*' by M/s. Patel Product would not be sustained. Further, we have also noticed from the impugned order that the learned adjudicating authority, has denied the gradation of the tobacco mentioned in the invoices issued by the suppliers. In this context, we find that such allegation made by the department was not considered at the time of investigation into the matter, which is evident from the fact that no such allegation has been levelled in the SCN issued by the department. Insofar as, investigation of alleged duty evasion is concerned, the investigation wing's role is confined only to the stage of unearthing of evidences, facts, etc., and once such investigation is concluded, then all the material particulars are to be placed before the adjudication wing, for initiation of the Show cause proceedings and for adjudication of the matter arising therefrom. In other words, the adjudication order cannot make out a new case, which was not canvassed in the base document i.e., the SCN, and the adjudication proceedings cannot be culminated, without the evidence that such allegation or the material particulars having been dealt with in the SCN.

In this context, the Hon'ble Supreme Court, in the case of *Commissioner of Customs, Mumbai Vs. Toyo Engineering India Ltd.* 2006 (201) E.L.T. 513 (S.C.), have held that the Department cannot travel beyond the show cause notice.

10.10 Even assuming that the findings recorded in the impugned order are correct, that there was no mention of the gradation of the tobacco supplied to the appellants, but on perusal of

the documents, more particularly the invoices issued for supply of tobacco, we find that there is a considerable price difference in the price of tobacco purchased by M/s Patel Product and those purchased by M/s Shree M.C. Patel & Sons or M/s Shree Krishna Traders. Therefore, it is quite evident that the quality of tobacco purchased by M/s Patel Product is superior, when compared to the quality of tobacco purchased by M/s Shree Krishna Traders or M/s Shree M.C. Patel & Sons. Hence, the allegation regarding non-mention of gradation of tobacco in the invoices cannot be the defensible ground for confirmation of the adjudged demands.

10.11 We find that during the course of investigation, statements of the packing labourer and labour supervisor of Unit III of M/s. Patel Product, Kurla, were recorded and relied upon in the adjudication order. On that basis, the adjudicating authority has observed that '*Om Special Pandharpuri Tambakoo No. 1*' was produced in excess, and were removed outside the premises in a clandestine manner. It is an admitted position that the appellants had requested the adjudicating authority for affording cross examination of the said labour supervisor and packing labourer. However, the same was denied.

Under such circumstances, we are of the view that in terms of Section 9D *ibid*, such statements have lost their evidential value and cannot be relied upon in isolation, without any further documentary evidence for confirmation of the adjudged demands. Further, the allegation of clandestine manufacture and clearance of excisable goods is a serious charge, and the burden to prove such charge is entirely lies with the Revenue. In this case, we find that the Revenue has not brought on any substantial evidence to prove such allegation levelled against the appellants.

10.12 Learned Special Counsel has relied upon various judgements delivered by the judicial forum, to strengthen the case of Revenue in support of confirmation of adjudged demands on the appellants. As far as Shyam Lal Biri Merchant (*supra*) is concerned, the same was a judgement of Hon'ble Allahabad High Court in a

petition, challenging the stay order for pre-deposit; it was held by the Hon'ble High Court that grant of stay was a discretion of the Tribunal, either to grant stay or to order for making pre-deposit; the said judgement is not applicable in the present case, inasmuch as clandestine manufacture and clearance of goods was not the subject matter dealt with therein. The Order of the Tribunal in the case of G Guru Instruments (North India) Pvt. Ltd. (supra) has dealt with the issue of valuation of excisable goods and not the issue dealt with in the present dispute. In the case of D. Bhoormull (supra), the Hon'ble Supreme Court have held that the case of clandestine clearance may not be proved with mathematical precision. On the contrary, the present case is not a one, wherein some part of investigation is not precise. The present case is the one, wherein there is absolutely no investigation in the direction of procurement of packing material printed with the brand '*Om Special Pandharpuri Tambakoo No. 1*', particularly when the allegation is regarding clandestine clearance of branded tobacco, bearing the said brand name. Therefore, the ratio of the said judgement would not apply in the present case. As regards, N.D. Textiles (supra), the said order of the Tribunal has already been distinguished by the CESTAT, Ahmedabad, in the case of Kelvin Industries Vs. Commissioner (2023) 3 Centax 252 (Tri – Ahmd), by holding that in the matter of recording of statement, the provisions of Section 9D *ibid* have to be strictly applied. In the case of Modi Alkalies & Chemicals Ltd (supra), the issue was in context with availment of the benefit of Small Scale Industry (SSI) exemption. Since, clubbing of turnover of different units for the purpose of such exemption is not the subject matter of dispute in the present case, the said judgement is distinguishable from the facts of the present case. The issue dealt with by the Tribunal, in the case of Gulabchand Silk Mills Pvt. Ltd. (supra), was in context with interception of truck carrying the goods in clandestine manner. The said order of the Tribunal was subsequently remanded back by the Hon'ble Andhra Pradesh High Court, reported in 2012 (275) ELT 388 (AP). Since, the issue involved therein was different from the present case and that the said order of the Tribunal was set aside by way of remand, it cannot be relied upon in the present case. As regards International Cylinders Pvt. Ltd. (supra), this judgement also considers the point of investigation without mathematical precision.

It is held that department is not required to prove quantity of goods carried in each truck for which no entry was made in company records. The facts of said case are entirely different, than the issue involved and dealt with in the present case. The judgement of Hon'ble Kerala High Court, in the case of R. Shreekumar (supra), was in context with mis-declaration of imported goods covered under bill of entry. Since the issue involved therein was not in context with clandestine manufacture and clearance of excisable goods manufactured or produced within India, ratio cannot be drawn from such judgement to decide the present appeals differently.

10.13 From the observations made herein above, we are entirely convinced that the charges of clandestine clearance of branded tobacco, as levelled against the appellant M/s. Patel Product cannot be sustained inasmuch as Revenue has not brought out any substantial documentary evidences to prove such charges. Therefore, the adjudged demands confirmed on the appellant M/s. Patel Product fails and consequently, the penalties imposed on the other appellants in the impugned order cannot be sustained.

11. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order, insofar as it has confirmed the adjudged demands on the appellants. Therefore, the impugned order is set aside and the appeals are allowed in favour of all the above mentioned appellants.

(Order pronounced in open court on 04.10.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)