

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. I

EXCISE APPEAL No. 55779 OF 2023

(Arising out of Order-in-Original No. 08/2021-CX dated 30.06.2021 passed by the Additional Director General (Adjudication), New Delhi)

M/s. Trikoot Iron & Steel Casting Ltd.
Industrial Estate, Meerut Road,
Muzzafarnagar,
Uttar Pradesh-250002

...Appellant

versus

**Additional Director General (Adjn.)
Directorate General of GST
Intelligence (Adjudication Cell)**
West Block-VIII, Wing-6,
2nd Floor, R.K. Puram,
New Delhi-110066

...Respondent

APPEARANCE:

Ms. Nisha Bineesh, Shri Anurag Mishra, Advocates and Ms. Sanya Bhatia,
C.A. for the Appellant

Shri Rakesh Agarwal and Shri Ratnesh Kumar Mishra, Authorised
Representatives for the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**Date of Hearing: 22.05.2024
Date of Decision: 09.09.2024**

FINAL ORDER NO. 58546/2024

JUSTICE DILIP GUPTA:

The order dated 30.06.2021 passed by the Additional Director General (Adjudication), adjudicating two show cause notices dated 10.02.2015 and 26.12.2015 has been assailed in this appeal. This order seeks to confirm the demand of central excise duty on M/s.

Trikoot Iron and Steel Casting Ltd.¹ under section 11A(10) of the Central Excise Act 1944². Payment of interest under section 11AA of the Central Excise Act and penalty under section 11AC of the Central Excise Act have also been ordered. The order also confirms the demand of central excise duty on the castings articles found short in the factory premises of Trikoort Iron & Steel. The order also directs for confiscation of MT End cutting and MT Miss-roll (TMT), with an option to the appellant to redeem the same on payment of redemption fine.

2. Trikoort Iron & Steel is engaged in the manufacture of MS Girders, Rounds, TMT Bars, MS Ingots, Castings. On 04.07.2013 the Directorate General of Central Excise Intelligence³, pursuant to an intelligence, conducted simultaneous searches at the factory premises of Trikoort Iron & Steel at Muzaffar Nagar, the office premises of Trikoort Iron & Steel at New Delhi, and the residential premises of Vaibhav Goel, Director of Trikoort Iron & Steel. During the search of the residential premises of the Director some loose slips, hard disks and pen-drives were seized. Printouts were also taken from the seized hard disk No. WD5000AZRX. During the course of search of the factory premises on 04.07.2013, the officers found shortage of 450.625 MTTMT Bar, 268.340MT Griders and 140.18 MT Casting Articles, having total value of Rs. 7009000/-. The officers also found excess of 7.710 MT of End Cuttings, 577.615 MT of Mis Roll and 438.805 MT of MS Ingot, having total value of Rs. 29553250/- in the recorded stock, excluding the quantity of work in progress. The goods were seized by the department.

1. **Trikoot Iron & Steel**
2. **the Central Excise Act**
3. **DGI**

3. The statement of the following persons of Trikoot Iron & Steel were recorded:

- a. Vaibhav Goyal (Director)
- b. Mohit Vaish (Accountant)
- c. Satish Chand Goyal (CEO)
- d. Pramod Kumar Jain (GM Finance)
- e. Sachin Garg (Accountant)
- f. Anil Kumar (Data Operator/Account Assistant)
- g. Uma Shankar (Supervisor)
- h. Sangee Kumar (Accountant)
- i. Harish Kumar (Sales Manager)
- j. Narender Kumar (Security Supervisor)
- k. Ravikant Sharma (Assistant Supervisor)

4. Statement of few suppliers were also recorded on various dates, but all of them retracted their statements. Statement of one transporter Mukhtar Aslam was also recorded.

5. On the basis of above investigation, a show cause notice dated 26.12.2013 was issued alleging:

2. On a specific intelligence, that M/s. TISCL is engaged in evasion of Central Excise duty, searches of the premises related to M/s. TISCL were conducted on 04.07.2013. During the course of search proceedings at the residence of the Directors at 854, Khala Par, Near DM Residence, Muzzafarnagar, one of the Directors, Shri Vaibhav Goel who was available in the premises resisted the proceedings of search. **However, the officers were able to recover hard discs and incriminating documents. It was found during the course of search that there was a secret office in the kitchen on the ground floor where a computer was installed and three computer monitors were connected in separate rooms on the second floor with cables in which employees of the businessman used to enter the data of both accounted and unaccounted sales made by the factory on a daily basis. The entire system was well secured and password protected but the**

officers were able to lay their hands on to the incriminating data stored in the hard disc as explained in detail in the panchnama dated 04.07.2013 (RUD-1).

XXXXXXXXXXXX

9. It appears that M/s. TISCL is engaged in clandestine manufacture and clearance of finished goods and the excess stock as detailed below have not been entered in the stock register with the intention to clear them without payment of duty and hence, the same were seized on 04.07.2013 at the factory premises of M/s. TISCL:-

S. No.	Commodity	Quantity found excess (MT)	Value (Rs.)	Duty involved (Rs. @ 12.36%)
1.	End cuttings	(+)7.710	2,15,880/-	26682.77
2.	Miss-rolls (TMT)	(+)577.615	1,61,73,220/-	1999009.99
3.	MS Ingots	(+)438.805	1,31,64,150/-	1627088.94
		Excess	2,95,53,250/-	3652781.70

(emphasis supplied)

6. The aforesaid show cause notice refers to a Panchnama dated 04.07.2013 drawn at the residential premises of the Director. The relevant portion of the Panchnama is reproduced below:-

“XXXXXXXXXX. While this entire episode was going on, the officers found Shri Vaibav Goel removed a hard disc from his kitchen and tried to throw it away. XXXXXXXXXXXX. **The officers during the search found that three computer monitors installed in a room, on the first floor of rear side of the house above the dog house, in which some documents and 07 pen-drive were also found.** One Shri Mohit Vaish who introduced himself as accountant, who was also available there. However, no CPU was found in the said room. **On being asked Shri Mohit informed that there is a one desktop computer connected with the CPU, which is installed in the kitchen of the said premises and these monitors are working as extension of the Computer in the kitchen and connected through cable. On the search of the**

said kitchen the officers recovered a Computer (CPU, Monitor, Keyboard and Mouse) which was switched on and CPU was found without cover and without having any hard disc. The officers conducted a thorough search of the entire residential premises and found one of the hard disc hidden in a corner lying near the dog house. The officers also found two hard discs from the cupboard of the kitchen of the said premises. The officers asked Shri Vaibhav Goel to connect the hard disc found in the corner near dog house with the CPU installed in the kitchen. **On direction of Shri Vaibhav Goel, Shri Mohit Vaish Accountant started the CPU after connecting the said hard disc in our presence and in presence of Shri Vaibhav Goel.** On scrutiny of the data it was found there is a program in MSDOS. Shri Mohit informed that the said software is a financial software in which accounted and unaccounted sales, purchase and cash transaction details are captured by them related to M/s Trikoot Iron and Steel Castings Ltd., Industrial Area, Meerut Road, Muzzafarnagar. The password of the said software was 'ingot'. He opened the said software and showed the details. **On being asked by the officers to take the printouts of data captured in the said software, Shri Vaibhav Goel informed that this being a MS Dos based software and printout cannot be taken without configuring printer Canon LBP 2900B (available in the residence) with site key and license key.** On being asked how these keys can be taken Shri Goel stated that for this he has to talk to expert for this. On direction of Shri Vaibhav Goel, Shri Mohit spoken to one Shri Dua on mobile no. 989700675. Shri Dua informed after some time that site key is 'EIGIDADEJTBO' and license key is 'HJHTVOGSVQ'. **Shri Mohit configured the printer and started taking printouts of sale, purchase and cash data which contain both accounted and unaccounted transactions of M/s Trikoot Iron and Steel Castings Ltd. Some printout from one of the pen-drive Toshiba 4GB recovered were also taken after connecting the same with the CPU.**

These printouts were signed by Shri Mohit and Shri Vaibhav, since the printouts are large in number, these were affixed with stamp of the company by Shri Mohit. The whole process of taking of print out of the data contained in the said CPU and the one pen-drive took a lot of time and printed started mal-functioning, the other hard discs and pen drive could not be scrutinized. Therefore, the officers discontinued the process of taking printouts on the spot and seized the said three Hard disks and seven pen drive properly. The said hard discs were separately sealed with paper seals and pen-drives were sealed in a small card board box by the officer in the presence of we the panchas, Shri Mohit Vaish and Shri Vaibhav Goel duly signed by all concerned and we the panchas. Details of seized hard discs and pen drives are mentioned in Annexure-A of this panchnama. Since, the CPU and printer were specially configured to run the said hard discs, the officers also sealed the CPU (without hard disc) and the printer as detailed in Annexure-A.

The officers also resumed some documents related to their enquiry as detailed in Annexure-A to the panchanama.

xxxxxxxxxxxx"

No other documents/articles/things taken in to the possession by the officers except the documents/articles mentioned at Annexure-A"

(emphasis supplied)

7. The relevant portion of Annexure-A referred to in the Panchnama is reproduced below:

"Details of documents resumed from the residential premises of Shri Satish Goel and Shri Vaibhav Goel, Directors M/s. Trikut Iron and Steel Casting Ltd., Muzaffarnagar (UP) at Roorkee Road, Near D M Residence, Muzaffarnagar (UP) on 04.07.2013.

S. No.	Particulars of documents resumed	Pages/Pcs.
1 to 13	Xxxxxxxxxx	xxxxxxx
14.	One harddrive No. WD5000AZRX installed in the computer installed in kitchen of the resident from which printouts were taken	One
15.	One Segate 250 GB hard disc, S/N: S2A19TZK	One
16.	One Simmtronics Hard Disc 320811	One
17.	One Kingston Pen drive Black colour	One
18.	One Kingston data traveler 2GB Pen Drive	One
19.	One Pen Drive attached with a bracelet	One
20.	Toshiba 4GB pendrive white colour	One
21.	HP 4 GB pendrive	One
22.	Toshiba 4 GB pendrive blue colour	One
23.	Kingston Data traveler 4 GB pendrive	One
24.	Canon Printer LBP2900B	One
25.	One CPU Frontech stylo zip drive without hard disc	One

8. Another Panchnama dated 15.07.2013 was prepared and the printout of the hard drive and pen drive was taken. The relevant portion of the Panchnama dated 15.07.2013 is reproduced below:

“We the above-named panchas having been called upon by Shri R S Rathore, Intelligence Officer, Directorate General of Central Intelligence, (DGCEI), West Block No. VIII, Wing No. VI, R.K. Puram, New Delhi presented ourselves at the office of DGCEI, New Delhi at around 13:00 hrs. on 15.07.2013, **Shri Rathore informed us that during the course of search of residence of Shri Vaibhav Goel, Director of M/s. Trikoot Iron & Steel Casting Ltd., Muzaffarnagar at Roorkee Road, Near D M Residence, Muzaffarnagar on 04.07.2013, they had interalia resumed three hard drives and seven pendrives from the said premises after taking some printout under Panchnama dated 04.07.2013 as per following details:**

XXXXXXXXXXXX

We, the panchas and Shri Mohit Vaish inspected the paper seal and found that the paper seals affixed on the same were intact. Shri Mohit Vaish also identified all the above mentioned CPU/printer/hard drives/pen drives and satisfied himself that these were the same items which were taken in possession by the officers on 04.07.2013.

3. **Then Shri Rathore in the presence of Shri Mohit Vaish and we the witnesses attached harddrive No. WD5000AZRX** (mentioned at S. No. 1 above) **with the CPU and printer (both also resumed from the residence on 04.07.2013** and identified by Shri Mohit Vaish). After that the hard drives and pen drives were attached with the above mentioned CPU one by one. **By using the CPU and printer resumed from the residence of Shri Vaibhav Goel, Director, the office took printouts of the data stored in the harddrive No. WD5000AZRX and Toshiba 4 GB pendrive white colour (mentioned at S.No. 1 & 7 above respectively). All the printouts were dully signed by Shri Mohit Vaish in our presence. These printouts were placed in different box files and those details are as under:**

XXXXXXXXXXXX

The officers also examined other hard drives and pendrives (S.No. 2 to 6 and 8 to 10 as mentioned above) but as no relevant data was found in these drives, no printouts was taken from these hard drives. Shri Mohit Vaish confirmed that the printouts taken today are related to accounted and unaccounted sale & purchase by M/s. Trikoot Iron & Steel Casting Ltd.”

(emphasis supplied)

9. Another show cause notice dated 10.02.2015 was issued to Trikoot Iron & Steel, amongst others, invoking the extended period of limitation under section 11A (4) of the Central Excise Act. The relevant portion of the show cause notice is reproduced below:

15. Quantification of duty payable by M/s. TISPL:
As discussed in foregoing paras, the total clearances of M/s TISCL from 1st June, 2012 to 03.07.2013 were recorded in data on the printouts obtained on 04.07.2013 from the residence of the Directors at 854, Khalapar, Roorkee Road, Near D.M. Residence, Muzaffarnagar (U.P.) in the presence of Shri Vaibhav Goel, Director, who admitted that the data in these printouts show the transaction made by his manufacturing unit i.e. M/s TISCL and these transactions, inetralia, show both accounted for and unaccounted for TMT sold by M/s TISCL. Further, the data of sale of TMT for the period Jan 2012 to March 2012, Sale of Girder for the period April, 2013 to 02.07.2013 and Scrap Sales from January, 2012 to March, 2013 was recovered from one hard drive and one pen drive on 15.07.2013 in the presence of Shri Mohit Vaish, accountant as also narrated in Panchnama dated 15.07.2013 (RUD-41). xxxxxxxxxxxx.

15.1 **A month wise chart of actual value of clearance of excisable goods i.e. TMT, Girder and Scrap, as per data recovered, value of clearance as declared in statutory records as submitted by Shri P.K. Jain, CA on 24.07.2014 and also verified with ER-1 returns/ invoices of the corresponding months, differential assessable value on which Central Excise duty was not paid by M/s TISCL was prepared and the Central Excise Duty payable by M/S TISCL is thereafter calculated on the basis of applicable rate of duty during the relevant period. The detailed chart showing quantification of duty is placed as Annexure-B (i) & B(ii) to this show cause notice. A summary of demand is given as below:-**

(Amount in Rs.)

Year	Total assessable value of clearance	Accounted sale as per ER-1 (RUD-54)/ Invoices (RUD-60)	Differential assessable value	Duty payable
				Total
January 2012 to March 2012	101,61,65,546	21,51,57,807	80,10,07,739	8,57,64,733

June 2012 to March 2013	272,75,67,914	63,04,53,523	209,71,14,391	25,92,03,339
April 2013 to June 2013	143,00,79,413	24,30,32,518	118,70,46,895	14,67,18,996
1 st to 3 rd July 2013	4,53,84,447	30,77,206	4,23,07,241	52,29,175
TOTAL	521,91,97,320	109,17,21,054	412,74,76,266	49,69,16,243

Therefore, it appears that M/s. Trikoot Iron and Steel Casting Ltd., Meerut Road Industrial Area, Near ITI, Muzaffarnagar (U.P.) evaded Central Excise duty amounting to Rs. 49,69,16,243/- on the goods cleared clandestinely by them during the aforesaid period.”

(emphasis supplied)

10. The main submissions made by the appellant in response to the show cause notice are:

- (i) The Panchnama proceedings were conducted under threat, coercion and use of physical force. The same are in violation of the principles laid down for conduct of such proceedings and are not truthful. There are also apparent inconsistencies in the proceedings recorded in the Panchnamas. Hence, the Panchnamas and the documents said to have been resumed cannot be relied upon against the noticee. The proceedings at the residential premises of the Director of the Noticee were conducted by use of physical force and the records allegedly resumed were not shown to Vaibhav Goel, who was present at the time of search. The signatures were obtained under coercion and threat. The details of records/electronic devices allegedly resumed have not been properly recorded in the Panchnama. It is not clear as to from where the loose sheets allegedly

resumed were recovered and whether these pertain to the unit of the noticee or not. There is no proof or discussion in the show cause notice as to who is the maker/writer of these loose sheets;

- (ii) The printouts allegedly taken from the computerized records of the noticee are not admissible in evidence, being violative of section 36B of the Central Excise Act; and
- (iii) The entire proceedings are based on oral statements, certain loose sheets and the computerized data, which are totally unreliable. The evidence is not sufficient to discharge the burden of proof for alleging clandestine clearance of the goods.

11. In regard to the contention advanced by the appellant that there were apparent inconsistencies in the proceedings recorded in the Panchnamas and that safeguards were not followed at the time of resuming the documents during search, the adjudicating authority made the following observations in the order dated 30.06.2021:

"40.2 It is observed that the procedure adopted for sealing the recovered electronic gadgets has been clearly mentioned in the panchnama. The exact places from where these gadgets were recovered have also been mentioned in the panchnama. The panchnama describes in detail the entire procedure as to how and from where the devices were found, obtaining the site key and license key by the employee of M/s TISCL on the direction of Sh. Vaibhav Goel, the Director of M/s TISCL, and the procedure undertaken to get the printouts from these electronic gadgets. **Further, the panchnama describes the records recovered and resumed from the premises as detailed in Annexure-A of the panchnama,** which mentions the description of records resumed along with their page numbering. This annexure has been duly

signed by Sh. Vaibhav Goel, Director of M/s TISCL, Sh. Mohit Vaish, accountant of M/s TISCL and the witnesses. **I find that the panchnama dated 4.7.2013 drawn at the residence of Sh. Vaibhav Goel, sufficiently satisfies the procedure prescribed in law,** as held by Kuber Tobacco Products Ltd. Versus Commissioner of C. Ex. Delhi 2013 (290) E.L.T. 545 (Tri. - Del.). **Thus I find that the panchnama lists the electronic gadgets and documents recovered and has recorded the search proceedings in detail and therefore the said panchnama can be relied upon in this case.** Thus, the contentions of the Noticee do not have feet and are accordingly rejected.

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40.7 The Noticee has contended that since the contents or relevance of particular document was not mentioned in the panchnama, the credibility of the evidentiary value of these papers is doubtful, is again not tenable as discussing a resumed or seized document in the body of panchnama is not a legal requirement.

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40.8 The Noticee has contended that the panchnama records the serial numbers of the Seagate and the Simmtronics hard drives, whereas in the case of hard drive WD5000AZRX, only the model number is recorded not its serial number. **This contention is not relevant as the panchnama dated 15.7.2013 (RUD41) regarding taking the printouts clearly states that the printouts were taken from hard drive No. WD5000AZRX and Toshiba 4 GB pen drive white colour** (sl. No. 1 and 7 of panchnama). **The panchnama dated 15.7.2013 was drawn in presence of independent witnesses and Sh. Mohit Vaish, Accountant of M/s TISCL, who was also instrumental in entering the data in these devices, and they had verified the paper seals and found them intact before they were opened.** Thereby any doubt on the genuineness of these devices, which is based on presumptions, is unfounded. The reliance placed on the judgment of the Hon'ble

CESTAT-Mumbai in the case of Jitendra Kumar Ghishulal Jain v. CC (Prev.), Mumbai, 1998 (103) E.L.T. 591 (Tribunal) is not correct as panchnama was drawn in presence of an employee of the Noticee in the instant case.

40.9 The next contention of Noticee is that that the print outs taken during the Panchnama Proceedings dated 15.07.2013 cannot be relied upon. In this regard it is observed that the printouts taken on 15.7.2013 has been recorded in panchnama drawn on 15.7.2013 and the entire process was conducted in presence of two independent witnesses and also in presence of Sh. Mohit Vaish, accountant of M/s TISCL. The printouts were taken at the residence of Sh. Vaibhav Goel on 4.7.2013 (day of search) in presence of Sh. Mohit Vaish and Sh. Vaibhav Goel. Sh. Mohit Vaish an employee of M/s TISCL was present at the residence of the Director on 4.7.2013 and used to make entries in the hard disks and pen drives. It is mentioned in the Panchnama that the printer started malfunctioning and so further printouts could not be taken on the day of the search and the proceedings of taking out the printout had to be conducted later on. There was non-cooperation with the investigation on part of Sh. Vaibhav Goel, as diskussed in foregoing paras. **Under the circumstances I see no reason as to why credibility should not be attached to the panchnama and the printouts taken thereunder,** in presence of Sh. Mohit Vaish on 15.7.2013. **Accordingly, I hold the panchnama drawn on 15.7.2013 and prinouts taken thereunder as valid evidence in this case.**

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41. The Noticee have inter alia contended in para 'B' of the written submission that the printouts allegedly taken from the computerized records are not admissible in evidence, being violative of Section 36B of the Central Excise Act.

41.1 In this regard I find that a number of conditions stipulated under Section 36B(2) need

to be satisfied for data to be admissible as evidence.

XXXXXXXXXXXX

Let me examine if the above stipulated condition are satisfied in the instant case. The first condition is that computer printout are produced by the computer which was used regularly to store information of an activity regularly carried out over that period by the person having lawful control over the use of the computer. In the instant case the computer was found installed in the residential premises of the Directors of M/S TISCL. During the search proceedings conducted in the residential premises on 4.7.2013 the officer also found one hard disk hidden in a corner lying near the dog house. The officers also found two hard disks from the cupboard of the kitchen of the said premises. The officers connected the hard disk found in the corner near dog house with the CPU installed in the kitchen. On scrutiny of the data, it was found that there was a program in MSDOS and it was informed by Shri Mohit Vaish, Accountant present at the residence of the Directors of M/s TISCL, that the said software was a financial software in which accounted for and unaccounted for sales, purchase and cash transaction details of M/s TISCL were captured by them. He revealed the password as 'ingot'. Shri Mohit Vaish opened the said software and showed the details. Shri Mohit Vaish configured the printer and printouts were taken from the hard disk (No. WD5000AZRX, Sl. No. 14 of Annexure-A of panchnama dated 04.07.2013) and pendrive (Toshiba 4GB, Sl. No. 20 of Annexure-A of panchnama dated 04.07.2013) which contain both accounted for and unaccounted for transactions of M/s TISCL. **The entire proceeding were recorded under Panchnama dated 04.07.2013. The printouts of this data, obtained from the hard disk and some of the pen drives recovered during the course of search, were placed in files as mentioned at Sl. No. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13 of Annexure-A of the Panchnama dated 04.07.2013.** The officers also recovered other incriminating documents from the residential premises which were resumed as mentioned in Annexure-A to the

Panchnama dated 04.07.2013. On being asked Shri Vaibhav Goel admitted that they used to clear their finished goods from the factory clandestinely and entire sale, purchase and cash transaction data of accounted for and unaccounted for goods were captured in the computer installed in the kitchen of his residence using hard disk. **It has been clearly brought out in the investigation that the computer was used regularly to store data of accounted for as well as unaccounted sale as well as purchases made by M/s TISCL for a certain period of time (may be called relevant period). Thus I find that the computer was under the lawful control of the Director of M/s TISCL since it was recovered from his residence and was used to store data for the period June 2012 to July 2013 and accordingly the conditions stipulated under Section 36B(2) are satisfied in the instant case.** The recovery of these electronic gadgets as well as taking printouts was carried out under panchnama proceedings as discussed in paras supra, in presence of independent witnesses. In the light of aforesaid discussions, **I am of the view that the printouts obtained from the hard disk and pen drive recovered from the residence of Sh. Vaibhav Goel, satisfy all the conditions mentioned in Section 36B(2) and therefore, command perfect evidentiary value."**

(emphasis supplied)

12. Learned counsel for the appellant submitted that it may not be necessary in the present case to controvert the factual findings regarding the alleged clandestine removal of goods, as the impugned order deserves to be set aside for the sole reason that the provisions of section 36B of the Central Excise Act have not been complied with. In this connection learned counsel submitted that:

- (i)** The quantification of duty payable by the appellant has been calculated on the basis of the total value of clearance determined from the computer printouts taken from the hard disk and pen drive recovered on

04.07.2013, after deducting value of clearances of the goods as declared in ER-1 returns. It was, therefore, obligatory on the part of the department to establish the admissibility of the documents;

- (ii)** The Panchnama does not mention the vital details of the recovery of hard disc and pen drives;
- (iii)** The conditions stipulated in section 36B of the Central Excise Act have not been observed in recovering the electronic records/documents. The printouts, therefore, could not have been taken into consideration;
- (iv)** The requirement of issuance of a certificate under section 36B of the Central Excise Act has not been satisfied;
- (v)** The adjudicating authority could not itself have examined the conditions stipulated in section 36B of the Central Excise Act to record a finding regarding compliance of the said section; and
- (vi)** The entire records on which the department is placing reliance to prove clandestine removal of products is the electronic record, which record is neither admissible in evidence nor can be examined for this purpose.

13. Learned authorized representative appearing for the department, however, supported the impugned order and contended that the adjudicating authority committed no illegality in relying upon the electronic records. Learned authorized representative submitted that the adjudicating authority has given good and cogent reasons for placing reliance upon the electronic records and the appellant is not

justified in contending that the conditions stipulated in section 36B of the Central Excise Act have not been followed. In this connection, learned authorized representative placed reliance upon the judgment of the Supreme Court in **Anvar P. V. vs. P. K. Basheer and others⁴**.

14. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

15. To examine the issues that have been raised, it would be necessary to first examine section 36B of the Central Excise Act. It is reproduced:

"Section 36B- Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.

(1) Notwithstanding anything contained in any other law for the time being in force,-

- (a) a microfilm of a document or the reproduction of the image or images embodied in such microfilm (whether enlarged or not); or
- (b) a facsimile copy of a documents; or
- (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout").

(2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following namely:-

- (a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities

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regularly carried on over that period by the person having lawful control over the use of the computer,

- (b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and
- (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether –

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (c) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and

references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to be to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

- (a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to

be supplied to it in the course of those activities;

- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation - For the purposes of this section,-

- (a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and
- (b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

16. Section 3 of the Evidence Act defines "document" as follows:

"Document. -- "Document" means any matter expressed or described upon any substance by means of letter, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

17. "Evidence" in section 3 of the Evidence Act is defined as follows:

"Evidence." -- "Evidence" means and includes — (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."

18. Section 36B of the Central Excise Act deals with cases where any document is required to be produced as an evidence in proceedings under the Central Excise Act and the Rules framed

thereunder. Such certificate should be signed by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities. In such a case it shall be evidence of any matter which is stated therein. It specifically mandates production of a certificate:

- (i) identifying the document containing the statement and describing the manner in which it was produced;
- (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer,
- (iii) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate.

19. The Central Excise Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Central Excise Act.

20. In respect of section 65B of the Evidence Act, which is pari materia to the provisions of section 36B of the Central Excise Act, it would be relevant to refer to the observations made by the Supreme Court in **Anvar P. V.** The Supreme Court, held that evidence relating to electronic record shall not be admitted in evidence unless the requirement of section 65B of the Evidence Act is fulfilled. The relevant paragraphs of the said judgment are reproduced:

"13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a

computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, **any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original.** The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). **Following are the specified conditions under Section 65B(2) of the Evidence Act:**

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it

is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the

Evidence Act are not complied with, as the law now stands in India.

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22. XXXXXXXXXXXX. **Section 63** and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65A and 65B. to that extent, **the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not laydown the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.**

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24. **The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs.** Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. **The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied.** It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Sections 59, 65A and 65B of the Evidence Act, if an electronic record as

such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.”

(emphasis supplied)

21. The aforesaid judgment of Supreme Court in **Anvar P. V.** was followed by the Supreme Court in **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & others**⁵, though with a slight modification. The Supreme Court held that if the original device is not produced, then electronic record can be produced in accordance with section 65B (1) of the Evidence Act together with the requisite certificate under section 65B (4). The relevant portions of the judgment of the Supreme Court are reproduced below:

“**18.** Sections 65A and 65B occur in Chapter V of the Evidence Act which is entitled “Of Documentary Evidence”. Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act is important, and states that secondary evidence may be given of “the existence, condition or contents of a document in the following cases...”.

19. Section 65 differentiates between existence, condition and contents of a document. Whereas “existence” goes to “admissibility” of a document, “contents” of a document are to be proved after a document becomes admissible in evidence. Section 65A speaks of “contents” of

5. AIR 2020 SC 4908

electronic records being proved in accordance with the provisions of Section 65B. Section 65B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65A and 65B.

20. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that "special provisions" as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65B then refers to "admissibility of electronic records".

21. Section 65B(1) opens with a non-obstante clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records.

22. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections 2(a) to 2(d) must be satisfied cumulatively.

23. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the

production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" – whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing any of the following things..." must be read as doing all of the following things, it being well settled that the expression "any" can mean "all" given the context. xxxxxxxx.

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30. Coming back to Section 65B of the Indian Evidence Act, subsection (1) needs to be analysed. The sub-section begins with a nonobstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "...without further proof or production of the original..." make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

31. The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document -

which would be the original “electronic record” contained in the “computer” in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the “original” document. All this necessarily shows that Section 65B differentiates between the original information contained in the “computer” itself and copies made therefrom – the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where “the computer”, as defined, happens to be a part of a “computer system” or “computer network” (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). **This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as “...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...”. This may more appropriately be read without the words “under Section 62 of the Evidence Act,...”. With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.**

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72. The reference is thus answered by stating that:

- (a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso

Bruno (*supra*), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (*supra*) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

- (b) The clarification referred to above is that the required certificate under Section 65B (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (*supra*) which reads as "... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,..." With this clarification, the law stated in paragraph 24 of Anvar P.V. (*supra*) does not need to be revisited.
- (c) The general directions issued in paragraph 62 (*supra*) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

- (d) Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016."

(emphasis supplied)

22. It transpires from the aforesaid two judgments of the Supreme Court in **Anvar P. V.** and **Arjun Panditrao Khotkar** that:

- (i)** Any documentary evidence by way of an electronic record under the Evidence Act can be proved only in accordance with the procedure prescribed under section 65B of the Evidence Act. The purpose of this provision is to sanctify secondary evidence in electronic form generated by a computer;
- (ii)** Any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) of section 65 of the Evidence Act are satisfied, without further proof or production of the original;
- (iii)** In view of the provisions of section 65(4) of the Evidence Act, a certificate must accompany the electronic record like computer printout, compact

disc, video compact disc or pen drive, pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence;

- (iv) Only if the electronic record is duly produced in terms of section 65B of the Evidence Act, that the question of its genuineness would arise. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if the requirements of section 65B of the Evidence Act is not complied with;
- (v) An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements of section 65B of the Evidence Act has satisfied; and
- (vi) This would not apply in a case where the appellant adduces primary evidence by making available in evidence the electronic records.

23. A Bench of the Tribunal in **Agarvanshi Aluminium Ltd. vs. Commissioner of Customs (I), Nhava Sheva⁶**, where the issue was with respect to section 36B of the Central Excise Act, also observed:

"12. it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and

6. **2014 (299) E.L.T. 83 (Tri.-Mum)**

clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).

13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for non-fulfillment of statutory condition of Section 36B of the Central Excise Act, 1944."

(emphasis supplied)

24. In **Popular Paints and Chemicals vs. Commissioner of Central Excise and Customs, Raipur**⁷, the Tribunal observed:

"15.2. Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act. It has been clearly laid down in para 15 of this judgment that all the safeguards as prescribed in Section 65B (2) & (4), to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are pari materia.

15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is admissible for want of cross examination of, Sh. Vipul Saxena, who

7. Excise Appeals No. 52738 of 2016 decided on 06.08.2018

has done cloning of the data from the computer system. **We, therefore, hold that the computer printouts cannot held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand."**

(emphasis supplied)

25. In **Global Extrusion Private Limited and Ors. vs. Commissioner of Central Excise & ST, Rajkot⁸**, the Tribunal observed:

"19. Ongoing through the aforesaid provisions, we find that Section 36B(2) provides the conditions in respect of computer printouts. In the present matter the computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the appellants. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the appellant to the computer in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. **In the present case, the data was not stored in the computer but the officers had taken the printout from the Hard Disk drive by connecting to the computer. The officers had not obtained any certificate as required under Section 36B of the said Act. It is also noted that none of the conditions under Section 36B (2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the allegations of the revenue. It is noted that the requirement of certificate under Section 36B (4) is also to substantiate the veracity of truth in the operation of electronic media. We also agree with the**

8. **Excise Appeal No. 11963 of 2016 decided on 15.01.2024**

contention of the appellants that at the time of sealing and de-sealing of the external data storage device as well as the time of obtaining printouts therefrom, a certificate should have been obtained as per the provision of Section 36B of the Act. No such certificate has been brought on record without which the evidentiary value of these printouts get vitiated. As no certificate from the responsible person of the Appellants was obtained by the department, the credibility of the computer printout gets vitiated."

(emphasis supplied)

26. The aforesaid decisions of the Tribunal, which are in the context of the provisions of section 36B of the Central Excise Act, hold 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. The decisions also hold 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.

27. The contentions advanced by learned counsel for the appellant and the learned authorized representative appearing for the department have to be examined in the light of the aforesaid observations.

28. What transpires from the two Panchnamas dated 04.07.2013 and 15.07.2013 is:-

- (i)** The officers found that Vaibhav Goel "removed a hard disc from his kitchen and tried to throw it away";
- (ii)** During the search, the officers found "three computer monitors installed in a room on the first

floor of rear side of the house above the dog house in which some documents and seven pen-drives were also found”;

- (iii)** However, no CPU was found in the said room. On being asked, Mohit Vaish, Accountant informed that there is “one desktop computer connected with the CPU, which is installed in the kitchen of the said premises and these monitors are working as extension of the computer in the kitchen and connected through cable”;
- (iv)** On searching the kitchen, the officers recovered “Computer (CPU, Monitor, Keyboard and Mouse) which was switched on and CPU was found without cover and without having any hard disc”;
- (v)** The officers conducted a thorough search of the entire residential premises and found “one of the hard disc hidden in a corner lying near the dog house”;
- (vi)** The officers also found two hard discs from the cupboard of the kitchen;
- (vii)** The officers asked Vaibhav Goel to connect the hard disc found in the corner near dog house with the CPU installed in the kitchen;
- (viii)** On the direction of Vaibhav Goel, Mohit Vaish started the CPU after connecting the said hard disc;
- (ix)** On being asked by the officers to take the printouts of data captured in the software, Vaibhav Goel informed that being a MS Dos based software, “printout cannot be taken without configuring printer

Canon LBP 2900B (available in the residence) with site key and license key”.

- (x)** On being asked how these keys can be taken, Vaibhav Goel stated that he would have to talk to an expert and on direction of Vaibhav Goel, Mohit Vaish spoke to one Dua, who on mobile informed after some time that site key is 'EIGIDADEJTBO' and license key is 'HJHTVOGSVQ'.
- (xi)** Mohit Vaish configured the printer and started taking printouts of sale, purchase and cash data, which is stated to contain both accounted and unaccounted transaction;
- (xii)** Some printouts from one of the pen drive Toshiba 4GB that was recovered were also taken after connecting the same with the CPU;
- (xiii)** Since the whole process of taking of printouts of the data in the CPU and the pen-drive was taking time and printing stated mal-functioning, the officers discontinued the process of taking printout and seized the three Hard disks and seven pen drives properly. Details of the seized hard discs and pen drives were mentioned in Annexure-A to the Panchanama;
- (xiv)** Subsequently, on 15.07.2013 another Panchnama was drawn. The Panchnama records that the hard drive mentioned at serial no. 1 was attached with the CPU and printers resumed from the residence of Vaibhav Goel on 04.07.2013 and printouts of the data stored in the hard drive and Toshiba 4GB pen drive were taken;

- (xv)** The other hard drives and pen drives did not contain any relevant data and so printouts were not taken.

29. It is not in dispute that the hard disk from which the printouts were subsequently taken was not found installed in the CPU. The Panchnama drawn on 04.07.2013 records that the officers found that Vaibhav Goel had removed a hard disc from his kitchen and had tried to throw it away. The panchnama does not mention that any officer had seen Vaibhav Goel actually remove the hard disc from the CPU. It only records that Vaibhav Goel had removed a hard disc from the kitchen and had tried to throw it away. At a different place, the panchnama records that the officers conducted a thorough search of the entire residential premises and found one hard disc hidden in a corner lying near the dog house. What needs to be noticed is that if Vaibhav Goel had thrown the hard disk, it would not have been found hidden in a corner of a room near the dog house. The seven pen drives were also recovered from a room on the first floor of the rear side of the house. In the said room three computer monitor were also installed without a CPU. The officers were informed that one desktop computer connected with the CPU is installed in the kitchen and these monitors are working as extension of the computer in the kitchen and were connected through a cable. Ultimately the officers recovered CPU, Monitor, Keyboard and Mouse in the room, but the CPU was found without cover and hard disk. The Panchnama does not record that Vaibhav Goel was seen removing the hard disk from the CPU and indeed it would not have been possible for Vaibhav Goel to remove this hard disk from the CPU in the presence of all the officers and throw it away. There is nothing on the record to link the hard disk to

the CPU, nor is there anything to link that the hard disc and the pen drive stored information contained in the computer.

30. A hard disk is a rigid magnetic disk that stores data. A pen drive is a data storage device that includes flash memory with an integrated USB interface.

31. The printouts, which are the sole basis for holding that the appellant had indulged in clandestine removal, were taken both on 04.07.2013 and on 15.07.2013 by placing the recovered hard disc and pen drive in the CPU.

32. It is, therefore, clear that the CPU did not contain the hard disk. The hard disk was in fact picked up from the corner of the room. No attempt was made by the department to admit the hard disk and the pen drive in evidence. The required certificate under section 36B (4) of the Central Excise Act was also not produced. Thus, no reliance can be placed on the printouts, in view of the two judgments of the Supreme Court in **Anvar P. V.** and **Arjun Panditrao Khotkar** and the three decisions of the Tribunal in **Agarvanshi Aluminium, Popular Paints and Chemicals** and **Global Extrusion**.

33. The adjudicating authority, on its own, examined the oral evidence on the points required to be stated in the certificate. This is not permissible in law. The confirmation of demand is based only on the printouts taken after connecting the hard disk and the pen drive to the computer.

34. It is, therefore, not possible to accept the contention advanced by the learned authorized representative appearing for the department that panchnama itself should be treated as a certificate or that the adjudicating authority was justified in itself examining

whether the conditions set out in section 36B (4) of the Central Excise Act had been satisfied.

35. The impugned order dated 30.06.2021 passed by the adjudicating authority, therefore, cannot be sustained. It is, accordingly, set aside in so far as the appellant is concerned and the appeal is allowed.

(Order Pronounced on **09.09.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

Jyoti