IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD

[Coram: Pramod Kumar, VP and Ms. Madhumita Roy, JM]

ITA Nos.23, 24, 25 & 26/Ahd/2016
Assessment Years: 2006-07, 2007-08, 2008-09 & 2010-11

Asstt. Commissioner of Income Tax,
Circle – 4, Baroda. **.....*Applicant***

Vs.

Welsuit Glass & Ceramics Pvt. Ltd., **.....*Respondent***
At & Post Gavasad,
Near DGH Gas Station,
Opp. Haldyan Glass
Tal: Padra, Baroda – 391 430
[PAN: AAACW 1720 G]

Appearances by
S.K. Dev *for the applicant*
K.C.Thaker *for the respondent*

Date of concluding the hearing : 15.01.2019
Date of pronouncing the order : 12.02.2019

O R D E R

Per Pramod Kumar, Vice President:

1. By way of these four appeals, the Assessing Officer has challenged correctness of the separate orders dated 28.10.2015, 28.10.2015, 20.07.2012 and 28.10.2015 passed by the ld. CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 for the assessment years 2006-07, 2007-08, 2009-10 & 2010-11 respectively.

2. The assessee has raised common grievance in all these appeals. Therefore, grounds raised in ITA No.23/Ahd/2016 for assessment year 2006-07 are reproduced as under :-

Grounds of Appeal in ITA No.23/Ahd/2016 for assessment year 2006-07

"1. On the facts of the case and on the circumstances and in law, the CIT(A)-2, Vadodara erred in holding that "once demand cum show cause Notice and the order of Commissioner of Central Excise on the basis of which the assessment order u/s.143(3) r.w.s. 147 had been passed are quashed, the addition made in the assessment order by relying upon the demand cum show cause and the order of the Excise Commissioner has to be automatically deleted" without appreciating that the AO had not only relied on the demand cum show cause notice and order of Commissioner of Central Excise and Custom, Vadodara, but had also independently corroborated the facts for

determining the profit earned from suppressed sales, as is evident from the findings recorded in para 3.10 & 3.11 of the assessment order.

2. On the facts of the case and on the circumstances and in law, the CIT(A)-2, Vadodara erred in holding that "once demand cum show cause Notice and the order of Commissioner of Central Excise on the basis of which the assessment order u/s.143(3) r.w.s. 147 had been passed are quashed, the addition made in the assessment order by relying upon the demand cum show cause and the order of the Excise Commissioner has to be automatically deleted" without calling for remand report from the AO, and without giving an opportunity to the AO to inquire from the Commissioner of Central Excise & Custom, Vadodara about the acceptance of order of Hon'ble CESAT Ahmedabad and filing of appeal against order of Hon'ble CESAT, Ahmedabad to Hon'ble Gujarat High Court."

3. When these appeals were called out for hearing, learned representatives fairly agree that the issue in the appeals is now covered, in favour of the assessee, by a co-ordinate bench's decision dated 11.07.2018 in ITA Nos.2783 to 2787/Ahd/2015 in the case of DCIT, Vadodara vs. Belgium Glass & Ceramics Pvt. Ltd., Vadodara for the assessment years 2005-06 to 2009-10 wherein the Tribunal after following the decision of M/s. Zirconia Cera Tech Glazes & M/s. Growmore Ceramics vs. DCIT (ITA Nos. 376 & 377/Ahd/2016 for AYs 2007-08 & 2008-09 and ITA Nos.988, 989 & 990/Ahd/2016 for AYs 2006-07 to 2008-09; order dated 30.11.2017), has observed as follows :-

6. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench in the case of M/s. Zirconia Cera Tech Glazes & M/s. Growmore Ceramics (supra). In the said decision, the co-ordinate bench has, inter alia, observed as follows:-

> *"10. Now assessee has filed appeal before us on the ground raised by assessee as already reproduced in Para 2. The stand of the ld. Authorized Representative on behalf of assessee is that additions havebeen solely made on the basis of show-cause notice issued by the DGCEI wherein, it was observed that assessee is engaged in under valuation of sales and clandestine removal of goods. Thus, Assessing Officer has reopened assessment solely on the basis of SCN issued by DGCEI and ultimately made additions of estimated Gross Profit, on under valuation of sales and clandestine removal of goods without independent application of mind. Ld. Authorised Representative further submitted that under excise proceedings, adjudicating authority passed the order, which was ultimately carried in appeal upto Hon'ble CESTAT. Hon'ble CESTAT vide order dated 12.02.2015 has decided the issue in favour of the assessee by holding that department cannot estimate value of alleged suppression of sales as well as clandestine removal of goods merely on the basis of assumption and surmises. The operative portion of CESTAT order is reproduced here as under:*
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> > *"6. In these proceedings the following issues are required to be deliberated upon:-*
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> > *(i) Whether the appellants mentioned in Para 5.1 above have indulged in clandestine manufacture and clearance of Ceramic Glazed Mixture (Frit), in view of the adjudication orders passed the adjudicating authorities on the basis of natural gas consumption norms per metric ton?*

(ii) Whether the appellants mentioned in Para 5.1 and 5.2 have indulged in undervaluation of frit and also clandestinely cleared frit as per a personal ledgers retrieved from a pen-drive recovered from SANYO and other personal records and pen-drives from the ceramic tile manufacturers read with their statements ?

(iii) Whether the adjudicating authorities were justified in denying cross-examination of witness under the provisions of Section 9D of the Central Excise Act, 1944 read with the judicial pronouncements on the issue?

7. For the purpose of point No. 6(i) above and clandestine removal of frit by the frit manufacturers adjudicating authorities have mainly relied upon average consumption of natural gas for manufacturers one MT of frit by taking data either from the appellants or by conducting some gas consumption studies. Besides certain studies/ data with respect to average packing time taking for filling of finished goods (Frit) in the plastic bags and consumption of electricity units per MT of Frit on the basis of appellants records, have also been used to support that clandestine manufacture and clearances have been effected by the concerned appellants.

8. As per Para 3.5 above, clandestine manufacture and clearance of frits by the appellants have been estimated by taking different gas consumption norms which either got suggested by the appellant or worked out by the investigation. Average gas consumption from 263 SCMs to 484 SCMs were fixed for different appellants and were considered by the Adjudicating authorities for calculating/ confirming the demands and imposing penalties. Following observations have been made by the Adjudicating authority in the case of Belgium Glass & Ceramics Pvt. Limited (Appeal Nos. 796 to 798/2011) in paras 24.4.4, 24.5.4 and 24.5.5 while passing OIO No. 05/VRC-1/MP/2011 dated 23.03.2011 and justifying the calculations/ estimations made by Revenue:-

> *"24.4.4. Thus, even by considering that 5 nos. of kiln operated by M/s. Belgium during the entire past period, were of lowest size, viz. 146x6, each one of which is having 4000 SCMs of natural gas consumption per day of 24 hours, the net output of ceramic frit per kiln per day by consuming 450 SCMs of gas would not be less than 8.888 MTs. In other words, the minimum monthly production of frit per kiln would be at least 266.640 NTs, and the total minimum monthly production for all the 5 kilns would not be less than 1333.200 MTs.*
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> *24.4.5. The above production of M/s. Belgium is fully substantiated from the Annexure F referred supra, wherein it is observed that during a period of 18 months out of the total 65 months covered therein, they have reported production of frit exceeding the quantity of 1300 MTs. In fact, during the month of July 2005, the recorded production quantity was 2574.500 MTs with a total gas consumption rate of 370.557 SCM per MT, which clearly reveals that the aforesaid calculated capacity of 1333 MTs is the barest minimum. Scrutiny of the chart, however reveals that during 15 months, they have declared production quantity less than 1000 MTs per month even with much higher rate of gas consumption. During 32 months, the total quantity declared by them in their statutory records was less than 1275MTs wherein also the gas consumption was exceeding the average requirement of 450SCM per MT.*
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> *24.5.4. Thus the above Panchnama proceedings, unambiguously revealed that the normal time required for manufacturing 50 Kgs of frit was 8 minutes, i.e. 100 Kgs in 16 minutes and 1 MT in 2 hours 40 minutes. This reveals that one Kiln can manufacture 10 MT of frit per*

day of 24 hours, which means that the total quantity of frit produced by M/s. Belgium with their 5 Kilns is 50MTs per day. Thus, it is observed that normal quantity of frit which could be produced in the factory of M/s. Belgium by using 5 Kilns at a time, would be 1500MT per month.

24.5.5 Comparison of the monthly production of frit accounted for by M/s. Belgium in their statutory records as appearing in Col. No. 2 of the Annexure-F vis-a-vis the actual quantity which would have produced by them in their factory as discussed above, fully substantiates large scale suppression of production by them. The fact that the quantity recorded in their statutory records during some months, exceeds the aforesaid average quantity of 1500MT per month, indicates that the physical verification conducted at the factory and inference drawn in respect of their production capacity is factual. In order to have an idea on the quantum of the suppression of production by M/s. Belgium Col. No. 7 has been added to the Annexure-F which indicates the difference of quantity accounted for in the official records as against the average production of 1500MT per month. The chart indicates that except during a period of 7 months, the monthly average production noticed during the aforesaid Panchnama dated 26.09.2009 exceeded the quantity accounted for by M/s. Belgium in their statutory records."

8.1 From the above findings of the adjudicating authority gas consumption of 450 SCM per MT of frit manufacture has been arrived at for M/s. Belgium Glass & Ceramics Pvt. Limited which according to Revenue will gave a capacity of 1333.2 MTs per month to that appellant. In Para 24.5.4 and 24.5.5, the adjudicating authority observed that the normal quantity of frit that could be manufactured by this appellant will be 1500MTs per month. It has also been fairly mentioned by the adjudicating authority that in certain months the production of this appellant was also more than 1500MT. Adjudicating authority has only seen one side of the coin that a production of more than 1500MT is possible, therefore a capacity of around 1300MTs is justified. The other side of coin will be that appellant has also reflected a quantity of more than 1500MTs of Frit manufactured per month in the records. Such a depiction in the books of accounts gives a certification to the correctness of the data maintained by the appellant. The very fact that using gas consumption method and time taken for packing finished goods adopted by the lower authorities gives different estimations of manufacture and clearances by this appellant, the same cannot be taken as a correct/ dependable method for calculating clearances and is also not prescribed. In the case of Belgium Glass & Ceramic Pvt. Limited, as per Annexure-F to the show cause notice dated 08.10.2009, gas consumptions of 383.715SCM and 321.959 SCM for manufacturing one MT have also been indicated in the records of the appellants alongwith higher consumption of gas. It is not understood as to why an arbitrary figure of 450SCM per MT is required to be taken for estimating the production/ clearance of finished goods Frits. In the same Annexure-F the units of electricity consumed in certain months is less than 55 units and is even as low as 40.153 units. The above data of the appellant contained in Annexure-F to the show cause notice dated 08.10.2009 reflects that records maintained by this appellant are genuine and correct. There is no corroborating evidence of excess/ short raw materials of frit procured clandestinely by this appellant or any of the other appellants. There is no seizure of clandestinely removed goods from any of the appellants or any excess stock of finished goods. No cash has been seized from any of the premises searched by the Revenue when crores of cash has been alleged to have been transferred to the appellants across the country. There is also no evidence of excess procurement of raw materials. It is also claimed by the appellants that calorific value of the gas supplied by GAIL vary in GCV (Gross Calorific Value) and NCV (Net Calorific Value) which also effect consumption of gas alongwith the type of frit grade manufactured. It is

observed from the ground (d), of the grounds of appeal filed by M/s. Belgium Glass & Ceramic Pvt. Limited, in the case of Belgium that such documentary evidences of gas having different GCV and HCV exist on records. This argument has been brushed aside by the adjudicating authority that Shri Piyush Makadia, Director of the appellant has agreed to consumption of 450SCM/PMT (plus/minus) 10% gas consumption. The above calculations are thus based on statement of Shri Piyush Makadia, Director reproduced in OIO dated 23.03.2011 at Paras 53 & 54. However, such statements can not be relied upon unless the cross-examination of the witnesses is extended to the appellants.

8.2 In the remaining cases also where clandestine clearances have been estimated on the basis of natural gas consumption, there is no evidence of excess raw material purchased by the appellants. No shortages/ excess of raw materials or finished goods have been detected any where during the investigations. In none of the cases there is any seized cash or seizure of clandestinely removed finished goods during transportation from the factory premises of the appellants. In this regard appellants have relied upon the case laws of Arya Fibers Pvt. Limited vs. CCE, Ahmedabad-II [2014 (311) ELT 529 (Tri. Ahmd.)]and Gupta Synthetics Limited vs. CCE, Ahmedabad II [2014 (312) ELT 225 (Tri. Ahmd.)]. Para 38 and 40 of the case law of Arya Fibers Pvt. Limited vs. CCE Ahmedabad-II is relevant and is reproduced below:-

> *"38. It was, therefore, the submission of the ld. Senior Advocate that, in three cases cited by the ld. Special Counsel for the Revenue, this Tribunal and Hon'ble High Court of Gujarat had taken a view that there was no need to prove such clandestine clearance with mathematical precision. These were cases where evidence was available regarding unaccounted duty paid goods being found, shortage of finished goods found and evidence regarding supply of raw materials and receipt of commission by brokers, which were all tangible evidence of clandestine clearances. It was further submitted by the ld. Senior Advocate that the cases cited by him were cases where no such evidence was available at all and the law laid down as applicable to such cases, to which category the present case belongs.*
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> *40. After having very carefully considered the law laid down by this Tribunal in the matter of clandestine manufacture and clearance, and the submissions made before us, it is clear that the law is well-settled that, in cases of clandestine manufacture and clearances, certain fundamental criteria have to be established by Revenue which mainly are the following :*
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> *(i) There should be tangible evidence of clandestine manufacture and clearance and not merely inferences or unwarranted assumptions;*
> *(ii) Evidence in support thereof should be of :*
>
> *(a) Raw materials, in excess of that contained as per the statutory records;*
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> *(b) Instances of actual removal of unaccounted finished goods (not inferential or assumed) from the factory without payment of duty;*
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> *(c) Discovery of such finished goods outside the factory;*
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> *(d) Instances of sale of such goods to identified parties;*

(e) Receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him;

(f) Use of electricity far in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty;

(g) Statements of buyers with some details of illicit manufacture and clearance;

(h) Proof of actual transportation of goods, cleared without payment of duty;

(i) Links between the documents recovered during the search and activities being carried on in the factory of production; etc.

Needless to say, a precise enumeration of all situations in which one could hold with activity that there have been clandestine manufacture and clearances, would not be possible. As held by this Tribunal and Superior Courts, it would depend on the facts of each case. What one could, however, say with some certainty is that inferences cannot be drawn about such clearances merely on the basis of note books or diaries privately maintained or on mere statements of some persons, may even be responsible officials of the manufacturer or even of its Directors/partners who are not even permitted to be cross-examined, as in the present case, without one or more of the evidences referred to above being present. In fact, this Bench has considered some of the case-law on the subject in Centurian Laboratories v. CCE, Vadodara [2013 (293) E.L.T. 689]. It would appear that the decision, though rendered on 3-5-2013, was reported in the issue of the E.L.T., dated 29-7-2013, when the present case was being argued before us, perhaps, not available to the parties. However, we have, in that decision, applied the law, as laid down in the earlier cases, some of which now have been placed before us. The crux of the decision is that reliance on private/internal records maintained for internal control cannot be the sole basis for demand. There should be corroborative evidence by way of statements of purchasers, distributors or dealers, record of unaccounted raw material purchased or consumed and not merely the recording of confessional statements. A co-ordinate Bench of this Tribunal has, in another decision, reported in the E.L.T. issue of 5-8-2013 (after hearings in the present appeals were concluded), once again reiterated the same principles, after considering the entire case-law on the subject [Hindustan Machines v. CCE [2013 (294) E.L.T. 43]. Members of Bench having hearing initially differed, the matter was referred to a third Member, who held that clandestine manufacture and clearances were not established by the Revenue. We are not going into it in detail, since the learned Counsels on either side may not have had the opportunity of examining the decision in the light of the facts of the present case. Suffice it to say that the said decision has also tabulated the entire case-law, including most of the decisions cited before us now, considered them, and come to the above conclusion. In yet another decision of a co-ordinate Bench of the Tribunal [Pan Parag India v. CCE, 2013 (291) E.L.T. 81], it has been held that the theory of preponderance of probability would be applicable only when there are strong evidences heading only to one and only one conclusion of clandestine activities. The said theory, cannot be adopted in cases of weak evidences of a doubtful nature. Where to manufacture huge quantities of final products the assessee require all the raw materials, there should be

some evidence of huge quantities of raw materials being purchased. The demand was set aside in that case by this Tribunal.

8.3 Appellants have also relied, inter-alia, on the judgment of Allahabad High Court in the case of CCE, Meerut-I vs. RA Castings Pvt. Limited [2012 (26) STR 262 (All.)], which is upheld by the Hon'ble Supreme Court as reported in 2011 (269 ELT A108. The facts of this case and the orders of the Allahabad High Court is as follows:-

> *"[Order]- These appeals under Section 35-G of the Central Excise Act, 1944 (hereinafter referred to as the Act) are against the order of the Tribunal dated 19-6-2008 [2009 (237) E.L.T. 674 (Tri. - Del.)], by which the Tribunal has allowed the appeals of the respondents and quashed the order passed by the adjudicating authority.*
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> *2. The Respondent Nos. 1 and 2 were involved in the manufacturing of MS ingots and in respect thereof had maintained the books of account as provided under the Central Excise Rules and were furnishing the returns and paying the central excise duties. The Superintendent issued the show cause notices dated 1-12-2006 asking the respondent to show cause why the demand towards central excise duty may not be confirmed for the period from 2001-02 to 2004-05 by invoking the proviso to Section 11A(1) of the Act and why the penalty should not be imposed under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC of the Act. Various allegations have been made in the show cause notices and from the perusal of the show cause notices it appears that the excess production has been estimated on the basis of the higher electricity consumption. The respondents filed their reply. The Commissioner of Central Excise, Meerut-I, vide its order dated 30-7-2007 has confirmed the demand against the respondent nos. 1 and 2 and also imposed the penalty on the respondent nos. 1 and 2 and on other respondents alleged to have been involved in the clandestine removal of the goods.*
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> *3. Being aggrieved by the impugned orders, the respondents filed appeals before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. The Tribunal observed that it is settled principle of law that the electricity consumption can not be the only factor or basis for determining the duty liability, that too on imaginary basis, especially when Rules 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. The Tribunal further observed that no experiment have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing on MT of steel ingots. Tribunal also observed that the electricity consumption varies from one heat to another and from one date to another and even from one heat to another within the same date. Therefore, no universal and uniformly acceptable standard of electricity consumption can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. The Tribunal has also considered the report of Dr. Batra, which has been relied upon for making the allegations that there was higher electricity consumption. It appears that Dr. Batra in his report has observed that for the production of 1 MT of steel ingots, 1046 units electricity required.*

8.4 In view of the settled proposition of law laid down above, estimation of quantity of goods manufactured and clandestine removal of goods by the appellants cannot be slapped on the basis of averages arrived and calculated based on norms of gas consumption in manufacture of 1 MT of frit. It is rightly contested by the appellants that frit manufactured is not covered by any notification issued under Section 3A of the Central Excise Act, 1944 where Compounded Levy has been prescribed and capacity of the unit is required to be fixed on gas consumption basis, as done by the Revenue. It is observed that Revenue has attempted to adopt an estimation method for demanding duty and proving clandestine removal which is not prescribed by law.

8.5 In the case of appellant M/s. Wellsuit Glass & Ceramics Pvt. Limited - [2014 (304) ELT 618 (Tri. Ahmd.)], this Bench remanded the case to the Adjudicating authority to get, inter-alia, some more studies done on the gas consumption per metric tonne of different grades. It has been argued by the Revenue that the studies suggested by the Bench are not possible now and such studies are also not possible with respect to the other appellants. Para 3.2 and 6 of the order passed by this Bench in the case of M/s. Wellsuit Glass & Ceramics Limited (supra) are reproduced below:-

> *"3.2 With regard to consumption of gas, learned Advocate relied upon the statements of Shri Balkrishna M. Thakkar, Managing Director, that the consumption of gas would vary on the quality of frit, raw material used, condition of Kiln, gas pressure, fluxes used, etc. It was thus argued that there are various factors which affect the consumption of gas and there cannot be a fixed ratio of consumption of gas for a specific frit output. He also argued that in October, 2007, there was a change in the management and the new management took a series of steps to improve quality of frit and made the gas consumption efficient. They also installed three new Refractory Kiln with greater production capacity and used superior refractories which were better maintained from time to time. He drew attention of the Bench to the fact that services of a Ceramic consultant was engaged to get better yield. He relied upon the submissions and records to show the purchase of new Kiln and generating set. It was due to these efforts that the ratio of gas consumption from 2008-09 onwards went down from 844 SCM/MT to 286 SCM/MT as indicated in Para 13.2 of order-in-original dated 10-5-2011. That before 2008 there was no generator available with appellant and every time there was a power failure, large quantities of gas was used in re-firing the Kiln. He produced documents relating to installation of DG Set. He referred to the purchase bills to show superior quality of refractories replaced in the Kilns after 2008-09. He argued that as per the statement of Shri Balkrishna Thakkar himself, which is recorded by the department, there cannot be any fixed ratio of gas consumption and that after the new management took over, they have improved the efficiency of the unit and that mere gas consumption cannot be used as a factor for clandestine manufacture and removal. He explained that frit consists of two components i.e. glass and silicone dioxide. That the melting point of glass is very high and other materials called fluxes are added, as per expert consultations, to lower melting point such as borax, boric acid and zinc oxide, etc. That when fluxes are used, the melting point required for manufacture of frit is reduced. Learned advocate referred to extracts from the book, Industrial Ceramics by Felix Singer and the book Glassing and Decoration of Ceramics Tiles by Autorivari and extracts from the journal. Ceramic Industry, January, 2000 as well as various extracts downloaded from internet to support his case. He referred to the following decisions to submit that gas consumption alone cannot be the sole basis of clandestine manufacture and removal of the finished product :-*

(i) Vishwa Traders Pvt. Limited v. CCE- [2012 (278) E.L.T. 362]

(ii) CCE v. Vishwa Traders Pvt. Limited - [2013 (287) E.L.T. 243]

(iii) Mukesh Dye Work v. CCE - [2006 (196) E.L.T. 237]

(iv) Southern Ispat Limited v. CCE - [2009 (248) E.L.T. 270]

(v) SVM Cera Tea Limited v. CCE - [2013 (292) E.L.T. 580]

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6. On the issue of clandestine removal of frit, based on the gas consumption of the main appellant, it is observed from Para 13.2 of the order-in-original dated 10-5-2011 that records maintained by main appellant show the gas consumption for making 1 MT of frit from 844 SCM to 286 SCM. It has been contested by the appellant that gas consumption varied from season to season, from one quality of frit to other quality of frit, use of better technology, etc. It has also been brought on record that after change in the management in Oct., 2007 and installation of new furnaces and new refractories, the gas consumption has reduced. Further appellant has also brought on record that due to expert consultations and use of certain fluxes also the gas consumptions per MT of frit have come down. Evidences were also brought on record during the course of hearing regarding installation of an Electricity Generator and replacement of better quality refractories in the kilns by the main appellant. Under the above factual matrix, the method used by the investigation cannot be a sound method to demand duty on assuming 318 SCM of gas required for manufacturing one MT of any quality of frit. The improper method adopted by the Revenue for calculating duty was agitated by the appellants before the adjudicating authority as per Para 4(xi) to (xxxiii) of the order-in-original dated 10-5-2011. It is observed that during conducting of gas consumption studies on 23/24-2-2010 by investigation only frit product code OP 202was being manufactured. It has been contested by the appellant that different frit product codes may consume different quantities of gas. As the appellant is not undertaking the manufacture of one standard product, in the interest of justice, it will be appropriate to conduct a few more representative studies of different frit product codes in order to arrive at a more realistic gas consumption PMT of frit manufactured."

8.6 In view of the above observations made by this Bench it has already been held that method adopted by the investigation to estimate clandestine removal of finished goods is not sound and has to be discarded. However, Revenue was given an opportunity to strengthen their case by corroborating evidence with some more factual data from additional studies. No appeal has been filed by the Revenue against the above order passed by this Bench. It is also observed from 3.2 of the remand order that appellant has made certain changes in the plant and machinery and other methodologies to reduce gas consumption. Even in the remand proceedings also adjudicating authority has not countered the arguments taken by the appellant as to why the steps taken by them from time to time, does not effect gas consumption. On a specific query from the Bench, the learned Senior Advocate also argued that similar modernization in processes of manufacture, as undertaken by M/s. Wellsuit Glass in the manufacture of frit, have also been undertaken by other appellants. No findings have been given by the Adjudicating authorities in countering the claims of the appellants, justifying the modernization done to reduce consumption of gas from time to time. No expert opinion has been

obtained by the Revenue to challenge the gas consumption pattern adopted by the appellants to indicate that claim of the appellants was wrong.

8. In view of the above observations and judicial pronouncements, methodology adopted by the Adjudicating authorities in estimating and demanding duty from the appellants; based on consumption of natural gas, electricity consumed and packing time taken; is not acceptable and is required to be rejected.

9. So far as points mentioned at Para 6(ii) and 6(iii) are concerned, it has been held by the adjudicating authorities that undervaluation and clandestine removal stand provided in view of the pen-drives, AJTAK XYZ of SANYO, personal ledger of Comet, private diaries/ writing pads and the statements of ceramic tile manufacturers. Appellants have argued that the print-out taken from the pen-drive AJTAK XYZ are not admissible as a piece of evidence as the same are not the documents admissible as evidence under the relevant Section of the Central Excise Act, 1944. It was also argued by the appellants that the number of Panchnamas recorded and the opening of the said pen-drive clearly suggest that the data recovered from the pen-drive is highly objectionable, suspicious and not acceptable. It is observed from the case records of Wellsuit Glass & Ceramic Pvt. Limited [E/13720/2014] that seizure of the said pen-drive was effected on 17.7.2008 under a Panchnama and it was not stated in this Panchnama that the pen-drive was put inside a sealed cover. It has been admitted by Shri V.N. Thakkar (Superintendent) DGCEI in the cross-examination before the Adjudicating authority that when an article is seized, the same is placed in a sealed cover and mention of the same is made in the Panchnama. It is also admitted by Shri Thakkar that as he remembers the seized pen-drive was placed in a paper cover and sealed with adhesive tapes. It is the claim of the appellants that the way the said pen-drive was handled, it is possible that the same could be tempered with as the same was kept in the paper cover sealed with adhesive tapes. A second Panchnama was made on 30.8.2008 where the said pen-drive was mentioned to have been taken out of a sealed cover when the first Panchnama never mentioned keeping the said pen-drive in a sealed cover. It is also observed that on 30.8.2008 the sealed cover was opened but contents of the silver pen-drive were not opened on 30.8.3008 but instead another black colour pen-drive was opened. On 06.9.2008 under a Panchnama the said silver pen-drive taken out of the sealed cover and on opening this pen drive in the Tally Folder, no data was found to be available. However, under another Panchnama dated 12.09.2008, when the said silver pen-drive was opened data was found in Tally Folder which is the relied upon as Aajtak XYZ. There is a strong force in the arguments made by the appellants that when no data was found in Tally folder on 06.9.2008, how the relied upon documents got generated on 12.09.2008. Shri V.N. Thakkar, Superintendent in his cross-examination explained the reason for non retrieval of data on 06.9.2008 to be due to operational lack, but he admitted that no mention of any operational lack is made in the Panchnama dated 06.9.2008. Further, it is observed that in Panchnama dated 12.09.2008, the print out of account AJTAK taken contained 52 pages and account of appellant Wellsuit appeared at page 30 out of 52 pages. Another Panchnama dated 24.09.2008 indicate in Annexure A3 that the number of pages of Account Aajtakwere 94 and the name of appellant existed at page 43 as against page 30 mentioned in Panchnama dated 12.09.2008. Appellants have also raised the issue regarding discrepancies in the name of the panch witnesses. It is also contended that Revenue had not followed the procedure as stipulated in Section 36B of the Central Excise Act, 1944. In view of the above discrepancies the authenticity and veracity of data retrieved by investigation from the silver pen-drive is not reliable and can not be accepted as a piece of evidence in deciding the case of undervaluation and clandestine removal against the present appellants with respect to point mentioned in Para 6 (ii).

10. So far as the question mentioned at Para 6(iii) regarding denying cross-examination of witnesses whose statements were used for establishing undervaluation/ clandestine removal of frit based on the private records, the statements of tile manufacturers and Shroff/ Angadias is concerned; it is argued by the appellants that the entire exercise of such quantification has been made as per the statements of the witnesses whose cross-examination has not been allowed by the adjudicating authority as per Section 9D of the Central Excise Act, 1944. Appellants relied upon the following case laws:-

(i) J.K. Cigarettes Limited vs. CCE [2009 (242) ELT 189 (Del.)]

(ii) CCE, Allahabad vs. Govind Mills Limited - [2013 (294) ELT 361 (All.)]

(iii) Basudev Garg vs. CC [2013 (294) ELT 353 (Del.)]

(iv) Swiber Offshore Construction Pvt. Limited vs. Commissioner of Customs, Kandla [2014 (301) ELT 119 (Tri. Ahmd.)]

10.1 Section 9D of the Central Excise Act, 1944 is reproduced below:-

> *9-D. Relevancy of statements under certain circumstances –*
>
> *(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*
>
> > *(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or*
> >
> > *(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.*
>
> *(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."*

10.2 In the case of J.K. Cigarettes Limited vs. CCE (supra), following conclusions were drawn by the Delhi High Court, in Para 32:-

> *"32. Thus, we summarize our conclusions as under:-*
>
> *(i) We are of the opinion that the provisions of Section 9D (2) of the Act are not unconstitutional or ultra vires;*
>
> *(ii) while invoking Section 9D of the Act, the concerned authority is to form an opinion on the basis of material on record that a particular ground, as stipulated in the said Section, exists and is established;*
>
> *(iii) such an opinion has to be supported with reasons;*

(iv) before arriving at this opinion, the authority would give opportunity to the affected party to make submissions on the available material on the basis of which the authority intends to arrive at the said opinion; and

(v) it is always open to the affected party to challenge the invocation of provisions of Section 9D of the Act in a particular case by filing statutory appeal, which provides for judicial review."

10.3 In the adjudicating proceedings, a list of witnesses to be relied upon by the Revenue is disclosed to the appellantsalongwith the show cause notice. The reasons for relying upon the statements are also available from the facts narrated in the show cause notice. It is not necessary that all the witnesses should be called by the Adjudicating authority suo-moto for examination in a quasi-judicial proceedings for cross-examination. However, as per the provisions of Section 9D (1)(b) of the Central Excise Act, 1944, read with the judicial pronouncements relied upon by the appellant every adjudicating authority should call the witnesses when requested by the party against whom those statements are to be used. If by making efforts for a few occasions the witnesses summoned do not appear than automatically the case could be mature for accepting the statements as admissible evidences under Section 9(D)(1)(a) of the Central Excise Act, 1944. However, it was not open to the adjudicating authorities to straightaway reject the request for cross-examination in view of the law laid down by the judicial pronouncements relied upon by the appellants. The reasons for rejecting the appellants request for not allowing are also required to be intimated to the appellants as per the case law of J.K. Cigarettes Limited (supra) so that appellant may explore the possibility of filing appeal against such rejections. The ratio laid down by the J.K. Cigarettes case (supra) has also been followed in series of other judgments. No such rejection orders were given by the adjudicating authorities separately. Hon'ble Supreme Court in the case of UOI &Anr.vs. GTC India and Ors in order dated 03.01.1995 arising out of SLP (C) No. 218131/1994 has already laid the following ratio:

"Special leave granted.

Heard.

The impugned order dated 05.9.94 has to be read alongwith Section 9D of the Central Excise and Salt Act, 1944. SO read, there is no infirmity in the impugned order.

It may, however, be clarified that in case reliance is placed on the provisions of Section 9D of the Act in respect of any particular witness, intimation of the same is required to be given to the respondents and it would be open to the respondents to approach the High Court against the order made by the authority in that behalf.

That appeal is disposed of in these terms. No costs."

Further in Para 16 and 19 of case law A.Tajudeen vs. UOI[2015 (317) ELT 177 (SC)] Apex court very recently held as follows on admissibility of statements and cross-examination:-

"16. Having given our thoughtful consideration to the aforesaid issue, we are of the view that the statements dated 25-10-1989 and 26-10-1989 can under no circumstances constitute the sole basis for recording the finding of guilt against the appellant. If findings could be returned by exclusively relying on such oral statements, such statements could easily be thrust upon the persons who were being proceeded against on account of their actions in conflict with the provisions of the 1973 Act. Such statements ought not to be readily

believable, unless there is independent corroboration of certain material aspects of the said statements, through independent sources. The nature of the corroboration required, would depend on the facts of each case. In the present case, it is apparent that the appellant - A. Tajudeen and his wife T. SahiraBanu at the first opportunity resiledfrom the statements which are now sought to be relied upon by the Enforcement Directorate, to substantiate the charges levelled against the appellant. We shall now endeavour to examine whether there is any independent corroborative evidence to support the above statements.

17 &18 .. ..

19. We shall now deal with the other independent evidence which was sought to be relied upon by the Enforcement Directorate to establish the charges levelled against the appellant. And based thereon, we shall determine whether the same is sufficient on its own, or in conjunction to the retracted statements referred to above, in deciding the present controversy, one way or the other. First and foremost, reliance was placed on mahazar executed (at the time of the recovery, from the residence of the appellant) on 25-10-1989. It would be pertinent to mention, that the appellant in his response to the memorandum dated 12-3-1990 had expressly refuted the authenticity of the mahazar executed on 25-10-1989. Merely because the mahazar was attested by two independent witnesses, namely, R.M. Subramanian and HayadBasha, would not led credibility to the same. Such credibility would attach to the mahazar only if the said two independent witnesses were produced as witnesses, and the appellant was afforded an opportunity to cross-examine them. The aforesaid procedure was unfortunately not adopted in this case. But then, would the preparation of the mahazarand the factum of recovery of a sum of Rs. 8,24,900/- establish the guilt of the appellant, insofar as the violation of Section 9(1)(b) of the 1973 Act is concerned? In our considered view, even if the mahazaris accepted as valid and genuine, the same is wholly insufficient to establish, that the amount recovered from the residence of the appellant was dispatched by Abdul Hameed, a resident of Singapore, through a person who is not an authorised dealer in foreign exchange. Even, in response to the memorandum dated 12-3-1990, the appellant had acknowledged the recovery of Rs. 8,24,900/- from his residence, but that acknowledgment would not establish the violation of Section 9(1)(b) of the 1973 Act. In the above view of the matter, we are of the opinion that the execution of the mahazaron 25-10-1989, is inconsequential for the determination of the guilt of the appellant in this case."

In view of the above, by not allowing the cross-examination of the relied upon witnesses under Section 9D of the Central Excise Act, 1944, the evidentiary value of such statements does not survive and is required to be discarded. We accordingly hold so.

11. It is also the case of the appellants that all the transactions are made by the appellants at the factory gate. That only exact amount of additional consideration received by each appellant has to be added to the transaction value and that no such quantification has been done by the Revenue which could be attributed to each manufacturer. That Revenue can not adopt any best judgment valuation method as suggested in Central Excise Valuation Rules even if all the statements/ documents relied upon by the Revenue are presumed to be correct admissible as evidences.

12. Before giving observations on this argument raised by the appellants, it will be relevant to glance through the relevant portion of the provisions of

Section 4 of the Central Excise Act, 1944 alongwith definition of transaction value:-

> *"4. VALUATION OF EXCISABLE GOODS FOR PURPOSES OF CHARGING OF DUTY OF EXCISE.*
>
> *(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, then, on each removal of the goods, such value shall -*
>
> *(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*
>
> *(b) in any other case, including the case where the goods are ot sold, be the value determined in such manner as may be prescribed.*
>
> *(2) .*
> *(3) .*
> *(a) .*
> *(b) .*
> *(d) transaction valuemeans the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to , or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertise or publicity, marketing and selling organisation expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."*

13. It is not the case of the Revenue that the value of the goods cleared by the appellants is not determinable at the Factory gate and therefore, some other method under the Central Excise Valuation Rules is required to be adopted to arrive at the assessable value. Rather the case of the Revenue on valuation is that certain additional consideration coming to the appellant by way of cash flow from the tile manufacturers to the frit manufacturers is required to be added to the assessable value. In the present circumstances and factual matrix the exact amount of such additional consideration was required to be determined for addition to the transaction value even if all the statements and documents were held to be admissible evidence and satisfied the test of Section 9D of the Central Excise Act, 1944. In Appeal Nos. E/11960/2013 and E/12386/2014, the valuation has been enhanced solely based on the assumption that after booking of the case these appellant enhanced their prices. In the case of transaction value realm the same product can be sold at different prices as per Section 4 of the Central Excise Act, 1944 unless actual additional consideration has been shown to have flown back to the appellants. Appellants in these appeals and in Appeal Nos. E/13720/2014 and E/534/2011 have also not admitted during investigation that they have received any additional consideration. In other appeals on the issue of undervaluation investigation attempted to show the flow back of such additional cash flow through the statements of ceramic tile manufacturer and the statements of Shroffs and Angadias. The amount so worked out has been worked out to be Rs. 38,95,860/- as per the statement of Shri Jayesh Patel, Prop. Of M/s. Kevel mentioned in Para 9.3.3 of OIO dated 23.03.2011 in the case of M/s. Belgium Glass & Ceramics. This statement clearly conveys that amount of Rs. 38,95,860/- was paid to various frit

manufacturers and at the same time mentions that the names of the frit manufacturers are not written against each payment in the concerned documents. Under the above factual matrix appellants had the right to cross-examination the witnesses especially Shroffs and Angadias as to what portion of such payment belongs to a particular appellant. As mentioned in the definition of Transaction Value in Para 11.1 above, only actual price paid or payable has to be added to the transaction value and not a hypothetical value based on averaging of prices or standardizing of frit grades. As already mentioned under the realm of transaction value as per Section 4 even the same product could be sold at different prices depending upon several market factors and all these prices will be acceptable as permissible transaction value. Present Section 4 does not go by the concept of Normal Price of the old Section 4 of the Central Excise Act, 1944. In the absence of exact quantification of cash received by individual frit manufacturer, transaction value cannot be enhanced even if there are half cooked circumstantial evidences to the proceedings indicating suspected undervaluation. It is now well understood that suspicion howsoever grave cannot take the place of an evidence. Therefore, it may not be correct to hold that preponderance of probability should always be given to the Revenue, as Hon'ble Apex Court in a particular held it to be so. Each case has to be decided in view of the facts of that case. In view of the above observation and the law laid down by the Apex Court in the case of A. Tajudeen vs. UOI (supra) preponderance of probability cannot always be allowed in favour of the Revenue when there is no independent corroboration of the facts and the case is made only on the basis of statements which were not allowed to be tested under cross-examination as per Section 9D (1)(b) of the Central Excise Act, 1944.

14. In view of the reasons recorded above, appeals filed by the appellants mentioned in paras 5.1 and 5.2 of this order, are allowed with consequential reliefs, if any. Miscellaneous applications are also disposed of accordingly."

In this background, ld. Authorised Representative submitted that Hon'ble CESTAT has considered the merit of the case, relevant material i.e Pen drive and also statements recorded by Excise Authorities. All such three questions as discussed in its order have been decided in favour of assessee. So far as CIT(A)'s observation are concerned that relief granted by the CESTAT is highly technical, it was submitted by the ld. Authorised Representative that such observations are devoid of merit. CESTAT has passed detailed reasoned order. As regard to CIT(A)'s observation as to opportunity of cross examination of persons whose statements have been recorded, ld. Authorised Representative submitted that it is absolutely illogical on the part of the ld. CIT(A) to seek an opportunity of examination of the statements recorded by the relevant Excise authorities. Ld. Authorised Representative further submitted that Excise Department preferred an appeal against above mentioned order of CESTAT before Apex Court which according to AR was dismissed as withdrawn vide order dated 27/01/2016 and copy of same is placed on Page 327-328 of Paper Book. Content of the same are reproduced as under:

"IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs.OF 2016

D No.39019/2015

COMMISSIONER OF CENTRAL EXCISE & ST,
AHMEDABAD – III .....APPELLANT(s)

VERSUS

ZIRCONIA CERA TECH. GLAZES PVT LTD & ANR...RESPONDENT(S)

ORDER

Learned Additional Solicitor General seeks leave to withdraw the appeals with a liberty to approach the High Court in view of the statutory requirement.

Leave and liberty granted.

The appeals are dismissed as withdrawn.

……..J.
(MADAN B. LOKUR)
……...J.
(R.K. AGRAWAL)

NEW DELHI
JANUARY 27, 2016

******

ITEM NO. 6

COURT NO.8 SECTION III
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Civil Appeal Diary No(s).39019/2015

COMMISSIONER OF CENTRAL EXCISE &ST, …….Appellant(s)
AHMEDABAD - III

VERSUS
ZIRCONIA CERA TECH. GLAZES PVT LTD & ANR.……Respondent (s)

(withappln. (s) for condonation of delay in filing appeal.)
Date : 27/01/2016 This appeal was called on for hearing today.
CORAM :
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE R.K. AGRAWAL
For Appellant(s) Mr. N.K, Kaul, ASG
Mr. Tara Chandra Sharma, Adv
Mr. NiteshDaryanani, Adv.
Mr. B. Krishna Prasad, AOR

For Respondent (s) Mr. M. Y. Deshmukh AOR

UPON hearing the counsel the Court made the following

ORDER

Learned Additional Solicitor General seeks leave to withdraw the appeals with a liberty to approach the High Court in view of the statutory requirement.
Leave and liberty granted.
The appeals are dismissed as withdrawn.

(SANJAY KUMAR-I) (JASWINDER KAUR)
AR-CUM-PS COURT MASTER
(Signed order is placed on the file)"

Ld. Authorised Representative further brought to our notice that even the Tax Appeal being Tax Appeal Nos.733 & 734 of 2016 preferred by the Excise Department before the Hon'ble Gujarat High Court was dismissed vide order dated 07.12.2016. and copy of the same has been annexed as Annexure – 'A' t the Chart filed on behalf of the assessee and relevant portion of the same is reproduced as under:

"CORAM: ***HONOURABLE MR.JUSTICE M.R. SHAH***
and

HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 13/11/2013
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] By way of this petition under article 226 of the Constitution of India, petitioner has prayed for an appropriate writ, direction and order quashing and setting aside the show-cause notice dated 14.03.2012[Annexure C to the petition] as well as the impugned order dated30.03.2013 passed by the Commercial Tax Officer(4), Mehsana by which an order of reassessment has been passed by the Commercial Tax Officer directing the petitioner to pay an amount of Rs.21,52,832/ towards the balance tax under the Gujarat Value Added Tax Act, 2003[hereinafter referred to as "VAT Act"] and also directed to pay 150%penalty i.e. Rs.32,29,248/and in all Rs.73,19,630/.

[2.0] Facts leading to the present special civil application in nutshell are as follows:

[2.1] That the petitioner is a dealer registered under the VAT Act. That the petitioner is excisable to tax on the basis of its turnover under the VAT Act. For the financial year 2006-07,the petitioner filed its return with the authorities under the Act. Such return was processed by the authorities and the order thereon was passed and accordingly the petitioner paid the value added tax of Rs.2,06,448/.

[2.2] A notice came to be issued on 14.03.2012 by the adjudicating authority indicating that for the period from 01.04.2007 to 31.03.2008,he has reason to believe that taxable turnover of the petitioner –

assessee has escaped assessment. That petitioner was required to attend the officer on 31.03.2012. That the petitioner appeared before the Commercial Tax Officer – Assessing Officer and submitted that they have come to know that authority has received certain information from central excise i.e. DGCEI and on the basis of the show-cause notice issued by the Central Excise Department, adjudicating authority has intended to enhance the sales and also intended to reassess under section 35(1) of the VAT Act It was also submitted that except the show-cause notice issued by the Central Excise Department, there is no material to show that the petitioner had suppressed the sales and has evaded the tax liability. That solely on the basis of the show-cause notice issued by the Central Excise Department, the AO came to the conclusion that there was a sale of Rs.17,45,46,653/- and accordingly at the rate of 4%, the tax liability would be Rs.67,13,333/- against which the credit of Rs.43,54,053/- is adjusted. The petitioner is liable to pay the VAT of Rs.23,59,280/- and giving the credit of Rs.2,06,448/- paid by the petitioner towards the tax, the petitioner is liable to pay balance ofRs.21,52,832/- towards VAT. Consequently, by order dated 30.03.2013,the AO has passed the reassessment order directing the petitioner to pay the balance amount of Rs.21,52,832/- along with interest upto31.03.2013 and has also imposed the penalty at the rate of 150% i.e. in all Rs.73,19,630/.Feeling aggrieved and dissatisfied with the impugned order, the petitioner the petitioner has preferred the present special civil application under Article 226 of the Constitution of India.

[2.3] At the outset it is required to be noted that we are conscious of the fact that against the impugned order of reassessment the petitioner has a statutory remedy available by way of appeal however, considering the fact in the identical facts and circumstances earlier this Court has entertained the petition and has quashed and set aside the order of reassessment, in the facts and circumstances of the case, we have entertained the present petition.

[2.4] The petitioner has challenged the impugned order passed in reassessment proceedings, which is passed solely on the basis of the show-cause notice issued by the excise department and the additions are made. Learned counsel appearing on behalf of the petitioners has vehemently submitted that this should be wholly impermissible.

[3.0] Shri Parikh, learned advocate appearing on behalf of the petitioner has heavily relied upon the decision of this Court in the case of Futura Ceramics Pvt. Ltd. vs. State of Gujarat rendered in Special Civil Application No.6500/2012 and relying upon the said decision, it is submitted that similar reassessment order passed by the AO solely on the basis of the show cause notice issued by the Excise Department has been set aside by this Court. Therefore, it is requested to quash and set aside the impugned order passed by the AO.

[4.0] Shri Jaimin Gandhi, learned AGP appearing on behalf of the respondent is not in a position to dispute the above. He is also not in a position to dispute that similar reassessment order has been set aside by this Court in the case of Futura Ceramics Pvt. Ltd. (Supra). However, Shri Gandhi, learned AGP appearing on behalf of the respondent has requested to reserve the liberty in favour of the AO and/or appropriate authority to pass reassessment order afresh in accordance with law and on merits.

[4.1] Shri Parikh, learned advocate appearing on behalf of the petitioner has submitted that it may be observed that fresh reassessment order can be passed in accordance with law and only if the same is permissible under the law.

[5.0] Having heard Shri Parikh, learned advocate appearing on behalf of the petitioner and Shri Gandhi, learned AGP appearing on behalf of the respondents and having gone through the impugned order passed by the AO, it appears that the reassessment order has been passed by the AO solely on the basis of show cause notice issued by the Excise Department. It can be seen that the assessment which was previously oncluded was reopened on the premise that during the excise raid, it was revealed that the petitioner had clandestinely removed goods without payment of excise duty. The Sales Tax Department, therefore, formed a belief that value of the goods + excise duty evaded and formed part of turnover of the assessee for the purpose of tax under the VAT Act. Identical question came to be considered by this Court in the case of Futura Ceramics Pvt. Ltd. (Supra) and a similar reassessment order which was passed on the basis of the show cause notice issued by the Excise Department has been set aside by the Division Bench of this Court by observing as under:

> *"It may be that the raid carried out by the Excise duty and the material collected during such proceedings culminating into issuance of a show cause notice for recovery of unpaid excise duty and penalty in a given case sufficient to reopen previously closed assessment. In this case, however, we are not called upon to judge this issue and would therefore not give any definite opinion. The question, however, is whether on a mere show cause issued by the Excise Department, the Sales tax Department can make additions for the purpose of collecting tax under the Gujarat Value Added Tax Act without any further inquiry. If the Assistant Commissioner of Commercial Tax has utilized the material collected by the Excise Department; including the statements of the petitioner and other relevant witnesses and had come to an independent opinion that there was in fact evasion of excise duty by clandestine removal of goods, he would have been justified in making additions for the purpose of VAT Act. In the present case, however, no such exercise was undertaken. All that the Assessing Officer did was to rely on the show cause notice issued by the Excise Department. Nowhere did he*

conclude that there was a case of clandestine removal of goods without payment of tax under the VAT Act. Merely because the Excise Department issued a show cause notice, that cannot be a ground to presume and conclude that there was evasion of excise duty implying thereby that there was also evasion of tax under the VAT Act. It is not even the case of the Department that such show cause notice proceedings has culminated into any final order against the petitioner. We wonder what would happen to the order of reassessment, if ultimately the Excise Department were to drop the proceedings without levying any duty or penalty from the petitioner.

All in all, the Asstt. Commissioner has acted in a mechanical manner and passed final order of assessment merely on the premise that the Excise Department has issued a show cause notice alleging clandestine removal of the goods. Such order, therefore, cannot be sustained and is accordingly quashed. When the order is ex facie illegal and wholly untenable in law, mere availability of alternative remedy would not preclude us from interfering at this stage in a writ petition."

[6.0] In view of the above decision of Division Bench of this Court, the impugned reassessment order deserves to be quashed and set aside. However liberty can be reserved in favour of the department to pass an order afresh in accordance with law and on merits after giving an opportunity to the petitioner and if permissible under the law now.

[6.1] In view of the above and for the reasons stated above, petition succeeds. Impugned order passed by the Commissioner Tax Officer(4), Mehsana [Annexuree] to the petition] dated 30.03.2013 is hereby quashed and set aside. However, it is observed that the same shall not affect the proceedings under the Central Excise Act for which the show cause notice has been issued. A liberty is also reserved in favour of the department to pass reassessment order afresh in accordance with law and on merits and after giving fullest opportunity to the petitioner and if permissible under the law now. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
(M.R. SHAH, J.)

Sd/-
(R.P. DHOLARIA,J.)"

In this background ld. Authorised Representative submitted that additions be deleted in both the years. On other hand ld. Departmental Representative supported the orders of authorities below and contended that order CESTAT is technical one so same should be ignored and orders of authorities below be upheld in both the years.

11. We find that the basis of addition is contents of show-cause notice issued by the Excise Department. An investigation was carried out by DGCEI at assessee premises on 25/08/2008, wherein it was alleged by the Excise Department that assessee has not declared actual assessable value of goods manufactured and cleared from factory. Based on above DGCEI issued show-cause notice dated 19/04/2010, Excise department concluded that assessee was engaged in under valuation of sales and clandestine removal of goods. Only on the basis of same Assessing officer reopened assessee's income tax assessment for the years under consideration and made addition of estimated Gross Profit on under valuation sales and clandestine removal of goods. The Revenue has brought nothing on record that it has applied it's mind over and above the contents of show-cause notice in question thus there is lack of independent application of mind on behalf of revenue in these matters.

12. Without prejudice to above, we find that in Excise proceedings, concerned authorities passed order against assessee and matter was carried up to concerned Hon'ble CESTAT. Hon'ble CESTAT vide its order dated 12/02/2015 as discussed above, has decided the issue in favour of the assessee holding that Excise Department could not estimate value of alleged suppression of sales as well as clandestine removal of goods merely on the basis of assumption and surmises. The CESTAT having considered the relevant facts of the case as well as relevant material i.e. Pen drive and statement recorded by the Excise Department has decided the matter in favour of the assessee as discussed above. In these circumstances Ld. CIT(A) was not justified in observing that relief granted by Hon'ble CESTAT was highly technical.

13. We also find that Excise Department carried matter before Hon'ble Apex Court wherein same was dismissed as withdrawn as mentioned above. Nothing contrary was brought to our knowledge on behalf of Revenue in this regard.

14. We also find that Tax Appeal being Tax Appeal No.733 and 734 of 2016 preferred by the Ld. Excise Department before Hon'ble Gujarat High Court came to be dismissed vide order dated 07/12/2016, as mentioned above. Again nothing contrary was brought to our knowledge on behalf of Revenue in this regard as well. In this background, we find that the order passed by Hon'ble CESTAT has achieved the finality against the revenue. As we have observed earlier that only Excise Department action was basis of additions before us in both the years which does not survive for the reasons discussed above, so the basis of additions made by the Revenue does not survive.

15. In view of the above additions made on account as alleged valuation of sales and clandestine removal of goods do not survive and same are directed to be deleted in both the assessment years. In the result both the appeals filed by the assessee are allowed."

4. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench.

5. Respectfully following the Tribunal's decision dated 11.07.2018 (supra), we confirm the order of the ld. CIT(A) and dismiss the grounds raised by the Revenue.

6. In the result, all the four appeals filed by the Revenue are dismissed. Pronounced in the open Court on this 12th of February, 2019.

Sd/-	***Sd/-***
Ms. Madhumita Roy	**Pramod Kumar**
(Judicial Member)	(Vice President)

Ahmedabad, the 12th day of February, 2019
*PBN/**

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*Commissioner*	*(4)*	*CIT(A)*
	(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad