

**IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT**  
**BEFORE DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER**  
**AND**  
**SHRI DINESH MOHAN SINHA, JUDICIAL MEMBER**

**आयकरअपीलसं./ITA No.165/RJT/2024**

**Assessment Year: (2016-17)**

**(HybridHearing)**

M/s. Sober Ceramics 8 - A, National Highway, At. Nava Jambudiya, Morbi - 363641 Gujarat	<b>Vs.</b>	The ITO, Ward - 4, Morbi - 363642
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AALFS3898R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**Appellant by** : Shri Mehul Ranpura, Ld. A.R.  
**Respondent by** : Shri Abhimanyu Singh Yadav, Ld. Sr. DR  
**Date of Hearing** : 12/12/2024  
**Date of Pronouncement** : 28/02//2025

**आदेश / O R D E R**

**PER DR. A. L. SAINI, AM:**

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2016-17, is directed against the order passed by the Learned Commissioner of Income Tax(Appeals), vide order dated 18.01.2024, which in turn arises, out of an assessment order passed by Assessing Officer (in short 'the AO') under section 143(3) of the Income Tax Act, 1961 (herein after referred to as "the Act"), order dated 17.12.2018.

2. Grounds of appeal raised by the assessee, are as follows:

1. *The grounds of appeal mentioned hereunder are without prejudice to one another.*
2. *The Id. Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi (hereinafter referred to as the "CIT(A)") in confirming rejection of book results and thereby confirming the estimated addition on account of suppressed sales and profit.*
3. *The Id. CIT(A) also erred in not following decision of the Hon'ble High Court of Gujarat in the case of PCIT vs. Ganga Glazed Tiles (P.) Ltd. which has been upheld by Hon'ble Supreme Court, wherein it is held that no addition can be made by the AO without bringing independent material on record.*
4. *The Id. CIT(A) erred on facts as also in law in retaining estimated gross profit at the rate 11.24% as against the same estimated by the AO at 16.24% on alleged suppressed sale and there by retaining addition of Rs.27,71,888/- out of total addition of Rs.40,04,933/- made by the AO. The addition confirmed is unjustified and uncalled for, which deserves to be deleted and may kindly be deleted.*
5. *Your Honour's appellant craves leave to add, to amend, alter, or withdraw any or more grounds of appeal on or before the hearing of appeal.*

3. The assessee has also raised the following additional grounds of appeal.

1. *Ld. AO erred in law and on facts of case in relying on the finding of Central Excise search and seizure action without considering the difference between the provisions of the Income Tax Act, 1961 and provision Central Excise Act, 1944 specifically concerning with respect to the lack of presumption applicable to entries in books of account and documents under the Central Excise Act, 1944."*
2. *Ld. AO erred in law and on facts of case in considering statements recorded by Central Excise Officer during the search and seizure, ignoring that the such officers lack the authority to record statement on oath under provision of section 14 of the Centralized Excise Act, 1991, unlike the provision of section 131 of the Income-tax Act, 1961."*

4. When this appeal was called out for hearing, learned Counsel for the assessee invited our attention to the judgement of Hon'ble jurisdictional, High Court of Gujarat in the case of PCIT v. Ganga Glaze Tiles P. Ltd. in Tax Appeal No. 206 & 207 of 2019 [(2020) 117 taxmann.com 107 (Guj.)], and also invited our attention to the order dated 21.05.2023, of jurisdictional ITAT Rajkot, in ITA No.

42/Rjt/2023, wherein the reopening of assessment, on identical and similar facts, were quashed holding that the assessing officer (AO) must have 'reason to believe' that income chargeable to tax has escaped assessment. Such reason to believe must be based on some material coming to the possession of the Assessing Officer which may trigger reason to suspect. It must be kept in mind that the "reason to believe" must have a rational connection with or relevant bearing on the formation of the belief, i.e, there must be the direct nexus or link between the material and the formation of such belief. Since in the assessee's case under consideration *since the assessing officer has reopened the assessment based on the findings of the Anti-Evasion Section, Central Excise Commissionarate, Rajkot, which were rejected/ reversed by the Customs, Excise and Service Tax Appellate Tribunal in assessee's own case.* Therefore in the facts and circumstances of the case, the Bench was of the opinion that 'reason to believe' which is the jurisdictional precondition to reopen the assessment, as required by the law, has not met in the reasons recorded in the instant case and therefore the action of the Assessing Officer to reopen the assessment is null in the eyes of law and hence, the Bench had quashed the initiation of reassessment proceedings being ab-initio void. Learned Counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench. Thus, we find that issue, of the assessee, under consideration, is squarely covered by the judgment of jurisdictional ITAT Rajkot, in ITA No. 42/Rjt/2023 order dated 21.05.2023, wherein the Co-ordinate Bench has held as follows:

*"24. We note that during the appellate proceedings, before ld CIT(A), the assessee has contested the issue of reopening of assessment under*

section 147 of the Act, however, *ld. CIT(A)* held that the validity of the reassessment proceedings is to be determined on the basis of the reasons recorded for reopening. At the stage of initiation of reassessment proceedings, the Assessing Officer is not required to hold conclusively that additions invariably be made. He truly had to form a bona fide belief that income had escaped assessment. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. When the Assessing Officer had such material available with him which he perused, considered, applied his mind and recorded the finding of belief that income chargeable to tax had escaped assessment, the reopening cannot be declared invalid. The *ld CIT(A)* further noted that in assessee's case a search was conducted in the premises of the assessee by Anti-evasion section, Central Excise Commissioner, Rajkot on 11.10.2013. During the course of search, unaccounted sales of Rs, 19,75,67,800/- was found on the basis of entries in two notebooks which was accepted by the Director of the assessee -company in his statement. The assessee had not obtained Central Excise Registration and was removing the finished goods clandestinely. The customers/buyers were also examined and the unaccounted sale was further established by their statements. The copy of show- cause notice dated 10.03.2015 issued by the Assistant Commissioner, Central Excise division, Morbi was in the possession of the assessee as well as with the assessing officer (AO). The information of the Central Excise along with show -cause notice was examined by the AO who after application of mind came to formation of belief that income had escaped assessment. The exact quantification of unrecorded sales based on entries in the two note books supported by statements of Director and the customers and also supported by the fact that the transportation was arranged by those customers point to the fact that there was sufficient material or evidence leading to reasons to believe that income had escaped assessment. The information cannot be treated as vague in this case and the AO has correctly reopened the case after proper application of mind. The *ld CIT(A)* also relied on the judgement of Hon`ble Gujarat High Court in the case of Principal Commissioner of Income Tax, Rajkot-3 v. Gokul Ceramics [Taxman Vol. 241 (2016) 241].

25. We note that after the above order of *ld CIT(A)* dated 22.12.2022, the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad in Excise Appeal No.10691 of 2017-DB, dated 07.02.2024 adjudicated the issue in favour of the assessee and the findings of the Anti-Evasion Section, Central Excise Commissionerate, Rajkot were reversed and rejected, by the Hon`ble Tribunal, observing as follows:

"4. We have heard both the sides and perused the records. We find that in the instant case, the entire case of the Revenue is based on the two note books seized from the residence of the Director Shri Anandbhai Vadhadia and that the note books were accepted as the details of transaction of sales of Tar Catchers by the said Director.

However we find that Shri Ananad Vadhada in his statement recorded on 08.12.2015 has specifically stated that quotation price to customers were given in some cases which were recorded on right side of two diaries, some cases where advance payments was received against such quotation price were also mentioned in note books, the transaction mentioned in the note books were not actual sales, and that goods were actually not delivered/sold to the customers in some cases where advance payment was received. We also gone through the said disputed Note Books and find that the said note books not clearly shows fact/details about the details of alleged clandestine manufacture and clearance of the disputed goods. It is an admitted position of facts that out of 176 parties found by the revenue officers in said two note books, only five parties were contacted during the investigation and there is no evidences of the remaining parties.

4.1 We also find that assessee filed a reply to show cause notice before the Learned Commissioner with various documents including affidavits of 107 persons/ parties whose name appeared in said disputed two Note Books. By these affidavits, the concerned persons clarified that they had not purchased or received any Tar Catchers from the assessee. We also observed that revenue itself excluded the 15 entries of 15 parties of the said Note Books while issuing show cause notice. Thus, the authenticity of said Note Books is not reliable. It is not open to drop the evidence in favour of the assessee and to pick up the partial evidence which may be against the assessee. It is the appreciation of entire evidence which needs to be done for arriving at the final conclusion, which cannot be arrived on the basis of pick and choose method. We find that only on the basis of said disputed entries of the Note Books charges of clandestine manufacture of 'Tar Catchers' and clandestine clearances of the said goods from assessee's factory is not sustainable. The investigation in the present case has been very sketchy and will not support the findings in the impugned order.

4.2 The allegation of clandestine production and removal are required to be arrived at on the basis of positive and tangible evidences including the evidences relating to procurement of raw-materials, conversion of the same to final products, clearances of the same and identification of the buyers and receipt of unaccounted cash etc. It has been the ratio of various decisions of the higher courts that mere entries in the private records, do not, ipso facto, lead to the allegation of clandestine removal unless there is corroborative evidence to that effect from independent sources. Testing on the said touch stone, we find that the revenue has not been able to produce sufficient evidence so as to hold against the assessee. There is no evidence of procurement of such a huge quantum of raw material for final product at any place; no evidence of transports of either the raw material or the final products; no statement of the transporters deposing against the assessee; no evidence of the buyers in respect of such a huge quantum of removal of final product; no statement of any

*production staff indicating the production of such a huge quantum of the final products; no recovery of any cash amount from the buyers or cash payments to the input suppliers. It is well settled that the charges of clandestine removal are required to be made on the basis of positive and tangible evidence, the same being quasi-criminal in nature. The Revenue has miserably failed to produce corroborative evidence on records so as to substantiate the charges of clandestine removal. In the absence of corroborative evidence, in the present case “the charge of clandestine clearance” cannot be levelled against the assessee.*

*4.3 We also noticed that the Learned Commissioner has confirmed the demand of duty on the basis of statement of five parties/ buyers, one raw material supplier and one director of the assessee. Assessee had specifically requested for cross examination of the said witnesses, but the witnesses were not offered for cross examination and the impugned order does not contain any reason for denial of this opportunity. Clearly, adjudicating authority has not followed the procedure as prescribed under Section 9D of the Central Excise Act for placing reliance on the statements of said witnesses. In this connection we note that denial of cross-examination and relying on the statements, put the impugned order in legal jeopardy. The provisions of Section 9D of the Central Excise Act, 1944 is very clear and by now, it is well-settled legal position that the Adjudicating Authority, if he intends to rely on the contents of any statement recorded under the Central Excise Act, 1944, then the procedure, as prescribed under Section 9D, has to be followed scrupulously. In fact, in a decision, the Hon’ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt. Ltd. - 2016 (340) E.L.T. 67 (P&H) held that Adjudicating Authority cannot straightaway rely upon the statement recorded during the investigation before the central excise officer, unless and until, he can legitimately invoke clause (a) of Section 9D(1). The statements given under Section 14 are to be examined before the Adjudicating Authority and if the same is not done, it cannot be taken as reliable evidence. If the maker of the statement is examined by the Department, cross-examination of the said person must be allowed, if sought for by the assessee. We find legal ratio regarding cross-examination of the person, whose statement has been relied upon by the Department, has been laid down by the Hon’ble Delhi High Court in Basudev Garg - 2013 (294) E.L.T. 353 (Delhi) = 2017 (48) S.T.R. 427 (Del.) and Hon’ble Allahabad High Court in Parmarth Iron Pvt. Ltd. - 2010 (260) E.L.T. 514 (All.). Further, reference can be made to the decision of Hon’ble Delhi High Court in J.K. Cigarettes Ltd. - 2009 (242) E.L.T. 189 (Delhi) = 2011 (22) S.T.R. 225 (Del.) and Hon’ble Allahabad High Court in Govind Mills Ltd. - 2013 (294) E.L.T. 361 (All.). In the present case, we find that the statements were relied upon as corroborative evidences and the cross-examination of witnesses who made such statements was denied without valid ground. We find that, the admissibility of these evidences is legally not sustainable, and the same cannot be the basis*

for confirmation of duty on the goods allegedly manufactured and cleared by the assessee.

4.4 On the another issue related to confiscation of two Tar Catchers seized on 11.10.2013 at the assessee's unit, we find that in the matter of Koch Rajes C.D. Industries Pvt. Limited v. Commissioner of Central Excise, Mumbai-IV [2006 (193) E.L.T. 566 (Tri. - Mumbai)], the CESTAT held in Para 3(b) of the decision as under :-

“(b) The law on confiscation of goods, in the factory and not entered in RG-1 production record is well settled. From the following decisions of the Bombay & Andhra Pradesh High Courts & of this Tribunal.

- (i) Southern Steels Ltd. v. U.O.I. - 1979 (4) E.L.T. (J 402) (A.P.)
- (ii) Kirloskar Brothers - 1988 (34) E.L.T. 30 (Bom.)
- (iii) Nalanda Tobacco - 1997 (91) E.L.T. 275 (A.P.)
- (iv) Bhilai Conductors Pvt. Ltd. - 2000 (125) E.L.T. 781 (Trib.)

It is very clear that mere non-entry of the productions in the RG-1 will not bring in the liability to confiscation under provision of the Central Excise Rules if there is no corresponding material of clandestine clearance also available. Unaccounted production goes in tandem with clandestine removal and evidence of both has to be present in a given case to avoid the charge to be determined on an assumption/presumption. Applying the tab for liability to confiscation in this case under Rule 173Q(1), we find the test to be not positive. The confiscation arrived is to be not upheld & is to be set aside.”

4.5 Similarly in the case of Commissioner of Central Excise & Customs v. Resham Petrotech Ltd. [2010 (258) E.L.T. 60 (Guj.)], the Hon'ble High Court of Gujarat held as under :-

“3. As can be seen from the impugned order of Tribunal and the record, th respondent has tendered explanation as to why the necessary entries were not made in the statutory records. The said explanation has not been disproved by any evidence to the contrary. The Tribunal has found that the explanation tendered is reasonable and does not warrant any confiscation of goods.

4. It is an accepted position that the liability to pay duty arises at the point of time when the goods are to be removed from the factory premises. Admittedly, the goods were found lying in the factory premises. Therefore the occasion to pay duty had not arisen. In other words, the liability to pay duty had not accrued in law. In the circumstances, it is not possible to accept the contention of the assessee that an inference should be drawn that the goods were to be clandestinely removed and hence confiscation was permissible. Such an inference should be possible if there are other surrounding or attendant circumstances. In the present case, no such evidence exists

*on record. The Tribunal was, therefore, justified in coming to the conclusion that the confiscation of goods was not justified.”*

*4.6 Further, in the case of Commissioner of Central Excise, Chandigarh v. Sadashiv Ispat Ltd. [2010 (255) E.L.T. 349 (P & H)], the Hon'ble High Court of Punjab and Haryana held as under :-*

*“8. A perusal of the impugned order shows that no evidence has been produced by the Revenue that the respondent had cleared the goods unaccounted and the goods were kept for clandestine clearance. In the present case, even if the goods had not been entered in the RG-1 register, yet the same cannot lead to the conclusion that the goods were meant for clandestine removal. Both the Commissioner as well as the Tribunal have returned a concurrent finding of fact that there was no mens rea on part of the respondent to clandestinely remove the goods.*

*9. The assessee had formulated the following question of law for adjudication by this Court :-*

*“Whether “mens rea” is a pre-condition for confiscation of unaccounted exciseable goods under Rule 173Q(a), (b), (c) of erstwhile Central Excise Rules, 1944 and present Rule 25(a), (b), (c) of Central Excise Rules, 2002?”*

*10. This question has squarely been answered by a Division Bench of this Court in Commissioner of Central Excise, Jalandhar. v. Indo German Fabs reported as 2007 (209) E.L.T. 184 (P & H), wherein while relying on the judgement of Hon'ble Supreme Court in Hindustan Steel Ltd. v. State of Orisa, reported as 1978 (2) E.L.T. (J159) (S.C.), it was held that element of mens rea is normally required to be shown for imposition of penalty. Same view was taken in The Commissioner of Income Tax, West Bengal v. Anwar AH, reported as AIR 1970 S.C. 1782.*

*11. In the present case, the Department has failed to prove the element of mens rea for imposition of penalty. It has been so held by the Commissioner as well as the Tribunal that no case was made out to impose penalty. The finding recorded that no case was made out for imposition of penalty is not shown in any manner to be perverse.*

*12. In view of the above, we find no merit in this appeal and the same is accordingly dismissed.”*

*4.7 In the case of Commissioner of Central Excise, Hyderabad v. Srinivasa Frozen Foods Ltd. [2010 (262) E.L.T. 594 (Tri. - Bang.)], also, CESTAT held as under:-*

*“5. I have considered the submissions made at length and perused records. The issue involved in this case is regarding the confiscation of the goods which were found unaccounted in the RG-1 of the*

*respondent. It is undisputed that these goods were found in the factory premises of the respondent. The allegation in the show cause notice that these goods were kept without entering in the records, with an intention to clear the same without payment of excise duty, is not supported by any evidence. Further, it is also seen that as regards the allegation of the clandestine removal in respect of other show cause notice, which also was issued based upon the very same investigations and visit by the officers, the respondent had settled the issue before the Settlement Commission. The proceedings which were settled by the respondent before the Settlement Commission cannot be brought into play for holding against the respondent in another show cause notice.*

*6. Be that as it may, I find that the goods once they are in the factory premises, no penalty can be imposed on the respondent under the provisions of Rule 173Q, as has been held by the majority decision of the Tribunal in the case of Bhillai Conductors (P) Ltd. (supra). In view of this, I hold that the goods which were found in excess in the factory premises are not liable for confiscation and the adjudicating authority's order of dropping the issue under the show cause notice is correct and does not require any interference on this count."*

*4.8 In the light of the above settled law on the issue it is observed that in the present case also the goods were lying within the assessee's factory. There was no evidence on record to show that there was any attempt to remove those goods clandestinely without payment of duty. In view of the above decisions on the issue, we hold that the goods in question were not liable to confiscation. Accordingly, we set aside the confiscation of the goods.*

*5. In view of the above discussions, the impugned orders cannot be sustained and accordingly the same is set asides. All the appeals are allowed with consequential reliefs as per law."*

*26. From the above order of the Customs, Excise and Service Tax Appellate Tribunal, in assessee's case (supra), it is vivid that the allegation of clandestine production and removal are required to be arrived at on the basis of positive and tangible evidences including the evidences relating to procurement of raw-materials, conversion of the same to final products, clearances of the same and identification of the buyers and receipt of unaccounted cash etc. Mere entries in the private records, do not, ipso facto, lead to the allegation of clandestine removal unless there is corroborative evidence to that effect from independent sources. The Revenue has miserably failed to produce corroborative evidence on records so as to substantiate the charges of clandestine removal. Assessee had specifically requested for cross examination of the witnesses, but the witnesses were not offered for cross examination. Based on these facts, we note that reasons recorded by the assessing officer u/s 147 of the Act are not sustainable in the eye of law.*

27. We note that statements and the diaries which were found during the search do not contain any information about removal of the Excisable Goods without paying the Excise Duty, therefore, the Customs, Excise and Service Tax Appellate Tribunal, in assessee's case has quashed the order based by the lower authorities. No doubt, the decision of Customs, Excise and Service Tax Appellate Tribunal, was not available before the Assessing Officer and before the Ld. CIT(A), therefore they are adjudicated the issue based on the information available with them at that point of time, however, later on, the issue been adjudicated in favour of assessee, by the Customs, Excise and Service Tax Appellate Tribunal (supra). Since the assessing official has reopened the assessment based on the findings of the Anti-Evasion Section, Central Excise Commissionarate, Rajkot, which were rejected/ reversed by the Customs, Excise and Service Tax Appellate Tribunal (supra) in assessee's own case. That is, no addition was made or sustained by the Customs, Excise and Service Tax Appellate Tribunal, based on the findings, of the Anti-Evasion Section, Central Excise Commissionarate, Rajkot, and we note that based on these findings, the assessing officer under the Income Tax Act, had recorded the reasons under section 147 of the Act, stating that assessee's income has escaped assessment, which is now not sustainable in law in view of the decision of the Customs, Excise and Service Tax Appellate Tribunal (supra) in assessee's case. Thus, the bases of reopening of the assessment under section 147 of the Act is not sustainable in the eye of law, as there is no foundation. Therefore, we are of the view that initiation of reopening proceedings under section 147/148 of the Act has vitiated as there is no foundation to uphold the order of the assessing officer under section 143(3) r.w.s. 147 of the Act dated 05.12.2017, on the same facts, which were adjudicated in favour of assessee, in the assessee's case by the Customs, Excise and Service Tax Appellate Tribunal(supra).

28. Hence we find that the basic premise on which the assessing officer has recorded the reasons under section 147 of the Act, on the ground of show-cause notice issued by the Assistant Commissioner, Central Excise Division, Morbi, is not maintained now in the eye of law and therefore completely fails. The findings of the search team of the Anti-Evasion Section, Central Excise Commissionarate, Rajkot, have been held by the Customs, Excise and Service Tax Appellate Tribunal (supra) in assessee's case, as not sustainable in the eye of law. Once the foundation fails, the superstructure also fails i.e the addition also is to be deleted. In this regard, we placed reliance on the legal maxim "**Sublatofundamentocadit opus**" (meaning **thereby that foundation being removed, structure /work falls**). Hence the initial action of the assessing officer in initiating the proceedings u/s 147 of the Act, itself is not in consonance with law, then all the subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order.

29. We note also note that Assessing Officer was not justified in making the addition to assessee's income in reassessment proceedings, based on the information received from Anti-Evasion Section, Central Excise Commissionarate, Rajkot, because there was no independent material brought on record by the Assessing Officer other than those which were collected by Anti-Evasion Section of Central Excise Commissionarate, Rajkot, and which were yet to be verified at the time when the reassessment proceedings, u/s 147 of the Act, were initiated by the Assessing Officer. For that we rely on the judgment of the Hon'ble Gujarat High Court in the case of **Commissionarate of Income Tax vs. Ganga Glazed Tiles (P.) Ltd., 117 taxmann.com 107**, wherein it was held as follows:

“6. Having heard learned advocates for the parties at considerable length at the outset, we may straightaway agree with the suggestion of the counsel for the Revenue that the present group of cases do not fall in the same category as the judgement of this Court in case of *Futura Ceramics (petitioner) Ltd v. State of Gujarat* reported in [2013] 40 taxmann.com 404 (Gujarat). It was the case in which, the petitioner before the High Court was a registered dealer under the *Gujarat Value Added Tax Act* and was liable to pay tax on the basis of its turnover. The petitioner's return for the financial year 2006-07 was scrutinized by the Assistant Commissioner of Commercial Tax. The assessee was served with the show-cause notice by the said authority indicating that he has reason to believe that taxable turnover was suppressed. This was on the basis of a show-cause notice issued by the Excise department pursuant to the raid indicating that the petitioner had suppressed sales to the tune of Rs. 5.25 crores and thereby evaded tax duty to the extent of 73.55 lacs. The Assistant Commissioner of Commercial Tax therefore, prima facie held a belief that the assessee's sale of Rs. 5.97 crores (i.e. the suppressed sale of 5.25 crores coupled with excise duty element of 73.55 lacs) had escaped assessment. He accordingly, framed the assessment after rejecting the petitioner's objections. Such assessment order was challenged by the petitioner before the High Court on the ground that the Assistant Commissioner of Commercial Tax had proceeded merely on the show- cause notice issued by the Excise Department without any further verification. The Court noticed that the entire order of reassessment proceeded on the show- cause notice issued by the Excise department without any further material being brought on record. The Court held that merely because the Excise department issued such a notice, it cannot be a ground to presume that there was evasion of excise duty further implying evasion of value added tax. It was noticed that the show-cause notice issued by the Excise department had not yet culminated into final order against the petitioner and a piquant situation would arise if C/TAXAP/206/2019 JUDGMENT ultimately, such show-cause notice were to be dropped in favour of the petitioner. On this ground, the Court quashed the order of reassessment.

7. In the present case, the Assessing Officer has not proceeded on the basis of show-cause notice taking the proposals contained in such show-cause notice as having achieved finality. He has put the assessee to notice with respect to the contents of such show-cause notice issued by the Excise department and also elicited assessee's response to the same. Whether this was sufficient to enable him to frame assessment is a question, which we will answer a while later.

8. Before proceeding further, we may discard the contention of the counsel for the assessee that since the excise proceedings had not yet been finalized, the Assessing Officer could not have passed the final order of assessment. This contention would have multiple objections from us. Firstly, as is well known, the adjudication proceedings under the *Central Excise Act* do not come with time barring provisions unlike as in the *Income Tax Act*. In fact, the Adjudicating authorities, under the *Central Excise Act*, enjoy much wider time period even for issuance of show-cause notice in case of the alleged nonpayment or short payment of duty is for any reason of fraud or collusion or willful misstatement or suppression of facts or contravention of the provisions of the Act with intent to evade payment of duty.

9. Under the circumstances, the Assessing Officer cannot be expected to defer completion of assessment awaiting final order of adjudication in excise proceedings at the risk of his assessment getting time barred. Even otherwise, in a given case, the material that may be brought on record in excise proceedings may be different from that which may form part of the assessment proceedings though the both may, to some extent, be common.

10. Having thus cleared the peripheral issues, we may examine the central question viz. did the Assessing Officer have sufficient material at his command to believe evasion of tax? We have noticed the broad modus operandi stated to have been C/TAXAP/206/2019 JUDGMENT adopted by the assessee as per the excise show- cause notices. Admittedly, these show-cause notices are only at such stage without in any of these cases the final orders of adjudication have been passed by the Excise authorities. These show-cause notices thus merely present the material collected by the Excise department suggesting the view of the department that this is a case of large scale excise evasion. Before final order levying excise duty with interest and penalty can be passed, these facts have to be established through by parte proceedings. Till then, it only remains in the realm of the stand of the department which is yet to be tested.

11. In addition to confronting the assessee with the contents of the show-cause notice issued by the Excise department, the Assessing Officer has done little else. He of course called upon the assessee to respond to the allegations contained in the show-cause notice, to the statements and materials accompanying such show-cause notice. As noted, the assessee gave a brief reply denying the allegations and

*pointing out that the charges are yet to be proved. If the Assessing Officer thereafter wanted to make additions on the basis of such materials, the same had to be brought on record. By merely producing the copies of the statements of the witnesses accompanying the show-cause notices, such statements and the veracity thereof does not get automatically established. The Assessing Officer merely cosmetically gave an opportunity to the assessee to meet with such allegations, virtually, shifting the burden of proving the evasion of duty that had taken place on the assessee. We have perused the entire order of assessment. There is no independent material brought on record by the Assessing Officer other than those which were already collected by the Excise department and which, as noted earlier, are yet to be verified.*

*12. Counsel for the assessee drew our attention to a judgement of Customs, Excise and Service Tax Appellate Tribunal in which, the order of adjudication passed in case of one of the ceramic units (not an assessee before us) by the Adjudicating authority came to be set aside. However, for the following reasons we do not wish to place any reliance on this C/TAXAP/206/2019 judgement:*

*Firstly, the excise show-cause notices in case of the present assessee are yet to be adjudicated. What would be the material on record during such proceedings is not possible for us to foresee.*

*Secondly, the Tribunal has mainly proceeded on the basis of absence of [section 4A](#) of the Central Excise Act at the relevant time which, in the opinion of the Tribunal, alone could have permitted the department to substitute the sale price by the transaction value of the goods. Such is not the case in the present group of cases. We would, therefore, be well advised to clear such controversy.*

*13. When we find that the Assessing Officer did not have the basis for making additions, the question of percentage of the sales at which stage additions should be made would become redundant.*

*14. In the result, question is decided against the Revenue. All Tax Appeals are dismissed."*

*30. Therefore, in the light of the aforesaid judicial precedents, we note that to initiate reopening of the assessment, the assessing officer (AO) must have 'reason to believe' that income chargeable to tax has escaped assessment. Such reason to believe must be based on some material coming to the possession of the Assessing Officer which may trigger reason to suspect. It must be kept in mind that the "reason to believe" must have a rational connection with or relevant bearing on the formation of the belief, i.e., there must be the direct nexus or link between the material and the formation of such belief. Since in the*

assessee's case under consideration since the assessing official has reopened the assessment based on the findings of the Anti-Evasion Section, Central Excise Commissionerate, Rajkot, which were rejected/ reversed by the Customs, Excise and Service Tax Appellate Tribunal (supra) in assessee's own case. Therefore in the facts and circumstances of the case, we are of the considered opinion that 'reason to believe' which is the jurisdictional precondition to reopen the assessment as required by the law has not met in the reasons recorded in the instant case and therefore the action of the Assessing Officer to reopen the assessment is null in the eyes of law and hence we are inclined to quash the initiation of reassessment proceedings being ab-initio void.

31. In view of the reasons set out above, as also bearing in mind entirety of the case, we are of the considered view that the reasons recorded by the Assessing Officer, as set out earlier, were not sufficient reasons for reopening the assessment proceedings. Therefore, we have quashed the reassessment proceedings. As the reassessment itself is quashed, all other issues on merits of the additions, in the impugned assessment proceedings, are rendered academic and infructuous.

31. In the result, assessee's appeal in ITA No.156/RJT/2023, for assessment year 2013-14, is allowed.

32. Since we have quashed the initiation of reassessment proceedings, vide assessee's appeal in ITA No.156/RJT/2023, for assessment year 2013-14, therefore, the grounds of appeal of revenue in ITA No.42/RJT/2023, for assessment year 2013-14, have become academic and, therefore, do not deserve to be adjudicated, hence Appeal of revenue in ITA No.42/RJT/2023, is dismissed.

33. In the result, appeal filed by the Revenue in ITA No.42/RJT/2023, for assessment year 2013-14, is dismissed.

34. Since we have adjudicated the issue by taking the lead case of assessee's appeal in ITA No.156/RJT/2023, for assessment year 2013-14, the facts and issues involved in other appeals of the assessee Viz: in ITA No.155/RJT/2023, for assessment year 2012-13, and in ITA No.157/RJT/2023 for assessment year 2014-15, are analogous to ITA No.156/RJT/2023, for assessment year 2013-14. In assessee's appeal in ITA No.157/RJT/2023 for AY.2014-15, the regular assessment was made by the Assessing Officer u/s 143(3) of the Act and not based on reopening under section 147 of the Act. In this order, the Department is not in appeal before the Tribunal, however, the addition was made by the assessing officer based on the findings of the Anti-Evasion Section, Central Excise Commissionerate, Rajkot, which were rejected/ reversed by the Customs, Excise and Service Tax Appellate Tribunal (supra) in assessee's own case, therefore, we allow this appeal of the assessee.

*Accordingly, our observations made in ITA No.156/RJT/2023, for assessment year 2013-14, shall apply mutatis mutandis to the aforesaid other appeals of assessee, namely, ITA No.155/RJT/2023, for assessment year 2012-13, and ITA No.157/RJT/2023 for assessment year 2014-15. For the parity of reasons, we allow abovementioned appeals of the assessee, in terms of directions noted in ITA No.156/RJT/2023, for assessment year 2013-14.*

*35. In the combined result, appeals filed by the assessee, (in ITA No.155/RJT/2023, for assessment year 2012-13, appeals filed by the assessee, in ITA No.157/RJT/2023 for assessment year 2014-15, and appeal filed by assessee in ITA No.156/RJT/2023, for assessment year 2013-14, are allowed, whereas appeal filed by the Revenue in ITA No.42/RJT/2023 is dismissed.”*

5. On the other hand, learned DR for the revenue, relied on the findings of the authorities below.

6. Since the issue is squarely covered by the judgement of the Coordinate Bench of ITAT Rajkot and it is also covered by the judgement of Hon’ble jurisdictional High Court of Gujarat in the case of PCIT v. Ganga Glaze Tiles P. Ltd. in Tax Appeal No. 206 & 207 of 2019 [(2020) 117 taxmann.com 107 (Guj.)] order dated 25.06.2019, therefore, respectfully following the binding precedents, we allow the appeal of the assessee.

7. As the reassessment itself is quashed, all other issues on merits of the additions, and the additional grounds raised by the assessee, in the impugned assessment proceedings, are rendered academic and infructuous.

8. In the result, appeal of the assessee is allowed.

Order is pronounced on 28/02/2025 in the open court.

**Sd/-**  
**(DINESH MOHAN SINHA)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

Rajkot

दिनांक/ Date: 28 / 02 /2025

**Copy of the Order forwarded to:**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Rajkot
6. Guard File

By Order  
Assistant Registrar/Sr. PS/PS  
ITAT, Rajkot