IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(T) No. 948 of 2016

1. **Balashri Metals Pvt. Ltd.**, a Company duly registered under the provisions of Companies Act, 1956, having its Unit at- Village- Bongabar, PO- Bharechnagar PS and District- Ramgarh, Jharkhand- 829146, through one of its Directors Shri Shyam Sundar Choudhary, son of Late Jugal Kishore Choudhary, Resident of- 18, Gola Road, PO and PS- Ramgarh Cantt., District- Ramgarh, Jharkhand- 829112.
2.**Shyam Sundar Choudhary**, son of Late Jugal Kishore Choudhary, Resident of- 18, Gola Road, PO and PS- Ramgarh Cantt., District- Ramgarh, Jharkhand- 829112.

.....Petitioners

Versus

1. **Union of India** through the Chief Commissioner, Central Excise and Service Tax (Ranchi Zone), having his office at- 1st Floor, Central Revenue (Annexe) Building, Birchand Patel Path, Patna, Bihar, 800001.

2. **The Commissioner**, Central Excise and Service Tax, Ranchi-1, 5-A, Main Road, PO- GPO, PS- Kotwali, Town and District- Ranchi, Jharkhand- 834001.
3. **Superintendent (Adjudication)**, 5-A, Main Road, PO- GPO, PS- Kotwali, Town and District- Ranchi, Jharkhand- 834001. .....Respondents

CORAM: HON'BLE MR. JUSTICE D.N. PATEL
HON'BLE MR. JUSTICE RATNAKER BHENGRA

For the Petitioners : Mr. Sumeet Gododia, Advocate
For the Respondents: Mr. Deepak Roshan, Advocate

09/Dated 31.08.2016:
Oral Order:
Per D.N. Patel, J.:

1. This writ petition has been preferred challenging the show-cause notice dated 26.09.2014 (Annexure-1), issued by the Commissioner, Central Excise and Service Tax, Ranchi as well as the Order-in-Original passed by the Commissioner, Central Excise and Service Tax, Ranchi dated 03.03.2016 (Annexure-14), mainly on the ground that the show cause notice has been issued on presumption

and surmises. The highest case of the department is that there is some possibilities of clandestine removal of the M.S. Ingot, which is a final product of this petitioner.

2. <u>Factual matrix:</u>

- This writ petitioner is manufacturing M.S. Ingot from sponge iron and they are manufacturing M.S. Ingot since long.
- **Show cause notice** dated **26.09.2014** was given by the Commissioner, Central Excise and Service Tax, Ranchi for the period running from September,2009 to March-2014.
- First date of hearing was on 10.04.2015 i.e. after approximately 8 months and 10 days. Petitioner remain present but no hearing made. A letter dated 04.04.2015 already issued by the respondents fixing next date on 28.04.2015.
- On 28.04.2015, petitioner appeared but respondent no. 2 was not present, so no hearing took place.
- On 22.12.2015, the petitioner appeared and filed a letter requesting that documents upon which the reliance is placed in the show cause notice may be supplied to the petitioner. Few of the documents though are relied upon by the respondents in the show cause notice like Nucleus Group report and All India Induction Furnace Association report which were referred in the show cause notice and though they were demanded by this petitioner, the same were not supplied.
- On 13.01.2016, petitioner again requested to supply the documents referred and relied upon in the show cause notice, but, they were not supplied.
- On 11.01.2016 petitioner again requested to supply the documents referred and relied upon in the show cause notice, but, they were not supplied.

- Again on 02.03.2016, petitioner appeared and again requested for the documents, but, they were not supplied by the respondents.
- Thereafter, the **Order-in-Original** was passed by the Commissioner, Central Excise and Service Tax, Ranchi on 03.03.2016(Annexure-14).
- Being aggrieved and dissatisfied by the show cause notice as well as by the Order-in-Original, the present writ petition has been preferred.

3. Arguments canvassed by the counsel for the petitioners:

- Counsel appearing for the petitioners submitted that there is gross violation of principle of natural justice. The documents which are referred to and relied upon, in the show cause notice like:
    a. Nucleus Group report;
    b. The All India Induction Furnace Association report, though were demanded, but, never supplied.
- The whole show cause notice is issued upon presumptions and surmises about unaccounted manufacturing of M.S. Ingots and clandestine removal of the final product and nothing has been proved by the respondents. Only on the basis of presumptions, the show cause notice has been decided. The consumption of electricity pattern which is referred in the show cause notice as well as in the Order-in-Original, is absolutely baseless. It is submitted by the counsel for the petitioner that looking to Annexure -RUD-7 as referred in para 4 of the show cause notice, reveals the electricity consumption per M.T. , which is absolutely in consonance with the report given by the **Joint Plant Commissioner** constituted by the **Ministry of Steel**, Government of India and as per this report, the consumption can be 1800 KWH/T (as referred in paragraph no 20 of a decision

reported in **237 ELT 674** in the case of **R.A. Casting (Private) Ltd. Vs. CCE**, case. Thus, there is no scientific survey carried out by the respondents which can lead to conclusive evidence of unaccounted manufacturing of M.S. Ingots and clandestine removal thereof.

- It is further submitted by the counsel for the petitioner that Dr. N.K. Batra's report has been referred every now and then, since 2003 onwards, by the respondents and there are no less than one dozen judgments in which it has been observed right from the learned Tribunal to the Hon'ble Supreme Court of India that electricity consumption per se cannot be relied upon by the respondents for proving clandestine removal of final product, because there is no set pattern for consumption of electricity. There are several reports given by more reliable institutions and persons than Dr. N.K. Batra, which have been referred in the aforesaid decisions of **R.A. Castings**. Cross examination of Dr. N.K. Batra is also not made available, despite the request was made. The respondents ought to have carried out experiment of consumption pattern of electricity at the factory premises of the noticee, which has been referred to paragraph no. 22 of the decisions of **R.A. Castings Private Ltd**, which has not been gone into by the respondents. The whole show cause notice is based upon presumptions and surmises. The burden of proof lies upon the respondents that there is clandestine removal of finished product, which has not been discharged, at all, by the respondents.
- It is also submitted by the counsel for the petitioners that the respondents are surprised about the loss sustained by the petitioner. Merely because there is a loss to this petitioner that does not mean that there is a clandestine removal.

- Counsel for the petitioners has further submitted that the respondents have also shown their surprise about the wages paid by this petitioner to its 40 employees. The respondents have never recorded the statement of any of the employee and the respondents have presumed that higher wages must have been paid by the petitioner in absence of any statement of any of the employee. Thus, on the basis of this presumption that the petitioner must be paying higher wages to its employees and therefore, there is clandestine removal. This is also a baseless conclusion arrived at, in the Order-in-Original.
- Counsel appearing for the petitioners has relied upon the decisions which are as under:-

    a. **R.A. Castings decisions** reported in **237 ELT 674,** which is confirmed by the **Division Bench of Allahabad High Court** reported in **2010(1) taxman.com. 342 (Allahabad),** against which SLP preferred by the department, has also been dismissed, and

    b. **W.P. No. 173 of 2014** decided on **22.04.2014** by the **Calcutta High Court**.

- Counsel for the petitioners has pointed out that in several similarly situated cases, in which Dr. N.K. Batra report has been referred and relied upon, for proving clandestine removal of the finished products, in the show cause, ultimately in the Orders-in-Original, the show cause notices have been dropped by the adjudicating authority itself. The similarly situated cases are as under:-

    a. Globe Steel & Alloys Pvt. Ltd, the Order-in-Original :02/Central Excise/commr /2015 dated 31.03.2015, copy whereof has been given by the counsel to the counsel for the respondents.

b. M/s. Madhura Ingots & Steel Co. Pvt. Ltd. Order-in-Original:07/ Central Excise/commr/2015 dated 19.05.2015.

c. M/s. Jagannath Cement Works Pvt. Ltd being Order-in-Original:31/Denovo/Commr/2015 dated 15.12.2015.

d. M/s. Kamsa Steel Pvt. Ltd. being Order-in-Original:33/ commr/2015 dated 21.12.2015, and several other orders, copies of which have been given to this Court and given to the respondents.

- On the basis of aforesaid decisions, it is submitted by the counsel for the petitioners that electricity consumption pattern, is useless argument, on behalf of the respondents. Every now and then, such argument has been canvassed, in the Order-in-Original and the first adjudicating authority has dropped the baseless notice and whenever the first authority has confirmed such ground, the tribunals have passed the Orders and quashed such ground, like in the case of **R.A. Castings Pvt. Ltd Vs. CCE**, which is approved by the Allahabad High Court and SLP has been dismissed by the Hon'ble Supreme Court. It is further submitted that whenever Order-in-Original are passed as stated herein above, dropping the show cause notice, the same are placed before the committee, consisting of two chief commissioners and they are taking decisions, whether to prefer any further appeal or not and all aforesaid cases where the show cause notice has been dropped and the ground of the electricity consumption pattern has also not been approved, in the Order-in-Original, no appeal has been preferred by the department. Thus, <u>it has become fashion with the respondent</u> that arbitrarily in few cases, ground of Dr. N.K. Batra will be raised for few industries and for rest of the industries, no such ground is ever raised. Because of this N.K. Batra's

report, several petitions have been filed and several decisions have to be given by the Courts.

- Counsel for the petitioners has submitted that even a circular has been issued, which is at Annexure-3 dated 26.06.2014 that whenever any decision has been finally accepted by the respondents-department, the same has to be followed in other cases. This circular has also not been followed in this case. In fact, the respondents could not prove the clandestine removal of the finished products viz. M.S. Ingots and hence show-cause notice dated 26.09.2014 as well as Order-in-Original dated 03.03.2016 which are at Annexure-1 and Annxure-14, respectively, may kindly be quashed and set aside.

4. Arguments canvassed by the counsel for the respondents:

- Counsel for the respondents submitted that these petitioners are having efficacious and alternative remedy against the Order-in-Original and the appeal could have been preferred before the Central Excise and Service Tax Appellant Tribunal (CESTAT) under Section 35(B) of the Central Excise Act, 1944.
- Counsel appearing for the respondents submitted that Dr. N.K. Batra's report is not an only ground as mentioned in the show-cause notice, there are several grounds, like high cost of production vis-a-vis income from sale, unrealistic low amount of expenditure incurred on salary of employees and manufacturing activity incurs losses and still petitioner no.1 continues, whereas in the profit & loss account from the non-core activities, profit has been shown by manipulating books of account. In detail, consumption of electricity pattern has been mentioned in Annexure-RUD-7, which is referred in paragraph-4 of the show-cause notice. Similarly, other grounds have also been dealt with in detail, in the Order-in-Original. Very

meager amount_of salary has been paid by these petitioners to their employees, there is a loss caused to the petitioner No.1 since long, still they are continuing in the manufacturing activities and the petitioners are showing profit in their profit & loss account by showing the profit from the non-core activities and no satisfactory explanation has been given by these petitioners. This aspect of the matter has been mentioned in detail in the Order-in-Original and hence, this Court may not entertain this writ petition.

- It is further submitted by counsel for the respondents that time and again opportunity of being heard was given to the petitioners, approximately for more than half dozen times, but, the petitioners had not filed any reply. Hence this Court may not interfere with the orders passed by the Commissioner, Central Excise and Service Tax dated 03.03.2016.

R E A S O N S

5. Having heard counsels for both the sides and looking to the facts and circumstances of the case, we, hereby, quash and set aside the Order-in-Original dated 03.03.2016 (Annexure-14 to the memo of this writ petition) mainly for the following facts and reasons:

i. Show-cause notice was given by the respondents on 26.09.2014 for the period running from September, 2009 to March, 2014 mainly on the ground that there is unrealistic electricity consumption, high cost of production vis-a-vis income from sale, unrealistically low amount of expenditure towards salary of employees and though manufacturing activity incurs losses, still the petitioner no.1 unit continues and profit is shown in the books of account from non-core activities by manipulating books of account. On this ground, the show-cause notice has been given by the Commissioner, Central Excise and Service Tax, Ranchi.

ii. In the show-cause notice, Dr. N.K. Batra's report has been referred to and relied upon. Moreover, there is also reference of Nucleus Group report as well as there is a reference of All India Induction Furnace Association report. Dr. N.K. Batra's report was given along with the show-cause notice, whereas, rest of the two documents were not supplied to the petitioners despite letter dated 11.01.2016 and the reminder letter dated 02.03.2016 were given.

iii. It further appears from the facts of the case that petitioner has requested to supply Nucleus Group Report as well as All India Induction Furnace Association report, but, those two documents have not been supplied to the petitioner. Nonetheless, in paragraph no. 18 of the Order-in-Original, it has been mentioned by the Commissioner, Central Excise and Service Tax, Ranchi that the noticee has not given any reply, thus, it appears that no adequate opportunity of being heard has been given to these petitioners.

iv. Counsel appearing for the petitioners has relied upon several decisions, as stated herein above. It ought to be kept in mind by the respondents that the electricity consumption pattern can be a corroborative ground and not a substantive ground at all. Thousands of possibilities cannot be equated with one truth. The grounds, which are referred in the Order-in-Original, are in fact leading the respondents towards the highest probabilities and nothing beyond that to suspect that there is clandestine removal of the finished product by the noticee. Nonetheless, for exact proof of unaccounted manufacturing of finished products and for clandestine removal thereof, more labour was required to be done by the respondents. It has become fashion with the respondents-department to rely upon a document, since 2003 onwards, which is known as report given by Dr. N.K. Batra, so-called

Professor of IIT, Kanpur. When IIT, Kanpur is inquired by these petitioners whether such report has ever been given by IIT, Kanpur, the answer given by IIT, Kanpur in negative (Annexure-5 to the memo of the petition).

v. Right from 2003 onwards, in not a single matter decided by the Commissioner or by the Tribunal or by any adjudicating authority, the department has produced Dr. N.K. Batra for cross examination by any assessee in whole of India. Nobody knows the authenticity of Dr. N.K. Batra's report. Nobody is error proof authority much less Dr. N.K. Batra. Hence, his cross examination is must. His report is not a conclusive piece of evidence as per Indian Evidence Act, 1972.

vi. Several decisions have been given by the Tribunals which have been confirmed by the High Courts that electricity consumption alone if adopted as a basis of the demand, the same is not tenable. The respondents can take the electricity consumption pattern as a corroborative piece of evidence, but, in absence of substantive proofs like-

(a) Details about the purchase of the raw material within the manufacturing units and no entries are made in the books of account or in the statutory records.

(b) Manufacturing of finished product with the help of the aforesaid raw material, which is not mentioned in the statutory records.

(c) Quantity of the manufacturing with reference to the capacity of production by the noticee unit.

(d) Quantity of the packing material used.

(e) The total number of the employees employed and the payment made to them.

In this case, statements of the labourers ought to have been reduced in writing, by the department which ought to refer that over and above of the salary paid by the noticee, some other type of remunerations, in cash or kind have been paid by the noticee, such statements are must.

(f) Ostensible discrepancy in the stock of raw materials and the finished product.

(g) Clandestine removal of goods with reference to entry/ exit of vehicles like Trucks etc in the factory premises.

(h) If there is any proof about the loading of the goods in the Truck, like weight of truck etc. at the weighbridge, security gate records, transporter documents such as lorry receipts, statements of the truck drivers, entries of the trucks/vehicles at different check-post. different types of forms which are supplied by the Commercial Tax Department, like Road Permit supplied by the commercial tax department, receipts by the consignees etc.

These documents ought to have been collected by the respondent-department, if at all, they are interested in collection of the correct central excise duty from the noticee upon whom or upon which allegation of clandestine removal of the finished product is levelled. The electricity consumption report like Dr. N.K. Batra report can hardly be treated as a substantive evidence. Time and again, the decisions have been given by the tribunals but the respondents-departments are turning ***deaf-ear to***. In this case, they are also turning ***deaf-ear*** to their own circular dated 26.06.2014 (Annexure-3 to the memo of this writ). In this case, the respondents are relying upon Dr. N.K. Batra's report, also upon the allegation that much less salary has been paid to the employee and the unit is running in losses. All these are nothing but the possibilities, for clandestine removal, but, for proving the clandestine removal, the

substantive piece of evidence is must. Few such evidences have been referred by this Court. The list of these evidences is not exhaustive:-

(i) The department should have collected the proof of amount received from the consignees, statement of consignees, receipts of sale proceeds by the consignor and its disposal.

vii. As no adequate opportunity of being heard has been given to the petitioner, there is violation of principles of natural justice, hence, this writ petition is entertained at this stage. It has been held by Hon'ble Supreme Court in the case of **'Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors'**, reported in **(1998) 8 SCC 1**,_in paragraph no. 14 and 15, which reads as under:-

> *“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.*
>
> *15. Under Article 226 of the Constitution , the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut*

down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field".

(emphasis supplied)

In view of the aforesaid decision, If there is a violation of principle of natural justice, writ is always tenable at law.

viii. Thus, the department has not done any home work and the show cause notice dated 26.09.2014 (Annexure-1) has been issued. This type of short cut should not have been followed by the department. There is no shortcut for success. The aforesaid documents and evidences could have been collected very easily by the department, if at all, department is of the opinion that there is a clandestine removal of finished product viz M.S. Ingots by the petitioners.

ix. The respondents have also been given time and again the guidance by various decisions that whenever they are relying upon the electricity consumption pattern, experiment in the very same unit ought to have been carried out for manufacturing of 1 MT of the finished product or for at least 1000 such unit, if any other product is involved, so that average consumption of electricity can be accurately measured by the respondent-department. Electricity consumption, which is based upon Dr. N.K. Batra's report is absolutely useless, with reference to the units for which allegation is levelled for clandestine removal without carrying out any experiment of consumption of electricity in the very same unit. Hence, we, hereby direct the respondents, henceforth not to use Dr. N.K. Batra report against any noticee especially when the department is levelling allegations of clandestine removal of finished products, unless, the experiment of consumption of electricity is carried out at the factory premises of the very same assessee/noticee.

The consumption of the electricity depends upon the efficiency of the machines also. It also depends upon the fact whether the noticee is utilizing obsolete machinery or modern machinery. Dr. N.K. Batra might have carried out experiment in a factory where there may be efficient machinery, whereas machines used by the noticee may not have the same efficiency. Therefore, cross examination of Dr. N.K. Batra is must. Department can use the report of Dr. N.K. Batra's as the guidelines and nothing beyond that. Department has to bring its own experts at the factory premises of the noticee. Department must carry out an experiment of the consumption of the electricity at the manufacturing place of the noticee either for 1 MT or for 1000 unit etc. so that, the electricity consumption pattern can be measured for the very same machinery and thereafter it can be compared with the quantity of the finished products mentioned, in the books of accounts, with the electricity bills of the noticee. This exercise is must before issuing the show cause notice by the respondent-department ,whenever the department is levelling allegation of clandestine removal on the basis of electricity consumption pattern. Instead of doing this exercise, straight way, Dr. N.K. Batra's report has been relied upon, which has no relevance with the factory premises of the noticee. Hence, such report shall not be relied upon by the respondents, unless the aforesaid experiment is carried out at the factory premises of the noticee. This is not a first case in which such guidelines has been given. Observations made in paragraph Nos. 20.1, 20.2, 21, 22.1, 23 & 24 of the decisions rendered by the Tribunal in the case of **R.A. Castings Pvt. Ltd. Vs. CCE**, reported in **237 ELT 674** read as under:-

"20.1 From the perusal of these reports, we find that wide variations in the consumption of electricity have been reported for the manufacture of one MT of steel ingots. This renders the norm of 1046 units adopted by the Revenue as arbitrary. Why not adopt the norm of 1800 KWH/T or 1427 KWH/T or 650 to 820 units/MT or 851 units/MT as per various reports referred to above or why not adopt some figure between 555 to 1046 units as norm as per Dr. Batra's report?

20.2 We note that no experiments have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing one MT of steel ingots. It is the basic philosophy in the taxation matters that no tax can be levied on the basis of estimation. In this case, there is added problem. Estimation of production fluctuates widly depending upon the fact as to which report is adopted. Tax is on manufacture and it is to be proved beyond doubt that the goods have been actually manufactured, which are leviable to excise duty. Unfortunately, no positive evidence is coming on record to that effect. Article 265 of the Constitution of India says that no tax shall be levied or collected except by authority of law. Unless the manufacture of the steel ingots is proved to the hilt by authentic, reliable and credible evidence, duty cannot be demanded on the basis of hypothesis and theoretical calculations, without taking into consideration the ground realities of the functioning of the factories. High consumption of electricity by itself cannot be the ground to infer that the factories were engaged in suppression of production of steel ingots. The reasons for high consumption of electricity in the case of the appellants' factories have not at all been studied and analysed by the Revenue independently. Instead, the norm of 1046 units fixed as per Dr. Batra's report has been blindly applied to the appellants' cases to work out the excess production. This approach is flawed and does not have sanctity.

21. The law is well settled that the electricity consumption cannot be the only

factor or basis for determining the duty liability that too on imaginary basis especially when Rule 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. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which 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. In the following case laws, it has been held that the consumption of the electricity alone is not sufficient to determine the production;

(i) Pure Enterprises (P) Ltd. v. CCE, Rajkot- 1999 (111) E.L.T. 407 (Tri.)

(ii) Kapadia Dyeing Bleaching and Finishing Works v. CCE, Surat- 2000 (124) E.L.T. 821 (Tri.)

(iii) A. Arti Leathers (P) Ltd. v. CCE and C, Ahmedabad- 2001 (136) E.L.T. 1255 (Tri.-Mum.)

(iv) Parshuram Cement Ltd. v. CCE, Lucknow- 2003 (160) E.L.T. 213 (Tri-Del.)

(v) Mukesh Dye Works v. CCE, Mumbai-VI- 2006 (196) E.L.T. 237 (tri.-Mum.)

(vi) Hans Castings Pvt. Ltd.v. CCE, Kanpur- 1998(102) E.L.T. 139 (T)

(vii) M/s. Padmanabh Dyeing and Finishing Works v. CCE, Vadodara- 1997 (90) E.L.T. 343 (T)

(viii) M/s. Madhu Products v. CCE, Hyderabad- 1999 (111)E.L.T. 197 (T).

22.1 For want of evidence relating to the above points, clandestine removal cannot be

sustained merely on the basis of the technical opinion report of Mr. Batra. In this connection, the following case laws are relied:

(i) Emmtex Synthetics Ltd. v. Commissioner of Central Excise, New Delhi reported in 2003 (151) E.L.T. 170 (Tri.-Del.);

(ii) Commr. of Central Excise, Chennai v. Dhanavilas (Madras) Snuff Co. reported in 2003 (153) E..T. 437 (Tri.-Chennai);

(iii) Commissioner of Central Excise, Madurai v. Madras Suspensions Ltd. reported in 2003 (156) E.L.T. 807 (Tri.-Chennai);

(iv) Commissioner of Central Excise, Coimbatore v. Sangamitra Cotton Mills (P) Ltd. reported in 2004 (163) E.L.T. 472 (Tri-Chennai);

(v) Commissioner of Central Excise Coimbatore v. Velavan Spinning Mills reported in 2004 (167) E.L.T. 91 (Tri.-Chennai);

(vi) M. Veerabadhran and others v. Commissioner of Central Excise, Chennai-II reported in 2005 (182) E.L.T. 389(T)= 2005 (98) ECC 790 (T).

23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

24. The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what is alleges with positive and concrete evidence. In the

absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained."

(emphasis supplied)

x. The aforesaid decision has been upheld by the Division Bench of Allahabad High Court in a decision reported in **2010(1) taxman.com 342(Allahabad)** and SLP preferred against the said decision has also been dismissed by the Hon'ble Supreme Court. Thus, the report of Dr. N.K. Batra has been several times, criticized by various adjudicating authority vis-a-vis clandestine removal and the respondent-department has also issued a circular dated 26.06.2014 and several times such notice has also been dropped while passing the Order- in- Original, as stated herein above, as pointed out by the counsel for the petitioner. Despite these facts, in violation of such directions and the circular of the department, the respondents are still issuing show cause notices, levelling allegations of clandestine removal of the finished product, based upon the electricity consumption pattern shown by Dr. N.K. Batra. We, therefore, direct the respondents not to mention Dr. N.K. Batra's report in their show cause notice unless an experiment is carried out by the respondent department in the factory premises of the noticee for production of 1 MT or for production of more than sufficiently large quantity like 1000 units etc. in any other cases, because electricity consumption depends upon the nature of machinery. Even two refrigerators of same kind and type and capacity may not have the same consumption of electricity, because one may be new and another may be old.

xi. Likewise such type of other reports are also available in this country, which are as under:-

(a) Dr. N.K. Batra's report

(b) Report by Joint Plant Committee constituted by the ministry of steel, Government of India.

(c) Report of NISST, Mandi Gobindgarh given in June-July, 2006.

(d) Report of Executive Director, All India Induction Furnace Association, New Delhi, and all these reports say different electricity consumption, per ton. These facts have been referred in paragraph nos. 19 & 20 of the decision reported in 237 ELT 674 and the same reads as under :-

"19. The main question to be decided in the instant appeals here is whether the appellants during the period December 2001 to March, 2005 have actually manufactured M.S. Ingots in excess of what has been recorded in their statutory records and removed the said quantity clandestinely from their factory without payment of duty. The excess production has been worked out on the basis of electricity consumption for which the standard norms are imported from report of late Mr. N.K. Batra, Professor of Material and Metallurgical Engineers, IIT Kanpur.

20. We find that the following reports have been referred to either by the appellants or the Revenue laying down the norms for the consumption of electricity for the manufacture of one MT of steel ingots:
(i) ***555 to 1046 (KWH/T)*** *as per Dr. Batra's report;*
(ii) ***1800 KWH/T*** *as per the report by Joint Plant Committee constituted by the Ministry of Steel, Government of India;*
(iii) ***1427 KWH/T*** *as per the report of NISST, Mandi, Gobindgarh given in June-July, 2006;*
(iv) ***650 units to 820 units/MT*** *as per the Executive Director, All India Induction Furnace Association, New Delhi;*
(v) 851 units/MT in the case of Nagpal Steel v. CCE, Chandigarh reported in 2000 (125) E.L.T. 1147".

(emphasis supplied)

In view of the aforesaid electricity consumption report, per tonnage, it appears that the variation is from 555 units

to 1800 kWH/Per Ton. This is mainly because of the nature of the machinery utilized by the noticee. Looking to the facts of the present case, the electricity consumption pattern as has been given in Annexure- RUD-7, as stated in paragraph 4 of the show cause notice, which is at page no. 63 of this memo of writ petition which reveals that this petitioner has consumed electricity absolutely in consonance with the report given by Joint Plant Committee, constituted by the Ministry of Steel, Government of India and for few months it is even less than that. Thus, there are varieties of report available in the markets, one could not have been chosen by the respondents, arbitrarily, without carrying out the experiment of consumption of electricity for one ton of manufacturing at the noticee's manufacturing unit. This type of experiment is a must by the department, whenever respondents are canvassing the ground of electricity consumption pattern vis-a-vis clandestine removal of finished products. Otherwise, without such experiment, if any one of the aforesaid report relied upon, then it is arbitrariness on the part of the respondents and whenever there is any arbitrariness, there is always violation of Article 14 of the Constitution of India because for few of the noticees such type of reports are not relied upon whereas for rest of the assessee, as per the choice of the respondents, such type of reports will be relied upon and in fact, this has happened in this case. Several Orders-in-Original have been pointed out during the course of arguments by the counsel for the petitioners wherein electricity consumption pattern allegation levelled in show cause notice and ultimately after adjudication, the show cause notice has been dropped. Thus, without experiment is being carried out at the premises of the noticees, use of any of the committee's report for electricity consumption pattern always leads to arbitrariness on the part of the respondent-department. Whenever arbitrariness is present, equality is absent. Equalities and arbitrariness are strong

enemies of each other. When equality is present, arbitrariness is absent.

6. Hence, this Court is remanding the matter to the Commissioner, Central Excise & Service Tax, Ranchi. This Court is not much going into detail of further arbitrariness in the Order-in-Original about the lower remuneration to the employees of the petitioner no. 1 as well as the manufacturing unit is running in loss and the profit is made from non-core activities etc. There appears to be very high sounding reasons, but, if they are viewed with zoom lens camera, it appears that nothing is proved by the respondents. “Low remuneration” is a relative word and therefore, statement of the employees of the noticee, ought to have been reduced to writing by the respondents-department. If the employees are stating that they are getting more remuneration than what is shown in the books of account by the noticee, then these statements ought to have been reduced in writing and they must be referred in the show cause notice. Copies of the gist of the statements should be given to the noticee and those employees must be kept ready for cross examination. This type of procedure ought to have been followed by the respondents-department. Instead of doing this exercise, allegation has been levelled that there is low remuneration paid by the noticee, is not sufficient at all.

7. The Order-in-Original is based upon mere presumptions and possibilities, and, nothing has been proved at all by the respondents, especially unaccounted manufacturing of M.S. Ingots and the clandestine removal thereof.

8. The documents which are referred to in the show cause notice and relied upon, should have been supplied to the petitioners. These documents are:- Nucleus Group report and All India Induction Furnace Association Report. These documents have been referred in the show cause notice dated 26.09.2014 (Annexure-1). Imaginary is the

basis of the show cause notice and without proof, the Order-in-Original has been passed in the same breath.

9. We, therefore, quash and set aside the Order-in-Original passed by the Commissioner, Central Excise & Service Tax, Ranchi dated 03.03.2016 (Annexure-14 to the memo of this writ petition).

10. As a cumulative effect, as the Order-in-Original passed by the Commissioner, Central Excise & Service Tax, Ranchi dated 03.03.2016 (Annexure-14 to the memo of this writ petition) is quashed and set aside, the matter is remanded for adjudication of the show cause notice dated 26.09.2014 and the matter will be decided afresh, keeping in mind the aforesaid principles, especially if the respondents are relying upon Dr. N.K. Batra's report, the experiment shall be carried out at the premises of petitioner no. 1, as stated herein above, for manufacturing of one ton or any such quantity which should be sufficiently large, so as to understand the pattern of consumption of electricity for manufacturing of M.S. Ingots as well as keeping in mind the nature of evidences as referred in para 5(vi) may also be collected as far as possible.

11. Accordingly, this writ petition is allowed and disposed of.

(D.N. Patel,J.)

(Ratnaker Bhengra,J.)

Sharda/S.B.

A.F.R.