

**Mohan Steels Ltd. Vs. Cce**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Jul-29-2004

**Reported in :** (2004)(97)ECC495

**Judge :** S Kang, a T V.K.

**Appellant :** Mohan Steels Ltd.

**Respondent :** Cce

**Judgement :**

1. M/s. Mohan Steels Ltd., have filed the present appeal against Order-in-Original No. 34/2001 dated 31.12.2001 by which the Commissioner has confirmed the demand of Central Excise duty and has imposed penalty on the ground that they had manufactured and cleared clandestinely excisable goods without payment of duty.

2.1 Shri R. Swaminathan, learned Consultant, mentioned that the Appellants manufacture M.S. Ingots, bars and rods; that the raw materials mainly are M.S. scrap, sponge iron and ferro alloys; that the dispute relates to the alleged suppression of production and clandestine removal; that the proceedings were initiated by issue of a show cause notice dated 28.12.94 for demanding duty for the period from December 1989 to January 1993; that the Commissioner, under Order-in-Original dated 23.9.96 confirmed demand of Rs. 59.44 lakhs and dropped the remaining demand, on the basis the 11 kgs. of ferro alloys would be required to manufacture one M.T. of the final product; that the Commissioner also assumed

that there could be consumption of power by theft which was not alleged in the show cause notice; that on appeal filed by them as well as Revenue, the Tribunal vide Final Order No. A 899-901/2000-NB dated 9.10.2000 set aside the Order and remanded the matter to the Commissioner with the direction that the Commissioner would furnish a copy of the report of the Indian Institute of Technology to both the sides and give the Appellants an opportunity of producing documents in their defence; that the Commissioner in the impugned Order, has confirmed the entire demand in the show cause notice based on the assumption that there could be manipulation of power consumption; he had assumed that the consumption of ferro alloys would be only 9 kgs. per M.T. of the final product and he ignored the report of experts on the ground that the same may not be relevant.

2.2 The learned Consultant further mentioned that the process of manufacture of ingots/billets is that M.S. Scrap and sponge iron are charged into the furnace; a sample is drawn after the melting of material for testing the composition; the second charge of the raw material is simultaneously done in the furnace without waiting for the test report; after melting of metal in the second charge, a sample is again drawn; as by now the result of first test is available, the melter adds necessary quantity of ferro alloys like silicon manganese, ferro manganese or ferro silicon; that similar charging of the raw materials takes place till the furnace is filled to the brim in terms of the liquid metal; then a sample is again drawn, the liquid metal is procured into the ladle; simultaneously, the quantities of ferro alloys as required are added in the ladle; a sample of the liquid metal in ladle is drawn and liquid metal is taken to concast where it is poured into the mould through a tundish; that in the meanwhile the test report is received and if it indicates certain deficiencies of ferro alloys, the required quantity of ferro alloys is added at the concast stage, the billets emerge in the conveyor line called run-out table from where they are pushed into a cooling bed; that if the sample of the billets indicates any physical defect, the entire batch of billets is rejected; that if at the concast stage the composition of the liquid metal is not within the parameters, the concast refuses to cast.

3.1 The learned Consultant submitted that taking the minimum consumption of 600 units per M.T. of steel ingots, their power consumption is as per requirement; that

in the show cause notice issued to them, there is no allegation of any use of power in excess of the power supplied by the U.P. State Electricity Board and as reflected in the meter reading recorded by the Electricity Board; that the power is supplied through Sub-station which is manned 24 hours by the Electricity Board Officials; that thus there cannot be any allegation of excess consumption of Power against them; that the Commissioner has proceeded on the assumption/suspicion that they had successfully managed the manipulation of meter reading; that this assumption is incorrect and is not supported by the evidence on record. He, further, submitted that the said assumption is totally incorrect and there was no manipulation of the meter reading and there was no excess consumption of power is evident from the following:-- (i) The U.P. State Electricity Board Divisional Engineer, Distribution Division, Unnao has given a certificate dated 26.11.1996 that the "metering arrangements were always found in order and there were no possibilities of electricity theft or pilferage of power." (ii) The Power is supplied to their Sub-station from Sonic Sub-station on direct feeder. The Power supply from Sonic Sub-station is metered at the said Sub-station. Therefore, the question of Appellant's Sub-station receiving any power over and above the power supply from Sonic Sub-station cannot at all arise.

3.2 He contended that the Appellants thus cannot obtain any quantity of power more than that supplied by the Sonic Sub-station; that the total quantity of extra power required for the production alleged to have been suppressed is around 1.3 crore units; that hence, the assumption by the Commissioner that they could have successfully managed the manipulation of meter reading is totally baseless. He mentioned that in order to justify the impugned demand of duty, the Commissioner has discredited the Divisional Engineer's certificate by stating that such certificates cannot be relied upon without any evidence; that it has been held by the Tribunal in the case of Rajasthan Petro Synthetics v.CCE, Jaipur, 2003 (88) ECC 657 (Tri): 2003 (160) ELT 297 (Tri) that the demand on the basis of clandestine removal should be based on conclusive and tangible evidence including excess consumption of electricity. Reliance has also been placed on the decision in the case of Gian Castings Ltd. v. CCE, Chandigarh, 2001 (131) ELT 380 (Tri) wherein the tribunal has held that demand of duty is not sustainable, though the Department relied upon a case booked by the Electricity Board for theft of

electricity, as the Department has not indicated the outcome of the case. He mentioned that on a reference made by the Revenue, the Punjab and Haryana High Court, 2003 (158) ELT 153 (P&H), has held that "no question of law arises from the Order of the Tribunal"; that the Supreme Court has also dismissed the Petition for Special Leave to Appeal filed by the Revenue as reported in 2004 (163) ELT A203 (SC).

3.3 The learned Consultant contended that in the instant matter of the Appellants, there is no case booked by the Electricity Board of Theft and there is no chance of pilferage or theft of power and as such the demand is not sustainable. He also relied upon the decision in the case of Manubhai U. Patel v. CCE, Rajkot, 2002 (142) ELT 53 (Tri), wherein it has been held that "whenever the charge of clandestine removal is made, the department has to prove that assessee has procured all the raw materials required for the manufacture of final product; the assessee have utilized human resource in the form of labour and paid that much wages for the production of the quantity of units which have been confirmed in the Order-in-Original as produced; what is the optimum electricity consumed for producing the quantity that is sought to be added to the production on the ground that the same was not accounted, through evidence of tampering of the meter; the evidence of not reflecting the correct expenditure in the account books, in procuring the raw materials; the expenditure of actual amount on transportation of goods to the customer place, as per the requisition of the customer. Normally these are all the evidence required for confirmation of charge of clandestine removal by the Department." 3.4 The learned Consultant mentioned that even the assumptions made by the Commissioner with reference to two instances are incorrect and contrary to the factual position; that in respect of the dates 2.5.92 and 3.5.92, the Commissioner has assumed that 4 heats were taken on 2.5.92 and 3 heats were taken on 3.5.92 which is incorrect; that the relied upon documents show only two heats on 2.5.92 and two heats on 3.5.92, that is only four heats as against seven heats assumed by the Adjudicating Authority; that in any case, since the heats taken on 2.5.92 and 3.5.92 were off grade and it did not come out in production which can be converted into castings, the meter reading seems to have been taken as the opening reading itself; that this is evident from the fact that on 4.5.92, the quantity produced was shown as 64.79 MTs and as per

the closing meter reading on the total units consumed was 51900 units; thus from the quantity of 64.79 MTs, the consumption per unit was only 675 units per M.T.; that since the 4 off grade heats taken on 2.5.92 and 3.5.92 approximating 20 MTs, which were re-melted, were also to be considered, it would clearly show that the total metal was 84.79 MTs and this clearly shows that the average consumption of power was 612 KVH/MT; that thus there was no production of usable material on 2nd and 3rd May, 1992; that the assumption of production without consumption of power is, therefore, a clear mis-assumption.

4.1 The learned Consultant referred to "Technology Evaluation in Mini Steel Industry," a Report prepared under Technology Absorption and Adaptation Scheme of Department of Scientific & Industrial Research, Ministry of Science and Technology according to which in India the Power consumption is minimum 600 kwh/tbillet/ingot and maximum is 1000 kwh/tbillet/ingot; that the Report also mentioned that the specific consumption of raw materials and services vary widely; that the norms for the important parameters were worked out in order to establish the benefits of the phases of modernization; that the recommendation in respect of Power was 670 kwh/t of billet for 10/12t furnace and 630 kwh/t of billet for 25/30 t furnace. He emphasized that the repeated observations made by the Commissioner to the effect that they indulged in systematic manipulations of records of power consumption is uncalled for; that the Department should have checked up with the Electricity Board for the supply of power to the Appellants; that one cannot assume that there could be consumption of power more than the power that was despatched from Sonic Sub-station; that therefore, the assumption and suspicion with which the Adjudicating Authority had proceeded in the matter is totally unjustified and the conclusions reached are liable to be set aside.

5.1 Regarding consumption of ferro alloys to produce per ton of material, the learned Consultant again referred to the Report prepared under Technology Absorption & Adaptation Scheme which indicates that "mini steel plants would consume about 10 kg/t of ferro manganese 5 kg/t of ferro silicon"; that in Hand Book of Procedures Vol. II, Standard Input -- Output and Value Addition Norms of Ministry of Commerce, 15 kgs. of Silico Manganese or (a) 5 kgs. of Ferro Silicon and (b) 10 kgs. of Ferro manganese have been prescribed. He also mentioned

that Dr. S.C. Koria, Professor of the Indian Institute of Technology, Kanpur in his letter dated 5.6.2001 has mentioned as under: 5.2 He mentioned that the report dated 13.9.96 of the Assistant Commissioner, Central Excise Jamshedpur regarding M/s. TISCO Ltd. mentions that in the manufacture of one M.T. of billets about 14.3 kg.

of silicon manganese is used; that inspite of these norms of ferro alloys consumption, the Commissioner has proceeded to confirm the demand holding that 9 kgs. of ferro alloys is sufficient for one M.T. of final product; that further the issue of ferro alloys as per the statutory records, RG23A, Part-I, is equal to the stores ledger issue/consumption; that after the personal hearing, a team of officers was deputed to their factory which conducted a study of the manufacturing process, including the quantities of ferro alloys added at every stage of manufacture; that obviously, the result of the said study had not thrown any result adverse to the submissions made by them since the report had not been made available to them and also during the de-novo proceedings. He contended that the onus is on the revenue to prove charge of manufacture and clandestine removal; that the Tribunal in the case of *Amba Cement & Chemicals v. CCE, Allahabad, 2000 (90) ECR 265 (Tri)* has set aside the demand confirmed on the evidence of short accountal of lime stone only holding that "no investigation is conducted in respect of other raw materials such as coal, gypsum and clay which are also required for manufacture of cement." Reliance has also been placed on the following decisions: *Saheli Synthetics Pvt. Ltd. v. CCE, Vadodara, 1999 (113) ELT 1000 (Tri)*, *T.G.L. Poshak Corporation v. CCE, Hyderabad, 2002 (140) ELT 187 (Tri)*, *Premier Packaging Pvt. Ltd. v. CCE, New Delhi, 1986 (26) ELT 333 (Tri)* wherein the demand of duty was found untenable by the Tribunal as no evidence had been produced to show that such goods had been produced and removed without payment of duty. *CCE, New Delhi v. Plastikot (Sundersons) Ltd., 2001 (138) ELT 700 (Tri)*, *Madhu Foods Products v. CCE, 5.3* Regarding the shortage of 6943 kgs. ferro manganese, the learned Consultant submitted that the issue ferro manganese made on 17.1.93 and 18.1.93 had not been taken into consideration; that the Commissioner had ignored this explanation on the ground that on 17.1.93 (Sunday) the factory was running and, therefore, there was no justification that the entry could not be made on 17.1.1993 and was to be made only on 18.1.93.

Finally the learned Consultant relied upon the judgment in the case of Oudh Sugar Mills Ltd. v. UOI, 1978 (2) ELT (J172) (SC) wherein it has been held by the Supreme Court that the demand of duty cannot be on the basis of assumptions and presumptions and mentioned that it was further held that there should be sufficient evidence of the removal of the goods alleged to have been manufactured and cleared without payment of duty and that the clandestine removal should be arrived at with tangible evidence and should not be based on inferences involving unwarranted assumptions.

6. Countering the arguments, Shri O.P. Arora, learned SDR, submitted that based on an information that the Appellants were indulging in suppression of production, the Central Excise Officers visited their factory premises on 18.1.93 and found that the factory was equipped with 4 induction furnaces and one spare crucible; that in addition they had one arc furnace of 15 tonne capacity; that at the time of visit the officers noticed three induction furnaces were in production; that they were maintaining daily production reports and heatwise furnace log sheets; that for preparing these records, the melters had been preparing and submitting kutchha log sheets/pads showing, inter alia, the quantity of ferro alloys used; that the Officers resumed some kacheha log sheets/Pads relating to the period 13.1.93 to 18.1.93 from 2 melters namely Rakesh Singh and Devi Dayal Singh; that these Melters in their statements dated 18.1.93 confirmed preparation of the said kacheha records on regular basis and confirmed correctness of the details recorded therein; that later on Mayank Pandey and Rajesh Kumar Rai, both melters, in their statements dated 3.2.93 and melter Sampat Lal Verma in his statement 16.2.93 endorsed the view in respect of preparation of kacheha records and correctness of the details recorded therein; that the Appellants were showing less production in their RGI Register than what was mentioned in kacheha records; that a quantity of 311.280 MT had been removed as indicated in kacheha log sheets resumed from the melters; that scrutiny of resumed kacheha slips and Pad for 13.1.93 to 18.1.93 revealed that on an average about nine kg or even less of silico manganese per M.T. of billets had been consumed; that Devi Dayal and Rakesh Singh had indicated in their statements dated 18.1.93 that the consumption of Silico Manganese per ton of billet is 8 to 10 kgs.; that other melters had also confirmed the consumption of silico manganese of 9 kg. per M.T. He

mentioned that a total of 51850 kg. of ferro manganese issued in December 1992 and January 1993 had been used in the production of 5965.942 M.T. ingots/billets etc. which were clandestinely removed without entry in the log sheets or the statutory records and without payment of duty; that a quantity of 6943 kg. of ferro manganese was found short on 18.1.93 out of which 798.872 M.T. of billets had been manufactured and cleared without payment of duty; that they had also shown higher consumption of ferro alloys and silico manganese; that out of this higher consumption a quantity of 15,778.391 MT had been manufactured and cleared without payment of duty. The learned SDR also contended that there is no force in the Appellant's contention about power not being available to manufacture the quantity of billets alleged to have been manufactured as three furnaces were found working when the officers visited their factory whereas they could not run more than 2 furnaces on the basis of power said to be available to them; that no person would like to run two furnaces at half of their rated production capacity simultaneously in preference to running of one furnace with full capacity rate, specifically when the final production remains the same; that further from kachecha papers and log sheets for the period 13.1.93 to 18.1.93 it is seen that 65 heats were taken and only 18 heats were accounted; that argument that 47 heats were off grade heats is not acceptable as it is amply clear that they in any case utilized extra power for these so called off grade heats; that thus it leaves no room for doubt that the power was being consumed by them in excess of the number of units reflected in the electric meter; that the officers had also found record of running of 4 induction furnaces simultaneously on dates prior to 18.1.93; that they have indulged in a systematic manipulations of records of power consumptions; that the certificate of Divisional Engineer cannot be interpreted to mean that there could be no possibility of irregular use or manipulation.

7. The learned SDR mentioned that as the genuineness of kachecha log sheets has not been challenged by the melters or the Appellants, duty is payable by them on 311.280 M.T. suppressed during 13.1.93 to 18.1.93; that as the shortage of 6943 kgs. of ferro manganese has not been explained satisfactorily, the duty has to be paid on the quantity of billets manufactured out of the same; that 51850 kgs. of ferro manganese had been used to manufacture billets clandestinely as no consumption of ferro silicon had been shown by them in any log sheet during the

said period. Finally he mentioned that kacheha slips for 5 days reveal the consumption ratio of silicon manganese to be 8.5 kgs.

approximately per M.T. which has been confirmed by the melters and others; that the TISCO report is not applicable as the quantum of various inputs used in the integrated steel plants cannot be compared with those in mini steel plants; that as per the production log sheets, only silico manganese has been shown to be consumed and the average consumption ratio is around 9 kgs. per M.T.; that thus the production of M.S. ingots/billets has been suppressed by the Appellants and duty on the suppressed production is demandable.

8. In reply, the learned Consultant mentioned that the melters in their cross examination has explained that molten material at the later stage was being sent back to furnace on account of some element deficiency and when it was melted second time, another number of heat is given and thus in such cases there would be duplication of numbers; that Shri Mahendra Singh Kushwaha has deposed in his cross-examination that the requirement is of 10 kgs. of manganese and 5 kgs. of silicon for every M.T. of billet; that the melters had stated about the quantity used at the time of melting and had not taken into consideration further additions made as per the laboratory report at the concast stage; that 51850 kgs. used by them was not ferro manganese but ferro manganese slag which would contain 1/5th manganese than the contents in ferro manganese and thus the consumption of ferro manganese slag is bound to be 5 times more than the ferro manganese; that the fact they had used ferro manganese slag is evident from the gate passes and the invoices and the certificates from the suppliers; that they had also taken the Modvat-Credit (lower side) as per the gate passes. The learned Consultant also mentioned that the furnaces were running simultaneously on reduced power input and half their rated capacity; that there is nothing on record in support of the Commissioner's finding that the induction furnaces were running and consuming power beyond the sanctioned load on the date of search; that while the running of the furnace had been noted, there is nothing to show that they were consuming power beyond the sanctioned load. Finally he emphasized that alloying materials are used at three stage, namely, at the furnace stage, at the ladle stage and the concast stage; that the technical material produced by them clearly show that the

quantum of alloying material required is every high and the quantum of 9 kgs. per M.T.cannot at all be sufficient for producing the metal; that if technically it is not possible to produce the casting by using the alleged quantum of alloying material, this would be a very strong reason for ignoring the statement; that the Revenue has not produced any contrary evidence to dispute the technical opinion and also to discredit the explanation offered by them.

9.1 We have considered the submissions of both the sides. The impugned Order has been passed by the Commissioner on remand by the Appellate Tribunal vide Final Order No. A/899-901/2000 dated 9.10.2000. The Tribunal had remanded the matter as the evidence produced by the Appellants from independent manufacturers and others "was not examined properly" and when the assessee had stated that power consumption may be taken as a factor for determining the quantum of final product the Commissioner had observed use of electricity which was not recorded in the bills without making such an allegation in the show cause notice.

The defence of the Appellants before us is that the power used by them is only sufficient to manufacture the quantity of ingots/billets recorded by them in their records and the Commissioner has come to the conclusion that the Appellants had managed the manipulations of meter reading. The Commissioner has confirmed the demand on the basis that 9 kgs. of ferro alloy is sufficient to manufacture one M.T. of ingots/billets. The Appellants have contended that the entire case of the Department is only on the basis of assumptions and presumptions whereas the contention of the Revenue is that the duty has been confirmed on the basis of statements of melters and other officials of the Appellants' company and records. After considering the various submissions made by the learned Consultant for the Appellants and learned SDR for the Revenue we observe that there are three vital raw materials for manufacturing the ingots/billets. These are M.S.Scrap/Sponge iron, ferro alloys and power. It is settled law that whenever the charge of clandestine removal is made the Revenue has to prove that the assessee has procured all the raw materials required for the manufacture of final product. In the present matter there is no mention as to whether the Appellants had procured any extra quantity of M.S. Scrap/Sponge iron in addition to what has been recorded in

their records. It is also not an allegation that when the Central Excise Officers visited the factory premises of the Appellants on 18.1.93, there was any excess stock of MS scrap/sponge iron. We also note that no excess stock of final product manufactured by the Appellants seems to have been found by the visiting officers. Regarding second most important input "power", the Appellants have produced a Report "Technology Evaluation in Mini Steel Industry", prepared under Technology Absorption & Adaptation Scheme by Ministry of Science & Technology. This study was initiated by the Department of Scientific & Industrial Research to assess and evaluate the existing technological norms in important sector of priority and corresponding international norms and to ascertain the gaps in technological levels. As per the Report the minimum and maximum consumption of Power in India was 600 to 1000 kWh per ton of billet/ingot. The Report has also mentioned that the consumption of power can be reduced by recent developments such as oxygen assisted melting, oxy-fuel burner, scrap pre-heating, water cooled roof and panels for wall lining, etc. The Report envisaged two model plants and the norms for the important parameters were worked out in order to establish the benefits of the phase of modernization. The norms for power was 670 kWh per ton of billet for 10/121 furnace and 630 kWh for 25/30t furnace. These norms regarding consumption of power have not been disputed by the Revenue. The Adjudicating Authority has come to the conclusion, merely on the basis of three furnaces found to be working by the visiting officers, that the Appellants had indulged in a systematic manipulation of records of power consumption. This finding is without any material brought on record. On the other hand the Appellants have brought on record a certificate dated 26.12.96 issued by the Divisional Engineer, Electricity Distribution Division, Unnao which mentions as under: "On the basis of the reports/raids conducted from 1988 till date of metering arrangement checks on USEB 33/11 kV Substation at Mohan Steels Ltd., Unnao; manned by the employees of the Board for 24 hours, it is very clear and apparent that the metering arrangements were always found in order and there were no possibilities of electricity theft or pilferage of power.": 9.2 The Divisional Engineer of Electricity Board, thus, rules out any manipulation of electric meter as "the metering arrangements were always found in order." The Commissioner has disregarded this certificate by merely observing that the certificate had been issued on the

request of the Appellants only; it also gives an indication that no irregularity was noticed during the time of raids; this certificate cannot be interpreted to mean that there could be no possibility of irregular use or manipulation. On the basis of such findings it cannot be claimed by the Revenue that the Appellants have indulged in a systematic manipulations of record of power consumption. It is well settled that strong suspicion and grave doubts cannot take the place of legal proof. It has been held by the Tribunal in case of Rajasthan Petro Synthetics v. CCE, supra, that "the charge of clandestine removal of the goods has to be established by the Department by adducing tangible, acceptable, cogent and convincing evidence. Such a charge cannot be based only on assumption and presumption." The learned Consultant has relied upon the decision in the case of Gian Castings Ltd., 2001 (131) ELT 380 wherein the Department had relied upon the theft case booked by Electricity Board. Even then the Tribunal did not uphold the demand holding that "there is nothing on record to show what ultimately happened to that case." The Punjab & Haryana High Court rejected the Reference Application filed by the Revenue and the Supreme Court dismissed the Special Leave Petition filed by the Revenue, 2004 (163) ELT A 203 (SC). It has also been contended by the Appellants that the supply of electricity to their Sub-station is made from 132/33, k VA Sonic Sub-station on direct feeder. There is nothing on record to show that the power required by the Appellants to manufacture the quantity of ingots and billets alleged to have been manufactured by them had been supplied by Sonic Sub-station to the Sub-station at the Appellants' end. Thus, the Revenue has not succeeded in proving its allegation that the Appellants have manipulated their records of power consumption.

10.1 Regarding the quantity of ferro alloys required to manufacture 1 ton of ingot/billet, the Commissioner has confirmed the demand on the basis that 9 kgs. ferro alloys is required for manufacturing 1 kg. of ingot/billet. This is not supported by any technical data/literature on the subject. On the other hand, the Report on "Technology Evolution in Mini Steel Industry" clearly mentions that "Analysis of the ferro-alloy consumption in mini steel plants reveal that consumption of ferro-manganese varies from about 5 to 12 kg/t and that of ferro silicon from about 3 to 7 kg/t of billets. In general, it can be assumed that mini steel plants would consume about 10 kg/t of ferro manganese and 5 kg/t of ferro-silicon." The Report

also fixes the same quantum of consumption ferro-manganese and ferro-silicon as norms while dealing with "Norms for Important Parameters". The learned Consultant has also brought on record the Input-Output ratio fixed by the Ministry of Commerce for Import-Export purposes. As per these norms also Silico Manganese required is 15 kgs. and Ferro Manganese 10 kgs. In view of this the Revenue cannot proceed on the assumption that only 9 kgs. of ferro alloys is required for manufacture of one ton of billet merely on the statement of melters.

The Revenue has not verified the contention of the Appellants that ferro alloy is also added at the stage of ladle and concast. As observed earlier, the Revenue has also not made any investigation in respect of another most vital raw material that in M.S. Scrap/Sponge iron. It has been held by the Tribunal in the case of Amba Cement & Chemicals, supra, when the Revenue alleged the clandestine manufacture of cement on the basis of formula for use of limestone per ton of cement; that "No investigation is conducted in respect of other raw-materials such as coal, gypsum and clay which are also required for manufacture of cement... As no investigation is conducted in respect of other raw materials which are essential for the production of cement, therefore, the demand on the basis of that appellants suppressed the receipt of one raw material is not sustainable." Similar views have been expressed by the Tribunal in *Manbhai U. Patel v. CCE, Rajkot* (T-Mum) and *T.G.L. Poshak Corporation v. CCE, Hyderabad*, 2002 (104) ELT 187 (T-Chennai) wherein it has been held that "unless there is clinching evidence on the nature of purchase of raw materials, use of electricity, sale, clandestine removals, the mode and flow back of funds, demands cannot be confirmed solely on the basis of note books maintained by some workers....." The Tribunal went in great detail and have clearly laid down that unless department produces evidence, which should be clinching, in the nature of purchase of inputs and sale of the final product demands cannot be confirmed based on some note-books." 10.2 The Commissioner has also confirmed the demand of duty on the basis of allegation that a quantity of 5965.942 M.T. has been manufactured out of a quantity of 51,850 kg. of ferro manganese shown as issued in RG23A, Part-1 register and no consumption of the same had been shown in log sheets. The Commissioner has not considered the submissions of the Appellants that the same was ferro manganese slag, a cheaper raw material and in support had produced the

evidence and also contended that they had taken the credit of the duty paid on slag.

Further no evidence regarding the removal of the final products said to have been manufactured has been brought on record. It has been held by the Tribunal in the case of Madhu Food Products v. CCE, 1997 (76) ELT 197 as under: "There is no evidence on record either by way of seizure of goods in transit or elsewhere or any private records being seized to show that there was clandestine removal. No evidence has been brought on record to prove that the goods were removed from the factory premises without payment of duty, even the estimated production is an estimate only which is subject to a number of limitations. We, therefore, hold that in the absence of documentary proof, that the goods estimated to be produced and not brought on record were removed without payment of duty, demand for duty on such estimated goods cannot be confirmed. In the absence of third documentary evidence, we hold that clandestine removal of goods is not proved, and therefore, the demand of duty on this issue is not maintainable in law." In addition there is no corroborated evidence to show the use of other raw materials etc. to sustain the demand of duty.

11. Regarding shortage of ferro manganese noticed by the Central Excise Officers when they visited the factory premises on 18.1.93, we are of the view that the submissions made by the Appellants regarding issue on 16.1.93 has not been properly considered by the Adjudicating Authority.

Shri S.K. Shukla, Stores Clerk of the Appellants, in his statement dated 18.1.93 had deposed that entries in respect of materials after 11.1.93 had not been made in the records and the entries regarding material issued after 14.1.93 were also not made even though the materials were issued for consumption on verbal request. This aspect requires to be examined by the Adjudicating Authority. We, therefore, remand this aspect for re-consideration of the jurisdictional Adjudicating Authority. Thus, the demand of duty as confirmed against the Appellants and penalty imposed on them are set aside. The issue regarding shortage of 6943 kg. of ferro manganese is remanded to the jurisdictional Adjudicating Authority for being adjudicated afresh in accordance with law.

