

Around Evidentiary Value of Micro Films, Facsimile and Computer Printouts in Adjudication



Section 36B of Central Excise Act, 1944, Section 138C of the Customs Act, 1962 and Section 83 under Chapter V of the Finance Act, 1994 lay down the provisions for admissibility of microfilms, facsimile copies of documents and computer printouts as document and as evidences. The author shows through the case of Commissioner of C. Ex., Ludhiana Vs. Moonlight Auto (P) Ltd. 2014 (305) E.L.T. 135 (Tri.-Del.) that the computerised stock statement (rebuilt upon by the Department) cannot be considered as evidence to establish the case of evasion of duty under Section 36B of the Central Excise Act, 1944 as the same does not fulfill the conditions laid down under Section 36B(2) of the Act, 1944. If on the computer printouts, the conditions of Section 36B (2) have not been satisfied, it does not mean the printouts could not be used in proceedings if such printouts have been corroborated by independent evidences. The printout is not a standalone evidence, they become evidence only when juxtaposed alongside the other evidence. Read on...



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Section 36B of Central Excise Act, 1944, Section 138C of the Customs Act, 1962 and Section 83 under Chapter V of the Finance Act, 1994 lay down the provisions for admissibility of microfilms, facsimile copies of documents and computer printouts as document and as evidences. Subsection (1) stipulates that-

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

- a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or

- b) a facsimile copy of a document; or
- c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"), if the conditions mentioned in sub-Section (2) and the other provisions contained in this Section are satisfied in relation to the statement and the computer in question,

shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Sub-Section (2) lays down the conditions referred to Section 138C(1) in respect of computer printouts which are:

- a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
- c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and
- d) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.

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

- a) by a combination of computers operating over that period; or

- b) by different computers operating in succession over that period; or
- c) by different combinations of computers operating in succession over that period; or
- d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Section as constituting a single computer; and references in this Section to a computer shall be construed accordingly.

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

- a) identifying the document containing the statement and describing the manner in which it was produced;
- b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- c) dealing with any of the matters to which the conditions mentioned in sub-Section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-Section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

Sub-Section (5) provides that for the purpose of this section—

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

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that computer, shall be taken to be supplied to it in the course of those activities;

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

Explanation to Section 138C contains that for the purpose of this Section,-

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

Section 139 of the Customs Act, 1962 is reproduced as follows:-

SECTION 139. Presumption as to documents in certain cases. - Where any document -

- (i) is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or
(ii) has been received from any place outside India in the course of investigation of any offence alleged to have been committed by any person under this Act, and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the court shall -
(a) presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the

handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;

- (b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
(c) in a case falling under clause (i) also presume, unless the contrary is proved, the truth of the contents of such document.

Explanation.- For the purposes of this section, "document" includes inventories, photographs and lists certified by a Magistrate under subsection (1C) of section 110.

Section 36A of the Central Excise Act, 1944 is as follows:-

Section 36A. Presumption as to documents in certain cases. -

Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall, -

- (a) unless the contrary is proved by such person, presume -
(i) the truth of the contents of such document;
(ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
(b) admit the document in evidence notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence.

Since Section 36B of the Act, 1944 and Section 138C of the Act, 1962 is a specific provision for use of computer printouts as evidence in adjudication, it will be applicable- *Wear Well Tyre and Tubes Pvt. Vs. Union Of India 2013 (294) E.L.T. 185 (M.P.)* resort to parallel provisions of the Indian Evidence Act, 1872 is not called *Commissioner of C. Ex., Trichy Vs. Sri Ulaganayagi Amman Steels 2009 (241) E.L.T. 537 (Tri. - Chennai)*.

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It is relevant to point out that the presumption of Section 36A read with Section 36B of the Central Excise Act, 1944 [corresponding to Section 138C and 139 of the Customs Act, 1962] can be made in regard to computer output/ computer printout seized and not in respect of computer printout taken from seized computer by any stranger. Similarly if the printout must have been seized from the custody or control of a person or at least such printouts should have been produced from his computer in his presence. However, there is not presumption of truth of the information stored in the memory space of a computer seized from the custody or control of a person, which is electronic record, and from which computer output/printout is generated.

Accordingly, in case of *Surya Boards Ltd. Vs. Commissioner of Central Excise, Rohtak 2014 (312) E.L.T. 282 (Tri.-Del.)*, it was held that the provisions of the provisions of Section 36A read with Section 36B of the Central Excise Act, 1944 are not inviolable in respect of the computer printout, generated by the GEQD from the personal computer/laptop seized from the assessee.

It is well settled that the condition in respect of the computer printout laid down in Section 36B as is evident from the reading of its clause (ii), is that, the computer printout containing the statement is produced by the computer during the period over which the computer is used regularly to store or possess the information.

In case of *Premium Packaging Pvt. Ltd. Vs. Commissioner of C. Ex., Kanpur 2005 (184) E.L.T. 165 (Tri.-Del.)*, the printouts were not produced by the computer. Peripherals were picked up by the Officers from the Head Office-cum-Sale Depot of the appellants and they were inserted into

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In the case of *Premium Packaging Pvt. Ltd. Vs. Commissioner of C. Ex., Kanpur 2005 (184) E.L.T. 165 (Tri.-Del.)*, zip floppies apparently tampered with were used to take printout and in the absence of the assessee. Some floppies used in those proceedings were found to be blank.

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the computer. On a reference, it was held that such printout cannot be used to prove clandestine removal because of not satisfy the very condition of their admissibility as documents in evidence in terms of Section 36B of the Central Excise Act, 1944.

In terms of Section 36B(2) of the Central Excise Act, 1944 if the computer is not in the control of the assessee, the printout of such computers are hit by the provisions of Section 36B(2)- *Jindal Nickel & Alloys Ltd. Vs. Commissioner of Central Excise, Delhi 2012 (279) E.L.T. 134 (Tri.-Del.)*.

It is well settled law that a reliance could be placed on the computer printout only if such printout were taken in the presence of the assessee from the computer under the control of him which are regularly used in the ordinary course of his business- *Surya Boards Ltd. Vs. Commissioner of Central Excise, Rohtak 2014 (312) E.L.T. 282 (Tri.-Del.)*.

In *Surya Boards Ltd. Vs. Commissioner of Central Excise, Rohtak 2014 (312) E.L.T. 282 (Tri.-Del.)*, a laptop being purchased only 4 months prior to the date of seizure, it was held that such laptop cannot be said to be a computer regularly used, in ordinary course of business, for the relevant period.

Since Section 36B plays only in case of computer regularly used and under the control of the assessee. Explanation to Section 36B define the terms "Computer". Accordingly, external disk like CD, DVD, pen drive, floppy, etc., are not following under Section 36B(2), so, even after corroboration, the printout taken from floppies, CD will not be admissible in terms of Section 36B. Once Section 36B is not applicable, there is no question for any corroboration- *Commissioner of C. Ex., Trichy Vs. Sri Ulaganayagi Amman Steels 2009 (241) E.L.T. 537 (Tri. - Chennai)*.

In the case of *Premium Packaging Pvt. Ltd. Vs. Commissioner of C. Ex., Kanpur 2005 (184) E.L.T. 165 (Tri.-Del.)*, zip floppies apparently tampered with were used to take printout and in the absence of the assessee. Some floppies used in those proceedings were found to be blank. The computer did not run at times or was found hung and not operational. Accordingly, it was held that the printouts become inadmissible more because the proceedings lacked transparency in view of the suspect quality of the media/CPU used to take the printout and as the printout was taken

in the absence of the assessee long after taking over of the floppy/CPU.

In the case of *Shri Ulaganayagi Ammal Steels Vs. Commissioner of C. Ex., Trichy 2008 (231) E.L.T. 434 (Tri.-Chennai)*, the floppy were opened using the password furnished by the assessee's representative who operated the CPU, or, the file was found to have been modify last (as per the floppy history) before the floppy was taken over by the Department. Moreover, the Commissioner accepted the appellant's plea that Section 36B using computer printouts as the sole evidence. The printout was substantially corroborated by documents/registers/records. The Commissioner did not confirm a demand for ₹1,84,57,861/- relying on SASAI/Fly2/File3 for want of other evidence. The printout of the floppies seized at the residence in their presence and the printouts were also taken in their presence. Since the authenticity of the seizure of the floppies has come under cloud, only such files opened after seizure for the first time in the presence of the assessee with the password he gave were reliable.

Since the printouts were corroborated with independent unimpeachable evidence, on a reference, considering the situation, it was held that computer printouts were acceptable evidence because the files were authentic and its retrieval was transparent.

It is reiterated that the printout should be produced when the computer is in regular operation. In the case of *Harsinghar Gutka Pvt. Ltd. Vs. Commissioner of C. Ex., Lucknow 2008 (221) E.L.T. 77 (Tri.-Del.)*, it was not in dispute that the printout or the R-documents was a reconstructed data and, obviously, it was not produced during the period over which the computer was used regularly to store or process information. A demand based on the reconstructed or retrieved data will not satisfy Section 36B(2) of the Central Excise Act, 1944 and prima facie such demand was not sustainable- *Harsinghar Gutka Pvt. Ltd. Vs. Commissioner of C. Ex., Lucknow 2008 (221) E.L.T. 77 (Tri.-Del.)*.

Since the requirement is that the computer is in the regular use of the assessee and its burden is on the Department to prove with adducing incontrovertible evidence- *Gujarat Narmada Valley Fertilizer Co. Ltd. Vs. C.C.E., Vadodara 2008 (231) E.L.T. 167 (Tri.-Ahmd.)*. In *Commissioner of C. Ex., Ludhiana Vs. Moonlight Auto (P) Ltd. 2014 (305)*

Since the requirement is that the computer is in the regular use of the assessee and its burden is on the Department to prove with adducing incontrovertible evidence - Gujarat Narmada Valley Fertilizer Co. Ltd. Vs. C.C.E., Vadodara 2008 (231) E.L.T. 167 (Tri.-Ahmd.). In Commissioner of C. Ex., Ludhiana Vs. Moonlight Auto (P) Ltd. 2014 (305) E.L.T. 135 (Tri.-Del.), the assessee was not regularly maintaining the computerised records production and clearance.



E.L.T. 135 (Tri.-Del.), the assessee was not regularly maintaining the computerised records production and clearance. On reference, it was held that the computerised stock statement (rebuild upon by the Department) cannot be considered as evidence to establish the case of evasion of duty under Section 36B of the Central Excise Act, 1944 as the same does not fulfill the conditions laid down under Section 36B(2) of the Act, 1944- see also *Jayshree Vyapar Ltd. Vs. Commissioner of Central Excise, Rajkot 2015 (327) E.L.T. 380 (Tri.-Ahmd.)*.

If on the computer printouts, the conditions of Section 36B (2) have not been satisfied, it does not mean the printouts could not be used in proceedings if such printouts have been corroborated by independent evidences- *Copier Force India Ltd. Vs. Commissioner of Central Excise, Chennai 2008 (231) E.L.T. 224 (Tri.-Chennai)*. The printout is not a standalone evidence, they become evidence only when juxtaposed alongside the other evidence. As long as integrity of data is not suspect and the adjudicator can show the concerned parties that same are not tampered with there could be no hazard to use the same. The provisions of Section 36B would come into operation only when the computer printouts were sought to be relied upon without any corroborative evidence. ■