

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. I

CUSTOMS APPEAL NO. 338 OF 2006

(Arising out of Order-in-Original No. 8/06 dated 31.01.2006 passed by the Commissioner of Customs, ICD, Tughlakabad, New Delhi)

Bimal Kumar Jain

.....Appellant

S/o Sh. Abhay Ram Jain,
R/o HD-50, Vishakha Enclave,
Delhi

Prop. M/s. Jain Enterprises,
17, Meera Tower,
Wazirpur Community Centre,
New Delhi – 110 052

VERSUS

**Commissioner of Customs,
ICD, Tughlakabad
New Delhi**

.....Respondent

APPEARANCE:

Shri Naveen Malhotra and Shri Ritvik Malhotra, Advocates for the Appellant

Shri Rajesh Singh, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 30.05.2025

DATE OF DECISION: 06.06.2025

FINAL ORDER NO. 50858/2025

JUSTICE DILIP GUPTA:

Bimal Kumar Jain¹ has filed this appeal to assail the order dated 31.01.2006 passed by the Commissioner of Customs, ICD, Tughlakabad, New Delhi² in so far as it imposes penalty of Rs. 25 lakhs upon him under section 114 of the Customs Act, 1962³.

2. Intelligence was received by the department that M/s. Sundram Export Pvt. Ltd.⁴ and M/s. Netcompware Pvt. Ltd.⁵ had exported CD-ROMs

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1. the appellant
 2. the Commissioner
 3. the Customs Act
 4. Sundram Export
 5. Netcompware

under Duty Entitlement Pass Book⁶ Scheme by grossly overvaluing it with an intention to wrongly avail DEPB scrips and thereby evade customs duty. Enquiries were, therefore, initiated by the Directorate of Revenue Intelligence⁷. Statement of various persons, including the appellant, were recorded and ultimately a show cause notice dated 04.12.2000 was issued to 26 persons including the appellant.

3. The case setup by the department in the show cause notice is that Sundram Export exported 96,800 pieces of CD-ROMs at highly inflated Freight on Board⁸ value of US 19\$ per piece. Another exporter, by name of Netcompware, also exported a consignment of 40,000 pieces of CD-ROMs at overvalued price of US 19\$ per piece. The 5 shipping bills covering the above exports were filed under the DEPB Scheme. According to the department, the overvalued export was used by the exporter to fraudulently procure DEPB scrips from the Directorate General of Foreign Trade⁹ and subsequently these DEPB scrips were sold in the open market and were thereafter used by companies to import goods without payment of duty. It is also the case of the department that the 40,000 CD-ROMs exported by Netcompware to Hong Kong were subsequently re-imported and cleared by M/s. Arvind International¹⁰ under a Bill of Entry dated 08.09.1998. It is said that the appellant was connected with Sundram Exports and had exported CD-ROMs by grossly overvaluing them to avail the benefit of DEPB scrips.

4. The impugned order imposes a penalty of Rs. 25 lakhs upon the appellant under section 114 of the Customs Act. The relevant portion of

6. DEPB
7. DRI
8. FOB
9. DGFT
10. Arvind International

impugned order, in so far as it deals with the appellant, is reproduced below:

“(A) **Shri Bimal Kumar Jain**, Noticee no. 2, in his written reply dated 1-3-2001 and 02.04.2003, interalia, submitted that he denied each and every allegation leveled against him in the SCN; that SCN has not been issued by the proper authority; that neither he has any concern with M/s. Sundram Exports Pvt. Ltd. or with any other company as stated in the SCN nor he had exported any goods by grossly over valuing the goods in his individual capacity, to avail any DEPB benefit; that he had no concern with Shri Deept Sarup Aggarwal, Shri Rajesh Jain or Shri Rajesh Aggarwal, whose statement had been relied upon in SCN; that his statement was taken under duress and had been retracted by him when he was produced before ACMMP Patiala House. In the course of Personal Hearing held on 09.10.2001 the learned advocate Sh. Naveen Malhotra appearing for Shri Bimal Kumar Jain also deposed that the statement of Shri Bimal Kumar Jain was recorded under duress and was retracted by Shri Jain immediately on his production before the court of Remand; that except for the statement of Shri Jain there was no evidence whatsoever to implicate him and further reiterated that Shri Bimal Kumar Jain was not connected with the export of impugned goods or with the manufacture of the goods and since there was no nexus with the goods in question, the allegation that Shri Bimal Kumar Jain was the real beneficiary of the impugned transaction, is not maintainable.

The statement of Shri Bimal Kumar Jain although retracted later, is corroborated by statements of bank employees as well as other noticees in the case as under:- ***”**

(emphasis supplied)

5. The statements that have been relied are the statements of the appellant, Sulekh Chand Jain, Surinder Kumar, Deept Swarup Aggarwal,

Sandeep Mehra, Rajesh Aggarwal and Rajesh Jain and ultimately the Commissioner observed:

"All these facts clearly indicate Shri Bimal Kumar Jain masterminded the entire fraud by keeping himself behind the curtain and getting the work done from the employees hired by him as per his wishes and directions. This further indicates that the retraction filed by Shri Bimal Kumar Jain was mere afterthought to save himself as it is not supported by material evidences on record. Therefore, the case laws cited by him in his defence reply do not apply in this case. Culpability of Shri Bimal Kumar Jain is established beyond any doubt."

(emphasis supplied)

6. Shri Naveen Malhotra, learned counsel of the appellant assisted by Shri Ritvik Malhotra made the following submissions:

- (i)** The goods once exported do not fall within the ambit of "export goods" as defined under section 2(19) of the Customs Act. Thus, the provisions of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007¹¹ cannot be invoked for re-determining the valuation of the goods. In support of this contention, learned counsel placed reliance upon the judgment of the Punjab and Haryana High Court in **Jairath International vs. Union of India**¹²;
- (ii)** The impugned order is based on the statements made by the appellant, Sulekh Chand Jain, Surinder Kumar, Deept Swarup Aggarwal, Sandeep Mehra, Rajesh Aggarwal and Rajesh Jain under section 108 of the Customs Act. Such statements cannot be relied upon in view of the provisions of section 138B of the Customs Act and in support of this

11. the Customs Valuation Rules
12. 2019 (370) E.L.T. 116 (P & H)

contention, learned counsel placed reliance upon the decision of the Tribunal in **M/s. Drolia Electrosteel P. Ltd. vs. Commissioner, Customs, Central Excise & Service Tax, Raipur**¹³; and

- (iii) The appellant is not at all connected with Sundram Exports and that he was not connected with the export of CD-ROMs. The finding to the contrary has been recorded by the Commissioner only on the basis of statements made under section 108 of the Customs Act.

7. Shri Rajesh Singh, learned authorized representative appearing for the department, however, supported the impugned order and made the following submissions:

- (i) The order passed by the Commissioner is a detailed order and has taken into consideration all the relevant facts;
- (ii) DGFT by order dated 18.07.2000 cancelled the DEPB License dated 30.06.1998 issued to Netcompware;
- (iii) The case involves fraudulent activities by various individual and entities regarding misuse of DEPB scrips and gross over-invoicing;
- (iv) The appellant was connected with Sundram Exports and was involved in the export of CD-ROMs; and
- (v) Penalty has been correctly imposed upon the appellant in view of the statements made under section 108 of the Customs Act.

8. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

9. A perusal of the impugned order, so far as it relates to the appellant, shows that it has placed reliance upon the statements made by the appellant and other persons under section 108 of the Customs Act that he was connected with Sundram Exports and was involved in the exports of CD-ROMs.

10. The statements made under section 108 of the Customs Act cannot be relied upon if the procedure followed under section 138B of the Customs Act is not followed. This is what was held by the Tribunal in **M/s. Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur**¹⁴. The Tribunal examined the provisions of sections 108 and 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act, 1944 and observed:

“**21.** It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B

of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. **What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain."**

(emphasis supplied)

11. After examining various judgments of the High Courts and the Tribunal, the Tribunal observed:

"28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to

be provided for cross-examination of such persons. **The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence."**

(emphasis supplied)

12. In **Drolia Electrosteel**, the Tribunal had also while examining the provisions of section 9D of the Central Excise Act held:

"13. Of the above, the 35 statements of various persons recorded under the Central Excise Act will be relevant to the proceedings only as per section 9D which lays down the procedure to be followed to make them relevant and the exceptions to such procedure.*****

14. Evidently, the statements will be relevant under certain circumstances and these are given in clauses (a) and (b) of subsection (1). There is no assertion by either side that the circumstances indicated in (a) existed in the case. It leaves us with (b) which requires the court or the adjudicating authority to first examine the person who made the statement and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence. Of course, the party adversely affected by the statement will have to be given an opportunity to

cross examine the person who made the statement but that comes only after the statement is, in the first place, after examination by the adjudicating authority, admitted in evidence. This has not been done in respect of any of the 35 statements. Therefore, all the statements are not relevant to the proceedings.

15. It has been held in a catena of judgments including Jindal Drugs Pvt. Ltd. versus Union of India [2016 (340) E.L.T. 67 (P&H)] that section 9D is a mandatory provision and if the procedure prescribed therein is not followed, statements cannot be used as evidence in the proceedings under Central Excise Act. The relevant extracts are as follows:

"13. Once the ambit of Section 9D(1) is thus recognized and understood, one has to turn to the circumstances referred to in the said subsection, which are contained in clauses (a) and (b) thereof.

14. Clause (a) of Section 9D(1) refers to the following circumstances :

- (i) when the person who made the statement is dead,
- (ii) when the person who made the statement cannot be found,
- (iii) when the person who made the statement is incapable of giving evidence,
- (iv) when the person who made the statement is kept out of the way by the adverse party, and (v) when the presence of the person who made the statement cannot be obtained without unreasonable delay or expense.

15. Once discretion, to be judicially exercised is, thus conferred, by Section 9D, on the adjudicating authority, it is selfevident inference that the decision flowing from the exercise of such discretion, i.e., the order which would be passed, by the adjudicating authority under Section 9D, if he chooses to invoke clause (a) of subsection (1) thereof, would be pregnable to challenge. While the judgment of the Delhi High Court in J&K Cigarettes Ltd. (supra) holds that the said challenge could be ventilated in appeal, the petitioners have also invited attention to an

unreported short order of the Supreme Court in UOI and Another v. GTC India and Others in SLP (C) No. 2183/1994, dated 3-1-1995 wherein it was held that the order passed by the adjudicating authority under Section 9D of the Act could be challenged in writ proceedings as well. Therefore, it is clear that the adjudicating authority cannot invoke Section 9D(1)(a) of the Act without passing a reasoned and speaking order in that regard, which is amenable to challenge by the assessee, if aggrieved thereby.

16. If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in evidence. Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

- (i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and
- (ii) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and

17. There is no justification for jettisoning this procedure, statutorily prescribed by plenary Parliamentary legislation for admitting, into evidence, a statement recorded before the Gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory. Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

18. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of

the witness has to be recorded before the adjudicating authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

20. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination”.

16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible.”

(emphasis supplied)

13. Except for the aforesaid statements made under section 108 of the Customs Act, there is no other evidence which has been considered by the Commissioner in the impugned order for imposing penalty upon the appellant under section 114 of the Customs Act. As these statements

cannot be relied upon, the imposition of penalty upon the appellant under section 114 of the Customs Act cannot be sustained and is set aside.

14. It also needs to be noted that the goods have been confiscated under section 113(d) of the Customs Act. Section 113(d) is reproduced below:

"113. Confiscation of goods attempted to be improperly exported, etc.

The following export goods shall be liable to confiscation:

- (a) *****
- (b) *****
- (c) *****
- (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force"

15. In the present case, the goods had been exported and, therefore, the goods could not have been confiscated under section 113(d) of the Customs Act. Penalty under section 114 of the Customs Act can be levied only if the goods are held liable to confiscation under section 113 of the Customs Act. As the confiscation cannot be sustained, penalty under section 114 of the Customs Act cannot also be sustained.

16. The impugned order dated 31.01.2006 passed by the Commissioner in so far as it imposes penalty upon the appellant under section 114 of the Customs Act is set aside and the appeal is allowed.

(Order pronounced on **06.06.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)