



## ***ALO Law Office- IDT Tax | Arbitration | Litigation***

**Date: 15.06.2025**

### **CESTAT Delhi- Statements Under Section 108 Not Admissible Without 138B Compliance**

In a significant ruling dated 6 June 2025, the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Principal Bench, New Delhi, set aside a penalty of ₹20 lakhs imposed on Appellant under Sections 112 and 114 of the Customs Act, 1962. The Tribunal held that the penalty was unjustified as the decision relied solely on inadmissible statements recorded under Section 108 of the Customs Act without following the mandatory procedure under Section 138B.

#### **Background of the Case**

The Directorate of Revenue Intelligence (DRI) initiated an investigation into M/s. Sundram Export Pvt. Ltd. and M/s. Netcompware Pvt. Ltd., alleging fraudulent overvaluation of CD-ROMs exported under the Duty Entitlement Pass Book (DEPB) scheme at an inflated FOB value of \$19 per piece. This overvaluation allegedly enabled undue credit of DEPB scrips, later used to evade customs duties.

Appellant was accused of facilitating the procurement and sale of these DEPB licenses and was slapped with a ₹20 lakh penalty, although he was neither an exporter nor an importer.

#### **Key Observations by CESTAT**

- **Inadmissibility of Statements:** The Tribunal ruled that statements made under Section 108 of the Customs Act are not automatically admissible. Section 138B mandates that such statements must be corroborated through witness examination and cross-examination before being relied upon. This procedure was not followed in this case.

- **Lack of Independent Evidence:** Other than the contested statements, no independent documentary or corroborative evidence was provided to establish the appellant's direct involvement in fraudulent exports or misuse of DEPB scrips.
- **Improper Confiscation Under Section 113(d):** The Tribunal noted that the goods had already been exported. Therefore, invoking Section 113(d) for confiscation was not legally tenable, and consequently, the penalty under Section 114 was also not sustainable.

### Legal Principles Reinforced

1. **Due Process under Section 138B:** Statements made during investigations cannot be used as evidence unless the statutory safeguards of witness examination are followed.
2. **Exported Goods Not Liable to Confiscation:** Once goods are exported, they fall outside the purview of "attempted to be exported" under Section 113(d).
3. **Penalty Requires Proven Mens Rea:** The Tribunal underscored the need to demonstrate active abetment or fraudulent intent, which was not substantiated in this case.

### Final Verdict

The penalty of ₹20 lakhs imposed on Appellant was quashed, and the appeal was allowed in his favour.

This ruling reinforces that customs adjudications must follow procedural safeguards and that penalties cannot be based on untested statements alone.

### Implications for Traders & Legal Advisors

- **Strict Adherence to Evidence Rules:** Statements recorded under compulsion or without legal compliance cannot hold water.
- **Exporters/Importers Need Legal Vigilance:** Any pre-export or post-export compliance must be diligently documented to avoid penal exposure.
- **Legal Advisors Should Cite Section 138B:** In similar show cause or adjudication proceedings, procedural lapses must be promptly challenged.

**Section 108 of the Customs Act, 1962** empowers gazetted customs officers to summon any person for giving evidence or producing documents during the course of an inquiry under the Act. It treats such inquiries as judicial proceedings, making it mandatory for the summoned individual to comply. Any false statement or refusal to appear may attract legal penalties. While statements recorded under this section can aid investigations, their evidentiary value in adjudication is subject to procedural safeguards under Section 138B.

**Section 138B of the Customs Act, 1962** lays down the conditions for the admissibility of statements made before customs officers during inquiries. It states that such statements can be used as evidence in legal proceedings only if:

- The person who made the statement is examined as a witness, or
- If that person is unavailable (due to death, absence, or other valid reasons), the statement may still be admissible subject to the discretion of the adjudicating authority or court.

This provision ensures fair trial safeguards, particularly the right to cross-examination, and prevents reliance on untested or coerced statements in adjudication or prosecution.

*This Article has been written by Shri Ravi Shekhar Jha, Advocate Delhi High Court based on his interpretation of the law. He can be reached at his email id [intelconsul@gmail.com](mailto:intelconsul@gmail.com) or on his Mobile +91-9999005379.*

**Source: CESTAT Delhi**

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

PRINCIPAL BENCH – COURT NO. I

**CUSTOMS APPEAL NO. 335 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)

**Sh. Deept Swarup Aggarwal**  
10/2, Sarvapriya Vihar,  
New Delhi

**.....Appellant**

**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. 50859/2025**

**JUSTICE DILIP GUPTA:**

Deept Swarup Aggarwal<sup>1</sup> has filed this appeal to assail the order dated 31.01.2006 passed by the Commissioner of Customs, ICD, Tughlakabad, New Delhi<sup>2</sup> in so far as it imposes penalty of Rs. 20 lakhs upon him under sections 114 and 112 of the Customs Act, 1962<sup>3</sup>.

2. Intelligence was received by the department that M/s. Sundram Export Pvt. Ltd.<sup>4</sup> and M/s. Netcompware Pvt. Ltd.<sup>5</sup> had exported CD-ROMs under Duty Entitlement Pass Book<sup>6</sup> Scheme by grossly overvaluing it with

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

an intention to wrongly avail DEPB scrips and thereby evade customs duty. Enquiries were, therefore, initiated by the Directorate of Revenue Intelligence<sup>7</sup>. 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 Board<sup>8</sup> 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 Trade<sup>9</sup> 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 International<sup>10</sup> under a Bill of Entry dated 08.09.1998. It is said that the appellant was involved in the export of CD-ROMs and availment of DEPB scrips by Sundram Exports and Netcompware.

4. The impugned order imposes a penalty of Rs. 20 lakhs upon the appellant under sections 114 and 112 of the Customs Act. The relevant portion of impugned order, in so far as it deals with the appellant, is reproduced below:

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- 7. DRI**  
**8. FOB**  
**9. DGFT**  
**10. Arvind International**

"42(B) Shri Deept Sarup Aggarwal noticee no. 3, in his reply dated 09.07.01 submitted through his counsel Shri R.K. Handoo stated that he had no concern with M/s Sundram Exports Pvt. Ltd., and M/s Netcompware Pvt. Ltd.; that the exports have been made by Limited Companies having their legal entity; that the allegation against him was that he helped in the procurement of material which ultimately were exported; that he was neither an exporter nor the beneficiary as alleged, but a mediatory / broker in the procurement of the product of export, the pre-export activity cannot be made / alleged to have committed the alleged contravention of the Customs Act, that making the exports was one thing and helping in procuring the material for export was another thing; that similarly in the case of M/s Netcompware Pvt. Ltd. though the investigations show that he has nothing to do even remotely with said company just on the basis of statement of Shri Roampy Bhatia, the guilt was being fastened on him; that he was also being asked to pay duty in respect of the imports made by different companies by invoking contradictory section of the Customs Act; that he was neither involved in the import nor concerned with the export of the goods, at the most it can be said that he coordinated with persons known to him for purchase of CD ROM's and for the sale of DEPB licenses which is not an offence; the scrutiny of the bank accounts have shown that he was not the beneficiary of the fraud, if any, and in the absence of any material it can hardly be alleged that he was beneficiary of the alleged export.

**The above contentions of Shri Deept Sarup Aggarwal that he was not involved in the fraudulent export are devoid of any substance whatsoever, and are unworthy of credit. It has abundantly been proved on record that Shri Deept Sarup Aggarwal had conspired with Shri Bimal Kumar Jain, Shri Sunil Wadhvani and Shri Ratinder Pal Singh Bhatia in fraudulent export of CD ROM's by M/s Sundram Exports Pvt. Ltd. and M/s Netcompware Pvt. Ltd. He was**

instrumental in obtaining DEPB licences from DGFT and selling them to the parties known to him as evident from the statements given below: \*\*\*\*\*”

**(emphasis supplied)**

5. The Commissioner then relied upon the statements made by Sunil Wadhvani, the appellant, Bimal Kumar Jain, Rajesh Aggarwal, Rajeev Maheshwari, Manish Goyal and Sunil Goyal, Shivraj Kapoor, Raminder Mohan Singh, Vineet Sood and Ratinder Pal Singh Bhatia made under section 108 of the Customs Act and then recorded the following finding:

**“All these facts clearly indicate deep involvement of Shri Deept Sarup Aggarwal in the export of CD ROM’s and fraudulent availment of DEPB licenses by M/s Sundram Exports Pvt. Ltd. and M/s Netcompware Pvt. Ltd. Unless the facts were told by Shri Deept Sarup Aggarwal, no body could have speculated them. It will also not be out of place to mention here that number of initial averments in the statements of Shri Deept Sarup Aggarwal were found false. Rather it all shows that Shri Deept Sarup Aggarwal attempted to mislead the investigation. Shri Deept Sarup Aggarwal undertook all these activities in a pre-planned manner with the sole intent to defraud the Govt. exchequer by way of claiming undue DEPB credits on the over-valued exports. He is liable for penal action under section 114 of the Customs act, 1962 for abetting the over-invoicing of CD-ROM’s exported by M/s Sundram Exports Pvt. Ltd. and M/s. Netcompware Pvt. Ltd. to avail undue DEPB benefits fraudulently.”**

**(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, 2007<sup>11</sup> 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**<sup>12</sup>;

- (ii) The impugned order is based on the statements made by the appellant, Bimal Kumar Jain, Rajesh Aggarwal, Rajeev Maheshwari, Manish Goyal and Sunil Goyal, Shivraj Kapoor, Raminder Mohan Singh, Vineet Sood and Ratinder Pal Singh Bhatia 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 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**<sup>13</sup>; and
- (iii) The appellant is not at all connected with the export of CD-ROMs and 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;

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11. **the Customs Valuation Rules**  
 12. **2019 (370) E.L.T. 116 (P & H)**  
 13. **Excise Appeal No. 52612 of 2018 decided on 30.10.2023**

- (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 facilitated the export of CD-ROMs; and
- (v) Penalty has been correctly imposed upon the appellant in view of the statements of the appellant and other persons.

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 involved in the export of CD-ROMs to confer undue benefit upon Sundram Exports and Netcompware.

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**<sup>14</sup>. 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

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**14. Excise Appeal No. 51148 of 2020 decided on 01.04.2025**

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.**

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**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 sections 114 and 112 of the Customs Act. As these statements cannot be relied upon, the imposition of penalty upon the appellant under sections 114 and 112 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 sections 114 and 112 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)**