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Date: 09.06.2025

CESTAT Delhi Sets Aside Penalty in DEPB Export Valuation

The Customs, Excise, and Service Tax Appellate Tribunal (CESTAT), New Delhi, has quashed the ₹10 lakh penalty imposed on him under Section 114 of the Customs Act, 1962. The penalty stemmed from alleged involvement in a major export overvaluation case under the DEPB scheme.

Background of the Case

The case revolves around alleged fraudulent exports of CD-ROMs by M/s. Sundram Export Pvt. Ltd. and M/s. Netcompware Pvt. Ltd., who were accused of inflating Freight on Board (FOB) value to wrongfully avail DEPB (Duty Entitlement Pass Book) benefits.

- **Allegation:** Exports were declared at an inflated rate of \$19 per CD-ROM, far exceeding actual value.
- **Objective:** To fraudulently earn DEPB scrips, later used to import goods duty-free.
- **Appellant's Alleged Role:** Accused of orchestrating the export of CD-ROMs and re-importation under a new entity, M/s. Arvind International.

Tribunal's Observations

The Commissioner had based the penalty entirely on statements recorded under Section 108 of the Customs Act, from various individuals alleging Amla's involvement.

However, CESTAT noted:

1. Statements under Section 108 cannot be accepted as evidence unless the mandatory procedures of Section 138B are followed—specifically:

- The person must be examined before the adjudicating authority.
 - Cross-examination must be allowed.
 - Adjudicating authority must form a reasoned opinion on admissibility.
2. The Tribunal held that none of these conditions were met, making the statements legally inadmissible as evidence.
 3. No independent or corroborative evidence was presented to prove Amla's alleged involvement in the export or re-import.
 4. The goods in question had already been exported and thus, could not be confiscated under Section 113(d) of the Customs Act. As a result, penalty under Section 114—which requires confiscability—was also unsustainable.

Final Decision

- Penalty of ₹10 lakhs quashed.
- Tribunal held that mere statements—without compliance with evidentiary procedure—cannot justify punitive action.
- Appeal allowed in full.

Key Takeaways

- **Due Process is Critical:** Statements recorded during investigations must follow strict procedural safeguards before being relied upon in adjudication.
- **Export Valuation Allegations Require Substantiation:** Without verifiable financial or transactional records, allegations of overvaluation cannot stand.
- **Misuse of DEPB Requires Concrete Evidence:** General association with exporters or firms is insufficient to attract penalties under customs law.

Legal Significance

This case sets a strong precedent reinforcing that penalties under the Customs Act must be based on admissible evidence, and that procedural lapses during investigations can vitiate the entire case. It is a reminder for customs authorities and adjudicating officers to adhere to statutory procedures strictly, particularly when imposing penalties based on third-party statements.

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 or on his Mobile +91-9999005379.

Source: CESTAT New Delhi

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

PRINCIPAL BENCH – COURT NO. I

CUSTOMS APPEAL NO. 291 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)

Arjun Amla

A-3, Hira Mahal, 44,
Amrita Shergill Marg,
Khan Market, New Delhi

.....Appellant

VERSUS

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

.....Respondent

APPEARANCE:

Shri Alekshendra Sharma, Advocate 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. 50855/2025

JUSTICE DILIP GUPTA:

Arjun Amla¹ 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. 10 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 under Duty Entitlement Pass Book⁶ 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 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 involved in the export of CD-ROMs by Netcompware and with the import of CD-ROMs by Arvind International.

4. The impugned order imposes a penalty of Rs. 10 lakhs upon the appellant under section 114 of the Customs Act. The relevant portion of impugned order, in so far as it deals with the appellant, is reproduced below::

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

"42(I) Shri Arjun Amla denied all the allegations leveled against him in his written reply dated 24.04.2001 submitted through advocate Shri Rupesh Kumar and deposed that he had no connection with the export of CD-ROM's by M/s. Netcompware Pvt. Ltd. or with the CD-ROM's imported by M/s. Arvind International and no penalty is leviable on him under section 112 (a) & 114 (a) of the Customs Act. **His contention of not having any concern with the activities of M/s. Netcompware Pvt. Ltd. is baseless as is evident from the following:-**

- (a) **Shri Raminder Mohan Singh @Sunny Singh, in his statement recorded on 28.6.2000** stated that M/s Netcompware Pvt. Ltd. was floated by Shri Arjun Amla and Shri Sachdeva, the two directors of M/s. Govardhan India (P) Ltd. situated at Hira Mahal, Amrita Shergill Marg, New Delhi; that they floated this firm in the name of Shri Ashfaq Beig and Shri Anil Sethi who were working with them; that Shri Anil Sethi and Shri Ashfaq Beig were carrying out the order of Shri Arjun Amla and Shri Sanjay Sachdevan in respect of transactions of this firm; that the export of 40,000 pcs. of CD ROMs under DEPB scheme by M/s Netcompware Pvt. Ltd. was made by Shri Arjun Amla & Shri Sanjay Sachdeva, Shri Deept Sarup Aggarwal and Shri Roampy Bhatia and they all were the beneficiaries of this export; that to give legal shape to the remittances received in the name of M/s Netcompware Pvt. Ltd. the pay orders were issued in favour of M/s Harkishan Overseas from where these were encashed; that the role of Shri Pankaj Soni in encashment of remittances of M/s Netcompware Pvt. Ltd. through the account of M/s Harkishan Overseas was limited and that Shri Pankaj Soni was acting on the instructions of Shri Roampy Bhatia.
- (b) **Shri Ratinder Pal Singh Bhatia @ Roampy Bhatia in his statement recorded on 27.6.2000** stated that he came to know that Shri Ashfaq Beig and Late Shri Anil Sethi, the two Directors of M/s Netcompware Pvt. Ltd.

were working in the firm M/s Govardhan India (P) Ltd. owned by Mr. Arjun Amla and Mr. Sanjay Sachdeva; that he knew Shri Arjun Amla and Shri Sanjay Sachdeva for the last 10 years; that Shri Deept Sarup Aggarwal was working with Mr. Arjun Amla and Mr. Sanjay Sachdeva and had relations and contact with them.

- (c) **Shri Davender Lal, in his statement dated 07.01.99** stated that Shri Arjun Amla was known to him as he had cleared export consignments of M/s Govardhan India (P) Ltd. (a company of Shri Arjun Amla) when he was working with M/s Shree Venkatesh Shipping Services Pvt. Ltd.; that for the clearance of CD ROM's under Shipping Bill NO. 39286 dt. 28.12.98 by M/s Netcompware Pvt. Ltd., Shri Arjun Amla had handed over the goods to him on 6.1.98: that he brought the same to Air Cargo Terminal and in the past he had cleared one or two consignments of M/s Netcompware Pvt. Ltd. through M/s Shree Venkatesh Shipping Services Pvt. Ltd. and the goods were handed over by Shri Arjun Amla on those occasions also.
- (d) **The involvement of Shri Arjun Amla is further corroborated with the averments made by Shri Raminder Mohan Singh @ Sunny Singh during his cross examination by Shri Rupesh Kumar**, counsel for Arjun Amla on 15.11.2002 in which he deposed that he knew M/s Netcompware Pvt. Ltd. through Shri Arjun Amla, Sanjay Sachdeva and Shri Deept Sarup Aggarwal and he was doing inspection on behalf of Shri Arjun Amla. During his cross examination by Shri R.K. Handoo counsel for Shri Bimal Kumar Jain on 06.01.2003, Shri Raminder Mohan Singh stated that M/s Netcompware Pvt. Ltd. was floated by Shri Arjun Amla and Shri Sanjay Sachdeva in the name of Shri Anil Sethi and Shri Ashfaq Beig who were working under Shri Arjun Amla; that Shri Anil Sethi was accountant of Shri Arjun Amla; that he was told by Shri Arjun Amla, Shri Roampy Bhatia and Shri Deept Sarup Aggarwal that Shri Deept

Sarup Aggarwal was a beneficiary of the business of M/s Netcompware Pvt. Ltd.

From the above statements it is evident that Shri Arjun Amla was fully associated with activities of M/s Netcompware Pvt. Ltd. and he intentionally deposed falsely before DRI that he was not aware about activities of M/s. Netcompware Pvt. Ltd.; and he intentionally avoided his appearance before DRI to give further evidence and his reply is a mere exercise to save himself from the situation which shows his culpability."

(emphasis supplied)

5. Shri Alekshendra Sharma, learned counsel of the appellant 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 Raminder Mohan Singh, Ratinder Pal Singh Bhatia and Davender Lal 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.**

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

Ltd. vs. Commissioner, Customs, Central Excise & Service Tax, Raipur¹³; and

- (iii) The appellant is not at all connected with either export of CD-ROMs by Netcompware or the import of 40,000 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.

6. 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 facilitated the export of CD-ROMs and import of 40,000 CD-ROMs through Arvind International; and
- (v) Penalty has been correctly imposed upon the appellant in view of the statements of the appellant and other persons.

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

8. 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 Raminder

13. Excise Appeal No. 52612 of 2018 decided on 30.10.2023

Mohan Singh, Ratinder Pal Singh Bhatia and Davender Lal under section 108 of the Customs Act to conclude that the appellant was associated with the activities of Netcompware.

9. 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

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

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)

10. 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)

11. 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)

12. 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.

13. 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”

14. 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.

15. 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)