CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. I

Customs Appeal No. 52046 of 2022

(Arising out of Order-in-Original No. 13/2022/SG/Pr. Commr/ICD-Import/TKD dated 25.05.2022 passed by the Principal Commissioner of Customs, (Import), ICD TKD, New Delhi)

Saurabh Kapoor ..... **Appellant**
S/o Sri Ashok Kapoor,
R/o 2226 FF Outram Lines
Kinghway Camp GTB Nagar,
Delhi-110009

Versus

Principal Commissioner of Customs, ICD (Import), TKD, New Delhi ..... **Respondent**
New Delhi-110037

APPEARANCE:
Shri A.K. Prasad and Ms. Surabhi Sinha, Advocates for the appellant
Shri Girijesh Kumar, Authorised Representative for the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: October 13, 2025
DATE OF DECISION: October 29, 2025

FINAL ORDER NO. 51624/2025

JUSTICE DILIP GUPTA

The order dated 25.05.2022 passed by the Principal Commissioner of Customs, ICD (Import) TKD, New Delhi[1] to the extent it imposes a penalty of Rs. 5 lakhs upon the appellant under section 112(b)(ii) of the Customs Act, 1962[2] and a penalty of Rs. 50 lakhs upon the appellant under section 114AA of the Customs Act has been assailed in this appeal.

2. The appellant is a partner in M/s Chandra Impex which is engaged in trading of fabrics. Ashok Kumar, father of the appellant, was the sole

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1. **the Principal Commissioner**
2. **the Customs Act**

proprietor of M/s Chandra Chemicals[3], which was engaged in the business of trading chemicals and sale of spray paints after importing the same from foreign suppliers. Chandra Chemicals, during the period from 17.03.2015 to 05.08.2019, imported 14 consignments of spray paints from three foreign suppliers. According to Chandra Chemicals, the import was made at negotiated rates mentioned in the commercial invoices issued by the foreign suppliers. For the 14th consignment, Chandra Chemicals filed a Bill of Entry dated 05.08.2019 in respect of goods imported from M/s Fuqi Industries Company Ltd., China under an invoice dated 10.07.2019.

3. On 02.08.2019, the officers of the Special Investigation and Intelligence Branch conducted a search at Shop No. 1, Kingsway Camp, New Delhi. On 02.08.2019/03.08.2019, the appellant tendered his statement under section 108 of the Customs Act. The said statement records that the appellant has voluntarily shared the e-mail communication made through his e-mail account and, thereafter, put his signatures on e-mail printouts of proforma invoices sent by the supplier from page numbers 1 to 163. He also stated that the amount mentioned in the proforma invoices were paid to the supplier and the commercial invoices were prepared for declaration to the customs authorities.

4. On 03.08.2019, the appellant sent a letter to the Chief Commissioner, Customs (Import) retracting the statement made by him. The contents of the letter are reproduced below:

> "To
> Chief Commissioner of Custom (Import)
> New Custom House,
> IGI Airport,
> New Delhi-110037

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3. Chandra Chemicals

> Subject- Retraction of Statement given on 03.08.2019 by Shri Saurabh Kapoor at SIIB room no. 119, ICD TKD, Delhi
>
> I was picked up from my office by Pritam Dahiya (superintendent, SIIB, TKD), Ankit Kumar (Inspection Officer, SIIB, TKD) against search warrant for Chandra Impex case dated 2.8.2019.
>
> **That I was made to sit in the office from evening of 02.08.2019 till early morning of next day i.e. 03.08.2019. The officers asked for password of my e-mail accounts and forcibly made me log into my e-mail ID. I was given a typed statement to sign by me in room no 119 at ICD TKD, Delhi. I was told that if I refused to sign I would be arrested along with my family members. To save myself from arrest and my family members from harassment I signed the typed statement. The contents of the statement are not known to me as I had signed the papers without reading.**
> That I have further signed some others documents the contents of which I do not know.
> **Therefore, I would like to retract/withdraw my statement dated 02/03.08.2019 in totality.**
>
> **(emphasis supplied)**"

5. Thereafter, the goods imported through Bill of Entry dated 05.08.2019 were examined by the officers on 20.08.2019. On the basis of the proforma invoices retrieved from the e-mail account of the appellant, a show cause notice dated 29.12.2020 was issued to the appellant proposing to reject the transaction value under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[4] and re-determine it under rule 9. The show cause notice also proposed to confiscate the goods under section 111A of the Customs Act

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4. the 2007 Valuation Rules

and the differential customs duty with interest and penalty was demanded. Annexure A to the show cause notice contains the list of Relied Upon Documents and the same is reproduced below:

Sr. No.	Description	Page No.
1.	Bill of Entry No. 4374395 dated 05.08.2019	1-24
2.	Panchnama dt. 02.08.2019, search proceedings at 1993, Shop No. 1, First Floor, Kngsway Camp, Delhi.	25-26
3.	Panchnama dt. 02.08.2019, search proceedings at 2226, First Floor, Outram Line, GTB Nagar, Delhi-110032	27-29
4.	Siezure memo dt. 02.08.2019 (seizure of 02 Mobile phones)	30
5.	07 original/proforma invoics retrived from e-mail	31-38
6.	Statement of Sh. Saurabh Kapoor dated 02.08.2019/03.08.2019	39-40
7.	Panchnama dt. 20.08.2019 for examination proceedings in r/o BE No.4374395 dated 05.08.2019	41-42
8.	Seizure Memo dated 05.09.2019 in r/o goods imported under BE No. 4374395 dated 05.08.2019	43
9.	Provisional release order dated 17.09.2019	44-45
10.	Summons dated 19.08.2019, 23.08.2019, 30.10.2019 and 10.12.2020 issued to Prop. Of M/s Chandra Chemicals	46-49

6. Chandra Chemicals and the appellant submitted a reply dated 01.04.2022 to the aforesaid show cause notice and denied the allegations made therein. It was stated that the demand was based on the proforma invoices retrieved from the e-mails, but the same were not retrieved under any panchnama. It was also stated that a proforma invoices cannot be considered as a regular commercial invoices for a regular commercial invoice is issued after negotiations and finalization of the price. It was also stated that the statement of the appellant would not be admissible as not only had the appellant retracted the statement, but even otherwise the provisions of section 138B of the Customs Act had not been followed.

7. The Principal Commissioner did not accept the submissions made by the appellant in the reply and confirmed the demand. The relevant observations are as follows:

> **"59.4 I find that Voluntary statements tendered under Section 108 of the Act, constitute cogent and legal evidence. Sh. Saurabh Kapoor already accepted undervaluation by him in his statement dated 02/03.08.2019. I find that the Modus Operandi in respect of Bills of Entry in which he had admitted undervaluation is same in case of other Bills of Entry for which no details are available. The importer has mis-declared the transaction value of such goods imported covered under 14 Bills of Entry by submitting fraudulent invoices for the clearance of goods imported under said B/Es.** It is noteworthy that such undervaluation was done on account of deliberate and willful suppression of actual transaction value by the importer.
>
> xxx xxx xxx
>
> **68.2.1 In the case in hand, I find that Sh. Saurabh Kapoor, in his statement recorded under Section 108 of the Customs Act, 1962 had admitted that proforma invoice was the actual amount paid to the supplier whereas commercial invoice was prepared for declaration before customs authorities in India.**
>
> xxx xxx xxx
>
> **71.3 In the present case, where value of the goods imported is available in the Proforma invoices recovered during the investigations and thus the declared value by the Noticee does not represent actual transactional value and is liable to be rejected in terms of Rule 12 of the Customs Valuation Rules, 2007.**
>
> xxx xxx xxx

71.6 The main point of dispute in this case is as to whether the declared transaction value of the goods imported from the Noticee, is acceptable or not. During the period of dispute, in accordance with the provisions of Section 14(1) the value of the imported goods was to be determined in accordance with the Customs Valuation Rules, 2007. Rule 3(1) of the Valuation Rules states that subject to Rule 12, the value of the imported goods shall be transaction value and if the value of the goods cannot be determined on the basis of transaction value, the same shall be determined by sequentially applying Rules 4 to 9 of these Rules. The Rule 9 provides for addition of costs of certain services to the value, and the cost of certain goods provided by the suppliers which is not the dispute in this case. Sub-rule (2) of Rule 4 mentions the conditions which have to be satisfied for acceptance of declared transaction value. Rule 12 provides for rejection of the declared transaction value when a proper officer has reasons to doubt its correctness and, in this regard, he has to arrive at this conclusion after conducting enquiry with the importers. **In this case, I find that the department is in possession of actual Invoices, depicting the actual transaction value. Accordingly, the value has to be determined in terms of the provisions of Section 14(1) of the Act, ibid read with Rule3(1) of the Valuation Rules, 2007. While determining the transaction value, costs of certain services are required to be added in terms of Rule 9, which is the case here.**

71.7 I do not find any infirmity on those direct evidences to form the basis of determination of the correct transaction value of the goods under Section 14 of the Customs Act, 1962 read with Rule 3 and Rule 9 of the CVR 2007."

(emphasis supplied)

8. It is this order that has been assailed in this appeal.

9. Shri A.K. Prasad, learned counsel appearing for the appellant assisted by Ms. Surabhi Sinha made the following submissions:

(i) The statement of the appellant made under section 108 of the Customs Act cannot be relied upon as not only had the appellant retracted the same immediately, but also because the provisions of section 138B of the Customs Act had not been complied with;

(ii) The printouts purportedly taken from the laptop of the appellant by accessing the e-mail account of the appellant cannot also be admitted in evidence since it was not recorded under a panchanama, but under a statement made under section 108 of the Customs Act;

(iii) Even otherwise, the printouts were taken of 163 pages and there is nothing to co-relate the 7 proforma invoices, on which reliance has been placed in the show cause notice, and which were marked as Relied Upon Document No. 5 to the 163 pages since the printout of the 163 pages is not a Relied Upon Document;

(iv) The same panch witness Chandan Singh Rawat is said to be at two places simultaneously when the searches were conducted on 02.08.2019;

(v) Out of the 14 Bills of Entries, 13 bills of Entries are not Relied Upon Documents and, therefore, it is not possible to compare the description and quantity of goods actually imported with those mentioned in the proforma invoices;

(vi) The seven proforma invoices cannot be extrapolated to re-determine the transaction value;

(vii) All the past imports had been cleared after the consignments were physically examined by customs; and

(viii) No penalty can be imposed upon the appellant under section 112(b)(ii) of the Customs Act or under section 114AA of the Customs Act.

10. Shri Girijesh Kumar, learned authorized representative appearing for the department, however supported the impugned order and made the following submissions:

(i) The proforma invoices retrieved from the e-mail account of the appellant showed the actual transaction values which were substantially higher than the value shown in the commercial invoices submitted before the customs authorities;

(ii) The case of the department is not based on suspicion but on various factors like recovery of invoices, voluntary confession made by the appellant under section 108 of the Customs Act, voluntary deposit of Rs. 5 lakhs towards differential duty and non-cooperation during investigation;

(iii) The seized consignment under the Bill of Entry dated 05.08.2019 was correctly held liable to confiscation under section 111(m) of the Customs Act; and

(iv) Penalties under sections 112 and 114AA of the Customs Act were correctly imposed upon the appellant.

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

12. The case of the department is mainly based on the printouts of the seven proforma invoices that the department claims were taken from the email account of the appellant during the course of the making of the statement by the appellant under section 108 of the Customs Act. A perusal of the said statement indicates that printout of pages from 1 to 163 were taken. These 163 pages have not been made a Relied Upon Document and, therefore, it is not possible to ascertain whether the seven proforma invoices which have been made Relied Upon Document No. 5 to the show cause notice are those proforma invoices of which the printouts were taken. The department had to substantiate that the seven

proforma invoices were printouts taken from the e-mail account of the appellant when the statement under section 108 of the Customs Act was recorded. It cannot be assumed that these seven proforma invoices are those very proforma invoices of which printouts were taken.

13. The impugned order also places reliance on the statement made by the appellant under section 108 of the Customs Act on 2/3.08.2019 that the prices mentioned in the proforma invoices were correct and were much higher than the commercial invoices. It is from these facts that a conclusion has been drawn that the valuation of the goods in the 14th live consignment was undervalued. It is for this reason that the valuation of the goods was rejected and re-determined under the provisions of the 2007 Valuation Rules.

14. Section 108 of the Customs Act would, therefore, have to be examined.

15. Section 108 of the Customs Act deals with power to summon persons to give evidence and produce documents. It provides that any Gazetted Officer of customs shall have the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Customs Act.

16. Section 138B of the Customs Act deals with relevancy of statements made under section 108 of the Customs Act and it is reproduced below:

> "**138B. Relevancy of statements under certain circumstances.**
>
> **(1)** A statement made and signed by a person before any Gazetted Officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.
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> **(2)** The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court."

17. It would be seen that section 108 of the Customs Act enables 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 section 138B of the Customs Act. A bare perusal of sub-section (1) of section 138B 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 138B of the Customs Act, the provisions of sub-section (1) shall apply to any proceedings under 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.

18. Section 9D of the Central Excise Act is almost identical to the provisions of section 138B of the Customs Act.

19. It would now be appropriate to examine certain decisions interpretating section 138B of the Customs Act and section 9D of the Central Excise Act.

20. In **Ambika International** vs. **Union of India**[5] decided on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that if none of the circumstances contemplated by clause (a) of section 9D(1) exist, then clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be

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5. 2018 (361) E.L.T. 90 (P&H)

examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority. The relevant portions of the judgment are reproduced below:

> **"15. A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.**
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> **16.** Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.
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22. 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 adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

23. 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.

24. 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 adjudication authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.

25. 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.

26. 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.

27. It is only, therefore, -

(i) **after the person whose statement has already been recorded before a gazetted Central Excise Officer is**

examined as a witness before the adjudicating authority, and

(ii) **the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,**

that the question of offering the witness to the assessee, for cross-examination, can arise.

28. Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

(emphasis supplied)

21. The Punjab and Haryana High Court in **Jindal Drugs Pvt. Ltd.** vs. **Union Of India**[6] that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 138B(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.

22. In **Hi Tech Abrasives Ltd.** vs. **Commissioner of C. Ex. & Cus., Raipur**[7] decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on the statement of the Director of the Company who is said to have

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6. 2016 (340) E.L.T. 67 (P & H)
7. 2018 (362) E.L.T. 961 (Chhattisgarh)

admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section 9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in **Ambika International**, the Chhattisgarh High Court held:

> "9.3 **A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.**
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> 9.4 **The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.**

9.5 ***** **The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory.** Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. **Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers.** Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. **We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted**

> **upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice.** In taking this view, we find support from the decision in the case of Ambica International v. UOI rendered by the High Court of Punjab and Haryana."
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> **(emphasis supplied)**

23. In **Additional Director General (Adjudication)** vs. **Its My Name Pvt. Ltd.**[8] decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 138B of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 138B(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant. The relevant paragraphs of the judgment of the Delhi High Court are reproduced below:

> **"76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the Learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus :** *****
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> **A Division Bench of this Court has, speaking through A.K. Sikri, J. (as he then was) held, in J & K Cigarettes Ltd. v. Collector of Central Excise [2009 (242) E.L.T. 189 (Del.)] that, by virtue of sub-section (2), Section 138B(1) of the Act would apply, with as much force, to**

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8. 2021 (375) E.L.T. 545 (Del.)

> **adjudication proceedings, as to criminal proceedings.**
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> *****
>
> We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act - or, for that matter, Section 9D of the Central Excise Act, 1944.
>
> **77.** The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. **The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the Learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019.**"
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> **(emphasis supplied)**

24. In **M/s. Drolia Electrosteel P. Ltd.** vs. **Commissioner, Customs, Central Excise & Service Tax, Raipur**[9] decided on 30.10.2023, a Division Bench of the Tribunal examined the provisions of section 9D of the Central Excise Act and after placing reliance upon the decision of the Punjab and Haryana High Court in **Jindal Drugs**, observed that if the mandatory provisions of section 9D(1)(b) of the Central Excise Act are not followed, the statements cannot be used as evidence in proceedings under Central Excise Act. The relevant portions of the decision of the Tribunal are reproduced below:

> "14. Evidently, the statements will be relevant under certain circumstances and these are

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

> 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.
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> 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. *****
>
> 16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible."
>
> **(emphasis supplied)**

25. It, therefore, transpires from the aforesaid decisions that both section 138B(1)(b) of the Customs Act and section 9D(1)(b) of the Central Excise Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 108 of the Customs Act or under section 14 of the Central Excise Act during the course of an inquiry under the said 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 138B(1)(b) of the Customs Act and section 9D of the Central Excise 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 108 of the Customs Act or under section 14D of the Central Excise Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that a statement 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 statement of a witness has to be recorded before the adjudicating authority, after which such a statement can be admitted in evidence.

26. Thus the statement made by the appellant under section 108 of the Customs Act cannot be considered as relevant as the procedure contemplated under section 138B of the Customs Act had not been followed.

27. It is only because of the statement made by the appellant under section 108 of the Customs Act that the amount mentioned in the seven proforma invoices have been preferred over the amount mentioned in the commercial invoices, whereas it is the amount mentioned in the commercial invoices that is arrived at after negotiations that has to be taken into consideration. The amount mentioned in the seven proforma invoices cannot, therefore, be considered for valuation purposes.

28. What is also important to notice is that after the statement under section 108 of the Customs Act was made on 2/3.08.2019, the appellant retracted the statement immediately on 03.08.2019 and the retraction

has been reproduced above. The appellant clearly stated that he was made to sit in the inspection office of Special Investigation and Intelligence Branch from evening till morning and when he was given a typed statement to sign he was told that if he refused to sign he would be arrested with his family members. He further stated that to save himself from arrest and to save his family members from harassment, he signed the typed statement without even reading it. He also stated that he had signed some other documents, the contents of which he does not even know.

29. Learned counsel for the appellant has also referred to the two panchnamas, both recorded on 02.08.2019. The first panchnama of shop no. 1 records that the two panchas, namely Madhu Malik and Chandan Singh Rawat were present throughout the search proceedings from 16.00 hrs to 18.45 hrs. The second panchnama of shop premises No. 226, First Floor, New Delhi also records that Chandan Singh Rawat who was one of the two panchas remained throughout from 4pm to 8.45pm on 02.08.2019. Thus, in both the panchnamas, Chandan Singh Rawat is said to be present at two different places from 16.00hrs to 16.45 hrs. This fact has been noticed only to show the casual manner in which the panchnamas were recorded.

30. It is important to notice that the printouts alleged to have been taken during the course of statement made by the appellant under section 108 of the Customs Act were not recorded under a panchnama and nor was the procedure contemplated under section 138B of the Customs Act followed.

31. The decision of the Supreme Court in **Additional Director General, Adjudication Directorate of Revenue Intelligence** vs.

Suresh Kumar And Co. Impex Pvt. Ltd. & Others[10] would, therefore, not come to the aid of the department.

32. If the printouts, on which reliance has been placed in the impugned order and the statements made by the appellant under section 108 are discarded, there is no other evidence which may substantiate under valuation of the goods imported through the 14th live consignment. The earlier 13 consignments had been cleared after assessment and the Bills of Entries relating to these consignments have also not been made part of the Relied Upon Documents in the show cause notice. Only an assumption has been drawn that if the appellant had undervalued the 14th consignment, he would also have undervalued the earlier 13 consignments.

33. It is, therefore, not possible to sustain the finding recorded in the impugned order that the imported goods had been undervalued in 14 consignments. The transaction value, therefore, could not have been rejected under rule 12 of the 2007 Valuation Rules, as a result of which it could not have been re-determined under rule 3 of the 2007 Valuation Rules.

34. Section 111 of the Customs Act deals with confiscation of improperly imported goods. Clause (m) of section 111 provides that if the goods do not correspond in respect of the value they can be confiscated. As the charge of under valuation cannot be substantiated, the goods could not have been confiscated under section 111(m) of the Customs Act.

35. Penalty has been imposed upon the appellant, both under sections 112(b)(ii) and section 114AA of the Customs Act. As the goods could not have been confiscated, penalty under section 112(b)(ii) of the Customs Act could not have been levied upon the appellant. Penalty under section

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114AA could also not have been imposed upon the appellant as he had not signed any document, much less knowingly or intentionally, concerning the transaction of any business.

36. Thus, for all the reasons stated above, the imposition of penalty upon the appellant under section 112(B)(ii) and section 114AA of the Customs Act deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(order pronounced in the open court on **29.10.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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