CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH- COURT NO. I

CUSTOMS APPEAL NO. 49 OF 2008

(Arising out of Order-in-Original No. 07/GS/CC/DRI/NCH/2007 dated 05.09.2007 passed by the Commissioner of Central Excise (Adjudication), New Customs House, New Delhi)

M/s Baba Leather Impex Pvt. Ltd. **.....Appellant**
5328/67, Hardhian Singh Road,
Karol Bagh, New Delhi- 110005

Versus

The Commissioner of Central Excise (Adj.) **.....Respondent**
New Customs House,
New Delh

WITH

C/50/2008 C/51/2008 C/52/2008
C/53/2008 AND C/54/2008

APPEARANCE:

Shri Piyush Kumar, Shri Sharad Srivastava, Ms. Reena Rawat and Ms. Gunjan Tanwar, Advocates for the Appellant

Shri Shiv Shankar, Authorised Representative of the Department

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing : 27.04.2026
Date of Decision : 12.05.2026

FINAL ORDER NO's. 50866-50871/2026

JUSTICE DILIP GUPTA:

All the six Customs Appeals seek the quashing of the order dated 05.09.2007 passed by the Commissioner of Central Excise (Adjudication)[1]. The said order rejects the declared transaction value of the goods imported by M/s Baba Leather Impex Private Limited[2], M/s Trade & Trends, M/s Do Best Trade Corporation, M/s Trade Dignity and

1. **the Commissioner**
2. **Baba Leather**

M/s Baba Le Crafts (P) Ltd[3] who have filed Customs Appeal No. 49 of 2008, Customs Appeal No. 51 of 2008, Customs Appeal No. 52 of 2008, Customs Appeal No. 53 of 2008 and Customs Appeal No. 54 of 2008 respectively and has re-determined the value. Accordingly, differential duty has been directed to be recovered with interest and penalty. Customs Appeal No. 50 of 2008 has been filed by Raj Kumar Anand, Managing Director of Baba Leather for setting aside the penalty imposed upon him under section 112(a) and (b) of the Customs Act, 1962[4].

2. It transpires from the records that searches were conducted by the officers of the Directorate of Revenue Intelligence[5] in the office, residence and godown premises of M/s Baba Leather and individuals involved. Details of the premises are as follows:

(i) Office premises of M/s Baba Leather Impex Pvt. Ltd. at 5328/67, Hardhian Singh Road, Karol Bagh, New Delhi;

(ii) Residential premises of Raj Kumar Anand, at 49/21, East Patel Nagar, New Delhi;

(iii) Godown premises of M/s Baba Leather Impex Pvt. Ltd. at 5954/3, Hardhian Singh Road, Karol Bagh, New Delhi;

(iv) Godown premises of M/s Baba Leather Impex Pvt. Ltd. at 498, Guru Harkishan Nagar, New Delhi;

(v) Godown premises of M/s Baba Leather Impex Pvt. Ltd. at 9/6535, Hardhian Singh Road, Karol Bagh, New Delhi; and

(vi) Godown premises of M/s Baba Leather Impex Pvt. Ltd. at 6093, Padam Singh Road, Karol Bagh, New Delhi.

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3. the appellants
4. the Customs Act
5. the DRI

3. Import documents, cash amounting to Rs. 83,00,00/- and a laptop were recovered. Raj Kumar Anand was also taken to the office of the DRI and was kept in custody from 27.05.2005 to 29.05.2005 and statements were recorded under section 108 of the Customs Act. According to Raj Kumar Anand, he was coerced to submit five drafts, all dated 28.05.2005, amounting to Rs. 36,25,969/-. Raj Kumar Anand was also arrested on 29.05.2005 and produced before the Duty Magistrate, Patiala House Court. According to Raj Kumar Anand, on the very next day, i.e. 30.05.2005, he submitted a letter addressed to the Court retracting the statements, stating that the statements were recorded by force and that he was made to sign documents and make the deposit by force. Raj Kumar Anand also stated that he was beaten and subjected to mental torture.

4. A show cause notice dated 29.11.2005 was issued to all the appellants alleging that all the five importers were controlled by Raj Kumar Anand and that he had mis-declared the thickness of the imported PU leather fabric and value to evade payment of custom duty. Accordingly, it was proposed to demand customs duty with interest and penalty, in respect of the goods imported through 404 Bills of Entry by taking recourse to the proviso to section 28(1) of the Customs Act.

5. The appellants filed replies to the show cause notice and denied the allegations made in the show cause notice. The appellants also adduced:

(i) Data pertaining to accepted unit prices relating to import of identical/similar goods cleared in the contemporaneous period to demonstrate that the declared values were in consonance with accepted values of identical/similar goods cleared by Customs Authorities;

(ii) Letter dated 30.05.2005 filed by Raj Kumar Anand through Superintendent Tihar Jail retracting the statements;

(iii) Copies of information obtained under Right To Information Act pertaining to assessment/examination/determination of value in respect of impugned consignment cleared through the ports of JNPT, Nhava Sheva; ICD, Patparganj, Delhi; Air Cargo, New Delhi; Air Cargo, Kolkata; Sea Port, Kolkata; and Sea Port, Cochin to establish that the goods wer duly examined in each case and were issued Out of Charge after due satisfaction that the goods were as per declaration and duty payable on the goods was duly discharged by respective importer; and

(iv) The appellants also sought cross-examination of various persons, whose statements were relied against the appellant and the Panch Witnesses to elicit true and correct facts.

6. The Commissioner, however, confirmed the demands proposed in the show cause notice. The Commissioner framed three issues for consideration, namely,

(i) Whether the value declared in the Bills of Entry was the correct transaction value or not, and whether it was liable to be rejected in terms of rule 10 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988[6];

(ii) Whether the value of the imported goods was required to be re-determined in terms of rules 5 and 6 of the 1988 Valuation Rules; and

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6. the 1988 Valuation Rules

(iii) Whether the goods were liable to confiscation under sections 111(d) and 111(m) of the Customs Act.

7. In respect of the first issue, namely whether the transaction value was liable to be rejected under rule 10, the Commissioner noted in paragraph 123 of the order that the following evidences were produced by DRI to prove that the value declared in the Bills of Entry was not correct:

(i) The main noticee Raj Kumar Anand in his voluntary statement recorded on May 27, 28 & 29, 2007 himself admitted in answer to Question No. 4 that while the value of goods was being shown between 0.6 to 0.8 cents, the actual purchase price for the goods having thickness of 0.6mm to 0.8mm was at US $1.2 to US $1.5;

(ii) In the invoices retrieved from the laptop belonging to Raj Kumar Anand, the price of goods was shown much higher than what was declared in the import documents; and

(iii) Certain communications between the main noticee Raj Kumar Anand and a hawala operator, namely, Raja retrieved indicate that the differential value of the price actually paid and declared in the import documents was routed to the supplier outside the normal channel of commerce.

8. The contention of the appellant that the statements under section 108 of the Customs Act were recorded under duress was rejected by the Commissioner for the following reasons:

> "126.
> (i) I find that notice is a man of mature years and a businessman of some standing. There is no allegation that he was physically abused or that any third degree methods were applied to extract a

> confessional statement. I find it difficult to believe that merely on threat of arrest from the DRI officers, he would have written whatever was dictated to him. I further find that whatever facts have been narrated by him in his statement have also been corroborated by physical evidences like parallel invoices and e-mails recovered from his computer. Obviously, these things were in his own personal knowledge and could not have been invented by the officers. I find no force in the plea that his statement is not voluntary in nature or was obtained under duress or compulsion. *****"

9. The Commissioner, therefore, held that the statement of Raj Kumar Anand recorded under section 108 of the Customs Act was a voluntary statement and also admissible in evidence. The Commissioner, thereafter recorded a finding, based on the statement of Raj Kumar Ananad that the differential amount of value of the goods was remitted through hawala transaction made by one Raja.

10. The Commissioner also observed that such admission was alone sufficient to sustain the charge of mis-declaration of value but the e-mail messages and other documents like commercial invoices and proforma invoices retrieved from the laptop computer of Raj Kumar Anand support the facts recorded in the statements of Raj Kumar Anand.

11. Regarding the plea of the appellants that the documents from the laptop were retrieved behind the back of Raj Kumar Anand and hence could not be relied upon, the Commissioner noted that the ownership of laptop computer was not in doubt as Raj Kumar Anand in his statement admitted it. The Commissioner also observed that at the time of personal hearing, the DRI officer categorically stated that they had made an offer to Raj Kumar Anand to be present at the time of retrieval of documents,

but as neither Raj Kumar Anand nor his lawyer contradicted this statement at the time of personal hearing, the statement has to be taken as correct. The Commissioner also placed reliance on the panchnama dated 28.05.2005, which is said to have been signed by Raj Kumar Anand. Thereafter, the Commissioner recorded the following findings:

> "128. ***** In fact, a perusal of copies of Relied Upon Documents shows that Rajkumar Anand has affixed his signatures alongwith pancha witnesses on all documents recovered and supplied. This clearly shows that not only the documents were recovered from the same laptop computer which admittedly belonged to Rajkumar Anand but also that the entire process of retrieval of documents was completed in the presence of Rajkumar Anand and not in his absence as pleaded by defence. It has been contested in the written reply received on 6th August, 2007 that the laptop computer as per panchnama was recovered from the business premises of Rajkumar Anand whereas the show cause notice states that the laptop computer was recovered from the residential premises. I have gone through the contents of the panchnama as well as the allegation in the show cause notice. I observe that the noticee has correctly pointed out, dichotomy between the panchnama and the show cause notice. There obviously is a mistake in the show cause notice and that the panchnama clearly states that the laptop computer in question was resumed on 27th May, 2005 from the office premises located at Hardhayan Singh Road, Karol Bagh, New Delhi. In the light of above and that the show cause notice has mentioned residential premises as place of resumption is at best a mistake and it does not vitiate the act of resumption itself which has been properly documented in the panchnama dated 27.5.2005. In any case, so long as the ownership of the concerned laptop computer has been confirmed by Rajkumar Anand on 27.5.2005 and the contents were also retrieved in his very presence, this is a minor

> mistake which neither negates the fact of resumption nor help the defence in their plea that the documents were planted by the DRI. The-request for cross examination of panch witnesses and the investigating officers of DRI also becomes irrelevant in the face of the fact that their retrieval was indeed done in the presence of Rajkumar Anand."

12. Based on the aforesaid, the Commissioner recorded a finding that the value declared in the Bills of Entry was not the true transaction value and was liable to be rejected.

13. The Commissioner then examined what would be the true value. In this connection, the appellants had produced certain print-outs and other information from various ports of imports to establish the value of contemporaneous imports of similar goods. These values were not accepted by the Commissioner for the following reasons:

> "**138**. In their written defence dated 18.7.2007, the noticee have also produced certain print outs and other information from various ports of imports to establish the value of contemporaneous imports of similar goods. However, they have not produced a copy of their request made under the RTI Act and, therefore, it is not clear what exactly was their query and what were the contents of the letter under which the information was sought. It is, therefore, possible that the information might have been requested in such a selective format which would suit the interest of the notice rather than bring out the entire truth of the matter. For example, the noticee might have asked for information in respect of only those Bills of Entry in which the value corresponds to his own declaration. This, however, would not tell us the complete truth. Any piece of information is relevant if it is known in what context it has been obtained, which is not the case here."

14. The Commissioner, thereafter placed reliance upon the statement of Raj Kumar Anand as also the e-mail messages exchanged between Raj Kumar Anand and his office and M/s Helen and others and the suppliers and ultimately held that the proposal made in the show cause notice to determine the value under rules 5 and 6 of the 1988 Valuation Rules could not be rebutted by the appellant.

15. The Commissioner also examined whether the goods were liable to confiscation under sections 111(d) and 111(m) of the Customs Act. The Commissioner noted that the goods had been mis-declared by the importers, regarding both the value and description, and, therefore, were liable to confiscation.

16. Regarding the imposition of penalty, the Commissioner observed:

> "**146(b).** I, now proceed to examine the penal liability of different noticees under Section 112 and of Section 114A of Customs Act, 1962. I find that this is a case which involves willful, deliberate and intentional mis-declaration of value and in the light of provisions contained in Section 114A of Customs Act, 1962, I hold that Noticee No. 1 to 5 are liable for penalty under Section 114A, of Customs Act, 1962. In addition, Noticee No.6 is also liable for penal action under Section: 112(a) of Customs Act, 1962 for his acts of omission and commission which rendered the goods liable for confiscation under Section 111(d) & (m) of the Customs Act, 1962."

17. Shri Piyush Kumar, learnd counsel for the appellants, assisted by Shri Sharad Srivastava, Ms. Reena Rawat and Ms. Gunjan Tanwar, made the following submissions:

(i) The charge of under valuation is primarily based on the statements of Raj Kumar Anand recorded under section 108 of the Customs Act during the course of investigation,

but these statements cannot be relied upon as the procedure contemplated under section 138(B) of the Customs Act was not followed;

(ii) Even otherwise, the statements of Raj Kumar Anand were recorded on 27.05.2005, 28.05.2005 and 29.05.2005 when he was kept in illegal custody by the DRI Officers. He was arrested on 29.05.2005 and immediately thereafter on 30.05.2005, through a handwritten letter addressed to the Trial Court filed through the Jail Superintendent, Raj Kumar Anand retracted his statements, complaining that they were recorded after physically beating him, abusing him and threatening him that his wife would be arrested;

(iii) The print-outs retrieved from the laptop computer of Raj Kumar Anand are not admissible in evidence;

(iv) There is no evidence to suggest mis-declaration of thickness of the product;

(v) The rejection of transaction value under rule 10 of the 1988 Valuation Rules and its redetermination is barred in law.

(vi) Out of the 404 Bills of Entry involved in the present appeal, in several of the Bills of Entry, the officer had rejected the declared value and reassessed it under rule 5/6 of the 1988 Valuation Rules. Thus, redetermination of the value again by the impugned order is illegal;

(vii) The demand of differential duty is, therefore barred; and

(viii) Penalties could not have been imposed on the importers and Raj Kumar Anand.

18. Shri Shiv Shankar, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

(i) The involvement of Raj Kumar Anand in fraudulent import of PU leather cloth/fabrics through firms is confirmed from his statements made under section 108 of the Customs Act and email records from the laptop showing invoices, payment instructions and communication regarding mis-declaration of thickness;

(ii) The request for cross-examination by the appellant was correctly rejected;

(iii) The DRI had produced evidence showing that the differential amount between the two sets of invoices was remitted to foreign suppliers through hawala transactions and this fact was admitted by Raj Kumar Anand in his statements recorded on May 27, 28, and 29, 2005;

(iv) The demand drafts were voluntarily deposited by the appellant;

(v) The Commissioner rightly rejected the transaction value under rule 10 of the 1988 Valuation Rules and re-determined it under rules 5 and 6 of the 1988 Valuation Rules;

(vi) The contention of the appellant that the documents were retrieved from the laptop behind the back of Raj Kumar Anand is not correct as Raj Kumar Anand had been given an opportunity to be present during the retrieval of the documents.

(vii) The documents retrieved from the laptop clearly establish two sets of invoices;

(viii) The extended period of limitation was correctly invoked; and

(ix) Penalty under section 114A was correctly imposed.

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

20. The first issue that arises for consideration is whether the statements of Raj Kumar Anand recorded under section 108 of the Customs Act could be made the basis for rejection of the transaction value under rule 10 of the 1988 Valuation Rules.

21. In this connection, it needs to be noted that these statements were recorded on May 27, 28 and 29, 2005 when Raj Kumar Anand was in the custody of the DRI Officers. He was arrested on 28.05.2005 and produced before the Duty Magistrate. Immediately on the next day, i.e., 30.05.2005, Raj Kumar Anand submitted a hand-written letter to the Trial Court through the Jail Superintendent complaining that the statements had been recorded under duress by not only physically beating him, but also threatening him of his wife's arrest. The Commissioner has rejected the contention that the statements were not voluntary and were obtained under duress or compulsion for the reason that merely on threats of arrest he would not have written whatever was dictated to him. The Commissioner further held that facts stated by him were also corroborated by the invoices and emails recovered from the laptop.

22. It may not be necessary to examine the issue from this aspect, because the statements recorded under section 108 of the Customs Act

cannot be considered as relevant if the procedure contemplated under section 138B is not followed.

23. 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.

24. Section 138B of the Customs Act deals with relevancy of statements under certain circumstances 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, —
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> (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.
>
> **(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."

25. 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 this provision. It is these statements which are referred to in 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) of the Customs Act 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.

26. In the case of **M/s Surya Wires Pvt. Ltd.** vs. **Principal Commissioner, CGST, Raipur**[7], a Division Bench of this Tribunal examined the provisions of section 108 and 138B of the Customs Act as also the provisions of section 9D and 14 of the Central Excise Act, 1944, which are similar to the provisions of section 108 and 138B of the Customs Act, and the observations are:

> "**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

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

> 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."
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> **(emphasis supplied)**

27. In **Ambika International** vs. **Union of India**[8] 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 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

8. 2018 (361) E.L.T. 90 (P&H)

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.**
>
> 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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> *****
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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)

28. In **Hi Tech Abrasives Ltd.** vs. **Commissioner of C. Ex. & Cus., Raipur**[9] 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 appellants 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 admitted clandestine removal of goods. The contention of the appellants 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.**
>
> 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**

9. 2018 (362) E.L.T. 961 (Chhattisgarh)

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."

(emphasis supplied)

29. In **Additional Director General (Adjudication)** vs. **Its My Name Pvt. Ltd.**[10] 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,**

10. 2021 (375) E.L.T. 545 (Del.)

for ready reference, Section 138B of the Act, thus:*****

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 adjudication proceedings, as to criminal proceedings.

*****

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.**"

(emphasis supplied)

30. In **M/s. Drolia Electrosteel P. Ltd.** vs. **Commissioner, Customs, Central Excise & Service Tax, Raipur**[11] 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 Pvt. Ltd.** vs. **Union Of**

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

India[12], 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 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. *****
>
> 16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible."
>
> **(emphasis supplied)**

31. Thus, the statements made by various persons under section 108 of the Customs Act could not have been relied upon by the Commissioner

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12. 2016 (340) E.L.T. 67 (P & H)

(Appeals) to record a finding that the appellant had smuggled 69 gold bars of foreign origin.

32. In this view of the matter, reliance on the statements of Raj Kumar Anand to support the plea of under valuation is not justified.

33. The next issue that arises for consideration is regarding the print-outs retrieved from the laptop of Raj Kumar Anand.

34. The impugned order and the show cause notice mention that the laptop was recovered from the residential premises of Raj Kumar Anand though the panchnama dated 27.05.2005 mentions that the laptop was seized from the business premises of Baba Leather. This raises serious doubts. In any case, the laptop was not sealed at the time of recovery and was in the custody of the Investigating Officer in an unsealed condition till the retrieval of the documents from the laptop. This is clear from the panchnama dated 27.05.2005 as it does not record that the laptop was sealed.

35. It also needs to be noted that the print-outs were not retrieved from the laptop of Raj Kumar Anand in his presence. The Commissioner has laid much emphasis on the fact that during the course of personal hearing held on 18.07.2007, the DRI Officer had categorically stated that an offer had been made to Raj Kumar Anand to be present at the time of retrieval of the documents and even though Raj Kumar Anand and his counsel were present when this submission was made by the DRI Officer, they did not contradict the statement of the DRI Officer.

36. It was imperative for the Commissioner to have ascertained whether any notice was issued to Raj Kumar Anand to be present at the time of retrieval of the documents from the lap. As seen from the order, even though the DRI Officer had stated that notice was issued but such a

notice was not brought on record. In such circumstances, the inference drawn by the Commissioner that opportunity was given to Raj Kumar Anand was present at the time of the retrieval of the documents is incorrect.

37. The contention of the appellant that he was coerced to subsequently sign the panchnama, therefore, deserves to be accepted as he was not present at the time of the retrieval of the documents from the laptop.

38. Even otherwise, the procedure contemplated under section 138C of the Customs Act was not followed for retrieving the documents from the laptop as the required Certificate has not been brought on record.

39. The charge of mis-declaration of thickness of the goods is based on the statements of Raj Kumar Anand and the documents retrieved from the laptop belonging to Raj Kumar Anand and the panchnamas. As noticed above, no reliance can be placed on the statements of Raj Kumar Anand as the procedure contemplated under section 138B of the Customs Act had not been followed. Reliance cannot also be placed on the documents retrieved from the laptop belonging to Raj Kumar Anand as he was not present when they were retrieved. The panchnamas do not also mention that the thickness of the PU leather fabric was physically measured. The samples were also not sent to any agency to ascertain the actual thickness of the goods and even the laboratory reports have not been relied upon in the show cause notice. In paragraph 133 of the impugned order, the Commissioner has merely referred to the goods at Kolkata which were found to have higher thickness than the goods involved in this appeal.

40. It needs to be noted that during the period of import from September 2001 to May 2005, all input consignments were given out of

charge order only after physical examination. To substantiate that the appellants had correctly declared the description and thickness in the Bill of Entry, the appellants had obtained information under the Right to Information from the concerned ports, which ports furnished the information. From the said information it is clear that out of charge order was given after physical examination. This means that the proper officers who issued the order did not find any discrepancy in the description and/or through thickness, though in some cases, the officers had assessed the duty enhancing the value.

41. The Commissioner rejected the data of contemporaneous import not for the reason that the data was not genuine or the goods were not comparable or the imports were not contemporaneous but for the reason that the "appellant may have asked for the information in respect of only those Bills of Entry in which the value corresponds to his own declaration and, therefore, this will not give the complete truth". This could not have been made a ground to reject the transaction value and if the Commissioner had any doubts, he could have obtained information regarding the other Bills of Entry from the ports but the information obtained by the appellant under the Right to Information Act from the department could not have been discarded in this manner. Even if one import of identical/similar goods with value similar to those declared by the appellant was available on the database, the same should have been accepted for determination.

42. There is no evidence on record that the appellant had paid any amount over and above the invoice value, directly or indirectly, to the overseas suppliers. The statements of Raj Kumar Anand that the differential value were transferred through hawala can not be relied upon

as the procedure contemplated under section 138B of the Customs Act had not been followed.

43. Thus the rejection of the transaction value under rule 10 of the 1988 Valuation Rules and re-determination under rules 5/6 is not justified.

44. In this view of the matter, penalty could not have been imposed upon the appellants under section 114A of the Customs Act or upon Raj Kumar Anand under sections 112(a) and 112(b) of the Customs Act.

45. The impugned order dated 31.08.2007 passed by the Commissioner, therefore, deserves to be set aside and is set aside. All the six Customs Appeals are, accordingly, allowed.

(Order pronounced on **12 .05.2026**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Apoorva, Shreya