IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.1

Customs Appeal No.76048 of 2019

(Arising out of Order-in-Original No.Kol/Cus/Commissioner/Port/82/2018 dated 31.12.2018 passed by Commissioner of Customs (Port), Kolkata)

Commissioner of Customs (Port), Kolkata
(15/1, Strand Road, Kolkata-700001)

Revenue

VERSUS

M/s Kalpena Plastiks Ltd.
(33, Shakespeare Sarani, Flat No.7A, 7th Floor, Kolkata-700017)

Assessee

APPERANCE :

Shri S.Dutta, Authorised Representative for the Appellant
Shri Ankit Kanodia & Ms.Megha Agarwal, both Advocates for the Respondent

WITH

Customs Appeal No.75319 of 2026
Customs Appeal No.75320 of 2026
Customs Appeal No.75321 of 2026

(Arising out of Order-in-Original No.Kol/Cus/Commissioner/Port/82/2018 dated 31.12.2018 passed by Commissioner of Customs (Port), Kolkata)

M/s Kalpena Plastiks Ltd.
(12, Dr.U.N.Brahmachari Street,Maruti Building,5th Floor,Flat No.5F,Kolkata-700017)
Shri Narrindra K. Suranna, CMD
Shri Tara Chand Jain, Director

Assessee

VERSUS

Commissioner of Customs (Port), Kolkata
(15/1, Strand Road, Kolkata-700001)

Revenue

APPERANCE :

Shri Ankit Kanodia & Ms.Megha Agarwal, both Advocates for the Appellant
Shri S.Dutta, Authorised Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75638-75641/2026

Customs Appeal No.76048 of 2019 & 75319-75321 of 2026

DATE OF HEARING : 20 MAY 2026

DATE OF PRONOUNCEMENT : **22 MAY 2026**

Per Ashok Jindal :

Both sides are in appeals against the impugned order. The assessee and the co-noticees have challenged the impugned order for confirmation of demand of Customs duty along with interest and imposition of penalty invoking Section 135 of the Customs Act, 1962.

2. Revenue is in appeal for non-imposition of redemption fine on the assessee.

3. The facts of the case in brief are that the Appellant-Assessee, formerly known as M/s. Sarla Gems Limited, is engaged in the import and trade of polymer and plastic raw materials under the Advance Authorisation ("AA") and Duty-Free Import Authorisation ("DFIA") schemes of the FTP. During 2009–2012, the Appellant obtained 29 authorisations from DGFT, Kolkata — 15 under Notifications No. 93/2004-Cus dated 10.09.2004 and 96/2009-Cus dated 11.09.2009 (AA), and 14 under Notifications No. 40/2006-Cus dated 01.05.2006 and 98/2009-Cus dated 11.09.2009 (DFIA) — declaring M/s. Kalpena Industries Limited ("KIL") as the supporting manufacturer in each application.

3.1 Under these authorisations, the Appellant imported polymer raw materials with total CIF value of Rs. 67,51,85,463/- and duty foregone of Rs.14,97,51,922/- (Rs.9,84,42,093/- under AA and Rs. 5,13,09,829/- under DFIA). The transaction architecture was: (i) merchant-exporter (Appellant) tied with named supporting

manufacturer (KIL); (ii) high-seas purchase of consignments sold by KIL to the Appellant under registered HSS agreements; (iii) discharge of export obligation by way of deemed exports to THPL, a 100% EOU under Chapter 7/8 of the FTP. This structure is expressly permitted by Para 4.1.3 read with Para 4.1.7 of FTP 2009-14, Para 4.04 of HoP (AA to merchant-exporter with supporting manufacturer); Para 8.2(b) (supply by DTA unit to EOU recognised as deemed export); and Para 8.3.1(ii) read with Para 4.28 of HoP (discharge of EO under AA/DFIA by deemed export to EOU on production of CT-3 and Central Excise attested invoice).

3.2 Upon completion of deemed export supplies, the DGFT, Kolkata, after due verification, issued Export Obligation Discharge Certificates (EODCs) for all 29 authorisations. On the strength of these EODCs, the customs bonds executed at the time of import stood duly redeemed and vacated by the jurisdictional Bond Cell of the Customs House, Kolkata, and bank guarantees, if any, were returned. This administrative closure of every one of the 29 authorisations by the Customs Department itself is an admitted and undisputed fact. No proceeding has ever been initiated by DGFT, Kolkata or by any other Regional Authority to revoke, cancel or reopen any of the EODCs; the EODCs remain valid and subsisting till date.

3.3 DRI, Kolkata Zonal Unit, on the basis of intelligence, issued SCN No. DRI F. NO. 02/KOL/APP/2013/Pt./KPL/4147 dated 29.08.2014 under Section 124 read with Section 28 of the Customs Act, 1962, alleging that the Appellant misused the AA/DFIA schemes by diverting

duty-free imported raw materials in the open market and that the deemed exports to THPL were fictitious. The SCN proposed (i) confiscation under Section 111(o); (ii) demand of Rs. 14,97,51,922/- under Section 28(4); (iii) interest under Section 28AA; and (iv) penalty under Section 114A. The Appellant filed a detailed reply dated 15.03.2016 denying every allegation.

3.4 Significantly, the SCN was issued by DRI without any prior reference to or consultation with DGFT, Kolkata, and without first seeking revocation of the EODCs from the licensing authority. The proceedings have thus been initiated in direct disregard of the jurisdictional scheme of the Foreign Trade (Development & Regulation) Act, 1992 read with the FTP, under which the licensing authority alone is competent to determine fulfilment of export obligation.

3.5 Equally significantly, five separate Show Cause Notices were issued by the Commissioner of Central Excise, Kolkata-V to THPL alleging short payment of duty on DTA clearance of manufactured excisable goods. Each of these Central Excise SCNs, and the OIOs passed thereon (three of which were the subject of appeals before this Hon'ble Tribunal), proceeded on the express footing that THPL actually received inputs from suppliers including the Appellant, manufactured goods therefrom, and cleared those goods. These contemporaneous departmental records from a sister CBIC authority are in direct contradiction to the DRI's theory that no goods ever moved from the Appellant to THPL.

3.6 The Ld. Commissioner of Customs (Port), Kolkata, adjudicated the SCN by the impugned OIO dated 31.12.2018, confirming the full

demand along with interest and penalty, and additionally recording at Paragraph 46 that the ingredients of Section 135 stand attracted. The Appellant filed WPA 5060 of 2019 before the Hon'ble Calcutta High Court on 01.03.2019, and the Hon'ble Court vide order dated 12.07.2019 granted protection against coercive action, extended from time to time till leave was granted on 21.04.2026 to file the present statutory appeal.

4. The ld.Counsel for the appellant-assessee, submits that the EODC issued by DGFT is conclusive of fulfilment of export obligation; Customs cannot sit in appeal over DGFT.

4.1 He further submits that all 29 authorisations were issued by DGFT, Kolkata after due application of mind. The Appellant discharged the export obligation by deemed export supplies to THPL under documents — ARE-3, CT-3, Central Excise attested invoices — expressly contemplated by Para 8.3.1(ii) of HoP. On verification, DGFT issued EODCs for all 29 licences. On production of EODCs, the Customs Bond Cell itself vacated the bonds. No revocation/cancellation of any EODC has been initiated by DGFT.

4.2 It is also submitted that the customs bond under Notifications 96/2009-Cus and 98/2009-Cus is a conditional instrument — a continuing undertaking to pay duty if EO is not discharged. Once EODC is issued and the bond vacated, the foundation of any demand under Section 28(4) read with these Notifications ceases to exist. The Department cannot approbate and reprobate by demanding the very duty whose security it has voluntarily released.

4.3 It is further submitted by the ld.Counsel for the appellant-assessee that the jurisdiction to determine fulfilment of export obligation vests in DGFT under the FT(D&R) Act, 1992 read with the FTP. The Customs authority's role is limited to verifying compliance with the conditions of the exemption notification; and the EODC is conclusive proof that those conditions stand satisfied. If the Department was aggrieved with the issuance of EODC, the appropriate course was to approach DGFT for revocation — which has not been done.

4.4 It is further submitted that the Ld. Commissioner has not recorded any finding that the EODCs were procured by fraud, collusion or wilful misrepresentation; nor has any proceeding been initiated by DGFT to cancel any EODC. In the absence of any such determination by the licensing authority, the EODCs remain valid and subsisting, and the demand on the ground of violation of notification conditions is wholly unsustainable.

4.5 Futher, he submits that the CBIC has itself, in Circular No. 16/2017-Cus dated 02.05.2017, clarified that recovery proceedings should be initiated only where the assessee fails to submit the EODC — thereby treating the EODC as conclusive of EO fulfilment. Though the Circular post-dates the period of dispute, it reflects the CBIC's settled understanding; this Hon'ble Tribunal has applied this position even to pre-2017 periods in Skipper Ltd. To support his contentions, he relies on the following decisions :

Titan Medical Systems Pvt. Ltd. v. Collector of Customs, New Delhi, 2003 (151) ELT 254 (SC);

Autolite (India) Ltd. v. UOI, 2003 (157) ELT 13 (Bom.);

Skipper Ltd. v. CC (Port), Kolkata, 2025 (27) Centax 246 (Tri.-Cal); *Aditya Birla Nuvo Ltd. v. CC, Bangalore, 2010 (249) ELT 273 (Tri.-Bang.)*, affirmed in *2021 (378) ELT 42 (Kar.)*;

Vedanta Ltd. v. CC, CESTAT Chennai, Final Order dated 23.01.2026; *SvamToyal Packaging Industries Pvt. Ltd. v. Pr. CC (Import), ICD Tughlakabad, CESTAT New Delhi, Final Order dated 21.02.2025*; *Hindustan Lever Ltd. v. CC (EP), Mumbai, 2012 (281) ELT 241 (Tri.-Mum.)*;

Goldfinch Hotels Pvt. Ltd. v. CC (ACC & Exports), Mumbai, 2015 (328) ELT 282 (Tri.-Mum.) (applying *Vadilal Chemicals Ltd. v. State of A.P., 2005 (192) ELT 33 (SC)*);

Interglobe Enterprises Ltd. v. CC, New Delhi, Final Order No. 51777/2025 dated 20.11.2025;

Bestech Hospitalities Pvt. Ltd. v. CC (Preventive), New Delhi, Final Order Nos. 51143-51145/2025 dated 05.08.2025.

4.6 He further submits that the Commissioner of Central Excise, Kolkata-V issued five separate SCNs to THPL, the 100% EOU, prior to the DRI SCN dated 29.08.2014. Each Central Excise SCN, and the OIOs passed thereon (three of which were the subject of appeal before this Hon'ble Tribunal), proceeded on the express footing that THPL had received raw materials from suppliers including the Appellant, manufactured excisable goods therefrom, and cleared those goods into DTA on alleged short payment of duty.

4.7 It is further submitted that these contemporaneous departmental records are in direct and irreconcilable conflict with the DRI's hypothesis that no goods ever moved from the Appellant to THPL. One wing of the same Department — the Central Excise Commissionerate — has demanded duty from THPL on the footing that goods were received; another wing — the DRI/Customs — demands duty from the Appellant on the footing that the same goods were never received. Both positions cannot be simultaneously sustained.

4.8 It is further submitted that the settled principle of administrative law forbids the State from approbating and reprobating. The Department cannot blow hot and cold simultaneously across its own divisions. Reliance: Pune Cantonment Board v. UOI, AIR 1957 SC 627; Babulal v. Caltex (India) Ltd., AIR 1967 Bom 6.

4.9 Further, he submits that the Appellant produced certificates issued by the Superintendent of Central Excise, Range, certifying receipt of imported goods by THPL on the basis of RG-23 Part-II purchase registers and ER-1 returns. This is the very mode of certification contemplated by Para 8.3.1(ii) of HoP (Vol. I).

4.10 He submits that the Ld. Commissioner discards these certificates at Para 41 of the OIO merely because (a) they are based on records only, (b) no physical verification was done, and (c) the Superintendent was not informed the certificate would be used for EODC. These objections are misconceived: the scheme does not contemplate physical verification at the recipient EOU end as a condition precedent; the

statutory format envisages signature on ARE-3/invoice on the basis of RG-23 and ER-1 returns.

4.11 Further, he submits that once a gazetted Central Excise Officer issues such a certificate, the burden shifts to the Department to prove that the certificate is false or fabricated — by independent forensic or documentary evidence. The Department has done nothing of the kind. An adjudicating Customs authority cannot, by a side-wind years later, sit in review over gazetted Central Excise attestations and discard the entire deemed export architecture of the FTP.

4.12 It is further submitted that the Ld. Commissioner has heavily relied on statements recorded under Section 108 of vehicle owners, transporters, drivers, CHA representatives and other persons. Despite specific written requests, cross-examination was denied on the reasoning (at Para 50.1) that the diversion is "well established" and that Section 138B is "not applicable".

4.13 He further submits that this reasoning is fundamentally erroneous. The right to cross-examine flows from natural justice and is independent of Section 138B. When statements under Section 108 form the bedrock of an adverse adjudication, denial of cross-examination is a per se violation of natural justice and vitiates the proceedings. Reliance: Andaman Timber Industries v. CCE, 2015 (324) ELT 641 (SC); CCE, Hyderabad-IV v. Venkateswara Silk Mills, 2024 (25) Centax 403 (Telangana).

4.14 He further submits that this is all the more so because the very transporter Shri Dinesh Singh, whose statement is relied upon, admits at OIO Para 12.4(ix)-(x) that "drivers of truck used to be deployed for the purpose. Many trucks were taken by them from the market. Hence he did not know about those drivers and their credentials." That admission alone negates strict attribution to the Appellant for any incorrect vehicle number — yet cross-examination was denied. The order is liable to be set aside on this short ground alone.

4.15 It is further submitted that the Annexure-B to the SCN itself admits that in about 65% of the consignments "no enquiries could be undertaken at all"; and within the remaining 35%, the enquiry was inconclusive in approximately two-thirds. Despite this admittedly partial and largely inconclusive enquiry, the Ld. Commissioner has confirmed the full demand of Rs. 14.97 Crores on 100% of the consignments across all 29 authorisations.

4.16 He further submits that a finding of alleged non-movement in a small and inconclusive subset cannot be extrapolated to the universe. Reliance: Continental Cement Company v. UOI, 2014 (309) ELT 411 (All.); Arya Fibres Pvt. Ltd. v. CCE, 2014 (311) ELT 529 (Tri.-Ahd.) — both holding that duty cannot be confirmed on extrapolation from a sample.

4.17 Further, the vehicle numbers entered in road-challans are self-reported by the transporter/driver and are not independently verified by the consignor. Minor clerical and digit-transposition errors (WB-11 read as WB-41) are routine in high-volume transactions, and many of the

alleged "bus / tanker / ambulance / taxi / auto" entries are explicable as transposition errors which the DRI has made no attempt to rule out. Several Benches of this Hon'ble Tribunal have held that wrong vehicle numbers, by themselves, do not establish non-movement of goods.

4.18 He further submits that The allegation of diversion of duty-free imported goods is a serious quasi-criminal charge and must be established by clinching and positive evidence — not by assumptions, presumptions and surmises.

4.19 He further submits that despite extensive search and investigation at multiple premises, the Department has produced: (a) no purchase/sale records of any broker or third-party buyer of allegedly diverted goods; (b) no banking trail of payment to any destination outside the THPL chain; (c) no statement of any alleged buyer of diverted goods; (d) no seizure of any diverted goods from the open market. The allegation rests on inference alone.

4.20 It is further submitted that the cash of Rs.17,22,72,185/- seized from M/s. Jaqua Industries has not been forensically traced to any sale proceeds of the Appellant's polymer consignments. This Hon'ble Tribunal, in M/s. Jaqua Industries & Sales Co. Pvt. Ltd. v. CC (Port), Kolkata, Customs Appeal No.75792/2017 dated 29.08.2017, has already held that the ingredients of Section 121 of the Customs Act stand unfulfilled qua that very cash — no sale was established and the identity of buyer and seller was not established. The cash seizure thus furnishes no nexus to the Appellant.

4.21 It is submitted that Section 28(4) can be invoked only on proof of collusion, wilfulmis-statement or suppression of facts with intent to evade duty. The OIO records no positive act on the part of the Appellant evidencing any of these — the demand has been confirmed by extended period invocation without any specific finding of mens rea.

4.22 It is further submitted that every fact relevant to the alleged "evasion" was before two arms of Government throughout: all 29 authorisations were issued by DGFT after scrutiny; all imports were effected through regular customs channels with Bills of Entry filed, assessments completed, licences registered and debited; all EODCs were issued by DGFT after verification of deemed export documents; all bonds were vacated by Customs. The Appellant has not concealed anything. There can be no "suppression" of facts that were openly placed before the Department.

4.23 He further submits that the Hon'ble Supreme Court has settled that mere non-payment is not equivalent to wilful default; "wilful" requires a positive mental element. Reliance: Pushpam Pharmaceuticals Co. v. CCE, 1995 (78) ELT 401 (SC); Cosmic Dye Chemical v. CCE, Bombay, 1995 (75) ELT 721 (SC); Uniworth Textiles Ltd. v. CCE, Raipur, 2013 (288) ELT 161 (SC); Dilip N. Shroff v. CIT, (2007) 6 SCC 329; Indras Agencies Pvt. Ltd. v. CC, 2025 TAXSCAN (CESTAT) 1368 dated 02.12.2025. A bona fide difference on scheme interpretation cannot ground extended period.

4.24 He further pointed out that Paragraph 46 of the OIO records that "the ingredients of Section 135 of the Customs Act, 1962 stand

attracted" without (i) identifying the specific sub-clause; (ii) recording any independent finding of mens rea or "knowing concern"; (iii) arithmetically demonstrating the per-authorisation duty/market-value threshold; and (iv) addressing Article 20(1) of the Constitution.

4.25 It is further submitted that Section 135(1)(a) and (b) requires that the person charged must "knowingly" be concerned in fraudulent evasion. The threshold of mens rea is a sine qua non. The Appellant imported openly through Kolkata Sea Port under 29 DGFT authorisations, filed regular Bills of Entry, suffered regular assessment, and obtained EODCs after verification. On these admitted facts, no element of "knowing concern" in fraudulent evasion can be imputed. Reliance: Kanungo & Co. v. Collector of Customs, (1973) 2 SCC 438; Akbar Badruddin Jiwani v. Collector of Customs, (1990) 2 SCC 203; Hindustan Steel Ltd. v. State of Orissa, (1969) 2 SCC 627.

4.26 It is further submitted that the period of import is 2009–2012. The current calibration of Section 135(1)(i) read with the First Proviso — which carves out the threshold of Rs. 50 lakh for the enhanced punishment category — was brought in by the Finance Act, 2013 (w.e.f. 10.05.2013) and subsequent amendments. The quantum-based classification as it stood at the time of the alleged offence must alone be applied; no retrospective invocation of enhanced penal consequences is permissible in view of Article 20(1) of the Constitution. The OIO does not arithmetically demonstrate, qua each authorisation, whether the duty allegedly evaded crosses the applicable threshold; lumping is impermissible for the purpose of attracting Section 135.

4.27 It is submitted that the findings attributing knowledge rest almost entirely on statements under Section 108 — without following Section 138B (examination-in-chief and cross-examination), without allowing the cross-examination sought, and without the Section 138C certificate for electronic records.

4.28 He further contended that Section 28(4) (a fiscal recovery provision) and Section 135 (a penal provision entailing imprisonment up to 7 years) operate on different planes and require different standards of proof. A Section 28(4) finding cannot, by itself, serve as a springboard for Section 135. This is all the more so where the alleged "evasion" arises from a contested interpretation of post-importation conditions of exemption notifications — a bona fide disagreement on scheme interpretation cannot be elevated to "knowing fraudulent evasion". Reliance: Radheshyam Kejriwal v. State of West Bengal, (2011) 3 SCC 581; P.S. Rajya v. State of Bihar, (1996) 9 SCC 1.

4.29 He further points out that this Hon'ble Tribunal, being the appellate authority over the very adjudication from which the Para 46 finding emanates, has the jurisdiction — indeed the duty — to examine that finding and expunge it if unsustainable. Once the adjudicatory foundation falls, the prosecution predicate cannot survive.

4.30 Further, he submits that the Order-in-Original itself records (correctly) that physical confiscation under Section 111(o) is not feasible as the goods stand cleared. The proposal qua confiscation has thus stood spent.

4.31 He further submits that with the substantive demand being unsustainable for the reasons above, neither interest under Section 28AA nor equal penalty under Section 114A can survive. In this regard, he relies on the following decisions :

CCE v. H.M.M. Ltd., 1995 (76) ELT 497 (SC);

Arihant Arts v. CCE, Mumbai, 2004 (173) ELT 194 (Tri.-Mum.);

Hi Line Pens Pvt. Ltd. v. CCE, Delhi-I, 2003 (158) ELT 168 (Tri.-Del.).

4.32 Finally, he prays for setting aside the Order-in-Original passed by the Ld. Commissioner of Customs (Port), Custom House, Kolkata by allowing their appeals with consequential benefit and the Revenue's appeal be dismissed.

5. On the other hand, the ld.A.R. for the Revenue submitted that as DRI investigated the case and found that the transporter was neither existent nor capable to transport the goods in question. Therefore, the goods have been diverted by the assessee through illicit means in the domestic market. Therefore, they are liable to pay duty and to face consequential action. Further, it is argued that the goods have been diverted in the domestic market. Therefore, they are liable to for confiscation . Consequently, redemption fine is also to be imposed on the assessee.

6. Heard both the parties and considered the submissions.

7. We find that in this case, the following issues have been framed for consideration :

(i) Whether the Customs authorities can demand duty on the ground of non-fulfilment of export obligation when EODCs have been issued by DGFT, Kolkata after due verification in respect of all 29 licences and have not been revoked?

(ii) Whether the demand can be sustained when the Central Excise Department, in five contemporaneous SCNs to THPL, has itself proceeded on the footing that goods were received by THPL — squarely contradicting the DRI's hypothesis of no-movement?

(iii) Whether the impugned OIO can stand when cross-examination of the very witnesses on whose statements the OIO is built has been denied to the Appellant despite specific requests?

(iv) Whether a duty demand on 100% of the consignments under 29 authorisations can be sustained by extrapolation from a vehicle enquiry that admittedly covered at best one-third of the consignments and was inconclusive in the bulk of that subset?

(v) Whether extended period under Section 28(4) of the Customs Act, 1962 is invokable in the absence of any positive act of fraud, collusion, wilful misstatement or suppression?

(vi) Whether the recommendation under Section 135 at Paragraph 46 of the OIO can survive once the foundation of the adjudication falls?

(vii) Whether the facts and circumstances of the case, the goods are held to be confiscated and redemption fine can be imposed or not ?

Issue (i)

Whether the Customs authorities can demand duty on the ground of non-fulfilment of export obligation when EODCs have been issued by DGFT, Kolkata after due verification in respect of all 29 licences and have not been revoked?

8. Admittedly, the assessee has obtained EODC from DGFT and all the bonds were executed by the assessee has been duly discharged and discharged. In that circumstances, the demand against the assessee is not sustainable as held by this Tribunal in the case of Skipper Ltd. Vs. Commissioner of Customs (Port), Kolkata reported in (2025) 27 Centax 246 (Tri-Cal),wherein this Tribunal has observed as under :

> *"8. In view of the above findings, we hold that the Appellant has not contravened the conditions of the exemption Notification No. 96/2009-Cus. dated 11.06.2009, as amended. As the appellant has discharged their export obligation and EODC has been issued by DGFT and the Customs authorities have also released the bond executed by them after satisfying that the appellant has fulfilled all the conditions, we hold that confirming the demand of Customs duty alleging violation of the conditions of the said Notification is bad in law. Therefore, we hold that the demand of Customs duty confirmed in the impugned order is not sustainable.*
>
> *8.1. Since the demand of duty itself is not sustainable, the question of demanding interest and imposing penalty does not arise.*
>
> *9. We also find that the Appellant has not suppressed any information from the Department. In the instant case, the Appellant has completed their export obligation, obtained EODC issued by the DGFT authorities and got the bond released by the*

Customs authorities. Thus, there is no question of wilful misstatement or suppression of facts with intent to evade payment of duty established in this case. Hence, we hold that the demand is not sustainable on the ground of limitation also."

9. Further, in the case of Vedanta Ltd. Vs. Commissioner of Customs vide Final Order No.40139/2026 in Customs Appeal No.40306/2020 dated 23.01.2026, this Tribunal has observed as under :

"25. In any case, we find that the demand has been confirmed by the Commissioner-Respondent under Section 143(3) of the Customs Act, 1962, it is an undisputed factual matrix on record that the bonds executed by the Appellant in respect of the three Advance Authorizations dated 02.01.2009, 30.11.2009 and 10.06.2010 have been cancelled by the Customs albeit after passing of the impugned order; since these bonds stand cancelled, we are of the view that no demand could be enforced under Section 143(3) of the Customs Act, 1962. On this ground as well, the demand so confirmed in the impugned order does not survive. When the demand for duty does not survive, there is no question of levy of any interest or penalty upon the Appellant and therefore, there is no question of confiscation in absence of there being any violation of the provisions of Customs Act, 1962 and / or the Notifications issued thereunder."

10. Further, in the case of Interglobe Enterprises Limited Vs. Commissioner of Customs, New Delhi vide Final Order No.51777/2025 dated 2011.2025, against this Tribunal has observed as under :

"18. In the instant case, the holding of the EODCs was determinative of completing their export obligations towards the import of the three cars. We note that copies of logbooks of all the 3 vehicles were submitted to the departmental authorities

establishing the use of the said three vehicles for transporting guests and used in other tourism related activities. The Department has led no evidence to the contrary. Hence, we hold that the appellant had completed his export obligation and the issuance of EODCs by DGFT are determinative of the same."

As it is evident from the records that the assessee has obtained the EODC from the DGFT and all the bonds issued have also been discharged against 29 licences, therefore, the impugned demand is not sustainable against the assessee.

The issue is answered in favour of the assessee.

Issue No. (ii)

Whether the demand can be sustained when the Central Excise Department, in five contemporaneous SCNs to THPL, has itself proceeded on the footing that goods were received by THPL — squarely contradicting the DRI's hypothesis of no-movement ?

11. We find that in this case, the allegation against the appellant is that they have not sent the goods to M/s THPL, who is the exporter. Therefore, the goods have been diverted in the domestic market, but the Revenue has issued the show-cause notice to M/s Tara Holdings Pvt. Ltd. (THPL) on 29.09.2011 alleging as under :

"It is further indicated from the records that the said assessee had procured raw materials, namely, modified LLDPE Compound without payment of duty from M/s Kalpena Industries Ltd. against CT3 No. THPL/100% E.O.U/R-1/09-10/05 dt. 08.01.2010 (Reference Invoice No. 005462 d. 11.01.2010 and AR3 No. SLV/IV/140-09-10 dt. 11.01.2010); Invoice No.5473 dt. 12.01.2010, 5562 dt. 17.01.2010, 6668 dt. 16.03.2010, 6029 dt. 12.02.2010, 6031 dt. 12.02.2010, 6083 d. 14.02.10, 5939 dt.

08.02.2010 and several others) and also procured PVC compound without filler from M/s Kalpena Industries Ltd. without payment of duty (Ref. Invoice No.4029 dt. 26.03.2010, 4030 dt. 26.03.2010). They had also procured Linear Low Density Polyethylene (LLDP) without payment of duty from M/s Reliance Industries Ltd., Surat (Ref. Invoice No. 101585 dt. 24.12.2009, 101587 dt. 26.12.2009, 101583 dt. 24.12.09."

It is evident from the show-cause notice itself issued to THPL that they have received the goods in question from the assessee before us. Therefore, the allegation that the assessee has diverted the goods into the domestic market, is not sustainable at all. Therefore, the Issue No.(ii) is answered in favour of the assessee.

Issue No.(iii) & (iv)

Whether the impugned OIO can stand when cross-examination of the very witnesses on whose statements the OIO is built has been denied to the Appellant despite specific requests?

Whether a duty demand on 100% of the consignments under 29 authorisations can be sustained by extrapolation from a vehicle enquiry that admittedly covered at best one-third of the consignments and was inconclusive in the bulk of that subset?

12. We find that in this case, no cross examination of the transporter whose statements have been relied upon by the adjudicating authority to the appellant. Therefore, it is gross violation of principle of natural justice. To rely the statement of the witness, the witness is to be examined in Chief and thereafter to be offered cross-examination to the accused,which the Revenue has failed to do so. In that circumstances, the statement

of the transporters cannot be relied upon to allege the diversion of the goods in the domestic market as held by the Hon'ble High Court of Punjab & Haryana in the case of Jindal Drugs Pvt. Ltd. Vs. Union of India reported in 2016 (340) ELT 67 (P & H), wherein the Hon'ble Punjab & Haryana High Court has observed as under :

> *"**6.**The present proceedings essentially emanated from Show Cause Notice No. C.No.V(33)84/HQ/Adj/CE/J&K/JDL/12/1275, dated 5-11-2012 issued to the petitioners by the Commissioner under Section 11A of the Act alleging that the petitioners had without manufacturing any finished products in its premises namely premises in Jammu, wrongly taken refund of ` 48,10,79,820/- during the period November, 2007 to March, 2010 proposing to demand a recovery thereof along with interest and penalty and requiring the petitioners to show cause thereagainst.*
>
> ***7.**Petitioners filed reply to the show cause notice and attended the personal hearing before respondent no. 2. It is contended by the petitioners that the 2nd respondent denied the opportunity for cross-examination of all the witnesses sought by the petitioners except Shri S.C. Tripathi, Accountant of M/s. Gupta Suppliers Company.*
>
> ***8.**In view of the fact that the case of the petitioners is essentially premised on Section 9D of the Central Excise Act, 1944, it would be appropriate to reproduce the said provision, in extenso, thus :*
>
> ***Relevancy of statements under certain circumstances.***
> ***"9D.** A statement made and signed by a person before any Central Excise - (1) Officer of a gazetted rank 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.

The provision of sub-section (1) shall, so far as may be, (2) 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."

9.*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.*

10.*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.*

There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

11.*As already noticed hereinabove, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).*

12.*The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.*

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 sub-section, 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 self-evident 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 sub-section (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 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.

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.*

21.*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.

22.*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.*

23.*Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in C.C.E. v. Parmarth Iron Pvt Ltd., 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :*

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

24.*That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in C.C. v. Bussa Overseas Properties Ltd., 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in Bussa Overseas Properties Ltd. v C.C., 2001 (137) E.L.T. 637 (T).*

25.*In the light of the above, respondent no. 2 is directed to adjudicate the show cause notice issued to the writ petitioners by following the procedure contemplated by Section 9D of the Act and the law laid down by various judicial authorities in this regard, including the principles of natural justice, in the following manner :*

(i) In the event that the Revenue intends to rely on any of the statements, recorded under Section 14 of the Act and referred to in the show cause notices issued to Ambika and Jay Ambey, it would be incumbent on the Revenue to apply to Respondent No. 2 to summon the makers of the said statements, so that the Revenue would examine them in chief, before the adjudicating authority, i.e., before Respondent No. 2.

(ii) A copy of the said record of examination-in-chief, by the Revenue, of the makers of any of the statements on which the Revenue chooses to rely, would have to be made available to the assessee, i.e., to Ambika and Jay Ambey in this case.

(iii) Statements recorded during investigation, under Section 14 of the Act, whose makers are not examined-in-chief before the adjudicating authority, i.e., before Respondent No. 2, would have to be eschewed from evidence, and it would not be permissible for Respondent No. 2 to rely on the said evidence while adjudicating the matter. Neither, needless to say, would be open to the Revenue to rely on the said statements to support the case sought to be made out in the show cause notice.

(iv) Once examination-in-chief, of the makers of the statements, on whom the Revenue seeks to rely in adjudication proceedings, takes place, and a copy thereof is made available to the assessee, it would be open to the assessee to seek permission to cross-examine the persons who have made the said statements, should it choose to do so. In case any such request is made by the

assessee, it would be incumbent on the adjudicating authority, i.e., on Respondent No. 2 to allow the said request, as it is trite and well-settled position in law that statements recorded behind the back of an assessee cannot be relied upon, in adjudication proceedings, without allowing the assessee an opportunity to test the said evidence by cross-examining the makers of the said statements. If at all authority is required for this proposition, reference may be made to the decisions of the Hon'ble Supreme Court in Arya Abhushan Bhandar v. U.O.I., 2002 (143) E.L.T. 25 (S.C.) and Swadeshi Polytex v. Collector, 2000 (122) E.L.T. 641 (S.C.)."

Therefore, the Issue Nos.(iii) & (iv) are also answered in favour of the assesses.

Issue No.(v)

Whether extended period under Section 28(4) of the Customs Act, 1962 is invokable in the absence of any positive act of fraud, collusion, wilful misstatement or suppression?

13. In this case, the show-cause notice dated 29.08.2014 was issued during the period 2013.2014 by invoking extended period of limitation. We find that the above demand is barred by limitation as obtaining EODC from the DGFT by the assessee and the discharging of the bonds were well within the knowledge of the Revenue, therefore, the extended period of limitation is also not invokable in the facts and circumstances of the case.

These issues are answered in favour of the assessee.

Issue No. (vi)

Whether the recommendation under Section 135 at Paragraph 46 of the OIO can survive once the foundation of the adjudication falls?

14. We find that the adjudicating authority has re-commended the proceedings under Section 135 of the Customs Act, 1962, whereas it has been established by the assessee that they have obtained EODC from the DGFT and as per the show-cause notice dated 29.08.2014, THPL received the goods from the assessee. Therefore, the proceedings under Section 135 of the Customs Act, 1962, are not warranted against the assessee as held by the Hon'ble Apex Court in the case of Radheshyam Kejriwal Vs. State of West Bengal reported in (2011) 3 Supreme Court Cases 581. Therefore, this issue is also answered in favour of the assessee.

Issue (vii)

Whether the facts and circumstances of the case, the goods can be confiscated and redemption fine can be imposed or not ?

15. As the goods in question has also been exported as held by us by deciding the Issue No.(i) in favour of the assessee, we hold that the goods in question are not held to be liable for confiscation. Consequently, no redemption fine is imposable.

16. In the result, the appeals filed by the assessee and the co-noticees, namely Shri Narrindra K. Suranna & Shri Tara Chand Jain, are allowed and the appeal filed by the Revenue is dismissed.

(Pronounced in the open court on **22.05.2026**)

(Ashok Jindal)
Member (Judicial)

(K.Anpazhakan)
Member (Technical)

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