CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70520 of 2025

(Arising out of Order-in-Appeal No.07-12-CUS/APPL/LKO/2025 dated 10.01.2025 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

Commissioner of Customs (P), Lucknow .....Appellant
(7A, Ashok Marg, Lucknow-226001)

VERSUS

Shri Md. Shahbaz Siddiqui, ...Respondent
(S/o Mohd. Aleem, R/o 425/62, Ambarganj,
Near Police Chowki, Ambarganj, Lucknow, U.P.-226003)

WITH

(i) Customs Appeal No.70521/2025 (Shri Lal Babu Varma);
(ii) Customs Appeal No.70522/2025 (Shri Rahul Varma);
(iii) Customs Appeal No.70523/2025 (Shri Suagat Jana);
(iv) Customs Appeal No.70524/2025 (Shri Chaudhary Ammar Husain);
(v) Customs Appeal No.70525/2025 (Shri Kishan Varma);

(Arising out of Order-in-Appeal No.07-12-CUS/APPL/LKO/2025 dated 10.01.2025 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

APPEARANCE:

Shri Santosh Kumar, Authorized Representative for the Appellant
Shri Kartikeya Narain, Advocate & Shri V. K. Pandey, Advocate for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NOs.- 70189-70194/2026

DATE OF HEARING : 13.03.2026
DATE OF PRONOUNCEMENT : 02.06.2026

P. K. CHOUDHARY:

These six appeals are directed against the Order-in-Appeal No.07-12-CUS/APPL/LKO/2025 dated 10.01.2025 passed by Ld. Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow by which the appeals filed by the Respondents have been allowed and the confiscation of seized gold bars along with penalties imposed on the Respondents have been set-aside.

2. Brief facts as stated in the impugned order are that a person namely Shri Md. Shahbaz Siddiqui was apprehended by the officials of DRI, Lucknow Zonal Unit along with gold ornaments weighing 946 grams and cut pieces of primary gold weighing 921.7 grams total weighing 1867.7 grams valued at Rs.90,50,385/- on 30.12.2022 at Charbagh Railway Station, Lucknow while he was travelling by Train No.15057 (Gorakhpur Anand Vihar Express) from Gorakhpur to Lucknow. It is the case of the Revenue that when apprehended, Md. Shahbaz Siddique could not produce any document with respect of purchase/import of recovered gold/ gold ornaments.

3. In his statement dated 30.12.2022, Shri Md. Shahbaz Siddiqui stated that he travelled to Gorakhpur to deliver gold jewellery made from smuggled foreign origin gold and in return he received gold pieces from Lal babu and Kishan Verma in Gorakhpur to smuggle the same to Lucknow. The gold jewellery was to be returned to Lucknow after a failed delivery and the same belongs to Suagat Jana and Ammar Hussain of Chauk Lucknow. He confirmed that the recovered jewellery and gold pieces were smuggled from Nepal. Kishan and Rahul told him that the said foreign origin gold was smuggled into India from Nepal. He could not produce any valid document with respect to purchase/import of the said recovered gold bars. The recovered gold was then seized under Section 110 r/w Section 123 of the Customs Act, 1962. Search was conducted at the residence and shop of Shri Lal babu Varma, Shri Kishan Varma, Shri Rahul and Lakhan on 30.12.2022 and the search did not reveal any incriminating evidence. As per CRCL report dated 09.01.2023, confirming the purity of the gold with 76.12% and 99.72% content by weight respectively. The analysis of call data record revealed that Shri Md. Shahbaz Siddiqui, Shri Kishan Verma, Shri Rahul Verma, Shri Chaudhary Ammar Husain and Shri Suagat Jana were in constant touch with each other during the relevant period. Show Cause Notice[1] dated 20.06.2023 was issued to Respondents proposing to confiscate the seized gold and for imposition of penalties. Shri Md. Shahbaz Siddiqui

[1] SCN

(Respondent No.1) in his reply dated 02.02.2024, Submitted that he was a jewellery maker and make jewelleries as per designs desired by the customers. On 28.12.2022, he went to Gorakhpur to sell the jewelleries, but jewelleries were not sold due to design of jewelleries not as per market demand, he also takes cut pieces of primary gold along with him to make the jewelleries from the job worker, due to complexity of design the job worker denied and said it can be done only in Kolkata, Delhi and Surat. After that he returned to Lucknow and apprehended by DRI on 30.12.2022 at Charbagh railway station. He had valid papers of gold cut pieces and jewelleries but DRI had not taken the same on record. Statement under Section 108 of the Customs Act, 1962, taken by the DRI under duress and threat. A typed copy of statement given by the DRI and pressurized to sign the same. Shri Lal Babu (Respondent No.2), Shri Kishan Verma (Respondent No.3) and Shri Rahul Verma (Respondent No.4), in their defence reply, all have denied that they have no business relation with Md. Shahbaz Siddiqui and Md. Shahbaz Siddiqui only calls to them to know the market rate of gold. Shri Suagat Jana (Respondent No.5) in his reply accepted that he very well knew Shri Md. Shahbaz Siddiqui and he had given 146.820 grams gold for making latest design jewellery to Shri Md. Shahbaz Siddiqui. The tax invoice of the gold was annexed with his reply. Shri Chaudhary Ammar Husain (Respondent No.6) replied to the Adjudicating Authority that he knew Shri Md. Shahbaz Siddiqui and he had given 215.870 grams cut pieces of gold for making jewellery from Gorakhpur. The Adjudicating Authority vide Order-in-Original dated 19.03.2024, absolutely confiscated the gold jewellery and cut pieces of primary gold and imposed penalty on the Respondents by relying on the statements recorded and the CDR.

4. Aggrieved with the Order-in-Original dated 19.03.2024, the Respondents preferred separate appeals before the Ld. Commissioner (Appeals), which has been allowed by Order-in-Appeal No.07-12-CUS/APPL/LKO/2025 dated 10.01.2025. The Ld. Commissioner (Appeals) has held that the case was of town seizure with no foreign markings engraved on the recovered gold bars, the Department could not bring any cogent evidence on record to establish foreign origin of recovered gold and its

smuggling into the Country, burden to prove from the Appellants could have possibly arisen only after the Customs had reasonable belief that the gold was smuggled one and therefore, the burden under Section 123 stands discharged. The penalties imposed on the Respondents have also been set-aside in the impugned order.

5. Aggrieved with the impugned order, the Appellants have preferred the present appeals. Ld. Authorized Representative for the Appellant Revenue reiterated the grounds of appeal, as stated in Review Order No.14/2024-25 dated 21.03.2025, to the effect that the Commissioner (Appeals) erred in treating the seizure as town seizure, statement of Shri Md. Shahbaz Siddiqui, Kishan Verma and Rahul Verma recorded under Section 108 is a material piece of evidence, he also admitted that he was not carrying any illicit document, CDR analysis corroborates the statements.

6. *Per contra*, Shri Kartikeya Narain ld. Counsel appearing for Shri Md. Shahbaz Siddiqui (Respondent No.1), Shri Suagat Jana (Respondent No.5) and Shri Chaudhary Ammar Husain (Respondent No.6) submits that the impugned order has been passed after considering and appreciating the entire facts of the case, he submits that it is the case of town seizure and as such there can be no presumption of them being smuggled goods as the goods were not seized from any international border or in any customs notified area. There are no foreign markings on the seized gold Jewellery and cut pieces of primary gold. The purity of gold Jewellery and cut pieces of primary gold was much less than the international standard of 99.99% purity. Statement of Shri Md. Shahbaz Siddiqui at best constitutes hearsay evidence and without there being any other evidence on record the allegation of foreign origin gold and smuggling does not stands proved.

7. Learned Advocate further submits that the Appellant requested the Department many times, for the cross-examination of the witnesses, but it was denied by the Adjudicating Authority in Order-in-Original dated 19.03.2024 for no good reason. Hon'ble Madras High Court observed, in the case of **Vijayaraj Surana vs. Commissioner of Customs,**

Chennai-III reported in (2016) 340 E.L.T. 308 (Mad.) that:-

> ***"7.*** *…….. it has to be noted that each case has to be decided on its peculiar facts. Admittedly, statements have been recorded by the respondent from those three persons under Section 108 of the Customs Act, 1962 and the matter is at the threshold. Therefore, while adjudicating the show cause notices, if the respondent propose to rely any of those statements, the petitioners should be given fair opportunity, because the show cause notices appear to be solely based upon the statements recorded from those three persons. Therefore, in my view, the facts of the present case would require opportunities to the petitioners to cross-examine those three persons, in the event the respondent proposes to rely upon their statements. If the respondent does not propose to rely upon those statements while adjudicating the show cause notices, then the question of affording an opportunity of cross-examination would not arise. However, for that reason, the petitioners should submit their reply to the show cause notices and at the time of adjudication, make a request to the authority for cross-examination, which shall be considered in accordance with law."*

8. Ld. counsel for the other three Respondents, Sri Prakhar Shukla has adopted the arguments of Sri Kartikeya Narain, Advocate and further submitted that penalty under Section 112(b) can be imposed only if improper import of goods is proved, which the Revenue has failed to prove in the present case. So, the findings of the impugned order are correct.

9. Heard both the sides, considered the submissions and perused the appeal records.

10. We find from records that the present case is that of town seizure, where the subject gold bars were seized from Shri Md. Shahbaz Siddiqui while he was travelling from Gorakhpur to Lucknow and there were also no foreign markings on the subject gold bars. Section 110 confers powers on the Proper Officer to seize goods only if has reasons to believe that the goods are liable for confiscation. We find that the Hon'ble Delhi High Court in the case of **Shanti Lal Mehta vs. Union of India & Ors. 1983 (14) E.L.T. 1715 (Del),** has elaborately dealt with town seizures and the evidences required to have the *'reasonable belief'* that the goods are smuggled in nature, in such cases. The relevant portion of the said decision is reproduced below: -

"54.*The other question which was argued before me was that the customs officer did not act on any reasonable belief when he searched the petitioner's premises on 15-12-1967 and seized the goods. Section 110 opens with the words "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods". What is the meaning of "reasonable belief"? Did the officer entertain reasonable belief in the facts and the circumstances of this case? This is the other question to be decided. The Supreme Court has said that reasonable belief is a pre-requisite condition of the power of seizure that the statute confers on the officer. (See Collector of Customs v. Sampathu Chetty, AIR 1962 S.C. 316). The preliminary requirement of Section 110 is that the officer seizing should entertain a reasonable belief that the goods seized were smuggled.*

55.*Reasonable belief as required by Section 110 refers to the point of time when the goods in question are seized and not to a stage subsequent to the act of seizure. (M.G. Abrol v. Amichand, AIR 1961 Bom. 227). The condition precedent that there was such a reasonable belief anterior to the seizure must exist before the presumption under Section 123 can be invoked. Section 123 says :*

Xxxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx

56.*In Babulal Amthalal Mehta v. Collector of Customs, AIR 1957 S.C. 877, while considering the provisions of Section 178A of the Sea Customs Act, 1878, it was observed;*

> *"Though the word `smuggling' is not defined in the Act, it must be understood as having the ordinary dictionary meaning, namely, carrying of goods clandestinely into a country."*

Where Section 123 cannot be invoked it would be for the customs authorities to prove that the goods were imported after the restrictions against import were imposed. (Amba Lal v. Union of India, AIR 1961 S.C. 264 = 1983 E.L.T. 1321). In Pukhraj v. D.R. Kohli, AIR 1962 S.C. 1559 = 1983 E.L.T. 1360, the Supreme Court said that when the court was dealing with the question as to whether the belief in the mind of the officer who effected a seizure, was reasonable or not, the court was not sitting in appeal over the decision of the said officer. All that it could consider was whether there was any ground which prima facie justified a reasonable belief. That the officer had reasonable belief must be stated in the notice to show cause. It must be adjudicated upon by the authorities under the Act. At the stage of appeal or revision from the *orders of the officer adjudging confiscation each successive appellate or revisional authority has also to address itself to this requirement of reasonable belief.*

The seizing officer either by his own evidence or other materials placed before the adjudicating authority, has to prove to its satisfaction that there was ground for him to reasonably believe that the goods were smuggled goods, that is to say that the goods were imported into the country and imported at a time and place when they were restricted or prohibited from being imported. If the adjudicating authority is not satisfied that the goods were seized on a reasonable belief Section 123 cannot be invoked and in that event it would be for the customs authorities to prove that the goods were smuggled and Section 123 in that event would have no application. If, therefore, Section 123 is wrongly applied and the presumption thereunder is raised, without the condition precedent thereunder having been satisfied, the entire inquiry and the order passed therein would be vitiated. In Collector of Customs v. Sampathu Chetty (supra) the Supreme Court under the old Sea Customs Act of 1878 said :

> *"The entire evidence in the possession of the seizing officer would be and has to be before the officer adjudicating the confiscation under Section 182 of the Sea Customs Act. No doubt, on the language of Section 178A the presumption of the goods being smuggled arises only when the seizure is made by an officer entertaining a reasonable belief that the goods are smuggled, and in that sense the reasonable belief of the seizing officer is a pre-requisite for the statutory onus to arise. It is also true that at the stage of adjudication the reasonableness of the belief of the officer effecting the seizure that the goods are smuggled would be the subject-matter of investigation by the adjudicating officer. Nevertheless it is manifest that at the stage of the adjudication (when only the rule of evidence laid down by the section comes into operation) the very facts which led the seizing officer to effect the seizure, as distinguished from their significance as affording a reasonable belief for the seizing officer to hold that the goods are smuggled, are before the adjudicating officer. These facts which justified the seizing officer to reasonably believe that the goods were smuggled would certainly import a rational connection between the facts on which the presumption is raised and the fact to be proved, so that whatever other constitutional infirmity might*

> *attach to the impugned provision, the lack of rational connection is not one of them."*

It would be necessary, therefore, before any person could be called upon to prove that the goods seized from him were not smuggled goods, that the customs officer making the seizure must proceed upon the foundation of a reasonable belief inspired in him by some definite material by way of some definite information or otherwise so that he could be said to have seized the goods in a reasonable belief that they were smuggled goods. (Bapalal v. Collector of Central Excise, AIR 1965 Gujarat 135). The question is whether the record before me shows that there was a reasonable belief in the mind of the seizing officer that the goods were smuggled goods. It does not appear to me that he had entertained any reasonable belief at the time of seizure. Neither the board on appeal, nor the Central Government applied their mind to this question.

Two reasons :

57.*Applying the principles of these cases to the facts of the present case what do we find? Two reasons were given in support of the reasonable belief. One is that the customs authorities received some information. What is that information? It was never disclosed to the petitioner. Nor was it disclosed to the adjudicating authorities. Very vague words such as `on information received' are used in the show cause notice. The information on which the customs authorities act must be definite information. No one suggests that they must disclose the name of the informant. That would be detrimental to investigation and against public interest. The least they can do is to give the gist of the information so that the person from whom the goods are seized knows the nature of the information received by the customs. To hold otherwise would mean that the customs officer can act on any information, wishy-washy though it may be, received from the underworld the nature of which the man in the over-world will not be entitled to know. The words "reasonable belief" used in Section 110(1) are intended to check the exercise of the powers given to the customs officers arbitrarily and without any foundation at all, to the harassment of the general public. The customs officer must have some definite materials by way of some definite information to form the foundation of his reasonable belief (M.G. Abrol supra).*

58.*The second reason for entertaining a reasonable belief is that the seized goods were not accounted for by the petitioner on 15-2-1967 when the officer seized the* *goods from his possession. The seized goods consisted of 20 items of ornaments and diamonds. Out of these six items were released before the show cause notice was issued. One item was released at the adjudication stage. Six items were released by the Board on appeal. Only 7 items have been confiscated. These consist of 2 packets of diamonds and 5 ornaments. The petitioner claimed that they belonged to the queen mother of Nepal. A letter was written to queen mother. On her behalf a reply was received that she had given certain ornaments to the petitioner for polishing, remaking etc., though not for sale. But this was done later on. The letter was written on 3-7-1967. The reply was received on 24-7-1967. But at the time of seizure all that the officer had before him were 2 packets of diamonds and 5 ornaments. Neither the diamonds nor the ornaments had any foreign markings or label to suggest to the customs that these were smuggled goods. In the search list these two packets of diamonds are described as "appearing to be diamonds". This shows that the customs officer did not believe them to be diamonds on any reasonable ground. The ornaments had no foreign label or making. They were ordinary ornaments as are worn in this country. There was nothing peculiar about them. Nothing extraordinary. On this material could any reasonable man entertain a belief that these were smuggled goods?*

59.*The belief must be such as any reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing. Simply because the goods were not accounted for at that time does not necessarily mean that the goods were smuggled goods. Unaccounted goods may be stolen goods. Reasonable belief could be entertained either on the basis of some external indicia or on the basis of some internal information that the goods had been illegally imported into India from Nepal or some other foreign country either without payment of duty or in contravention of any restriction or prohibition imposed by statute. There was nothing to suggest the foreign origin of the goods. There was nothing to suggest the illegal importation of the goods into the country.*

60.*The goods must be smuggled goods. The word `smuggled' means that the goods were of foreign origin and they had been imported from abroad. Only then does the presumption under Section 123 arise. The goods themselves did not suggest that the petitioner was an old smuggler or a dealer in smuggled goods. If there was such information with the customs, they ought to have disclosed it. The goods themselves did not suggest any illicit* *importation. Nor was there any inscription on the goods which could be the basis of the reasonable belief that the goods were of foreign origin. There was nothing in the appearance of the goods to suggest that they had been newly manufactured and brought into this country very recently from another country. In a word there was nothing absolutely from which inferences about their origin or recent import could arise. It was not a case where large quantity of gold with foreign markings was found hidden in the trousers of the accused as happened in Hukma v. State of Rajasthan, AIR 1965 S.C. 476.*

61.*In fact there is a finding by the Board in favour of the petitioner supporting his contention that there could be no reasonable belief in the mind of the officer when he seized the goods. On the penalty of Rs. 25,000/- imposed on the petitioner the Board observed : "there is no definite evidence to show that the appellant knew or had reason to believe that those items were smuggled. In the absence of this evidence the penalty imposed is not justified. The Board accordingly remits the personal penalty in full". If the petitioner did not know that the goods were smuggled, how could the customs officer reasonably believe that the goods were smuggled. The petitioner knew better.*

62.*The customs officer merely thought that as the goods had not been accounted for these are smuggled goods. At the time of seizure what happened was this. The petitioner was present at the shop. He told the customs officer that they were duly entered in his account books but his accountant had gone to the income tax officer. The officer did not wait for the man to arrive to explain the entries to him. He seized the goods and took them away. This was not a case of reasonable belief. It was a case of suspicion. A case of speculation. A case of guess work.*

63.*As a result Section 123 did not apply to the case. There was no reasonable belief. No presumption could be raised under Section 123. There was no obligation on the petitioner to prove that the goods were not smuggled. The burden of proof was wrongly cast on him. The entire inquiry was vitiated."*

The aforesaid judgment has been followed and the test enunciated therein has been applied by this Tribunal in **R.K. Swami Singh vs. Commissioner of Customs (Preventive), Shillong (2024) 18 Centax 459 (Tri-Cal), Neeraj Agarwal vs. Commissioner of Customs (Preventive), Kolkata (2024) 18 Centax 539 (Tri-Cal) and Shri Balwant Raj Soni vs. Commissioner of Customs, Patna in Customs Appeal**

No.75414/2022 [Final Order Nos.75455-75457/2023 dated 18.05.2023 (Tri.-Kol.].

11. Applying the aforesaid test in the present case, we find that the seizure was made on the basis of statement of Shri Md. Shahbaz Siddiqui. On perusal of the statement as reproduced in the SCN, we find that the fact of smuggling was not stated by Shri Md. Shahbaz Siddiqui on the basis of his own knowledge but on the basis of what was told to him by Shri Kishan and Rahul Verma. While the Revenue is heavily relying on the statement of Shri Md. Shahbaz Siddqui and its evidentiary value, we cannot lose sight of the fact that the statement of Shri Md. Shahbaz Siddiqui, at best, constitutes a hearsay statement, as what was stated by him was only hearsay. At the same time, Shri Kishan Verma in his first statement recorded on 30.12.2022 at Gorakhpur, nowhere admitted his involvement in smuggling or foreign origin of recovered gold bars and on 04.01.2023 and 11.01.2023 again the statement recorded of Shri Kishan Verma at Lucknow, where he admitted his involvement in smuggling and he also admitted that the gold comes from Nepal to India. In his reply of the SCN he submitted that the statement given on 30.12.2022 is true and the subsequent statements given at Lucknow DRI office were under duress and threat. Now which statement is voluntary, is improbable to conclude without any corroborative evidence. Now, if we see the statement of Shri Rahul Verma he has nowhere said the foreign origin of recovered gold comes from Nepal to India. So, therefore this event chain starts with a loose link and nothing can be concluded that the foreign origin of recovered gold comes from Nepal to India.

12. In these facts, it was incumbent upon the Revenue to bring on record some other corroborative evidence to support the charge of smuggling. However, no further corroboration has been made by the Revenue by leading any other evidence to show smuggled nature of subject gold bars. Thus, we observe that the reason to believe on which the officers presumed that the recovered gold bars were of smuggled nature is not supported by any corroborative evidence. There is no document available on record to establish that gold bars were smuggled into India without payment of customs duty. Hence the statement of Shri Md. Shahbaz Siddiqui, Kishan Verma and

Rahul Verma does not establish 'reason to believe' that the gold bars were smuggled into India without any valid documents.

13. We also find that the Ld. Commissioner (Appeals) has rightly treated the seizure as 'town seizure' as cases of town seizure requires greater degree of proof of smuggling and the Ld. Commissioner (Appeals), after considering the statements of Shri Md. Shahbaz Siddiqui and Shri Kishan Verma, has rightly held that it shows that seizure was done on the basis of general information. There is no chain of events which shows that who brought the gold, what route and time of smuggling. There is no cogent evidence on record to support the charge of smuggling or foreign origin of seized gold bars.

14. One of the grounds of appeal pertains to the CDR analysis. In our opinion, the call records do not corroborate the case of the Revenue. The call records only demonstrates that the Respondents talked with each other several times during the relevant period, but on the basis of the same it cannot be concluded that the subject gold is of foreign origin and was smuggled into India by the Respondent, unless the subject matter of conversation in call records is brought on record, which admittedly has not been done in the present case. A bench of this Tribunal in **Shafeek P.K. vs. Commissioner of Customs, Cochin 2015 (325) E.L.T. 199 (Tri-Bang.)** has held that it is the subject matter of conversation and not the call records itself, which is material to prove the charge, as under: -

> ***"11.3.*** *Otherwise also, we find that the entire case of the Revenue rests upon the sole retracted statement of Shri Antony Morris. Even if according to the Revenue, the said retraction was only a mechanical retraction and as an afterthought, inasmuch as no force was used to obtain the same, we find that as per the settled law, statement of a co-accused cannot be held as sufficient to nail another person, unless there is an independent corroborative evidence to that effect. The adjudicating authority has nowhere doubted that the appellant was in Dubai during the period of seizure and had only visited India during the last week of July, 2012.* ***However he has relied upon the call data records showing telephonic talks between the appellant with Shri Kannan and Shri Antony Morris. What was the subject matter of the conversations during the call records has not come on record. Merely on the basis of such call records, it***

> ***cannot be concluded that the appellant was the kingpin of smuggling operations, as concluded by the adjudicating authority.*** *It may be observed here, even at the cost of repetition, that except Shri Antony Morris, no other person has named the appellant in the detailed statements recorded by the Revenue. If the goods were meant for the appellant, admittedly the other concerned and connected accused persons would have known about him and would have disclosed the name of the appellant. Not even Shri Kannan, who according to the Revenue, is the kingpin of smuggling operations in India, had mentioned about the appellant. As such, we agree with the learned advocate that the retracted statement of a co-accused cannot be adopted as an evidence to conclude against the appellant, without any other independent corroborative evidence."*

15. A perusal of the Order-in-Original dated 19.03.2024 para 5.2.2.1.a shows that the Shri Md. Shahbaz Siddiqui (Respondent No.1) requested for the cross examination. However, the Adjudicating Authority denied permission for cross examination on the ground that the case was strongly corroborated by the CDR details. In our opinion, this cannot be a ground for not complying with the mandatory procedure specified under Section 138B of the Act. It was held by the Tribunal in the case of **Flemingo (DFS) Pvt. Ltd., Vs. Commissioner of Customs, Visakhapatnam reported in 2018 (363) E.L.T. 450 (Tri-Hyd.)** that if Revenue chooses not to examine any person in the adjudication proceedings, it amounts to giving up that witness and such statement cannot be considered relevant. Hon'ble Delhi High Court in **Basudev Garg vs. Commissioner of Customs 2017 (48) S.T.R. 427 (Del)** has also considered the effect of Section 138B of the Act and has held that both Section 9D and Section 138B are identical. The findings are as under:-

> ***"12.*** *Section 138B of the Customs Act, 1962 reads as under :-*
>
> ***"138B. Relevancy of statements under certain circumstances. -*** *(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -*

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable or

(b) When the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest 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."

It is apparent that both the provisions are identical.

13. *This court while upholding the validity of Section 9D of the Central Excise Act, 1944 interpreted its provisions as under :-*

> *"12. Bare reading of the above section manifests that under certain circumstances, as stipulated therein, statement made and signed by those persons before any Central Excise Officer of a gazette rank during the course of inquiry or proceedings under this Act can be treated as relevant and taken into consideration if under the given circumstances such a person cannot be produced for cross-examination. Thus, this provision makes such statements relevant for the purposes of proving the truth of the facts which it contains, in any prosecution for an offence under the Act in certain situations. Sub-section (2) extends the provision of sub-section (1) to any proceedings under the Act other than a proceeding before the Court. In this manner, Section 9D can be utilized in adjudication proceedings before the Collector as well. In the present case, provisions of Section 9D of the Act were invoked by the Collector holding that it was not possible to procure the attendance of some of the witnesses without undue delay or expense. Whether such a finding was otherwise justified or not can be taken up in the appeal."*

14. *The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have* *adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a 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 and expense which, under the circumstances of the case, the Court considers unreasonable. It is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi judicial proceedings. The Division Bench also observed as under :-*

> *"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf. It goes without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."*

15. *The observations and conclusions arrived at by the Division Bench in the case of J&K Cigarettes Ltd. (supra) would apply with equal vigour to the provisions of Section 138B of the Customs Act, 1962. We find that this aspect of the matter has not been considered by any of the*

> *authorities below. In fact, Section 138B of the Customs Act, 1962 has not been examined at all."*

16. It was for the Adjudicating Authority to follow the procedure and only then he could have relied upon the statements. Having not done so, we hold that the said statements cannot be relied upon and has to be eschewed from consideration.

17. In view of the above, we find that Revenue has not made any case to interfere with the impugned order passed by the Commissioner (Appeals), Lucknow. Accordingly, we are not inclined to interfere with the impugned order.

18. In result, all the six appeals of the Revenue are dismissed.

(Order pronounced in open court on - **02.06.2026**)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

LKS