CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 4

CUSTOMS APPEAL NO. 50559 OF 2024

(Arising out of Order-in-Appeal No. D-II/Exp/ICD/1479-1480/2021-22 dated 23.12.2021 passed by the Commissioner of Customs (Appeals), New Delhi)

Nitin Gupta ...... **Appellant**

Director of M/s Oak Shipping and Services Pvt. Ltd.
D-30, 2nd Floor, Acharya Niketan,
Mayur Vihar, Phase-I,
New Delhi-110091.

Versus

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

New Delhi

AND

CUSTOMS APPEAL NO. 50011 OF 2024

(Arising out of Order-in-Appeal No. D-II/Exp/ICD/1479-1480/2021-22 dated 23.12.2021 passed by the Commissioner of Customs (Appeals), New Delhi)

Nitin Gupta ...... **Appellant**

Director of M/s Oak Shipping and Services Pvt. Ltd.
D-30, 2nd Floor, Acharya Niketan,
Mayur Vihar, Phase-I,
New Delhi-110091.

Versus

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

New Delhi

APPEARANCE:

Shri G.K. Sarkar and Shri Prashant Shrivastav, advocates for the appellant
Shri Rohit Issar, authorised representative for the department

CORUM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

DATE OF HEARING: July 09, 2026
DATE OF DECISION: July 21, 2026

FINAL ORDER NOS. 51218-51219/2026

MR. ASHOK JINDAL:

Both the appeals are having common issue, therefore, both are disposed of by a common order. The facts of the case are as under.

2. The case of the department is that intelligence was gathered by them against various exporters, namely, Yashnavi Exports and Blue Sky

Exports Pvt Ltd, who are the exporters herein. The said exporters were mainly engaged in the manufacture of Readymade Garments falling under chapters 61 and 62 of the Customs Tariff Act, 1975. As per the department, the said exporters have diverted their consignment intended to export from ICD, TKD to destination other than the destination declared in the shipping bills, in order to avail undue benefit of Focus Market Scheme (FMS), Special Focus Market Scheme (SFMS), Market Linked Focus MProduct Scheme (MLFPS) and Merchandise Export from India Scheme (MEIS) under chapter 3 of Foreign Trade Policy. The case of the department is that shipping bills used to file showing country of destination which was notified under chapter 3 of Foreign Trade Policy for availing benefits and after clearance of such shipping bills by the Customs TR-1/TR-2 copies of the shipping bills were used to change the country of destination to a country which was not notified under chapter 3 fo the Foreign Trade Policy. As per the department such amendments were carried out by the key persons of concerned freight forwarding agency as per the directions of the exporters and thereafter, the goods were used to be exported to the changed intended destination. The aforesaid allegations have been made by relying on the statement of the appellant as well as the exporters recorded under section 108 of the Customs Act, 1962. On the basis of these statements, the show cause notices were issued to the appellant to impose penalty under section 114(iii) and 114AA of the Customs Act, 1962. The show cause notices were adjudicated and relying on the statement recorded under section 108 of the Customs Act, 1962, the penalty on the appellant was imposed under section 114(iii) and 114AA in both the appeals. Aggrieved from the said orders, the appellant is before me.

3. Learned counsel for the appellant submits that in these cases, penalty has been imposed on the appellants relying on the statement

recorded during the course of investigation without any corroborating evidence brought on record. It is the submission that in terms of section 138B of the Customs Act, 1962, the statement recorded during the course of investigation is required the Examination-in-Chief is to be done first and thereafter cross-examination is required to be given to the appellant. As in this case, provisions of section 138B have not been followed, therefore, the impugned order is not sustainable in the eyes of law. To support this contention, they relied on the decision of this Tribunal in the case of **Surya Wires Pvt Limited vs. Principal Commissioner of CGST** vide Final Order Nos. 50453-50454 of 2025 dated 01.04.2025 and in the appellant's own case vide Final Order No. 50835-50836 of 2025 dated 04.06.2025..

4. On the other hand, learned authorised representative for the department submitted that as the appellant did not ask for any cross-examination, under the circumstances, provisions of section 138B of the Customs Act, 1962 are not required to be followed by the adjudicating authority as held by the Hon'ble Allahabad High Court in the cae of **Commissioner of Customs (Preventive), Lucknow vs. Sarad Chand Agrahari**, 2026 (396)E.L.T.120(All.) dated 16.01.2026 .

5. In rebuttal to the arguments advanced by the learned aurhtorised representative, learned counsel for the appellant submits that the order of the Hon'ble Allahabad High Court is *per inquirum* to the order of the Hon'ble Apex Court in the case of Additional Director General (Adjudication), **Director of Revenue Intelligence vs. Suresh Kumar and Co. Impex (P) Limited**, 2026 (Centax 258 (S.C.) dated 20.08.2025. The Hon'ble Apex Court held that provisions of section 138B of the Customs Act, 1962 are required to be followed.

6. Heard the parties. Considered the submissions.

7. I find that in this case, learned authorised representative heavily relied on the decision of Sarad Chand Agrahari (supra) of the Hon'ble Allahabad High Court but while passing the said order the Hon'ble High Court has not taken into consideration the decision of the Hon'ble Apex Court in the case of Suresh Kumar and Co. (supra), wherein the Hon'ble Apex Court has recorded as under:

> "Even, while giving reply to the show cause notice, the contents of such statements recorded under Section 108 of the Act, 1962 were not disputed. This, of course, would be relevant only insofar as determining whether there has been due compliance of Section 138C(4) of the Act, 1962 is concerned. The evidentiary value of such Section 108 statements, in any other proceedings, if any would have to be considered in accordance with law, including the compliance of Section 138B of the Act, 1962."

8. Therefore, the decision in the case of Sarad Chan Agrahari (supra) is not relevant to the facts of the case.

9. Further, I find that in appellant's own case, this Tribunal has examined the issue and observed as under:

> "**9**.The issue that arises for consideration is whether the statements recorded under section 108 of the Customs Act can be considered as evidence under section 138B of the Customs Act.
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> **10**. In this connection, reference can be made to the decision of the Tribunal in M/s Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur5. The Tribunal examined the provisions of sections 108 and 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act, 1944 and observed as follows: "21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections

makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of subsection (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as 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."

11. After examining various judgments of the High Court and the Tribunal, the Tribunal observed as follows: "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 crossexamination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/ investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence."
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> **12**. In view of the aforesaid decision of the Tribunal in Surya Wires, the statements made by the appellant and the exporters under section 108 of the Customs Act could not have been considered by the Commissioner of Customs (Appeals). The finding that has been recorded by the Commissioner (Appeals) that the appellant helped the exporters in availing the benefit of drawback cannot, therefore, be sustained.
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> **13**. In this view of the matter, the penalties that have been imposed upon the appellant under sections 114(iii) and 114AA of the Customs Act based on the statements of the appellant and the exporters are set aside.
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> **14**. The impugned order dated April 04, 2022 passed by the Commissioner (Appeals), therefore, deserves to be set aside and is set aside. Both the appeals filed by the appellant are, accordingly, allowed."

10. In view of the decision of this Tribunal in appellant's own case, I hold that as provision of section 138B of the Customs Act have not been followed, therefore, the statement recorder under section 108 of the Customs Act have no relevance and on the basis of the said statement, penalties cannot be imposed on the appellant.

11. In view of this, the penalties imposed on the appellant are set aside, consequently, by setting aside the impugned orders, the appeals are allowed with consequential relief, if any.

(Order pronounced on ....)

(MR. ASHOK JINDAL)
MEMBER (JUDICIAL)

Apoorva