CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70333 of 2023

(Arising out of Order-in-Original No.02/Commr./2022-23 dated 01.11.2022 passed by Commissioner of Customs (Preventive), Lucknow)

Mayank Agrawal **.....Appellant**
(S/o Shree Ram Agrawal
6/8-E-01, Lal Bahdur Shastri Marg
Allahabad-211001)

VERSUS

Commissioner of Customs Preventive **....Respondent**

(CGO Complex, Aliganj Lucknow)

APPEARANCE:

Shri Vineet Kumar Singh, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

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

FINAL ORDER NO.70174/2023

DATE OF HEARING : 02.11.2023
DATE OF DECISION : 02.11.2023

SANJIV SRIVASTAVA:

This appeal is directed against the Order-In-Original No.02/Commr./2022-23 dated 01.11.2023 of the Commissioner of Customs (Preventive), Lucknow. By the impugned order following has been held:-

> *"(i) I order for absolute confiscation of the seized gold bars totally weighing 5,000 Gms and valued at Rs.2,46,00,000/- under the provisions of Section 111(a), 111(b), 111(h), & 111(m) of the Customs Act, 1962. Consequently, the earlier Provisional Release order No. 23/Commr./2022-23 dated 27.10.2022 issued in this regard by the undersigned is accordingly modified.*

ii) I order for confiscation of the seized Hyundai Venue car bearing registration no. UP-70-EX-0465 (under Section 115(2) of the Customs Act, 1962. However, I give an option to the legal owner to redeem the said seized vehicle on payment of redemption fine of Rs. 5,00,000/-(Rupees Five lakh) within one month of receipt of this order failing which the vehicle would be disposed off in terms of the provisions of Customs Act, 1962.

(iii) I order for absolute confiscation of Packing material i.e. HDPE bag under Section 118 of the Customs Act, 1962.

(iv) I impose penalty of Rs.1,00,00,000/-(Rupees One Crore), Rs.1,00,00,000/-(Rupees One Crore) and Rs.5,00,00,000/- (Rupees Five Crore)- Total Penalty Rs Seven Crore, under Section 112 (a), 112 (b) and 114 AA respectively of the Customs Act, 1962 upon Mr. Mayank Agrawal, S/o Shri Shree Ram Agrawal, Address: R/o 6/8E/A-01, Lal Bahadur Shastri Marg, Allahabad, Uttar Pradesh-211001;

(v) I impose a penalty of Rs. 5,00,000/- (Rupees Five lacs) each under Section 112 (a) and 112 (b) respectively of the Customs Act, 1962--Total Penalty Rs Rupees Ten lacs, upon Mr. Rajwan Singh @ Sh. Rajwant Yadav @Rajwansh Singh Yadav, Age- 38 years, S/o Shri Indra Gopal Singh, R/o-CDA (P), Droupadi Ghat, P.S.- Sadar Bazar Cantonment, Allahabad, Uttar Pradesh;

(vi) I impose penalty of Rs. 5,00,000/- (Rupees Five lacs) each under Section 112 (a) and 112 (b) respectively of the Customs Act, 1962--Total Penalty Rs Rupees Ten lacs, upon Mr. Mohammad Sarfaraz Hashmi (Age-43 years) S/o Shri Mohd. Gulab Hashmi, R/o 227, Nakhas Kohna, P.S. Shahganj, Allahabad City, Uttar Pradesh-211003;

2.1 Acting on intelligence that two persons namely Mr. Mohammad Sarfaraz Hashmi & Mr. Rajwant Singh were carrying goods in a Hyundai Venue Car bearing Registration No.UP-70-EX-0465 from Agra to Prayagraj. DRI officers intercepted and searched the vehicle. During search five Gold Bars weighing 5,000 Gm and valued at Rs.2,46,00,000/- was found in possession of the said two persons.

2.2 Thereafter further investigations were undertaken in which it was observed that all the documents which were found from the possession of the said two persons were in the name of Shri Mayank Agrawal appellant before us.

2.3 On 03 bars out of 05 bars marking "The Perth Mint Australia" 1 Kilo 9950 was found but the bar number on these bars was found erased. On fourth bar marking as 'RAND Refinery 9950 FINE GOLD" 1 KILO 9950 was found but "bar number on this bar was alos found erased. On the fifth bar marking was "I KILO GOLD 9950 ASSAY CERTIFIED' ws found on the bar number as "AJ0038812" was found embossed.

2.4 Under a reasonable belief that these gold bars were liable for confiscation they were seized as per the provisions of Section 110 of Customs Act, 1962 and on completion of the investigation a show cause notice dated 02.11.2021 was issued by the Joint Director, DRI, LZU, Lucknow stating as follows:

A. (i) Mohammad Sarfaraj Hashmi (Age 43 years) S/o Shri Mohd. Gulab Hashmi, R/o 227, Nakhas Kohna, P S Shahganj Allahabad City, Uttar Pradesh -211003 (Noticee No 1) (ii) Rajwant Singh @ Rajwant Yadav @ Rajwansh Singh Yadav, Age 38 yrs, S/o Shri Indra Gopal Singh, R/o CDA (P) Droupadi Ghat, P S Sadar Bazar Cantonment, Allahabad, Uttar Pradesh (Noticee No 2) and (iii) Mayank Agarwal, S/o Shree Ram Agarwal Address:R/o 6/8E/A-01, Lal Bahadur Shastri Marg, Allahabad, Uttar Pradesh-211001 (Noticee No 3) to show cause as to why

(i) The seized foreign origin smuggled gold weighing 5000 grams valued at Rs 2,46,00,000/- (Rs Two Crore Forty Six Lakhs only) should not be confiscated under Section 111 (a), (b), (h) & (m) of the Customs Act, 1962 for the easons discussed herein above.

(ii) Vehicle Hyundai Venue car bearing registration No UP 70 EX 0465 should not be confiscated under Section 115 of teh Customs Act,1 962.

(iii) Packing material should not be confiscated under Section 118 of the Customs Act, 1962.

B. Shri Mayank Agarwal, S/o Shree Ram Agarwal Address:R/o 6/8E/A-01, Lal Bahadur Shastri Marg, Allahabad, Uttar Pradesh-211001 (Noticee No 3) to show cause as to why penalty should not be imposed upon him under Section 112 (a) and/or 112 (b) and Section 114 AA of the Customs Act,1962, separately, for the reasons discussed in the show cause notice.

C. Shri Mohammad Sarfaraj Hashmi (Age 43 years) S/o Shri Mohd. Gulab Hashmi, R/o 227, Nakhas Kohna, P S Shahganj Allahabad

City, Uttar Pradesh -211003 and Shri Rajwant Singh @ Rajwant Yadav @ Rajwansh Singh Yadav, Age 38 yrs, S/o Shri Indra Gopal Singh, R/o CDA (P) Droupadi Ghat, P S Sadar Bazar Cantonment, Allahabad, Uttar Pradesh were asked to show cause as to why penalty under Section 112 (a) and/or 112 (b) of the Customs Act, 1962, for the reasons discussed in the show cause notice.

2.5 The show cause notice has been adjudicated as per the impugned order. Aggrieved Appellant has filed this appeal.

2.6 Early hearing application filed by the appellant was allowed vide Miscellaneous Order No 70096/2023 dated 17.10.2023.

3.1 We have heard Shri Vineet Kumar, learned counsel for the appellant and Shri Manish Raj learned Departmental Representative appearing on behalf of the respondent.

- 3.2 Arguing for the appellant, the learned counsel submits that in the present case appellant Shri Mayank Agarwal had specifically requested for cross-examination of two persons namely:
    - Shri Rajat Gupta, Prop. Of M/s Shree Giriraj Ji Jewellers, 198/200, % Hotel The Mansion, Mallapura, Potrakund, Mathura UP; and
    - Shri Rajesh Kumar Gupta, valuer from M/s Badri Narain laxmi Narain Lewellers, Rajkamal Hotel Building, Aminabad Road, Lucknow 226018**.**
- Cross-examination of these two persons have been denied by the Adjudication Authority without assigning any satisfactory reasons.
- The request and the prayer in this appeal is as follows:
    - *"Without affording the opportunity of cross examination, the adjudicating authority cannot rely on the statement straightway.*
    - *When the photographs of gold which were shown to the seller are not a part of RUD, then how the adjudicating authority can rely on such a statement.*
    - *Mere marking is not conclusive evidence that the seized gold bars were of foreign origin.*

- *GST Invoice evidencing purchase of gold bars is conclusive evidence that it was not smuggled."*

➢ *matter needs to be re-adjudicated after allowing the cross examination of the said two persons, as they were neither the panch witnesses nor co-noticee in the case and the reliance is placed on their statements which wer e recorded behind the abc of the appellant.*

3.3 Learned A.R. submits that this issue has been discussed and the Adjudication Authority has relied on various decisions to not to allow the cross-examination of these two persons.

4.1 We have considered the impugned order along with the submissions made in the appeal memo and during the course of argument.

4.2 For denying the cross-examination Commissioner has recorded in the order as follows:-

> *"Noticee No.3 has made request for opportunity of cross examination of following person to meet the requirement of principles of natural justice*
>
> *i. Shri Rajesh Kumar Gupta, valuer from M/s Badri Narain Laxmi Narain Jewelers, Rajkamal Hotel Building, Aminabad Road, Lucknow-226018;*
>
> *ii. Shri Rajesh Kumar Gupta, Prop. of Mis Shree Giriraj Ji Jewellers, 1981200, Clo Hotel The mansion, Mallapura, Potrakund, Mathura, U.P.*
>
> *While Noticee No.1 and 2 have requested vide their written submission dated 21.10.2022 for cross examination of witnesses.*
>
> *The issue has been considered in detail in view of material facts available on records and submission made by the Noticees.*
>
> *Cross examination of Shri Rajat Gupta, Shri Rajesh Kumar Gupta and witnesses as requested by the Noticees is primarily based on the contention that recordings of the proceedings undertaken by the DRI officers in this regard have not been made RUDs in the impugned show cause notice issued to them and after lapse of considerable time, the Noticees have submitted their statement was taken under duress/records available withem was not atken into consideration by the DRI Officers.*

Shri Rajat Gupta of M/s Girraj Ji Jewellers in his voluntary statement recorded under Section 108 of the Act has accepted of selling 05 Gold Bars under invoice 13 dated 30.06.2021 to Noticee No.3 which Noticee No.3 has later on claimed to be the same as seized by the DRI Officers. But Shri Rajat Gupta has clearly stated in his said statement that the Gold Bars which has been supplied by him was in form of molded brick on which no mark, identification number or series number was mentioned whereas several different types of marks are found on all of the seized Gold Bars.

The said statement of Shri Rajat Gupta has neither been so far retracted by him nor there is any documentary evidence available on record that his statement was recorded under duress. It is also a fact that Gold Bars itself have not been challenged by the Noticees. Noticees have also not made any claim that the seized Gold Bars do not bear any mark, number etcas has been submitted by the Sh Rajat Gupta in his voluntary statement recorded under Section 108 of the Act.

Noticees have disputed voluntary statement of Shri Rajat Gupta recorded under section 108 of the Act before the DRI officers on the sole basis of his admission i.e. how he has made submission that the Gold Bars supplied by him do not bear any mark, number etc whereas notices themselves have so far not claimed that the seized goods do not bear any mark, number etc.

The following case laws may be considered in this regard.

12.1. In the case of Sh. Surjeet Singh Chhabra v. UOI, reported in 1996 taxmann.com 71 (SC)/[1997] 89 ELT 646 (SC)[25-10-1996, it was held that

2. It is contended by learned counsel for the petitioner that the petitioner is entitled to cross-examine the Panch witnesses and the Seizing Officer for the goods seized in contravention of the FERA & Customs Duty Act and that the opportunity has not been given. Therefore, it is violative of natural justice.

3 .....perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-

examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioners. So there is no need to call panch witnesses for examination and cross-examination by the petitioners .....

12.II. In the case of Jagdish Shanker Trivedi Vs. Commissioner of Customs, Kanpur [2006 (194) E.L.T. 290 (Tri.-Del.)], Tribunal observed at Para 7.2

"Confessional statements of noticee - Retraction thereof which was otherwise unacceptable, would not entitle them to claim cross-examination of witnesses on aspects which were confessed by them- There is no violation of natural justice principles in such a course...

12.III. The Hon'ble Delhi Tribunal in the case of Onida Saka Ltd. v/s Commissioner of Central Excise, Noida [2011 (267) E.L.T. 101 (Tri.Del)] in para 4 of its order held that

"…….,since the statements» of the persons whose cross-examination has been sought, has not been retracted, there was no necessity for permitting their cross-examination"

Accordingly, in the light of judgment of case laws as detailed supra, I donot find any merit to allow request of cross-examination as made by the Noticee.

12.IV. The Hon'ble Apex Court in case of M/S. Telestar Travels Pvt. Ltd. & ... vs Special Director Of Enforcement on 13 February, 2013 in the Civil Appeals Nos. 1306-1309 of 2013 (Arising out of S.L.P. (C) Nos.15546-15549 of 2008), has observed as under:

"11........ We may usefully refer to the legal position stated in the following paragraph by this Court in K.T.M.S. Mohd. & Anr. (supra):

"34. ...... the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been

obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted.........

20. .....the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. The third limb of the case of the appellants also in that view fails and is rejected."

12.V. The Hon'ble High Court of Telangana in the case of WP.No.18081 of 2020 of Mr Mohammed Muzzamil And Another vs The Central Board Of Indirect Taxes in its order observed and held as under:
"….
"17.The main contention of the petitioners is that there has been a violation of principles of natural justice by the 2nd respondent by relying on the statements made under Sections 108 of the Customs Act, 1962 without permitting the petitioners to cross-examine them.

25.A Constitution Bench of the Supreme Court in Ramesh Chandra Mehta (4 supra) held that the Customs Officer even under the Act of 1962 continues to remain a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become either a police officer, ...

Any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence....

...

...
32.....the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had

retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner." (emphasis supplied)

33. Thus the Supreme Court in Surjeet Singh Chhabra (3 supra) indicated that it is also necessary to consider the question of prejudice to the party who complains of denial of right to cross examine the witnesses, and in cases where there is a confession, such denial is justified and no prejudice can be pleaded by such party.

34. This was reiterated by the Supreme Court in M/S. Telestar Travels Pvt. Ltd. v Special Director Of Enforcement 10 which observed that cross-examination of witnesses would make no material difference and failure to permit the party to cross-examine cannot be said to have caused any prejudice calling for reversal of the orders impugned by directing a denovo enquiry into the matter......

......In our opinion, the principles of natural justice do not require that in matters like this the persons who have given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statements made before the Customs Authorities. Accordingly we hold that there is no force in the third contention of the appellant."

35. Thus there is no doubt that where a plea of violation of principles of natural justice by denying a party an opportunity to cross examine witnesses is raised in proceedings under the Customs Act, 1962 or similar legislation, the question of prejudice suffered to such party by such denial has to be gone into. If there is no prejudice caused by such denial, no relief can be granted to him…....

38. We have also noticed that the petitioners were admittedly given a show-cause notice on 04.04.2016; they gave response there to on 02.03.2017 and 07.10.2019; and their counsel was also given a personal hearing on 02.03.2017 and 09.10.2019. So the contention of the petitioners that there were *violation of other principles of natural justice, cannot also be sustained.*

In the instant case, a show cause notice was issued to the notices and teh notices were duly informed to submit their reply by giving them sufficient opportunity. Further,a number of dates of personal hearings were also fixed to give them an opportunity to submit their view point. The Notice No 3 have submitted their defense reply and also requested for providing them an opportunity to cross examine Shri Rajesh Kumar Gupta, valuer and Shri Rajesh Kumar Gupta, while Noticee No 1 & 2 vide their written submission dated 21.10.2022 have requested for providing them an opportunity for cross examination of witnesses claiming that the GST invoice was available with them at the time of interception of seized vehicle by the DRI officers.

Noticees have never disputed the seizure of recovered Goods under the Fard/ Baramdagi/ Recovery Memo dated 30.06.2021/ 01.07.2021 duly signed by the Noticee No 1 & 2 and Panchas and DRI Officers.

I find that the noticees have made request for cross examination of the persons mainly based on following issues as submitted by them citing the violation iof principle of natural justice:-

A. challenging the voluntary statement of Shri Rajat Gupta tendered before the officers under Section 108 of the act.

B. Technical reports submitted by Shri rajesh Kumar Gupta, valuer

C. Noticee no 1 and 02 were in possession of invoice at the time of interception of seized vehicle by DTI officers.

I find no justification fro violation of principle of natural justice as claimed by the Noticees in view of the opportunities given to them to submit their defence replies as well as providing them further opportunities by way of fixing dates of personal hearing in this regard.

The cross examination of Shri rajat Gupta is being sought by the Noticee No 03 on account of his voluntary statement tendered before the officers under section 108 of the act, wherein he has categorically submitted that the gols supplied by him does not bear any mark, number itself which is contradictory to the afcts and claim of Noticee No 03 that the seized Gold which does have marking, number etc, is being duly purchased from Shri rajat Gupta under the invoice dated 30.06.2021

…..

The request for cross examination of Shri rajesh Kuar Gupta, valuer who has given his opinion regarding *valuation and purity of the seized Gold, I find that the Noticees had taken that report does not indicate that the goods in question were of foreign. It simply gives opinion on purity, weight and value. In the present case, the allegation is that the goods in question are of foreign origin but the report does not give support to teh aforesaid allegation. In this regard, I do not find any discrepancy by the investigating team as they had clearly adhered to a legal procedure of seeking the services of two agencies , Government approved assayer and prestigious Government Lab CRCL, New Delhi. The purity of more than 99% as confirmed by Chief Analyst's report establishes the seized goods as of foreign origin and the confessions made by Noticees that the same were smuggled ones also confirm the a;llegation of show cause notice. More over Noticees under the provisions of Section 123 of the Act are liable to prove the licit movement of the seized Gold, besides as discussed earlier there are ample tangible and corroborative evidence to establish the same.*

Technical report submitted by Shri rajesh Kumar Gupta is an opinion given by person duly approved by the competent authority and the same has not been contradicted by the rest report of sample given by the CRCL, as discussed supra, negligible amount of variation thereof can not be the basis of cross examination as sought by the Noticees. Therefore, cross examination of Shri Rajesh Kumar Gupta in view of observations made by the Hon'ble courts in their various judgments as cited herein above is also not granted.

Hence, I do not find any merit to allow the request for cross examination of the persons made by the noticees in the light of discussion held above and also in the light of observation made by the Hon'ble courts in their various judgments as discussed supra. "

4.3 From the facts as recorded in teh impugned order it is evident that the two persons namely Shri Rajat gupta and Shri Rajesh Kumar Gupta, valuer are neither co-accused in teh matter nor are they the panch witnesses. The persons whose cross examination has been asked by the appellant were the person whose statement revenue intends to rely for proceedings against the appellant. Commissioner ahs in the impugned order relied upon series upon series of judgements which were not on the identical facts as noted in the table below:

Surjeet	1997 (89)	Cross examination of panch witnesses and the

Singh Chabbra	ELT 646 (SC)	officers was not allowed in view of the confessional statement of the accused.
Jagdish Singh Trivedi	2006 (194) ELT 290 (T-(Del)]	Commissioner has in the impugned order quoted the head note which is neither the aprt of the decision and has not even cared to rad the decision. Para 9 of the decisions which is relevant is reproduced below: *"**9.** As noted above, all the noticees including the appellants were informed about all the material which was sought to be relied on against them along with the relevant documents and statements as stated in the detailed show cause notices issued to them, and they sent their replies to the show cause notices. Some of the appellants were represented by consultants. The appellants remained absent on various dates resulting delay in the proceedings. Statements of the two drivers of the vehicles from which contraband silver was recovered, the employee of the appellant Ashish Kumar Chaurasia and the statements of the persons who were travelling in the vehicles for taking the contraband silver to Delhi as also the statements of Ram Avatar Singhal, and the statements of independent persons before whom seizures were made clearly establish that all the appellants were persons concerned with prohibited silver and were liable to imposition of penalty under Section 112 of the said Act. In such a situation insistence for cross-examining one of them can be purely strategic with a view to raise a contention of violation of principles of natural justice. In almost all the cases such persons dealing in contraband would refuse to be cross-examined on the ground that they are accused of an offence and, had a fundamental right against testimonial compulsion under Article 20(3), and thereby create a situation where each one of them, in the same breath, would ask for cross-examination of the other and refuse to be cross-examined, and then contend that refusal has resulted in failure of proper hearing. Therefore, principles of natural justice do not require that in matters like this, persons who had given information should be allowed to be cross-examined by the co-noticees on the statements made before the customs authorities. If cross-examination is to be allowed as a matter of right then in all cases of conspiracy and joint dealings between the co-noticees in the commission of the offences in connection with the contraband goods, they can bring about a situation of failure of natural justice by a joint strategic effort such co-noticees by each one refusing to be cross-examined by resorting to Article 20(3) of the Constitution and simultaneously claiming cross-examination of the other co-noticees. We, therefore, hold that the appellants, including the appellant Ashish Kumar Chaurasia were not entitled to claim cross-examination as a matter of right. The appellant Ashish Kumar Chaurasia had, in fact, cross-examined two official witnesses and at the end, he had only sought for time for further hearing. The cross-examination made by the*

		appellant, Ashish Kumar Chaurasia of two officers, A.K. Chaturvedi and Simon has been set out in the impugned order and it is recorded that, "various dates of personal hearing was given one after the other but neither Ashish Kumar Chaurasia nor his advocate turned up". It is clear from the record that the appellants had been given adequate opportunity of being heard in the matter pursuant to the show cause notice issued under Section 124 of the said Act, and there has not been any violation of the principles of natural justice."
Onida Saka Ltd.	2011 (267) ELT 101 (T-Del)	Tribunal has in the case found that no fruitful purpose will be served if the cross examination of the persons whose cross examination has been sought is denied.
Telestar Travels Pvt Ltd.	2013 (289) E.L.T. 3 (S.C.)	The text of paras relied upon by the adjudicating authority is reproduced below: *"11. The Tribunal has relying upon the decision of this Court in K.T.M.S. Mohd. v. Union of India - (1992) 3 SCC 178, K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin - (1997) 3 SCC 721 = 1997 (90) E.L.T. 241 (S.C.) held that retracted statements could furnish a sound basis for recording a finding against the party making the statement. There is, in that view, no gainsaying that the Adjudicating Authority and the Appellate Tribunal have both correctly appreciated the legal position and applied the same to the case at hand, while holding that the statements were voluntary and, therefore, binding upon the appellants. Decision of this Court in Vinod Solanki v. Union of India & Anr. (2008) 16 SCC 537 = 2009 (233) E.L.T. 157 (S.C.) = 2009 (13) S.T.R. 337 (S.C.) relied upon by Mr. Diwan does not lend any help to the appellants. The decision is an authority for the proposition that a person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by an inducement, threat or promise by a person in authority. The burden is on the authority/prosecution to show that the statement sought to be relied upon was voluntary and that the Court while examining the voluntariness of the statement is required to consider the attending circumstances and all other relevant facts. The decision does not hold that even when a statement is founded upon consideration of the relevant facts and circumstances and also found to be voluntary, it cannot be relied upon because the same was retracted. We may usefully refer to the legal position stated in the following paragraph by this Court in K.T.M.S. Mohd. & Anr. (supra) :* *"34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any*

		inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated..." ***20.*** *Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by Miss Anita Chotrani and Mr. Raut. These documents were, it is admitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly confronted to the appellants was in the nature of production in terms of Section 139 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same was a substantial compliance with the principles of natural justice. That being so, there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected."* From the perusal of the para 20 it is quite evident that cross examination of the person tendering the documents during the course of investigation has been denied. It is not the case were the statements of the person which were recorded during the course of investigation and had been

		disputed by the accused during the adjudication proceedings. In the impugned order Commissioner has recorded that appellant disputed the content of the statements recorded and the opinion given and also produced the evidences in this regard then how by the application of this decision can cross examination request be denied.
Mohammed Muzzamil	2021 (376) E.L.T. 46 (Telangana)]	***"35.*** *Thus there is no doubt that where a plea of violation of principles of natural justice by denying a party an opportunity to cross-examine witnesses is raised in proceedings under the Customs Act, 1962 or similar legislation, the question of prejudice suffered to such party by such denial has to be gone into. If there is no prejudice caused by such denial, no relief can be granted to him. The issues arising in this case are thus answered as above.* ***36.*** *Having perused the impugned order passed by the 2nd respondent, prima facie, it appears to us that the basis for levying penalty against the petitioners were their statements recorded under Section 108 of the Customs Act, 1962, wherein certain confessions appear to have been made by them implicating themselves in the smuggling of cigarettes, which was subject matter of enquiry.* ***37.*** *Therefore, we are of the opinion that no prejudice has been caused to the petitioners by the action of the 2nd respondent in denying an opportunity to them to cross-examine the other persons who had implicated them in the said act of smuggling.* ***38.*** *We have also noticed that the petitioners were admittedly given a show-cause notice on 4-4-2016; they gave response there to on 2-3-2017 and 7-10-2019; and their Counsel was also given a personal hearing on 2-3-2017 and 9-10-2019. So the contention of the petitioners that there were violation of other principles of natural justice, cannot also be sustained.* ***39.*** *In this view of the matter, we are not inclined to entertain this Writ Petition.* ***40.*** *We accordingly dismiss this Writ Petition at the admission stage as not maintainable, giving liberty to the petitioner to avail the alternative remedy of Appeal under Section 129A of the Customs Act, 1962.* ***41. We clarify that we have not expressed any opinion on the merits of the claims of the petitioners and whatever observations have been made by us are only for the purpose of disposal of this Writ Petition and cannot be treated as conclusive; and if any such appeal is preferred by the petitioners, the same shall be decided by the Appellate Authority uninfluenced by any observations made by us in this order. No order as to costs."*** **Para 41 of the decision itself says that the observations are only for the purpose of not admitting the writ petitions and the ammeter should be taken in appeal be that appellants may file without reference to any of the observations made in this decision, Commissioner has relied upon this decision in**

		total ignorance of para 41.

4.4 Section 138 of the Customs Act,1962 provides as under:

"Section 138B. Relevancy of statements under certain circumstances. -

(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

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

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

(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."

This provision is pari-materia to Section 9(d) of the Central Excise Act, 1944, Act which has been considered by the Hon'ble Punjab & Haryana High Court in the case of Jindal Drugs Pvt. Ltd. [2016 (340) E.L.T. 0067 (P & H)]. Hon'ble High Court held as follows:

"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 :

"9D. Relevancy of statements under certain circumstances. - (1) A statement made and signed by a person before any Central Excise 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.

(2) The provision 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."

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.)."

4.5 Similarly in case of Andaman Timbers [2015 (324) E.L.T. 641 (S.C.)], Hon'ble Supreme Court held as follows:

"6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the *price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. …"*

4.6 Relying upon this decision Hon'ble Gujarat High Court has in case of Rajputana Stainless Ltd. [2023 (384) E.L.T. 300 (Guj.)] held as follows:

"15. With regard to the cross-examination of the names of the witnesses which were required to be cross-examination, will need to be dealt with by the officer concerned when the matter is remanded for the purpose of adjudication afresh from the stage where it was left. It is required to be remanded to the officer concerned.

16. The Apex Court in the case of Andaman Timber Industries v. Commissioner of C. Ex., Kolkata-II, reported in CDJ 2015 SC 1277 = 2015 (324) E.L.T. 641 (S.C.) = [2015] 62 taxmann.com 3 (SC) = [2015] 52 GST 355 (SC), was dealing with a case where the assessee had not been allowed cross-examination of the witnesses by the adjudicating authority though the statement of those witnesses were made the basis of the impugned order. This was held "to be a serious flaw which made the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-

examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them." The Apex Court further held in Paragraph 7 as under :

"......."

17. The authority concerned is seeking to rely upon certain statements following the various decisions of this Court, the dialect of which is not necessary and the decision of the Apex Court is sufficient enough to bring to the fore the requirement of permitting the cross-examination of witnesses whose statements are sought to be relied upon by the authorities."

4.7 Hon'ble Bombay High Court has in case of Rishabh Sanghvi [2019 (367) E.L.T. 614 (Bom.)] held as follows:

"6. *In this case, the statements of persons relied upon by the Revenue are not being made available for cross-examination only on account of alleged delay in making application. We are unable to understand how an application seeking cross-examination of the persons being relied upon could be rejected on account of delay in making the application when the impugned order dated 11th September, 2018 itself records that the documents relied upon in the Show Cause Notice were supplied/given to the petitioner on that day itself. Further, there is no time-limit provided in the Act for completion of adjudication proceedings as its object is as to ensure that justice is done to the parties. In fact, the Supreme Court in Andaman Timber Industries (supra) and this Court in Kalpana Industries Ltd. (supra) had held that in the absence of an opportunity to being given to the petitioner to cross-examine the person on whose statement the Revenue is relying upon would render the order bad."*

4.8 Hon'ble Allahabad High Court has in case of Hindustan Mint & Agro Products P. Ltd. [2017 (346) E.L.T. 206 (All.)] held as follows:

"5. *The request for cross-examination has been considered by the adjudicating authority in a cursory manner. The Supreme Court in Andaman Timber Industries (supra) in Paragraph 6 dealt with the issue relating to cross-examination of witnesses by the assessee.*

6. *In the facts and circumstances of the case, it would be appropriate for the adjudicating authority at Chandigarh to examine the issues raised by the petitioners afresh. For this purpose, the petitioners may file an application before the Authority with a copy of the order passed by the Court so that a considered decision can be taken at the earliest."*

4.9 In case of Kay Pan Sugandh Pvt Ltd. [2017 (7) G.S.T.L. 276 (Ori.)] Hon'ble Orissa High Court relying on the decision in case of Andaman Timbers held as follows:

"12. *In such background, the Supreme Court concluded by saying that if the testimony of those two witnesses is discredited then there would be no material for the department on the basis of which they can justify their action and accordingly allowed the appeal. Taking a clue from that, this Court has no hesitation in quashing the impugned order under Annexure-1, which, this Court hereby does. Further, this Court remands the matter back to the opposite party directing him to give opportunity to the petitioner to cross-examine Mr. Tapan Chandra Dey and Soumendra Kumar Sahoo vis-à-vis their statements and conclude the entire proceeding within three months in accordance with law. However, it is made clear that this Court has expressed no opinion on the merits of this case and no observation made herein should in any way influence the opposite party in coming to a conclusion afresh after taking into account the versions of Mr. Tapan Chandra Dey and Soumendra Kumar Sahoo after they are cross-examined."*

4.10 In the present case it is interesting to note that the Commissioner has by the impugned order imposed penalties under Section 112 (a) and 112 (b) on the appellant and others in respect of the same offense. This only goes to show total lack of understanding of the legal provisions by the adjudicating authority. While imposing the penalties in this manner adjudicating authority has even failed to examine the legal provisions and the case law on the subject. Not a single word is recorded in the impugned order as to why penalty is imposable under Section 112 (a) and/ or section 112 (b) in the impugned order. This clearly shows that the impugned order has been passed in haste without even recording a finding on the basic issues and the legal provisions. Explaining the scope of Section 112 (a) and 112 (b) and the spheres in which these two sections operate Hon'b;le Madras High Court has in case of Visteon Automotive Systems India Limited [2018 (9) G.S.T.L. 142 (Mad.)] held as follows:

***"11.** The provisions contained in Section 111 are clearly directed against the goods. In juxtaposition to this, under Section 112(a) of the Act, any person, who in relation to any goods, does or omits to do any act, which act or omission, would render such goods liable for confiscation under Section 111 of the Act, shall be liable to a penalty, in respect of which any prohibition is in force under the Act, not exceeding the value of the goods or Rs. 5,000/-, whichever is greater. Under Section 112(b), any person who acquires possession or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe, are liable to confiscation under Section 111 of the Act, in* *case of dutiable goods other than prohibited goods, and a penalty is liable to be imposed not exceeding the duty sought to be evaded on such goods or Rs. 5,000/-, whichever is greater. Thus, it is the importer or the person who acquires possession or sells, etc., the goods that are liable to confiscation under Section 111, is liable to be dealt with for imposition of penalty."*

4.10 In our view the matter needs to be reconsidered by the Original Authority after permitting the cross-examination of the above referred two persons before deciding the matter.

5.1 The appeal is allowed. Matter is remanded to the Original Adjudicating Authority for allowing the cross examination request of the appellant. While remanding we keep all the issues open.

(Dictated and pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal