

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70448 of 2024

(Arising out of Order-in-Appeal No.01(R)-CUS/APPL/LKO/2024 dated 01.03.2024 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

Mr. Raj Kumar Swarnkar,

.....Appellant

(1249/3G, Purani Fal Mandi,
Makarikhoh, Opp. BLJ School, Mirzapur-231001)

VERSUS

Commissioner of Customs, Lucknow

....Respondent

(3/194, Vishalkhand-3,
Gomti Nagar, Lucknow-226010)

APPEARANCE:

Shri Kartikeya Narain, Advocate for the Appellant

Shri A. K. Choudhary, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70154/2025

DATE OF HEARING : 02.01.2025
DATE OF PRONOUNCEMENT : 02.04.2025

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.01(R)-CUS/APPL/LKO/2024 dated 01.03.2024 passed by the Ld. Commissioner (Appeals), by which absolute confiscation of gold weighing 2 kgs, valued at Rs.59,00,000/- under Section 111(d) and 120 of the Customs Act, 1962¹ along with penalty of Rs.4,00,000/- on the Appellant has been upheld.

2.1 The brief facts as stated in the show cause notice² dated 17.10.2017 are that on 24.04.2017, one of the co-noticee Shri Suresh Kumar was apprehended by GRP along with 2 pcs of gold bars, weighing 1 kg each, while he was travelling from Kolkata to Mirzapur since he could not produce documents regarding

¹ Act

² SCN

lawful possession of gold. He was then handed over to the Officers of Customs, Varanasi under Fard dated 24.04.2017. The Customs Officers then recorded his statement on 24.04.2017, where he stated that he is working for the Appellant, on the instructions of the Appellant he travelled to Kolkata by Chambal Express with Rs.59,78,000/- to bring gold, he reached Kolkata on 23.04.2017 and visited the premises of one Sri Babloo situated at Bada Bazar, Sonapatti, Kolkata and handed over the amount of Rs.59,78,000/- and received 2 kgs gold from him without any papers and on 24.04.2017 when he reached Mughalsarai station by Howrah-Jodhpur Express train, he was apprehended by the GRP police officials. He also stated that the subject gold is illegally acquired and further clarified that he was informed by the Appellant and Shri Babloo that the subject gold has been smuggled from Bangladesh and brought to Kolkata after which its purity was changed from 999 to 995, while recasting the gold, the foreign origin markings were eliminated and fresh markings were impressed and the place where serial number is marked was also scratched. The recovered gold was seized vide seizure memo dated 26.04.2017 and Shri Suresh Kumar was arrested on 26.04.2017, where after he was remanded to judicial custody by the court of Special CJM (Economic Offence), Varanasi on 27.04.2017.

2.2 In follow up action, search was conducted at the residence of Shri Suresh Kumar on 25.04.2017, during which nothing incriminating was found. Search was also conducted at the residential premises of the Appellant where two firms namely M/s Kamakhya Bullion Centre and M/s M.R. Jewellers were existing. At the time of search, the Appellant was not found present and the search was conducted in the presence of wife of the Appellant Smt. Madhubala Sheth. During the search proceedings, no incriminating goods were found and only 4 file folders containing bank statements, commercial tax registration papers, purchase invoices of gold, ITR returns relating to M/s Kamakhya Bullion Center and M/s M.R. Jewellers were recovered along with three books of tax invoices.

2.3 Based on the disclosure made in the bail application filed by Shri Suresh Kumar to the effect that the subject gold was legally procured from two firms of Kanpur namely M/s Ambay Jewellers and Bullion Merchants, 54/37, First Floor, Annapurna Bhawan, Nayaganj, Kanpur and M/s Radha Mohan Purshottam Jewels Pvt. Ltd., 59/39, Birhana Road, Kanpur, investigation was conducted. The statement of authorised representative of M/s Radha Mohan Purshottam Jewels Pvt. Ltd., Shri Rajiv Nayan Gupta was recorded on 22.05.2017 wherein he accepted to have issued tax Invoice No. KNP/17-18/T-0045 dated 22.04.2017 in favour of M/s Kamakhya Bullion Centre for sale of 1 kg gold bar bearing marking MMTC-PAMP and serial No.200965 but on showing the coloured photograph of recovered gold bar, he stated that the seized gold bar is not what was sold by them to M/s Kamakhya Bullion Centre. Similarly, the proprietor of M/s Ambay Jewellers and Bullion Merchants, Kanpur, Shri Sanjeev Agarwal in his statement dated 31.05.2017 admitted of having issued tax Invoice No.11 dated 17.04.2017 in favour of M/s Kamakhya Bullion Centre for sale of 1 kg of gold bar, however on showing the coloured photograph of recovered gold bar he stated that the seized gold bar is not what was sold by them to M/s Kamakhya Bullion Centre.

3. SCN dated 17.10.2017 was then issued calling upon the Appellant, Shri Suresh Kumar and Smt. Madhubala Sheth to show cause as to why not the recovered and seized gold be confiscated under Section 111 (b) and (d) of the Act and penalties be imposed on them under Section 112(b) of the Act.

4. By Order-in-Original No.09/ADC/2018 dated 06.07.2018, the SCN was adjudicated confirming the proposals made in the SCN by relying upon the statement of Shri Suresh Kumar to conclude that the subject gold bars were smuggled into India, the subject gold bars were not the gold bars sold by the two firms of Kanpur to the Appellant and Shri Suresh Kumar failed to discharge the burden under Section 123 of the Act. Penalty of Rs.4,00,000/- was also imposed on the Appellant along with

penalties of Rs.2,00,000/- each on Shri Suresh Kumar and Smt. Madhubala Sheth.

5. Aggrieved with the Order-in-Original No.09/ADC/2018 dated 06.07.2018, the Appellant preferred appeal before the Ld. Commissioner (Appeals), which has been dismissed on the reasoning that the statement of Shri Suresh Kumar recorded under Section 108 of the Act is a substantive evidence, his statement was never retracted, cross-examination of Shri Suresh Kumar was never sought and hence no question of non-compliance of Section 138B arises and therefore the subject gold has been rightly confiscated and penalties have been rightly imposed.

6. Aggrieved with the impugned order, the Appellant has filed the present appeal. Heard learned counsel for the Appellant and Ld. Authorized Representative for the revenue.

6.1 Sri Kartikeya Narain, Ld. counsel for the Appellant submitted that the statement of Shri Suresh Kumar was not voluntary as the same was tendered when Shri Suresh Kumar was under the custody of the Customs Officers, the pleadings made in the bail application shows retraction of his statement, Section 123 of the Act has no application in absence of any foreign markings on the subject gold and also in absence of any test report to the effect that the subject gold is of foreign origin, the procedure contemplated under Section 138 has not been complied, hence statement of Shri Suresh Kumar cannot be relied and has to be eschewed from consideration and therefore, the confiscation of subject gold and imposition of penalty cannot be sustained.

6.2 Ld. Authorized Representative, on the other hand reiterated the findings recorded in the impugned order and submitted that the statement of Shri Suresh Kumar was never retracted and hence the same is an admissible evidence to prove the foreign origin and smuggling of subject gold. He prayed for confirmation of the findings recorded in the impugned order.

7. Heard both the sides and perused the appeal records.

7.1 I find that the case of the Revenue is based on the statement of Shri Suresh Kumar, non-retraction of such statement, invocation of Section 123 of the Act and statements of the authorized representative of M/s Radha Mohan Purshottam Jewels and proprietor of M/s Ambay Jewellers and Bullion Merchants.

7.2 A perusal of the impugned order shows that the Appellant raised specific objection in respect of non-compliance of Section 138B *vis-à-vis* the statement of Shri Suresh Kumar, which objection has been turned down on the ground that the cross-examination of Shri Suresh Kumar was never sought by the Appellant. In my opinion, this cannot be a ground for not complying with the mandatory procedure specified under Section 138B of the Act. Hon'ble Punjab & Haryana High Court in ***Jindal Drugs Pvt. Ltd. vs. Union of India 2016 (340) E.L.T. 67 (P&H)***, while considering Section 9D of the Central Excise Act, 1944, which is *pari-materia* to Section 138B of the Customs Act, 1962, laid down the importance of Section 9D as under:-

"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."

7.3 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."

7.4 In view of the above binding precedents, compliance of Section 138B of the Act was mandatory before relying upon statement of Shri Suresh Kumar. The compliance of Section 138B was not dependent upon whether the Appellant sought opportunity of cross examination or not. It was for the adjudicating authority to follow the procedure and only then he could have relied upon the statement. Having not done so, I hold

that the said statement cannot be relied upon and has to be eschewed from consideration. Once the statement of Shri Suresh Kumar is eschewed from consideration, I find that there is absolutely no evidence on record, to show that the subject gold was of foreign origin and was smuggled.

7.5 Even otherwise, a perusal of the statement of Shri Suresh Kumar, as narrated in the SCN, shows that Suresh Kumar stated that the subject gold is illegally acquired and that the Appellant and Shri Babloo informed him that the said gold has been smuggled from Bangladesh and brought to Kolkata, where it's purity was changed and on recasting, the foreign origin markings were eliminated and serial number was also scratched. A closer scrutiny of this statement, shows that the same is not based on the personal knowledge of Shri Suresh Kumar but based on what was told to him by the Appellant and Shri Babloo. Therefore, the statement, being an hear say statement cannot be relied upon solely, to conclude that the subject gold was of foreign origin and was illegally imported from Bangladesh.

7.6 The finding in the impugned order that the statement was never retracted also cannot be sustained. As noted in the SCN itself, Shri Suresh Kumar in his bail application made pleadings regarding legal and lawful possession of subject gold by M/s Kamakhya Bullion Centre and denial of the allegations made by the Revenue. The pleadings made in bail application, submitted after few days of statement, in my opinion constitutes a clear retraction of the initial statement. Once the maker of the statement resiled it, then it is no longer safe to rely on it as a substantive piece of evidence, as held by Hon'ble Delhi High Court in **Commissioner of Central Excise vs. Vishnu & Co. Pvt. Ltd. (2016) 332 E.L.T. 793 (Del)**, where the Hon'ble Court held as follows:-

"41. What the above submission overlooks is the 'reliability' of such statements. Once it is shown that the maker of such statement has in fact resiled from it, even if it is after a period of time, then it is no longer safe to rely

upon it as a substantive piece of evidence. The question is not so much as to admissibility of such statement as much as it is about its 'reliability'. It is the latter requirement that warrants a judicial authority to seek, as a rule of prudence, some corroboration of such retracted statement by some other reliable independent material. This is the approach adopted by the CESTAT and the Court finds it to be in consonance with the settled legal position in this regard."

Therefore, the finding in the impugned order that the statement of Shri Suresh Kumar is a substantive piece of evidence, cannot be sustained. The entire case of the revenue thus is based on presumption and not on any material evidence on record.

7.7 Further, since the present case is that of town seizure and not that of seizure at Airport, Seaport or Land Customs Station, the initial onus was on the Revenue to show that the subject gold was of foreign origin and was smuggled into India. Apart from the statement of Shri Suresh Kumar, which has no evidentiary value as discussed above, there is no evidence on record to suggest that the subject gold was smuggled. On the contrary, the Appellant produced invoices regarding legal procurement of subject gold and upon enquiry been made, the sellers also confirmed the transaction of sale of gold by them to the firm of the Appellant.

7.8 I also find that the statement of Shri Rajiv Nayan Gupta, authorised representative of M/s Radha Mohan Purshottam Jewels Pvt. Ltd., Kanpur and also statement of Shri Sanjeev Agarwal, proprietor of M/s Ambay Jewellers and Bullion Merchants, Kanpur, to conclude that the gold bars sold by them were different from the seized gold, also cannot be relied against the Appellant as these statements were not subjected to the rigour of Section 138B and therefore, not admissible as evidence.

7.9 As regards imposition of penalty under Section 112(b) on the Appellant, once necessary material to prove smuggling of subject gold is not on record, no penalty can be imposed on the Appellant.

8. In view of the above discussion, the appeal filed by the Appellant is allowed with consequential relief to the Appellant and direction to the respondent to release the seized gold in favour of the Appellant.

(Order pronounced in open court on- **02nd April, 2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS