

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 61074 of 2019

[Arising out of Order-in-Original No. COMMR/ASR/LDH/CUSTM/04/2019 dated 20.05.2019 passed by the Commissioner of Customs, Ludhiana]

M/s Varun Enterprises

D.N. Singh Road, Bhagalpur,
Bihar-853204

.....Appellant

VERSUS

Commissioner of Customs, Ludhiana

Customs, House, ICD GRFL, GT Road,
Sahnewal, Ludhiana, Punjab-141120

.....Respondent

WITH

Customs Appeal No. 61075 of 2019

[Arising out of Order-in-Original No. COMMR/ASR/LDH/CUSTM/04/2019 dated 20.05.2019 passed by the Commissioner of Customs, Ludhiana]

M/s SRM Pvt. Ltd.

113 Park Street, Kolkata,
West Bengal-700027

.....Appellant

VERSUS

Commissioner of Customs, Ludhiana

Customs, House, ICD GRFL, GT Road,
Sahnewal, Ludhiana, Punjab-141120

.....Respondent

AND

Customs Appeal No. 61076 of 2019

[Arising out of Order-in-Original No. COMMR/ASR/LDH/CUSTM/04/2019 dated 20.05.2019 passed by the Commissioner of Customs, Ludhiana]

M/s Contessa Commerical Co. P. Ltd.

113 Park Street, Kolkata,

.....Appellant

West Bengal-700027

VERSUS

Commissioner of Customs, Ludhiana

Customs, House, ICD GRFL, GT Road,
Sahnewal, Ludhiana, Punjab-141120

.....Respondent

APPEARANCE:

Shri Gaurav Prakash and Shri Rahul Raheja, Advocates for the Appellant

Shri Anurag Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.60865-60867/2025

DATE OF HEARING: 02.07.2025

DATE OF DECISION: 18.07.2025

P. ANJANI KUMAR:

M/s Contessa Commercial Co (P) Ltd (C/61076/2019), M/s SRM Pvt Ltd. and M/s Varun Enterprises, the appellants filed these appeals against the Order-in-Original dated 20.05.2019 passed by the Commissioner of Customs, Ludhiana.

2. Brief facts of the case are that are that acting on specific information some firms like the appellants were indulging in fraudulent claims of Drawback and DEPB credit by way of exporting mis-declared goods through CFS (OWPL), Ludhiana, officers of DRI, Amritsar initiated investigation in the exports made by these firms; investigation revealed that the above firms/companies had exported the goods of low quality declaring them as Gear Cutting Tools of Cobalt bearing High Speed

Steel, Heat Resistant Rubber Tension Tape and Gaskets under Drawback/ incentive schemes; investigations were also conducted against some other exporters, namely, Sh. Vinod Garg and N. D. Garg, under six companies namely M/s. Garg Forging & Casting Ltd., M/s. SRG Forge Overseas Ltd, M/s. SRG International, M/s. Ragini Steels, M/s. Garg Con-cast and M/s. Goodwill Impex belonging to them who have exported similar/ identical goods; it was found that goods cleared as gear cutting tools of cobalt bearing high steel and heat-resistant rubber tension tape had been mis-declared; in his statement 22.06.2000, Shri Vinod Garg replied that he had no association with the Appellants; on completion of the investigation, Show Cause Notice dated 29.03.2004 was issued to i.e. M/s. Contessa Commercial Co (Pvt.) Ltd, M/s Varun Enterprises, M/s. A.S.K. Exports and M/s. S.R.M. (Pvt) Ltd seeing to confiscate goods, exported by them, valued at Rs.3,00,91,466, Rs.2,79,65, 455, Rs. 3,04,95,133 and Rs. 59,54,315/- respectively under Section 113 (d) & (i) of the Customs Act, 1962; seeking to recover fraudulently availed drawback of Rs 2,68,31,323 and to stop disbursement of drawback of Rs.89,07,720; appropriate an amount of Rs.49,30,000 paid by them during investigation and to impose penalties on them.

2.1. Commissioner of Customs (Preventive), vide Order in Original No. 37/Cus/05 dated 6.1.2006, confirmed the proposals but dropped the proceedings as far as they relate to confiscation of Gaskets valued at Rs.2,92,31,936; recovery of duty drawback availed amounting Rs. 38 lakhs (Rs 8,80,000 by M/s Contessa +8,60,000 by M/s SRM and

20,60,000 by M/s Varun) and proposed denial of drawback amounting to Rs. 7,98,000(to M/s Contessa). Revenue filed appeals Nos. C/149-153/2007 challenging the portion of the order dropping the demands; CESTAT vide final order No. 56729-56746/2013-CU(DB) dated 28.6.2013, remanded the case for fresh adjudication in respect to drawback availed by the Noticees on the export of the gaskets. Commissioner vide, Order-in-Original dated 20.05.2019, confirmed the confiscation of gaskets and imposed fine in lieu of confiscation; conformed recovery of drawback of Rs 8,80,000 from M/s Contessa, Rs 20,60,000 from M/s SRM and 8,60,000 from M/s Varun and stoppage of drawback of Rs 7,98,000 to M/s Contessa and imposed penalty under Section 114(iii) of the Customs Act, 1962. Hence, these appeals.

3. Learned Counsel for the appellants submits that the commissioner has not considered the submissions made by the appellant vide his reply dated 23.01.2019; imposed redemption fine, confirmed recovery of drawback, denied sanction of pending drawback and imposed penalty in an arbitrary manner. That here it is important to state that the export was allowed after due testing and verification and thereafter the drawback was only released to the Appellant after such report was in consonance with the declaration made on the shipping documents; the action is blatantly illegal as there was no material to dispute the fact of export of gasket by the appellant; though there was a dispute about the quality/value of the goods, there was no dispute as far as gaskets are concerned. He submits that the impugned order based upon assumption and presumption; there is no corroborative evidence

produced; no co-relation has been made by the department with regard to exports made by the Noticees and quality of gaskets; allegations upon the Appellant is solely based upon the statements which are not corroborated; findings based on such presumptions and assumptions without any tangible evidence will be vitiated by an error of law as held by the Hon'ble Supreme Court in the case of Oudh, Sugar Mills Ltd 1978 (2) ELT (J 172) and by the Tribunal in the case of Poly Printers 2002 (139) ELT 295.

4. Learned Counsel for the appellants submits also that the suppliers from whom the Appellant purchased the goods were existent and had issued valid bills/ invoices for the goods sold by them; the suppliers, in some cases, had two valid addresses as mentioned in their respective invoices/ bills; department had not made inquiries at both the addresses; had the department made proper inquiries, it would have come to know about the genuineness of such suppliers of the Appellant. He submits that the gaskets were never seized and were not subjected to any testing or market survey.

5. Learned Counsel for the appellants submits also that the Appellant has sought for the cross examination of various persons whose statement have been relied upon against the Appellant; statement of Mr. Gautam Mukherjee has been relied upon; having relied upon the statement, it was bounden duty on the part of the adjudicating authority to grant cross examination of Mr. Gautam Mukherjee. He submits that as held in several judgements Procedure prescribed in

Section 9D(1) of Central Excise Act, 1944 is to be scrupulously followed; adjudicating authority cannot straightaway rely on the statement recorded during investigation/inquiry before Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1) *ibid*; If makers of statements recorded during investigation under Section 14 *ibid* not examined in chief before adjudicating authority, such statement to be eschewed from evidence and should not be relied on as evidence while adjudicating the matter; statements recorded behind back of assessee cannot be relied upon in adjudication proceedings without allowing assessee an opportunity to test evidence by cross-examining makers of said statements; if makers of statement examined in chief by Department, cross-examination of witness must be allowed if sought for by assessee. He relies on the following cases.

- *Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623*
- *Lakshman Exports Ltd (2005) 10 SCC 634, t*
- *New India Assurance Company Ltd Vs Nusli Neville Wadia & Another AIR 2008 SC 876;*
- *K.L. Tripathi v. State Bank of India & Ors., AIR 1984 SC 273, In Transmission Corporation of A.P. Ltd. v. Sri Rama Krishna Rice Mill, AIR 2006 SC 1445*
- *Rajiv Arora v. Union of India & Ors., AIR 2009 SC 1100*
- *Govind Mills Limited' - 2013 (8) TMI 649 - Allahabad High Court*
- *Rama Shyama Papers Ltd 2004 (168) E.L.T. 494 (Tri. - Del.)*
- *Karan Traders 2016 (339) ELT 249 (Mad.)*
- *Jindal Drugs Pvt Ltd. 2016 (340) ELT 67 (P & H)*

6. Learned Counsel also submits that impugned order did not allow the same in breach of natural justice; unless the procedure prescribed in

Section 138B of the Customs Act, 1962 for making the statements relevant is followed, the same cannot be relied upon; mandate of section 138B of the Act has not been followed while passing the impugned order; statements are the basis on which the present case has been set up by the Revenue against the appellant, cannot be relied upon for the want of examination, of the persons whose statements have been relied upon, following the procedure prescribed under Section 138B of the Customs Act; the entire impugned adjudication order falls and is liable to be quashed and set aside, due to insufficient evidence. He relies on

- *Ambika International (2016) SCC Online P&H 4559*
- *Andaman Timber Industries (2016) 15 SCC 785*
- *G-Tech Industries (2017) 42 GSTR 153*
- *R. A. Castings P. Ltd., 2010 SCC Online All 2983*

7. Learned Counsel for the appellants submits also that the Appellant's shipping bills were duly assessed, and drawback/MEIS was allowed by the Assistant Commissioner without objection; the assessments have attained finality; Department, instead of invoking the proper review or appeal mechanisms under the Customs Act, has attempted to reopen the same via an audit objection, issuing a separate show cause notice; such a collateral challenge is not legally tenable; the established legal principle is that once a shipping bill has been assessed and drawback has been allowed by the competent authority, it cannot be subsequently recovered without first challenging the original assessment order. He relies on

- *Priya Blue Industries Ltd (2005) 10 SCC 433*
- *ITC Ltd (2019) 17 SCC 46/ (2019) 11 SCC 516*

- *Design Co 2024 SCC Online Del 8163*
- *BT (India) P. Ltd. (2023) 119 GSTR 387*

8. Learned Counsel for the appellants submits also that redemption fine can only imposed when goods are seized and are liable for confiscation; in the present case, goods are neither seized nor available for confiscation cannot be subjected to redemption fine; section 125 of the Customs Act explicitly states that redemption fine is an option only when goods are liable for confiscation and are available for confiscation at the time of adjudication; courts have consistently held that in the absence of actual confiscation or seizure, the imposition of redemption fine is illegal and cannot be sustained; confiscation must precede or be contemplated for the option of redemption to exist.

9. Shri Anurag Kumar, Learned Authorised Representative, submits that Shri Vinod Garg and N.D. Garg, floated/used five firms - Jyoti Steel, Jindal Alloys, Rama Krishna Steel Traders, R.K. Steel Traders and Krishna Hardware & Mill Store to legitimize the fraud; they issued fraudulent invoices without actual movement of goods, enabling exporters to overvalue shipments; investigations proved their nonexistence: sales tax authorities cancelled their registrations; physical verification showed the addresses to be fake; one of the addresses, for example, "Jyoti Steel, 1/2 Bhambri Market" was a rented shop housing an STD-PCO booth; Shri Vinod Garg and N.D. Garg used these firms to operate bank accounts, in State Bank of Hyderabad, in the name of employee proxies like Sanjeev Kumar and Vineet Kumar;

they used the accounts to launder drawback funds through circular transactions; issued ₹16.7 lakh in bearer cheques to P.N. Pandey; they helped exporters like M/s Contessa Commercial, ASK Exports, SRM Pvt Ltd, and Varun Enterprises, to fraudulently claim ₹9.45 crore in drawback. He submits that Shri Sunil Kishorpuria, Director, M/s Contessa, admitted collusion with the Garg's for a 3% commission; they surrendering pending drawback claims; deposited ₹49.3 lakh towards recovery; despite knowing that the suppliers were fictitious, he authorized purchases from shell firms like Jyoti Steel and Krishna Hardware, coordinating logistics through intermediaries like Alok Mukherjee; his initial claims of ignorance were contradicted by DRI evidence showing his direct involvement in settling rates with N.D. Garg and managing export documentation; kishorpuria's confessions were pivotal in corroborating the findings and implicating the Kolkata based exporters.

10. Learned Authorised Representative, rebuts the arguments of the appellants and submits that claim by appellants that DRI lacked authority under Rule 16 of Drawback Rules, is nullified by amendments to Section 28(11) of the Customs Act. He submits on the request to cross-examine Shri Gautam Mukherjee (IIC Container) that Hon'ble Supreme Court in the case of Kanungo & Co held that corroborative evidence without cross-examination. On the plea that no gaskets were seized or tested, Learned AR submits that the very sourcing of the gaskets from non-existent; shell firms and diversion of shipments to Dubai, proves modus operandi. He supports the imposition of redemption fine stating that Section 125 permits fines in lieu of

confiscation for exported goods liable for confiscation. He submits that the impugned order in remand is correct and legally tenable as the Gaskets were sourced from the same fictitious suppliers (Jyoti Steel etc.), whose names were used for mis-declaring gear tools/rubber tapes; sales tax records proved suppliers to be non-existent and bank transactions showed circular transaction; Sunil Kishorpuria admitted the confession by N.D. Garg statement dated 25.08.2003.

11. Heard both sides and perused the records of the case. The main allegation of the revenue against the appellants is that they have availed drawback and other export benefits on the strength of export of mis declared items. Investigation was initiated against two persons Shri Vinod Garg and N.D. Garg, who have been alleged to have floated/used five firms - Jyoti Steel, Jindal Alloys, Rama Krishna Steel Traders, R.K. Steel Traders and Krishna Hardware & Mill Store etc; supplied just invoices to exporters without any movement of goods; they have shown that goods have been procured goods from certain suppliers, who were found non-existent. Shri N.D. Garg accepted the fraud; Shri Kishorpuria, Director, M/s Contessa accepted that he colluded with Shri N.D. Garg; enquires revealed that the goods were diverted to Dubai instead of sending to declared destinations. The appellants on the other hand submit that the results of investigation done in respect of other items have been applied to export of impugned gaskets; test conducted did not show any mis-declaration and no market survey was conducted; goods were examined by officers and cleared for export; all financial transactions were through banking channels and export proceeds were

received; the adjudicating authority, in the first round of litigation, dropped the proceedings, as far as they related to the export of gaskets, for the very same reasons; in the second round of litigation, the commissioner has confirmed the same for the reason that proceedings in respect of the exports effected by Shri Vinod Garg and Shri N.D. Garg, pertaining to items other than gaskets, were upheld up to the level of Hon'ble Apex Court. They further submit that the principles of natural justice were violated as the cross-examination of the persons whose statements are relied upon was not allowed; proceedings are also vitiated as commissioner did not examine the persons whose statements are relied upon, under the provisions of Section 138(B) of the Customs, Act; Revenue seeks to recover drawback, duly sanctioned by an authority after due verification, without challenging the order, in violation of the principles laid down by Supreme Court in the case of ITC Ltd(supra).

12. we find that the Adjudicating Authority, in the first round of litigation, vide Order-in-Original No. 37/Cus/05 dated 06.01.2006, categorically found that there was no seizure of Gaskets and there was no report evidencing mis-declaration of gaskets in terms of description, content and fictitious invoices.

13. We find that the adjudicating authority, while passing the order in remand, in the second round of litigation, observes as following.

*4.4. I find that the original Adjudicating Authority
vide Order in Original No. 37/Cus/05 dated 6.1.2006*

confirmed the recovery of the inadmissible drawback claimed fraudulently by declaring the export goods to be Gear Cutting Tools of Cobalt bearing High Speed Steel and Heat-Resistant Rubber Tension Tape. The said demand has been confirmed by the CESTAT vide its order No. C/A/56729-56746/2013-CU(DB) dated 25.6.2013 and has been upheld by the Hon'ble Punjab & Haryana High Court, Chandigarh vide its order dated 8.9.2014 while dismissing the appeal [CUSAP No. 28 of 2013(0&M)] filed by M/s Contessa Commercial Co. P. Ltd. against CESTAT order dated 25.6.2013. Further, the Hon'ble Supreme Court, vide SLP (C) No. 026433/2016(Diary No. 40338/2014) vide Order dated 16.09.2016 has dismissed the petition filed by M/s. Contessa Commercial Pvt Ltd. Thus, the modus operandi adopted by the exporting firms, viz., Noticee Nos. 1, 2, 3 & 4 in light of evidences unearthed by the Investigating agency for fraudulently claiming the inadmissible drawback has been upheld by the Appellate Tribunal as well as the Hon'ble Punjab and Haryana High Court and Hon'ble Supreme Court as well.

4.6 All the consignments of gasket exported by the firms of Kishorepurias are very much the part of investigations conducted by the DRI. I find that the Kishorepurias, through their firms viz. Noticee Nos.1, 3 & 4, were engaged in export of inferior quality goods, as confirmed from the test reports received in respect of Gear Cutting Tools of Cobalt bearing High Speed Steel and Heat-Resistant Rubber Tension Tape. They adopted the modus operandi of mis declaring the export goods including the gaskets in terms of description, contents, quality and value for fraudulent drawback claim.

14. It is seen on going through the above, that the adjudicating authority has relied upon the findings of the commissioner in the first round of adjudication, there too in respect of the other goods, such as gear cutting tools of Cobalt bearing high speed steel, heat resistant rubber, tension tape, etc, whose exports were managed by Shri Vinod Garg and Shri N.D. Garg and not in respect of the impugned goods i.e. gaskets. It is on record that there was a dispute of quality of goods and market value of the goods and enquiries were conducted to ascertain the quality and value. However, in respect of gasket, no such enquiries were made; samples were tested and market enquiries were not done; thus, there was no dispute raised in the show cause notice as to the quality or market value of the goods or the fact of export. The only common evidence in both the issues appears to be the statements of persons and the result of the enquiry that the suppliers of goods are non-existent.

15. The appellants contend that the export was allowed after due testing and verification; drawback was released to the Appellant only after such report was in consonance with the declaration made on the shipping documents; moreover, Shri Vinod Garg in his statement dated 22.06.2000 replied, to a specific question, that he had no association with the Appellant or its associated persons/ firms; as it was alleged that Shri Vinod Garg and N. D. Garg had mis-declared their goods, the Appellant had also exported their respective goods by mis declaring the same. We find that it is not the case of the department that the test report, in respect of the goods exported by the Appellants, indicated

any mis-declaration. The value was also accepted by the department and no market survey etc. was done. Moreover, the unmissable fact is that the goods were allowed to be exported after due examination by the officers. We find that there is no allegation of collusion etc. raised against the officers and the appellants. Under the circumstances, we find that the impugned order erred in extrapolating the findings in case of export of other goods by Shri Vinod Garg and N. D. Garg, to the goods exported by the appellants.

16. Regarding the non-existent suppliers as claimed by the revenue, the appellants submit that no independent enquiries were made and whereas, the invoices mentioned, more than one address of the suppliers, all the places were not verified. We find that under the circumstances, the adjudicating authority should have examined the persons whose statements have been relied upon under the provisions of Section 138B and should have allowed cross examination, of Shri Gautam Mukherjee, whose statement dated 10th July, 2002, was relied upon in respect of Gaskets exported under Shipping Bill no, 430, 431 both dated 27th January 2000 and 1385 and 1387 both dated 6th March, 2000 and of others. We also must consider the fact that samples were taken at the time of export, in the presence of CHA and Customs Officers; Test Report confirmed the goods to be as per declaration; the same was endorsed on the reverse of the shipping bills drawn by the Customs Officers; revenue has not challenged the Test Reports; the customs officers were not questioned. Therefore, it establishes that the goods exported by the appellant were as per declaration and the

confirmation of demand was on presumption that the impugned goods also are like other goods exported by Shri Vinod Garg and N. D. Garg.

17. We find that the appellants submit that there is no allegation that the Appellant was related, in any manner, with the foreign buyers and the suppliers; exports were backed by Letter of Credit, duly registered and confirmed by the RBI; foreign buyers made payments only after accepting goods; remittances were received in India by the Appellant through banking channel; payments to its supplier (alleged to be non-existent) were made through Account Payee Cheques/ Drafts which were duly reflected in accounts; Income-tax Authorities had not found any irregularity therein; the suppliers of the Appellant (alleged to be non-existent) were also co-Noticees and had participated in the Adjudication Proceedings. We find that the submissions of the appellants cannot be brushed aside as there was no enquiry in this direction in respect of impugned Gaskets exported. Therefore, there is a force in the contention of the appellant that the impugned proceedings were based on assumptions and presumptions based on results in respect of other items exported by Shri Vinod Garg and N. D. Garg. We find that it was held in *Arsh Castings Pvt Ltd* 1996 (81) ELT 276, *Balbir Steel Pvt Ltd* 1999 (114) ELT 561 *Emmtex Synthetics Ltd. v. CCE, New Delhi* 2003 (151) ELT 170 (T) that no presumption can be made on the basis of uncorroborated oral evidence more so, when cross - examination was not allowed. We find that Reserve Bank of India has also issued a circular that obligation of an Indian Exporter would be

completed the moment the goods are made over to the shipping Company and goods leave territorial water of India.

18. Another issue that is agitated by the appellants is that they sought for the cross examination of Shri Gautam Mukherjee and other persons whose statements have been relied upon against the Appellant; it was bounden duty on the part of the adjudicating authority to grant cross examination; We find that in a number of cases, it was held that procedure prescribed 138 B of the Customs Act, needs to be followed; adjudicating authority cannot straightaway rely on the statement recorded during investigation/inquiry before Central Excise officer, unless procedure prescribed in Section 138B of the Customs Act, 1962. We find that statements are the basis on which the present case has been set up by the Revenue against the appellant, cannot be relied upon for the want of examination in terms of Section 138B of the Customs Act and for want of cross-examination. We find that the entire impugned adjudication order falls and is liable to be quashed and set aside, due to insufficient evidence.

19. We find that Hon'ble Punjab & Haryana High Court in the case of Ambika International (supra) held that

22. Once discretion, to be judicially exercised is, thus conferred, by Section 90, 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 v. GTC India in SLP (C) No. 2183/1994 dated 03/01/1995 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.

23. If none of the circumstances contemplated by clause (a) of Section 90 (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.

24. 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.

25. The rationale behind the above precaution contained in clause (b) of Section 90 (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 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.

26. clearly, therefore, the of 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 adjudicating 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.

27. 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.

28. It is only, therefore,

(1) 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,

29. that the statement deserves to be admitted in evidence, that the question of offering the witness to the assessee, for cross-examination, can arise.

30. 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.

20. We find that the Principal Bench of CESTAT in the case of M/ Surya Wires Pvt. Ltd. vide Final Order No. 50453-50454/2025 dated 01.04.2025 has held that:

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 sub-section (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 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.

21. We find that in addition, the appellants argued that their shipping bills were duly assessed, and drawback/MEIS was allowed by the Assistant Commissioner without objection; the assessments have attained finality; Department, instead of invoking the proper review or appeal mechanisms under the Customs Act, has attempted to reopen by issuing a separate show cause notice demanding back the drawback already sanctioned. We find that it was held in a number of cases that such a collateral challenge is not legally tenable. The established legal principle is that once a shipping bill has been assessed and drawback has been allowed by the competent authority, it cannot be subsequently recovered without first challenging the original assessment order. We find that after the decision of Apex Court in the case of ITC Ltd(supra), Courts and tribunal have been continuously holding that refund is consequential to assessment and unless the assessment is challenged, refund which is executive in nature cannot be initiated. We find that the principle applies equally to rebate already sanctioned by following due process of Law, unless the sanctioning order is challenged and modified by a competent appellate authority, the drawback sanctioned can not be held to be erroneous and be recovered under relevant provisions of Customs, Act. We find that Hon'ble supreme Court held in ITC Ltd as follows.

43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression "Any person" is of wider amplitude. The Revenue, as well as the assessee, can also prefer an appeal aggrieved by an order of assessment. It is not

only the order of reassessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of reassessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts 22.

44. The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or reassessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing a refund application, reassessment is not permitted nor conditions of exemption can be adjudicated. Reassessment is permitted only under Sections 17(3), (4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually

amount to an order of assessment or reassessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. 22

47. When we consider the overall effect of the provisions prior to amendment and post-amendment under the Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

22. We also find that it was held in BT India (Supra) that:

37. The learned counsel specifically referred to clause 3(g) of the said notification and which speaks of the Assistant or the Deputy Commissioner being obliged to record their satisfaction with respect to the correctness of the claim as well as the fact that goods cleared for export or services provided have actually been

exported. According to learned counsel, it is only when such satisfaction is reached that the claim of the exporter of goods or services is liable to be granted in full or in part.

38. In view of the aforesaid, it was the contention of the respondents that a conjoint reading of section 11B of the Excise Act and rule 5 of the CCR

would lead one to the irresistible conclusion of a power of determination inhering in the competent authority even at the stage where an application for refund may be made.

67. We thus come to the firm conclusion that in the absence of the self-assessed return having been questioned, reviewed or re-assessed, the claim for refund of Cenvat credit could not have been denied by the respondents. When confronted with the application for refund, all that the respondents could have possibly examined or evaluated was whether the provisions of rule 5 read along with the various prescriptions contained in the notification dated June 18, 2012 had been complied with. The respondents, at this stage of the proceedings, could not have doubted, questioned or undertaken a merit review of the self-assessed return which had been submitted.

23. In view of the above discussion we find that department conducted enquiries in relation to export of goods cleared as gear cutting tools of cobalt bearing high steel and heat-resistant rubber tension tape by Shri Vinod Garg and Shri N. D. Garg, in the name of companies namely M/s. Garg Forging & Casting Ltd., M/s. SRG Forge Overseas Ltd, M/s. SRG International, M/s. Ragini Steels, M/s. Garg Con-cast and M/s. Goodwill Impex and found that the goods were mis-declared with reference to

quality and value; test reports confirmed that the goods were mis declared. Department has extrapolated these findings to the exports of Gaskets by the appellants for the reason that the suppliers were same as in the case of exports by Shri Vinod Garg and Shri N. D. Garg.

24. We find however, that in the impugned case, test report did not give any adverse findings and no market survey was conducted. We find that the impugned goods were examined, samples were taken and tests were conducted and cleared for examination by the officers. The officers have not been questioned and no case of collusion has been made. Thus, we find that the case of the appellants stands on a different footing than other exports investigated, the results of the same, thus, cannot be applied to the impugned case by way of assumptions. The only evidence available with the department is the statement of Shri Kishorpuria on 21-22.08.2002, wherein, he was alleged to have admitted colluding with Vinod and N.D. Garg for a 3% commission on export turnover, allowing them to use Contessa's export licenses in exchange for financial benefits and the statements of Shri Gautam Mukherjee and other persons. However, the reliability of these statements becomes suspect for the reason that Shri Vinod Garg in his statement dated 22.06.2000 replied, to a specific question, that he had no association with the Appellant or its associated persons/ firms. Shri N.D. Garg in his statement recorded at a later date, i.e. 25-08-2003 accepted relationship. The statements are contradictory to each other. On the one hand department alleged that the suppliers were fake and on the other hand the same have been made co-Noticees and the same participated in the proceedings. The Adjudicating Authority has not

examined these persons under the provisions of Section 138 B thus, vitiating the proceedings. The Adjudicating Authority has also denied cross examination in violation of principles of Natural Justice. Revenue did not cause enquiries at the all-available addresses of the alleged fake suppliers.

25. We find that as the impugned goods were examined, tested and allowed export by the officers and the report was not challenged, the case does not stand on a couple of statements which were not examined under the provisions of Section 138B of the Customs Act and allegations are not backed by any corroborative evidence. We find that not allowing Cross-Examination further vitiated the proceedings. Moreover, the original order sanctioning the refund was not challenged, the proceedings cannot be sustained in view of Apex Court's judgment in the case of ITC Ltd (Supra).

26. In view of the above, we find that no case has been made, by the department that the gaskets exported by them are mis-declared, with incontrovertible evidence. Therefore, we hold that the impugned goods are not liable for confiscation and consequently no fine in lieu of confiscation and no penalty can be imposed. In view of the discussion above, no case has been made for recovery of drawback already sanctioned. In so far as the drawback of Rs. 7,98,000, which is yet to be sanctioned, we find that the issue is premature for the Bench to interfere. We hold that the competent authority may examine the same and grant the drawback if found otherwise eligible.

27. In view of the above:

(i). Appeal No.61074 filed by M/s Varun Enterprises and Appeal No. 61075 filed by M/s SRM Pvt. Ltd. are allowed.

(ii). Appeal No. C/61076/2019 filed by M/s Contessa is partially allowed, by way of remand, in following terms:

(a).by setting aside the demand, fine and penalty.

(b). The competent authority would decide, the pending drawback and pay the same, if otherwise eligible, within 12 weeks of receipt of this order.

(Order pronounced in the open court on 18/07/2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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