CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal No. 51145 of 2022

(Arising out of Order-in-Original No. 09/Adjournment/2021 dated 02.02.2021 passed by the Commissioner of Customs, IGI Airport, New Delhi)

Mahesh Kartik **...Appellant**
B-232-A, New Basti Colony
Delhi- 110096

VERSUS

Commissioner of Customs **...Respondent**
T-3, IGI Airport
New Delhi- 110037

APPEARANCE:
Dr. G.K. Sarkar, Advocate for the Appellant
Shri Rajesh Singh, Authorized Representative of the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: 31.07.2025

FINAL ORDER NO. 51098/2025

JUSTICE DILIP GUPTA

Mahesh Kartik[1] has filed this appeal to assail the order dated 02.02.2021 passed by the Commissioner of Customs to the extent it imposes a penalty of Rs. 1 crore on the appellant under section 114 of the Customs Act, 1962[2] read with section 13 of the Foreign Exchange Management Act[3] for the various acts of omissions and commission as pointed out in the show cause notice.

2. The appellant was noticee no. 4 in the show cause notice. Manish Garg, Mohammad Kashif and Shahzad alias Munna were noticee no's. 1, 2 and 3 in the show cause notice.

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1 the appellant
2 the Customs Act
3 FEMA

3. The allegations against the appellant in the show cause notice is that Manish Garg, (noticee no. 1) in his statement dated 07.08.2019 had stated that he had illegally purchased foreign currency amounting to 2 lakh Euros from the appellant and this fact was reiterated by Manish Garg in his subsequent statement dated 13.11.2019. It, thus, appeared to the department that the appellant was liable to penal action under the provisions of Customs Act and FEMA. Accordingly, a show cause notice dated 04.02.2020 was issued to the appellant as also to Manish Garg, Mohammad Kashif and Shahzad. The appellant denied the allegations made in the show cause notice. However, the Commissioner by the order dated 02.02.2024, imposed penalty of Rs. 1 crore upon the appellant under section 114 of the Customs Act read with section 13 of the FEMA.

4. A perusal of the order passed by the Commissioner shows that the statements made by Manish Garg on 07.08.2019 and 13.11.2019 that he had illegally purchased foreign currency amounting to 2 lakh Euros from the appellant is the sole basis for imposing penalty upon the appellant. The Commissioner held that the statements recorded under section 108 of the Customs Act can be used as a substantive evidence. The Commissioner also noticed that though the statements made by Manish Garg and Mohammad Kashif were substantially retracted but this retraction was an afterthought.

5. Dr. G.K. Sarkar, learned counsel appearing for the appellant submitted that the Commissioner committed an error in placing the reliance upon the statements made under section 108 of the Customs Act as the procedure followed under section 138 of the Customs Act was not followed. Learned counsel for the appellant submitted that

statements cannot be considered as relevant in view of the various decisions, to which reference be made at relevant stage. Learned counsel for the appellant also pointed out that the appellant clearly submitted documents to show that the appellant had not dealt with Manish Garg or Mohammad Kashif regarding foreign currency.

6. Shri Rajesh Singh, learned authorised representative appearing for the department, however, supported the impugned order and stated that even Manish Garg, Mohammad Kashif and Shahzad have not filed any appeals before the Tribunal.

7. The submissions advanced by learned counsel for the appellant and learned authorised representative appearing for the department have been considered.

8. The sole issue that arises for consideration is whether the statements made by Manish Garg and Mohammad Kashif under section 108 of the Customs Act can be considered as relevant for the purposes of imposing penalty under section 114 of the Customs Act on the appellant. Such statements could not have been relied upon as the procedure contemplated under section 138B of the Customs Act was not followed.

9. This is what was held by the Tribunal in **M/s. Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur**[4]. The Tribunal examined the provisions of sections 108 and 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act, 1944 and observed as follows:

> "21. It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to

4. Excise Appeal No. 51148 of 2020 decided on 01.04.2025

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 an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been

> made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain."

10. After examining various judgments of the High Courts and the Tribunal, the Tribunal observed as follows:

> "28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating

> authority, after which such statements can be admitted in evidence."

11. The impugned order is based solely on the statements made by Manish Garg and Mohammad Kashif under section 108 of the Customs Act.

12. The submission advanced by the learned authorised representative for the department that since Manish Garg, Mohammad Kashif and Shahzad had not filed appeals to assail the impugned order, no relief should be granted to the appellant cannot be accepted. The filing of appeal by the appellant is not dependent upon whether the remaining three persons covered by the impugned order have filed appeals or not.

13. It is, therefore, not possible to sustain the order dated 02.02.2021 passed by the Commissioner in so far as it imposes penalty of Rs. 1 crore upon the appellant. It is, accordingly, set aside and the appeal is allowed.

(Dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Diksha