IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –IV

Customs Appeal No.C/51918, 51919,51920/2017 & E/50095/2018-CU [DB]

[Arising out of Order-in-Original No.NKU(03)ADG (ADJ)/DRI/N. Delhi/2017-18 dated 17.07.2017 passed by the Additional Director General (Adjudication), Directorate of Revenue Intelligence, New Customs House, New Delhi.]

M/s. S.N. Agrotech - (C/51918/2018)
Shri Nikhil Asrani - (C/51919/2018)
Shri Aseem Asrani - (C/51920/2018)
M/s.Suresh Kumar & Co.
(Impex) pvt. Ltd. **-** (C/50095/2018) **...Appellants**

Vs.

C.C., New Delhi **... Respondent**

Present for the Appellant : Mr.Ashish Batra, Advocate
Present for the Respondent: Mr.R.K. Maji, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing: 23/03/2018

Pronounced on: 17/04/2018

FINAL ORDER NO. 51373-51376/2018

PER: S.K. MOHANTY

Brief facts of the case are that M/s Suresh Kumar & Co. (Impex) Pvt. Ltd., M/s. VPN Trade Links and M/s. S.N. Agrotech were engaged in the business of import of food items from various countries through ICD, Tukhlakabad, Nhava Sheva Port, Mundra Port and Air Cargo Complex, New Delhi. The officers of Directorate of Revenue Intelligence (DRI) gathered intelligence that the said importers under-valued the imported goods. On 16.06.2015, the DRI officers visited the business premises and residences of the Directors of the importers and other various places. The said DRI officers seized Laptops, I. Pads, I.Phones, Labeling Printers for affixing MRP stickers etc. and also recorded statements of the Directors of the importers during the course of investigation. A Show Cause Notice dated 06.06.2016 was issued, proposing demand of customs duty along with interest and for imposition of penalties on the importers and other persons. The Additional Director General (Adj.) of DRI, New Delhi has been appointed as the common adjudicating authority by CBEC to adjudicate the Show Cause Notice in respect of various ports. By the impugned order, the adjudicating authority confirmed the demand of duty alongwith interest and imposed penalties on the importers separately. It has also enhanced the assessable value, in terms of Rule 9 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 against all the importers. The seized goods were confiscated and redemption fines were imposed. Further, penalties were also imposed on the appellants. Hence, feeling aggrieved with the impugned order, the appellants have filed these appeals before the Tribunal.

2. The ld. Advocate appearing on behalf of the appellants argued the matter at length and also filed written submission.

The main contention of the ld. Counsel is that the electronic evidence relied upon by the adjudicating authority is inadmissible, in absence of a certificate, in terms of Section 138C of the Customs Act, 1962. He relied upon the decision of the three Judges Bench of the Hon'ble Supreme Court, in the case of Anvar P.V. -Vs, P.K.Basheer & Others - (2014) 10 SCC 473 and the decision of the Tribunal, in the case of Telebrands Pvt. Ltd. -Vs- C.C. – 2016 (336) ELT 97 and other decisions. It is also contended that differential duty for the period upto 31.12.2012 cannot be confirmed, in view of the earlier proceedings. It is further contended that the assessment is RSP based. It is also contended that the adjudicating authority had not examined the witnesses in compliance of the provisions of Section 138B of the Act. He relied upon various case laws on this issue.

3. The ld. A.R. for the Revenue reiterated the findings of the adjudicating authority and also submitted written submission. It is submitted that the Directors of the appellants and other persons admitted the under valuation and misdeclaration in their statements and, therefore, there was no requirement to follow provisions of Section 138B of the Act. It is further submitted that in view of the decision of the Tribunal, in the case of M/s. Laxmi Enterprises - Vs – C.C., Preventive, vide Final Order No.50544/2018 dated 05.02.2018, the rigors of Section 138C need not be followed, in case where the documents are obtained from the custody of the appellants

and the appellants admitted such documents in their statements.

4. Heard both sides and perused the record.

5. We find that the DRI officers conducted search operation in the residential premises of Shri Nikhil Asrani, Director of the importer, office-cum-godown of Suresh Kumar & Co. (Impex) Pvt. Ltd. and other premises. Panchnamas both dated 16.06.2015 were prepared in respect of recovery of Laptop, Desktop, I.Pad, I.Phone and Labeling Printing machines. The Officers also recorded statement of Shri Nikhil Asrani, Shri Aseem Asrani, Shri Suresh Kumar Asrani on different dates. Record of proceedings were prepared on various dates for forensics analysis of the electronic evidences such as, Laptop, Desktop, etc. The demand of duty was confirmed for the period from 2011 to 2016 on the importation of food items on the ground of under valuation.

6. The issue involved in these cases is mainly confined for determination, as to whether, the transaction values declared by the importers are correct or not. The adjudicating authority observed that the evidence for the actual price was retrieved from the laptop, which contained the email correspondences made by Shri Aseem Asrani. It has been alleged that the printouts were taken from the electronic devices used by Shri Nikhil Asrani and Shri Aseem Asrani. The authenticity of all the said printouts was admitted by them in their statements. On

the other hand, the appellants disputed the veracity and authenticity of the evidences, collected through electronic devices.

7. Section 138C of the Act, 1962 provides admissibility of micro films, facsimile copies of documents and computer print-outs as documents and as evidence. For the proper appreciation of the case, Section 138C of the Act, 1962 is reproduced below:

> **SECTION 138C**. **Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence.** –
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> (1) Notwithstanding anything contained in any other law for the time being in force, -
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> (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
>
> (b) a facsimile copy of a document; or
>
> (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"), if the conditions mentioned in sub-section (2) and the other provisions contained in this section are satisfied in relation to the statement and the computer in question, shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
>
> (2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely :-
>
> (a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over

that period by the person having lawful control over the use of the computer;

(b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of the contents; and

(d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act and the rules made thereunder where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. - For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of these processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.

8. On close reading of Section 138C of the Act, 1962, it is seen that the legislature had prescribed the detailed

procedure to accept the computer print-outs and other electronic devices as evidences. It has been stated that any proceedings under the Act, 1962, where it is desired to give a statement in evidence of electronic devices, shall be evidences of any matter stated in the certificate. In the present case, we find that the provisions of Section 138C of the Act were not complied with to use the computer print-outs as evidence. The ld. Counsel for the appellants submitted that there is a gross illegality committed during the retrieval of the electronic documents. It appears from the Panchnama and record of proceedings that the alleged date recovered from electronic documents, so seized, were copied in a hard disk in presence of one person and, thereafter, it was opened in front of other persons. It is noted that the certificate was not prepared during the seizure of the electronic devices, as required under the law.

9. The investigation is normally started after collecting the intelligence/information from various sources. The investigating officers are procuring the evidences in the nature of documents, statements, etc. to establish the truth. During the evolution of technology, the electronic devices were used as evidence. In this context, the law is framed to follow the procedure, while using the electronic devices as evidence for authenticity of the documents, which would be examined by the adjudicating authority during adjudication proceeding. In the instant case, it is found that the entire case proceeded on

the basis of the electronic documents as evidence. But the investigating officers had not taken pain to comply with the provisions of the law to establish the truthfulness of the documents and merely proceeded on the basis of the statements. Hence, the evidence of electronic devices, as relied upon by the adjudicating authority cannot be accepted.

10. The Hon'ble Supreme Court in the case of Anvar P.V. (supra), while dealing with Section 65B of the Evidence Act, 1872 (Parimateria to Section 138C of the Act, 1962), observed as under:

> *"14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65*-B**. -** Section *65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non-obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original……*
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> *15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:*
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> > *(a) There must be a certificate which identifies the electronic record containing the statement;*
> > *(b) The certificate must describe the manner in which the electronic record was produced;*

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India."

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"22.The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall

> *yield to the same. Generaliaspecialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."*

11. Upon perusal of the judgment of the Hon'ble Supreme Court in the case of Anvar P.V. (supra), we note that the Apex Court has categorically laid down the law that unless the requirement of Section 65B of the Evidence Act is satisfied, such evidence cannot be admitted in any proceeding. We note that the Section 138C of the Customs Act is *parimateria* to Section 65B of the Evidence Act. Consequently, the evidence in the form of computer print-outs etc. recovered during the course of investigation can be admitted as in the present proceedings only subject to the satisfaction of the sub-section (2) of Section 138C. This refers to the certificate from a responsible person in relation to the operation of the relevant lap-top/computer. After perusing the record of the case, we note that in respect of the electronic documents in the form of

computer print-outs from the seized lap-tops and other electronic devices have not been accompanied by a certificate as required by the Section 138 C (2) as above. In the absence of such certificate, in view of the unambiguous language in the judgment of the Hon'ble Supreme Court (supra), the said electronic documents cannot be relied upon by the Revenue for confirmation of differential duty on the appellant. In the present case, the main evidence on which, Revenue has sought to establish the case of under-valuation and mis-declaration of the imported goods is in the form of the computer printouts taken out from the laptops and other electronic devices seized from the residential premises of Shri Nikhil Asrani, Director in respect of which the requirement of Section 138C (2) has not been satisfied. On this ground, the impugned order suffers from un-curable error and hence, is liable to be set aside.

12. The ld. AR for Revenue relied upon the decision of the Tribunal in the case of M/s.Laxmi Enterprises (supra) in which the Tribunal upheld the charge of under-valuation and demand for differential duty. In the said decision, Tribunal overruled the objection of the appellant in connection with Section 138 C, by holding that the documents printed out from lap-top will be admissible as evidence in view of the fact that the truth of such documents stand admitted by the proprietor in his statement.

We have gone through the said decision of the Tribunal and we note that the judgement of the Hon'ble Supreme Court in the case of Anvar P.V. (supra) has not been cited and was never brought to the notice of the Bench. Consequently, we are of the view that the decision in the case of Laxmi Enterprises is not applicable to the facts of the present case.

13 It is submitted by the ld. Counsel for the appellant that the adjudicating authority had not examined the witnesses, as per the provisions of Section 138B of the Act, 1962. He has relied upon the decision of Hon'ble Delhi High Court, in the case of J&K Cigaratte – Vs. – Collector of Customs – 2009 (242) ELT (Del.). In that case, the Hon'ble High Court, while dealing with Section 9D(1) of the Central Excise Act, 1944 (Parimatria to Section 138B of the Customs Act, 1962) have held that the procedure as prescribed in the statute is required to be followed for proving the truth of the statement. The said decision of the Hon'ble Delhi High Court has also been relied upon by the Hon'ble Punjab & Haryana High Court, in the case of G-Tech Industries - Vs. – Union of India-2016 (339) ELT 209 (P&H). We find force in the submissions of the ld. Counsel for the appellant that the adjudicating authority had not followed the procedures prescribed under Section 138B of the Act, 1962. We have already observed that the demand of duty cannot be sustained, as the evidences as available for the alleged under valuation cannot be accepted under the law, as per the mandates of Section 138 C of the Act. Hence, there is no need to discuss the said issues, as raised by the appellants regarding consideration of the Provisions of Section 138 B ibid.

16. In view of the above discussions and analysis, we do not find any merits in the impugned order, in confirming the adjudged demands against the appellants. Therefore, the impugned order is set-aside and the appeals filed by the appellants are allowed.

[Pronounced in the open Court on 17/04/2018]

(V.PADMANABHAN)
MEMBER (TECHNICAL)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Anitha