

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75368 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/674/2023 dated 08.09.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Vikash Kumar : **Appellant**
S/o. Bagishwar Sharma,
Kaswan, Jehanabad, Bihar – 804 429

VERSUS

Commissioner of Customs (Preventive) : **Respondent**
3rd Floor, Custom House,
15/1, Strand Road, Kolkata – 700 001

WITH

Customs Appeal No. 75369 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/648/2023 dated 23.08.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Vikash Kumar : **Appellant**
S/o. Bagishwar Sharma,
Kaswan, Jehanabad, Bihar – 804 429

VERSUS

Commissioner of Customs (Preventive) : **Respondent**
3rd Floor, Custom House,
15/1, Strand Road, Kolkata – 700 001

WITH

Customs Appeal No. 75370 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/672/2023 dated 08.09.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Vikash Kumar : **Appellant**
S/o. Bagishwar Sharma,
Kaswan, Jehanabad, Bihar – 804 429

VERSUS

Commissioner of Customs (Preventive) : **Respondent**
3rd Floor, Custom House,
15/1, Strand Road, Kolkata – 700 001

AND

Customs Appeal No. 76038 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/673/2023 dated 08.09.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Vikash Kumar

: Appellant

S/o. Bagishwar Sharma,
Kaswan, Jehanabad, Bihar – 804 429

VERSUS

Commissioner of Customs (Preventive)

: Respondent

3rd Floor, Custom House,
15/1, Strand Road, Kolkata – 700 001

APPEARANCE:

Shri A.K. Pattanayak, Advocate,
For the Appellant

Shri Tariq Sulaiman, Authorized Representative,
Shri Subrata Debnath, Authorized Representative,
for the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 75183-75186 / 2026

DATE OF HEARING: 27.01.2026

DATE OF DECISION: 06.02.2026

ORDER: [PER SHRI ASHOK JINDAL]

The appellant is in appeal against the impugned order whereby the penalties imposed on the appellant under Section 114AA of the Customs Act, 1962, have been upheld.

2. The facts of the case are that the appellant is a 2009 batch IRS officer and his pleadings are limited to the penalties imposed on the appellant alone vide the orders passed by the original authority, which have been upheld by way of the impugned orders, the details of which are as under: -

Sl. No.	Appeal No.	Order-in-Original No. & Dt.	Order-in-Appeal No. & Dt.	Penalty imposed
1.	C/75368/2025	OIO No. 103/ADC/(P)/CUS /WB/19-20 dated 05.06.2020	OIA No. KOL/CUS/CCP/KS /674/2023 dated 08.09.2023	Rs.10,00,000/- u/S 114AA of the Act
2.	C/75369/2025	OIO No. 100/ADC/(P)/CUS /WB/19-20 dated 05.06.2020	OIA No. KOL/CUS/CCP/KS /648/2023 dated 23.08.2023	Rs.10,00,000/- u/S 114AA of the Act
3.	C/75370/2025	OIO No. 101/ADC/(P)/CUS /WB/19-20 dated 05.06.2020	OIA No. KOL/CUS/CCP/KS /672/2023 dated 08.09.2023	Rs.10,00,000/- u/S 114AA of the Act
4.	C/76038/2025	OIO No. 102/ADC/(P)/CUS /WB/19-20 dated 05.06.2020	OIA No. KOL/CUS/CCP/KS /673/2023 dated 08.09.2023	Rs.10,00,000/- u/S 114AA of the Act

3. The case of Revenue against the appellant are that during the course of investigation by DRI, Kolkata Zonal Unit in the matter of fraudulent exports made by various exporters through Petrapole Land Customs Station by a syndicate using the IECs of two firms, namely M/s. Spak Enterprises Pvt. Ltd. and M/s Samiran Biswas wherein the goods were either found to be misdeclared in terms of quality, quantity and value or junk to earn undue duty drawback, a DVD was found at the premises of M/s. Spak

Enterprises Pvt. Ltd. of Shri Ajaya Kumar Mohapatra, along with other incriminating documents. The seized DVD marked was as '23/EXP/ SPAK/2016' dated 29.07.2016 and the same was allegedly having data relating to export through Land Customs Station, whose computer name was 'Petrapple'. Owner of the said computer i.e., Shri Mohapatra, stated to DRI officers on that date that the said DVD belonged to one private person by the name of Shri Jyoti Biswas of Kolkata.

3.1. Officers of the DRI searched the house of Shri Jyoti Biswas on 21.09.2016, after two months from seizure of the said DVD and recorded his various statement(s). It is alleged that from the statement of Shri Jyoti Biswas recorded on 22.09.2016, it is clear that he had voluntarily stated before the DRI to have admitted his own involvement in fabricating documents for export of items to Bangladesh during 2012-13 and 2013-14 along with other departmental officers, including Shri Vikash Kumar (the appellant herein), in which Drawback benefits were deposited in the bank accounts of the concerned exporters which were taken by Shri Jyoti Biswas and allegedly given to the appellant.

4. In these set of facts, Show Cause Notices, all dated 10.01.2018, came to be issued proposing recovery of alleged fraudulently availed drawback from various exporters. The said Notices also proposed imposition of penalty on the appellant herein, along with other co-accused, under Section 114AA of the Customs Act, 1962.

4.1. The matters were adjudicated vide the above mentioned Orders-in-Original, wherein, inter alia, imposition of penalties on the appellant under Section 114AA of the Act have been confirmed.

4.2. The appellant challenged the said Orders-in-Original before the Ld. Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001, who has passed the impugned Orders-in-Appeal, rejecting the appeals filed by the appellant and upholding the orders of imposition of penalties under Section 114AA *ibid.* on the appellant.

4.3. Against the said orders, the appellant is before us.

5. At the outset, the Ld. Counsel for the appellant has drawn attention to the following list indicating the sequence of events in the present proceedings: -

- 09.11.2009: Bank of one Rudra Prasad Mondal certified for issuance of IEC code by DGFT which shows Sri Mondal was in export & import business from the year 2009 in absence of the appellant.
- Appellant joined in the department after his probation in 2011.
- 17.07.2015: Demand-cum-Show Cause Notice issued to four exporters including Sri, Rudra Prasad Mondal for non-fulfilment of Draw Back Rules.
- 09.10.2015: Original Authority confirmed demand of two exporters including Rudra Prasad Mondal.

- 29.07.2016: DRI, Kolkata, claimed to have seized one DVD which latter on found broken inside the sealed cover under DRI custody.
- 03.08.2016: Calcutta High Court dismissed writ filed by the exporters Sri, Rudra Prasad Mondal.
- 26.08.2016: concluding investigation on broken DVD, DRI, issued Show Cause Notice to exporters, where appellant was not made co-noticee.
- 21.09.2016: DRI searched house of Joti Biswas and found no evidence, drawn NIL Panchanama.
- 22.09.2016: DRI recorded statement of Joti Biswas which he retracted in Court on same day.
- 25.09.2016: DRI recorded statement of defaulted Exporter Rudra Prasad Mandal, who claimed innocent by shifting his responsibility.
- 02.11.2016: Department informed DRI, Kolkata that recovery process of Drawback is on against Rudra Prasad Mondal & Debnath Barik.
- 10.01.2018: On same set of facts SCNs were issued to those four exporters including Sri, Rudra Prasad Mondal, where the Appellant is co-noticee.
- 05.06.2020: Impugned Orders passed, ignoring the recovery process of 2015.

6. The Ld. Counsel for the appellant submits that the appellant is 2009 batch IRS officer and joined in the year 2011 after probation period whereas Sri Rudra Prasad Mondal got his IEC code from DGFT as exporter and engaged in the export & import business from 2009 when the appellant was not even born in the Department. Hence, it is contended that the claim of DRI and finding of subsequent adjudicating authority that the present appellant was involved in export by forming a syndicate with Rudra Prasad Mondal and other exporters is far from reality and meant to mislead recovery process of the Revenue aiming to extend un-due favour to the said defaulter exporters at the cost of National Exchequer. He argues that no reasonable person can believe that the adjudicating authority was not aware of the fact that the so-called DVD was in broken condition and that the said DRI officers purposefully excluded the concerned bank officers from the investigation on receipt and withdrawal of the Draw Back amount by Rudra Prasad Mondal and others by putting their valid signatures, opening of bank account etc.

6.1. He submits that the adjudicating authority ignored the role of proper officers of Customs and provisions of section 50 & 51 of the Act, on clearance of exported goods and the declarations / Letter of Undertaking required under the statute only to confuse official recovery process of Revenue; that conclusion of the adjudicating authority basically relies on conspiracy theory of three departmental officers namely Shri Vikash Kumar (the Appellant herein), Sri Sandeep Kumar Dixit (The then Senior Intelligent Officer (SIO) of DRI) and Shri Kislay (The then Inspector) by referring to one so-called broken DVD and retracted statement of one private person

Shri Jyoti Biswas; that evidently such story of conspiracy was fabricated by DRI to implicate the appellant; that as the only material evidence i.e., DVD was found to be broken within the sealed cover, is not available to connect the appellant with the alleged offence to justify any conspiracy by Shri Vikash Kumar in any stretch of imagination.

6.2. It is also mentioned by the Ld. Counsel for the appellant that the adjudicating authority mechanically relied on the retracted statements of the said private person i.e., Shri Jyoti Biswas knowing that such retraction was made before the Ld. CMM, Court, Alipore in 2016 on which no objection petition has been filed by DRI; that further, statement of the said private person is not supported with compliance of Section 138B of the Customs Act ,1962 and hence, cannot be valid evidence to be relied upon under Indian Evidence Act, r/w BSA in the impugned order.

6.3. Moreover, by way of written submissions filed on various dates, the Ld. Counsel for the appellant has advanced various additional submissions, which inter alia can be summarized as under: -

- (i) That new facts came to light as to electronic records like DVD being fabricated with the preloaded agenda to extend un-due favor to illegal exporters by implicating the appellant, then destroyed such electronic evidence which was ultimately exposed.
- (ii) These appeals filed against the impugned orders of Commissioner of Customs (Appeal), Kolkata arises out of Order of the Additional Commissioner, Customs (Prev.), Kolkata, issued on the cases already adjudicated by

Order-in-Original dated 09.10.2015 for recovery of Drawback where present appellant was neither noticee nor co-noticee, yet, penalized after five years, without the mandate of law, by un-settling the settled issues of 2015.

(iii) Impugned orders were passed relying on the following materials which is not available to refute;

- a. An imaginary DVD not in existence.
- b. One self-incriminating statement of a private person Shri, Joti Biswas allegedly recorded under duress by DRI on 22.07.2016 which was retracted on the same day before the Ld. Court of CMM, Alipore and DRI not filed any objection on it till date.
- c. Other witnesses referred by Adjudicating Authority, such as the man from whose possession the disputed DVD was seized, the seizing officer / custodian of that suspected DVD not examined in fact-finding process of adjudication of Revenue.
- d. The computer devices by which the said suspected DVD was created & operated are suppressed.
- e. Objection of CFSL Chandigarh dated 12.04.2017 for want of original electronic records is suppressed hence not available with the Adjudicating Authority, for application of mind, to justify the order.

- (iv) Departmental proceeding was instituted on same set of facts against the appellant, where some suppressed evidences emerged out on trial, which are pivotal to conclude the instant appeal in favour of justice.
- (v) Examination of the seizing officer Shri Shubhamoy Mondal of DRI exposed that before entering to the place where the said DVD was seized it was found to be on operation in their computer earlier and he took the plea that wrong timing was shown in that device and he was not directed to seize that device. Above confession proved that officers of DRI were involved in suppressing primary evidences.
- (vi) Private person Shri Jyoti Biswas contradicted entire stand of Revenue before the Ld. Inquiry Authority of department confirming his retraction in CMM, Court, where charge sheet is not filed by Revenue from 2016 till 2026, for lack of evidence.
- (vii) In the departmental proceeding, it is disclosed that CSFL, Chandigarh, vide letter No. CFSL ©-727/ 2017/PHY/243/2017/ 225 dated 12.04.2017 had not accepted the said DVD and Micro SD card send by DRI, Kolkata and returned such electronic records to DRI.
- (viii) In in response to CSFL Chandigarh, Shri Manish Chandra the then Additional Director, of DRI, Kolkata, vide letter dated 21.04.2017 dispatched after 12 days on 03.05.2017 stated that "original recording media as well as the recording device cannot be provided."

- (ix) Appellant's request as Charged Officer for the cross-examination of Shri Manish Chandra the then Additional Director, DRI, Kolkata, was first denied and then permitted by Ld. Inquiry Authority vide letter dated 10.11.2025, and on 26.12.2025, but the said DRI officer Shri Manish Chandra preferred not to give evidence in the inquiry.
- (x) It is established that DRI, Kolkata, fabricated such false case against appellant. The adjudicating authority and first appellate authority have mechanically passed orders without evaluating the admissibility of vital evidences and reached to such wrong conclusion.
- (xi) Admittedly the impugned orders are for demand of Drawback amount due to non-realization of export proceeds from the foreign buyers of four Exporters against 164 Bills of Export executed by them, but not against appellant as he was neither Exporter, nor posted as Customs officer in any of the place of export, nor he was having any official capacity to deal with the matter in any manner.
- (xii) Yet, penalty has been imposed on the appellant, referring to one broken DVD not available to refute and the retracted statement of private person not affirmed in oral examination. Thus, the impugned orders are passed without the mandate of law, only to divert attention from the ongoing recovery process of 2015 and extending undue favour to the defaulted exporters at the cost of Revenue.

- (xiii) In the instant case, the appellant being not the exporter as per the record of Revenue had no scope to make, sign or use, or caused to make, sign or use, any declaration, statement or document which is false or incorrect in any transaction for the purposes of export under the Act, thus there is no scope for him to violate the provisions of section 114AA of the Act, as projected in the SCN and impugned order.
- (xiv) That the appellant was neither posted nor had any supervisory power in any land Customs Station of West Bengal at that relevant point of time. Hence, he has not violated any provision of the Act and thus, imposition of penalty on the Appellant is without the mandate of law.
- (xv) On the one hand, the original authority demanded Drawback from the said four exporters as they made, signed and used declaration, Letter of Undertaking & Customs documents, as the author of those evidences, on the other hand charged the appellant for making forged export related documents to commit the same offence under section 114AA of the Act, which no reasonable person can believe as true, because same declarations / documents cannot be signed by the exporters and by the Appellant or by others through forgery. One cannot blow hot and cold in one mouth at a time. Such contradictory stand proves that the appellant had not violated section 114AA of the Act, as projected.

(xvi) In the impugned orders explaining role of the appellant, it is stated about forging of the signature and seal in official documents relating to the export in question. But the investigation of DRI is silent on such matter. Rather CBI, Kolkata disclosed from the specimen signatures of the said exporters and their bank records that the authors of the export invoices-cum-packing list & ARE-1 containing signature of the concerned exporters, which establishes that the allegation of forgery on which impugned orders are passed are far from reality.

(xvii) In this connection the appellant relies on the Order dated 10.07.2025 of this Hon'ble Tribunal in the case of *Sandeep Kumar Dikshit Vs. Principal Commissioner of Customs (Port), Custom House, Kolkata [Customs Appeal No. 75713 of 2025]*, on the same cause of action as involving this appellant.

6.4. In view of the above submissions, the Ld. Counsel for the appellant prayed for setting aside the penalties imposed on him under Section 114AA of the Act, as upheld by way of the impugned orders.

7. On the other hand, the Ld. Authorized Representatives of the Revenue appearing before us have supported the impugned orders. Accordingly, they justified the imposition of penalty on the appellant under Section 114AA *ibid*.

7.1. Additionally, the Revenue has taken the ground that the appeals are not maintainable before this Tribunal in terms of the proviso to Section 129 of the Customs Act, 1962 as these appeals have involvement with duty drawback claims by the exporters. Therefore, it is the submission of the Ld. Authorized Representatives of the Revenue that against such orders, the appeals shall not lie before this Tribunal. In support, reliance has been placed by the Revenue on the following decisions: -

- i. *Commissioner of Customs, Air Cargo Export & anr. v. Sans Frontiers [2024 (387) E.L.T. 590 (Del.)]*
- ii. *Titagarh Wagons Ltd. v. Commissioner, C.G.S.T. & C.Ex., Patna [Final Order Nos. 77571-77572 of 2024 dated 20.11.2024 in Customs Appeal Nos. 75592-75593 of 2021 – CESTAT, Kolkata]*

8. In response to the above submissions made by the Revenue on the maintainability of appeals before this Tribunal, it has been submitted by the Ld. Counsel for the appellant as follows: -

- (a) Admittedly the appellant is no way concerned on the payment of drawback, which is on those four exporters, as per Revenue.
- (b) The statutory exclusion contained in Section 129A under the Act is confined only to orders relating to the payment of drawback but does not extend to penal provisions.
- (c) Accordingly, this Tribunal has full jurisdiction to adjudicate the legality, validity and sustainability of the penalty imposed under Sections 114 / 114AA of the Customs Act, 1962.

- (d) Though the proceedings arise out of a drawback matter, the impugned order of the Ld. adjudicating authority followed by the order of the Ld. Commissioner (Appeals) imposed penal liability, which are independent and distinct from the determination of payment of drawback under Chapter X of the Customs Act, 1962. Such facts need judicious consideration under the justice delivery system of law.
- (e) Thus, the present appeals are maintainable before this Tribunal under Section 129A of the Customs Act, 1962 insofar as it challenges the imposition and confirmation of penalty under Section 114 / Section 114AA of the Act, without the support of any valid evidence.

9. Heard the parties and considered their submissions.

10. Before going into the merits of the case, we find it relevant to examine the contentions raised by the Revenue as regards maintainability of the present appeals before this Tribunal under Section 129A of the Customs Act, 1962. We find that in this case, the appellant has not at all claimed the drawback. In fact, the appellant is challenging only the penalty imposed on them, under the provisions of Section 114AA of the Customs Act, 1962. Therefore, the objection raised by the Ld. Authorized Representatives of the Revenue on this count is turned down.

10.1. We have also examined the case-law of *Sans Frontier (supra)* and *Titagarh Wagons Ltd. (supra)* cited by the Revenue in support of its above contentions. However, we find that both the above

cases were related to claims of duty drawback whereas, in the present case, the only issue involved is the imposition of penalty on the individual, Shri Vikash Kumar (i.e., the appellant herein), under Section 114AA of the Customs Act, 1962. Hence, the above decisions cited by the Revenue are distinguishable on facts and not applicable to the facts of the case on hand.

10.2. Accordingly, we hold that the appeals are maintainable before this Tribunal.

11. On the merits of the case, we find that the main issues that arise for our consideration are as under: -

- (1) Whether, the electronic record in the form of the so-called DVD in the instant case can be admissible as evidence for imposition of penalty under Section 114AA of the Customs Act, 1962 on the appellant in this case, without verifying its genuineness, veracity or reliability from the original electronic device by/from which these are created, or not.
- (2) Whether, the statement(s) recorded under the stress of investigation from Shri Jyoti Biswas, co-accused, which was retracted before the Court of the Ld. CMM by serving the copy to Respondents on the same day in Court on 22.09.2016, can be relied upon to implicate the appellant in this case, or not.

11.1. We now proceed to examine the above issues in seriatim.

Issue No. (1): Whether, the electronic record in the form of the so-called DVD in the instant case can be admissible as evidence for imposition of penalty under Section 114AA of the Customs Act, 1962 on the appellant in this case, without verifying its genuineness, veracity or reliability from the original electronic device by/from which these are created, or not

12. From the records available before us, it can be gathered that the primary evidence which has been used to implicate the appellant in the alleged offence is the information available in the DVD which was recovered from the premises of M/s. Spak Enterprises Pvt. Ltd., 1, Cock Burn Lane, Room No. 403, 4th Floor, Kolkata – 700 016 on 29.07.2016, along with the statements recorded in connection with the said DVD. The appellant has questioned the veracity of the said DVD and the documents contained therein on the ground that the original of the said DVD projected by the Revenue was destroyed from the beginning of its recovery and is not available as evidence, for imposition of penalty on the appellant. It has also been stated by the appellant that the computer device utilised for creation of the said DVD not available with Revenue; thus, it has been contended that the entire allegation against him has been levelled on the basis of documents obtained from a forged DVD; that compliance under Section 138C of the Customs Act, 1962 was not done, nor opposed before the Ld. CMM's Court till date for the last 10 years.

12.1. It is the appellant's claim that the said DRI officers not only destroyed the so-called DVD, but also manufactured another DVD to escape from detection but caught on record when the matter was inquired

by CBI and the result of investigation was placed in the judicial record serving copy to the appellant. As per the appellant, the Revenue, on the one hand, destroyed the so-called DVD from beginning, fabricated another DVD using a computer device, and on the other, denied access to the original computer device by which said disputed & destroyed DVDs were created, thereby keeping the origin of such electronic evidence out of the reach of fair investigation.

12.2. We find that after about two months from seizure of the DVD in July, 2016 the DRI officers searched the house of Shri Jyoti Biswas and arrested him in September 2016, on 22.09.2016, who was allegedly said to have been involved with the appellant in the export done by the said four exporters, as per his statement recorded by DRI on 22.09.2016. The seizure of the DVD and arrest of Shri Jyoti Biswas after two months from seizure of DVD, therefore, raises serious question on the conduct of the investigation.

12.3. It is well settled that the source and authenticity of electronic records, such as the said DVD in this case, are required to be ensured, in order to be used as evidence. Since electronic records are more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, an order based on unproved or unverified electronic records like DVDs can lead to travesty of justice. Admittedly, in the present case, the evidence, i.e., the so-called DVD, was never there in existence to support the case of the respondents and not available from the beginning of its recovery for appellant to refute, in spite of his request. We also take note of submission that the Hard Disk of the said computer utilised for

creation of the said DVD, taken possession of by the DRI officers, was not placed before original authority before finalization of the adjudication orders. In fact, the appellant has pointed out that the said DVD was admittedly found to be broken inside a sealed cover, under DRI custody.

13. In this connection, it is also pertinent to refer to the statement of the seizing officer of the aforesaid broken DVD, namely, Shri Shubhamoy Mandal, as IO, which was recorded by CBI on 10.11.2020. The relevant portion of the statement of Shri Shubhamoy Mandal, IO of DRI is as under:

"On being asked to explain that when the search commenced at 15.20 hours on 29.07.2016 and concluded at 20.30 hours on the same day, then how can the time on the screenshot of the DVD shows the time as 01.11 AM on 29.07.2016, I am to state that this is because of the wrong time which was being shown on the computer from which screenshot was taken."

In the second page, Shri Mandal further confessed that:

"On being shown the copy of Annexure to Panchanama dated 29.07.2016, it is seen that 45 items (including files & folders) are present, whereas in the copy of DVD provided to CBI only 44 items are present, I am to state that Shri, B. N. Mallick, Sr. IO, DRI, who is dealing the matter may explain the same."

13.1. It has also been stated before us that CSFL, Chandigarh, vide letter No. CFSL ©-727/2017/PHY/243/2017/ 225 dated 12.04.2017

had not accepted the said DVD and Micro SD card send by DRI, Kolkata and returned such electronic records to DRI, in response to which Shri Manish Chandra, the then Additional Director, of DRI, Kolkata, vide letter dated 21.04.2017 dispatched on 03.05.2017, stated that "original recording media as well as the recording device cannot be provided."

13.2. We find merit in the claim of the appellant that the documents available in the said DVD may have been fabricated. Admittedly, the DVD relied upon in the impugned proceedings is not the original one recovered from the premises of M/s. Spak Enterprises Pvt. Ltd. Since the original DVD seized from the premises of M/s. Spak Enterprise Pvt. Ltd. is unavailable, which is the main source of information based on which the impugned proceedings have been initiated, we are of the opinion that without verifying the original DVD, the information available in the re-constructed DVD cannot be relied upon to implicate the appellant in the alleged offence. Therefore, the allegations of the Revenue to this extent are without any basis, as no corroborative evidence has been adduced in support of the same.

14. In view of the aforesaid facts, so far as the present proceedings are concerned, in the absence of the original DVD or the computer device used in the alleged act of forgery, the allegations levelled against the appellant in relation to forging alleged export documents or any act in relation to such forgery for imposition of penalty under Section 114AA *ibid.*, are found to be unsubstantiated.

15. In this connection, we have also examined the contentions raised by the appellant as to non-compliance of the provisions of Section 138C of the Customs Act, 1962 by the Revenue as far as the purported contents of the DVD in question are concerned. It is a fact on record that no certificate under Section 138C of the Customs Act, 1962 read with Section 65B of the Indian Evidence Act, 1872 has been procured by DRI while seizing the DVD or documents derived from such DVD. The originals of the export documents, which were actually utilized in the export proceedings and for passing through Customs authorities of Kolkata Port are not in the possession of DRI. Under such circumstances, computer printouts taken from the so-called DVD recovered during the search cannot be relied upon as evidence to impose penalty on him, in the absence of a certificate as prescribed under Section 138C of the Customs Act, 1962.

15.1. For ready reference, the provisions of Section 138C of the Act are reproduced as under: -

"SECTION 138C. Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. — (1) Notwithstanding anything contained in any other law for the time being in force, -

(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 print out"), 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 print out shall be the following, namely :-

(a) the computer print out 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 therefrom by calculation, comparison or any other process."

15.2. A similar issue came up for consideration before the Tribunal at Mumbai in the case of *M/s. Jeen Bhavani International Versus Commissioner of Customs, Nhava Sheva-III* [(2023) 6 Centax 11 (Tri.-Bom)]. The relevant observations made by the Tribunal in the above Order are reproduced below: -

"12.1 Section 138C ibid deals with the situation, where the computer printouts cannot be considered having evidentiary value in certain circumstances. Various conditions have been prescribed under the statute. Admittedly, in this case, the prescribed conditions have not at all been complied with by the department. More particularly, the required certificate in terms of sub-section (4) of Section 138C ibid has not been furnished by the department. In this context, the Tribunal in the case of S.N. Agrotech (supra) has held that in absence of certificate required under section 138C ibid, the electronic documents in the form of computer printouts cannot be relied upon by Revenue for confirmation of the adjudged demands. The relevant paragraphs in the said order are extracted herein below:

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

.....

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 printouts 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 printouts 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 data 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 (Pari materia 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 65A, can be proved only in accordance with the procedure prescribed under section 65B. - Section 65B 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.

15. Under Section 65B(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 :

- (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;*

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 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - 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

65B 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 65A 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 65A and 65B. 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 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B 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 printouts, 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 laptop/computer. After perusing the record of the case, we note that in respect of the electronic documents in the form of computer printouts from the seized laptops and other electronic devices have not been accompanied by a certificate as required by Section 138C(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 undervaluation and misdeclaration 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 incurable error and hence, is liable to be set aside."

12.2 Further, in the case of Tele Brands (India) Pvt. Ltd. (supra), the Tribunal by relying upon various authoritative judgments has also held that the computer printouts allegedly recovered from the computer of the assessee cannot be relied upon as admissible evidence, in absence of compliance of the conditions laid down in Section 138C ibid. In the instant case, it is not established that the computer in question was in regular use by the appellant in the course of his business. No certificate whatsoever, as required under the provisions of Section 138C (2) was obtained. It is settled proposition of law that if a certain act is to be done by a certain authority, in a particular manner, the same should be done in the manner in which it is ordained. There are no short cuts in investigation. Without fulfilling the statutory requirements, subjecting the computer to forensic analysis is of no help and would not help the cause of Revenue. Therefore, we are of the considered opinion that the emails/documents etc retrieved in the instant case are not reliable evidence for the reasons cited above.

12.3 With regard to seizure of CPU and alleged data retrieved there from, the department has concluded that there was parallel set of invoices for the 21 Bills of Entry, wherein the actual invoice values have been shown, which were less than the declared invoice values. We find that the procedures laid down under section 138C have not been observed by the department, in addition to non mentioning of the details of the CPU, the place of installation in the premise, custodian of the CPU etc. Therefore, we find that as per the ratio laid down in the above referred judgments, the documents retrieved, lost their evidentiary value and cannot be relied upon for upholding the charges of undervaluation of goods and demand of the differential duty."

15.2.1. We find that the above decision has been affirmed by the Hon'ble Supreme Court as reported in (2023) 6 Centax 14 (S.C.).

15.3. Therefore, by applying the ratio laid down in the decisions cited supra, we are also of the view that the information available in the said DVD cannot be relied upon as admissible evidence against the appellant in the impugned proceedings in the absence of compliance of the provisions of Section 138C ibid.

16. In view of the detailed discussions in the foregoing paragraphs, we hold the electronic record, in the form of the so-called DVD in the present case, cannot be treated as admissible evidence, in the absence of any verification as to its genuineness, veracity or reliability from the original electronic device by/from which these are created, for the purpose of imposition of penalty under Section 114AA of the Customs Act, 1962 on the appellant. The said issue is therefore answered in favour of the appellant.

Issue No. (2): Whether, the statement(s) recorded under the stress of investigation from Shri Jyoti Biswas, co-accused, which was retracted before the Court of the Ld. CMM by serving the copy to Respondents on the same day in Court on 22.09.2016, can be relied upon to implicate the appellant in this case, or not.

17. Apart from the said DVD, the allegation against the appellant herein is based on the statement recorded from Shri Jyoti Biswas by which the purported modus operandi in relation to three departmental officers namely Sri Vikash Kumar (the appellant herein), Shri Sandeep Kumar Dikshit (the then Senior Intelligence Officer (SIO) of DRI) and Shri Kislay (the then Inspector) came to the knowledge of the Revenue. Accordingly, it has been alleged by the Revenue that Shri Jyoti Biswas has connived with appellant herein for fabrication / forgery of the export documents. Admittedly, the above statement/s of Shri Jyoti Biswas has been retracted by him in court before the Ld. Chief Metropolitan Magistrate (CMM) on 22.09.2016.

17.1. The contention of the appellant is that Id. adjudicating authority, while passing the impugned adjudication orders imposing penalty on him, has mechanically relied on the retracted statements of the said private person, namely, Shri Jyoti Biswas knowing that such retraction was made before the Court of the Ld. CMM, Alipore in 2016, on which no objection petition had been filed by DRI.

18. We find that the above said statement of Shri Jyoti Biswas has been heavily relied on by the Revenue against the appellant, to say that he has conspired with Shri Jyoti Biswas and two other

departmental officers, name, Sri Sandeep Dikshit and Shri Kislay, in the alleged offence. However, we do not find any concrete or corroborative evidence being placed on record by the Revenue to substantiate the above allegations. It is well settled that suspicions, howsoever strong, cannot take the place of proof. It must be supported by legal, reliable, and circumstantial evidence that proves guilt beyond a reasonable doubt. However, apart from the said statement, no tangible or documentary evidence has been adduced by the Revenue to substantiate its case. We also take note of the fact that Shri Jyoti Biswas, i.e., the person from whom the above said statement/s have been recorded, is a co-accused in this case. Therefore, such statement/s cannot be the sole basis to implicate the appellant in the alleged offence. The role of the appellant, if any, was required to be proved by means of cogent and independent evidence, for the purpose of imposition of penalty under the Act.

19. We also take note of the appellant's submission that the said statement/s relied upon against him in this case were allegedly recorded under duress and coercion and retracted later and thus such retracted statements have no evidentiary value in the absence of any corroborative evidence. Since the statement of Shri Jyoti Biswas has been retracted, we agree with the contention of the appellant that the same cannot be relied upon as evidence for implicating the appellant in the alleged offence, in the absence of any corroborative evidence. Reliance in this regard is placed on the decision of *Jeen Bhawani International (supra)*, wherein it has been observed as under: -

"14. We find that revenue heavily relies on the statements of Shri Mahesh Chandra Sharma, though retracted later. The adjudicating authority has held that no documents are available in the case records to show that the statements, recorded between November, 2016 and June, 2019, were retracted by the appellant. Further, he also held that belated retraction has no evidentiary value and the evidences available on record in the form of statements cannot be ignored. On perusal of the appeal records, we find that by letter dated 5-9-2019, addressed to the adjudicating authority, the appellant had retracted all the statements, assigning the reason that the appellant had never stated regarding mis-declaration of value, quantity or description of goods and accordingly, deny the whole statements recorded under section 108 *ibid*. It has further been stated that the statements were obtained by threat, duress etc.

14.1 We find that the statements were recorded by the department from Shri Mahesh Chandra Sharma on different dates in a span of 3 years. However, the copies of same were not furnished to the appellant immediately on completion of the summon proceedings. Upon receipt of the SCN together with the RUD's, the appellant came to know about the content in the statements, though made by him and thus, had sent the retraction letter within the reasonable time. Thus, it cannot be said that there is inordinate delay in filing the retraction letter. Further, the letter of retraction cannot be discarded on such ground, without examining the genuineness of the transactions and for that purpose, to verify the authenticity of available documents and those retrieved during the course of investigation, which admittedly has not been done by the department. In this context, the law is well settled that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and having also made a few payments as per the statement, it cannot lead to self-assessment or self-ascertainment. In the case of *Vinod Solanki* [2009 (223) E.L.T. 157 (S.C.)], the Hon'ble Supreme Court has ruled that the initial burden to prove that the confession was voluntary is upon the department and that evidence brought by confession if retracted, must be corroborated by other independent and cogent evidence. *Madras High Court in the case of Shri Nandi Dhall Mills India Private Limited* 2022 (60) G.S.T.L. 227 (Mad.)] held that merely because an assessee has, under the stress of investigation, signed a statement admitting tax liability and has also made a few payments as per the statement, cannot lead to self-assessment or self-ascertainment. Though the judgement was pronounced in respect of GST, it goes to indicate that acceptance by the appellant during the course

of recording the statement is not just enough and the same has to be confirmed by adducing independently corroborative evidence. The whole case cannot rest simply on the basis of a retracted statement though belatedly.

14.2 We find that the appellants have shown enough cause for delayed retraction. Learned Commissioner has simply brushed the same aside. He should have examined the appellant during the adjudication proceedings in terms of Section 138(B) of the Customs Act, 1962, to confirm the veracity. Learned adjudicating authority could have examined the officers too. Section 138B (1) ibid deals with the aspect of relevance of statements under certain circumstances. It has been provided that a statement made and signed by a person during any enquiry or proceeding shall be relevant, for the purpose of proving an offence, when the person, who made the statement, is examined as a witness in the case before the court. In this case, having acknowledged that the retraction has been made by the appellant in the course of the adjudication proceedings, more specifically, during the period between issuance of SCN and passing of the impugned order, it was incumbent upon the learned adjudicating authority to examine the person, who made the statement. However, the adjudicating authority chose to rely on the statement alone as evidence, which is beyond the scope and ambit of the statutory provisions. Thus, contents of the retracted statement cannot simply be brushed aside, to conclude that the appellant has indulged into the activity of undervaluation of goods."

20. Hence, we find that relevancy of the above retracted statement of Shri Jyoti Biswas has not been proved by Revenue. Consequently, in the absence of any concrete evidence being adduced by the Revenue, we hold that the statement recorded from Shri Jyoti Biswas, which has been retracted before a court of law, cannot be relied upon in the instant proceedings against the appellant. Accordingly, the Issue No. (2), as framed under paragraph 11 of this Order, stands answered in favour of the appellant.

21. Having addressed the issues under dispute, we now proceed to examine the applicability of the relevant statutory provisions invoked in this case to impose penalties on the appellant. We find that penalties have been imposed on the appellant under Section 114AA of the Customs Act, 1962. For the sake of ready reference, the relevant Section of the Customs Act, 1962, is reproduced below: -

▪ **Section 114AA:**

"SECTION 114AA - Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

21.1. Section 114AA envisages that a person who knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, shall be penalized under the said Section. We find that the conditions mentioned in Section 114AA of the Act are not satisfied in the present case, as there is no cogent, tangible or corroborative evidence on record to show that the appellant has made any declaration, statement or document which is false or incorrect in any material particular in the transaction of any businesses for the Act. There is also nothing on record to show that the appellant was in any manner concerned with the export of goods. Since the above ingredients, which are essential for imposing penalty under Section 114AA of the Act, are absent in the case, we do not find any justification for imposition of penalty under Section 114AA of the Customs Act on the appellant.

21.2. It is also relevant to note that in the earlier Show Cause Notices issued to the various exporters in the course of investigation, the name of the appellant was not mentioned. In fact, as pointed out by the appellant, the appellant was brought in these proceedings only at a later stage, although he was neither posted / holding any supervisory post of Customs at the relevant point of time where the exporters exported their goods, nor was any nexus found to establish his involvement in the alleged fraudulent exports by means of independent and concrete evidence. Therefore, even on this count, we agree with the submission of the appellant that under such circumstances, the provisions of Section 114AA of the Act cannot be invoked against the appellant.

22. In view of the above discussions, we hold that the penalties imposed on the appellant under Section 114AA of the Customs Act, 1962, as upheld vide the impugned orders, are not sustainable. Consequently, the said penalties imposed on the appellant are set aside.

23. The appeals are disposed of in the above manner.

(Order pronounced in the open court on **06.02.2026**)

Sd/-

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd