

Reserved On : 20/11/2025
Pronounced On : 25/11/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO.11791 of 2025

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.S. SUPEHIA

Sd/-

and

HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Sd/-

=====		
Approved for Reporting	Yes	No
	✓	
=====		

M/S MITESH IMPEX & ORS.

Versus

UNION OF INDIA & ANR.

Appearance:

MR PARESH DAVE, ADVOCATE for

MR PARESH V SHETH(3998) for the Petitioner(s) No. 1,2,3,4

MR PRADIP D BHATE(1523) for the Respondent(s) No. 1

MR UTKARSH R SHARMA(6157) for the Respondent(s) No. 2

CORAM: HONOURABLE MR. JUSTICE A.S. SUPEHIA

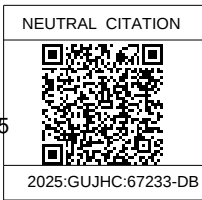
and

HONOURABLE MR. JUSTICE PRANAV TRIVEDI

CAV JUDGMENT

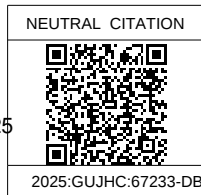
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. Learned advocate Mr.Paresh Dave, appearing for the petitioners, at the outset, has submitted that the impugned order dated 18.03.2025, passed by the respondent No.2 (at Annexure-A) is in complete defiance of the directions issued by the Central Excise and Service Tax Appellate Tribunal, West Zonal Bench at Ahmedabad ("the Tribunal" for short), in Customs Appeal No.12442 of 2014, hence is liable to be quashed. It is submitted that albeit, the Tribunal while remanding the matter had directed the adjudicating authority to grant an opportunity to the petitioner to cross-examine the



witnesses, who were not cross-examined in the first instance; the respondent No.2 has passed the impugned order ignoring the statements of three witnesses, who have deposed in favour of the petitioners after cross-examination, while concurrently considering the evidence of three other witnesses, who were not cross-examined in the first round of adjudication. It is submitted that thus, the impugned order may be set aside and the matter may be remanded to the respondent No.2 for fresh adjudication by considering the evidence of the three witnesses, as the remaining three witnesses have chosen not to appear despite the order passed by the Tribunal and despite having been granted sufficient opportunity.

2. When a specific query was raised by us to the learned Senior Standing Counsel Mr.Sharma regarding non-cross-examination of three witnesses, he was unable to dispute the same. However, he has submitted that as per the provisions of Section 138-B of the Customs Act, 1962 (in short, "the Act"), the statements of three witnesses, who did not remain present despite having been given four opportunities, can still be considered as evidence, which has been precisely done by the respondent No.2 while passing the order. While placing reliance on clause (b) of sub-section (1) of Section 138-B of the Act, it is contended that any officer of the respondent-Department can place reliance on the statement of a witness against an assessee during the course of any inquiry or proceedings under the Act, even if the witness or the person whose statement is recorded by such officer is not present or is not available. It is thus submitted that the approach adopted



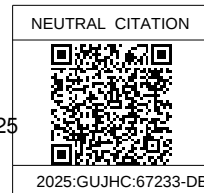
by the respondent No.2 falls in line with the provision of clause(a) to sub-section-1 to Section 138-B of the Act, hence the impugned order dated 18.03.2025 is required to be sustained.

3. The facts established from the record are that petitioner No.1 is a partnership firm registered under the provisions of the Indian Partnership Act, 1932, petitioner No.2 is a partner of the firm and a citizen of India, and petitioner Nos.3 and 4 are the persons, who are alleged to have contravene the provisions of Section 112(a) and Section 114(iii) of the Act and accordingly, penalty is imposed under the said provisions. The petitioner no.1 is engaged in manufacturing of excisable goods like copper ingots/billets etc.

4. The petitioners were issued a show cause notice dated 04.05.2012, calling upon as to why the penalty under section 112(a) and 114(iii) of the Act, may not be imposed.

5. The petitioners replied to the show cause notice with, which ultimately culminated in to the order in original dated 28.05.2014 passed by the Commissioner of Central Excise, Rajkot which was assailed by the petitioner, by filing Customs Appeal No.12442 of 2014 before the Regional Bench, Ahmedabad. The Tribunal, by order dated 13.03.2023, allowed the appeal of the petitioners by observing thus:

"5. We have considered the rival submissions. We find that the statement of six persons who the appellant sought to cross-examine has been relied in the Impugned order. It is also noticed that no examination/cross-examination of the said witness was undertaking by the adjudicating authority in terms of 138(B) of the Customs Act, 1962. We find that the Issue regarding cross-examination has been



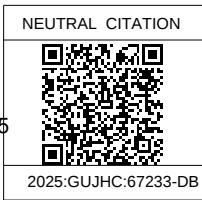
examined by Hon'ble High Court of Delhi in the case of J & K CIGARETTES LTD.-2009 (242) ELT 189 (Del.) and by Hon'ble High Court of Punjab and Haryana In the case of JINDAL DRUGS PVT. LTD VSL UNION OF INDIA-2016 (340) ELT 67 (P & H). Respectfully following the aforesaid decisions we hold that no reliance can be placed on the statements without granting the opportunity under Section 138 (B) of the Customs Act, 1962 to the appellants. We also take note on the fact that Section 9D of the Central Excise Act, and 138 (B) of the Customs Act, 1962 are Pari materia.

6. In view of above, the order is set aside and appeals are allowed by way of remand to the adjudicating authority for fresh adjudication after granting the appellant to due opportunity for cross-examination. All the issues are kept open."

6. Thus, from the aforesaid order, it appears that there were six witnesses whose evidence was considered against the petitioner's bereft of their cross-examination, though requested as per the provisions of Section 138-B of the Act, and by placing reliance on the judgments of various High Courts. Hence, the matter was remitted back to the adjudicating authority for fresh adjudication after granting the petitioners, due opportunity for cross-examination.

7. After the matter was remitted, the respondent No.2 re-heard the entire matter and has passed the impugned order against the petitioners.

8. We have carefully perused the impugned order and it is found that the respondent No.2, while passing the order, has categorically placed reliance on the evidence of three witnesses - (i) Shri Ankit Changani, Partner of M/s. Darpan General Trading, Dubai; (ii) Shri Anand Patel, Partner of M/s. Golden Elephant Trading; and (iii) Shri Dineshbhai Changani, Partner of M/s. Amardeep Exports - for holding against the petitioners, based on their statements recorded by the



assessing officer. The record also shows that despite granting four opportunities to these witnesses to remain present, none of them remained present. On the other hand, three witnesses – (i) Shri Prahladbhai Indarmal Jhaver, Proprietor of M/s. Bharti Overseas; (ii) Shri Suresh Gangdas Patel, Partner of M/s. Super Impex, Jamnagar; and (iii) Shri Sanjay Notandas Gandhi, Proprietor of M/s. Global Marine Agencies, Gandhidham – did remain present before the adjudicating officer, i.e. the respondent No.2, and deposed in favour of the petitioners after cross-examination. Thus, the respondent No.2, while passing the impugned order, placed reliance on the evidence of three witnesses who did not appear in the subsequent proceedings after remand and considered their statements recorded in the first round of adjudication, wherein the petitioners were never granted the opportunity of cross-examination, while ignoring the evidence of three witnesses, who deposed in favour of the petitioner. This fact is not disputed by the respondents before us.

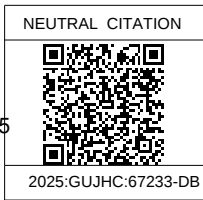
9. The case of the respective parties' hinges on the provision of Section 138-B of the Act. We may refer to the provisions of Section 138-B of the Act, which are reproduced hereunder:

"138B. Relevancy of statements under certain circumstances.—(1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,—

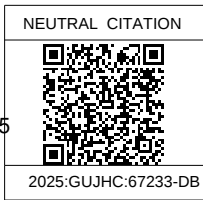
(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the

circumstances of the case, the court considers unreasonable; or
(b) when the person who made the statement is examined as a
witness in the case before the court and the court is of opinion that,
having regard to the circumstances of the case, the statement
should be admitted in evidence in the interests of justice.
(2) The provisions of sub-section (1) shall, so far as may be, apply in
relation to any proceeding under this Act, other than a proceeding
before a court, as they apply in relation to a proceeding before a
court.]”

10. The caption of Section 138-B of the Act mandates consideration of the relevancy of the statements of witnesses under certain circumstances. Sub-sections (1) and (2) of Section 138-B stipulate that the statements which are made and signed by the persons before any Gazetted Officer during the course of inquiry or proceedings under the Act can be treated as relevant. As far as the provision of clause (b) is concerned, the same relates to the admissibility of the statements in evidence in the interest of justice, which are made by the witness, who is available during the course of inquiry or proceedings, and has offered for cross-examination. Thus, clause (b) envisages and introduces the element of cross-examination of the witness who has given the statement before the officer during the course of inquiry or proceedings. Unless an opportunity of cross-examination is given to the person (assessee) against whom the statement of such witness is proposed to be used, the same is inadmissible in evidence, since the denial or absence of cross-examination of the witness, and the admissibility of such statement in evidence will be in violation of the principles of natural justice and also against fair play and equity. However, clause (a) expositis a different approach. Clause (a) authorizes the officer to consider the relevancy of the statements of that witness, who under the



circumstances narrated therein, is a person/witness, who cannot be produced or is unavailable for cross-examination. The language of clause (a) is akin to Section 32 of the Indian Evidence Act, 1872, (Now Section 26 of Bhartiya Sakshya Adhiniyam, 2023) which prescribes the evidentiary value of the statement of a witness who is not available to testify. However, the quintessential feature is that the statement of such witness can be treated as relevant only when the circumstances mentioned in clause (a) regarding the non-availability of the person/witness are established and a finding is recorded to the extent that it is impossible to secure the presence of the person. At this stage, while attempting to secure the presence of such a witness, an opportunity is also required to be offered to the assessee for securing presence of the witness at his/her expense. The process of securing the witness should not be delayed as per the provision of clause (a), and effort should be made for a reasonable time, and the inquiry or the proceedings should not procrastinated beyond a reasonable time. In case all attempts have failed to secure the presence of the witness within a reasonable time, then a finding has to be recorded on this aspect. After such a finding is recorded by the officer, the officer has to give an opportunity to the assessee to respond to the statement of such witness. The statement of such witness, recorded during the course of inquiry or proceedings, cannot be used against the assessee unless he is confronted with the statement and has been afforded full opportunity to deal with the same. The officer cannot blindly rely on the bare statement of the witness unless some corroborative material is produced to support such statement, and the assessee is offered an

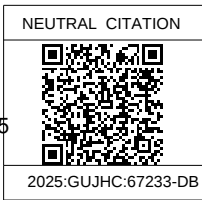


opportunity to rebut the same. The officer has to record reasons, based upon the material placed before him, for arriving at a definite finding. In our opinion, in either of the scenarios envisaged in clause (a) or clause (b), the evidence has to pass the test of admissibility in the interest of justice.

11. In the instant case, the respondent No.2, while passing the impugned order, was required to consider the evidence of three witnesses, who appeared in the proceedings and were cross-examined along with the statements of three other witnesses who did not come for cross-examination. The relevancy of the statements of three witnesses, who were not cross-examined, were required to be undertaken by adopting the course as narrated hereinabove. The adjudicating authority has to record the findings after weighing the evidence emerging from the statements of all the witnesses, and corroborative proof along with the defence of the assessee.

12. In the present case, it cannot be said that the respondent No.2 has violated the directions issued by the Tribunal, since the Tribunal had only remitted the matter for giving an opportunity of cross-examination of all six witnesses, however, since three witnesses failed to offer themselves for cross-examination by remaining absent despite having being granted opportunities to do so in the adjudicating process, the only correct approach for the respondent No.2 was to consider the evidence in the manner as declared by us.

13. Hence, the present writ petition merits acceptance. The impugned order dated 28.05.2014, is quashed and set aside.



The matter is remanded back to the adjudicating authority i.e the respondent No.2 for fresh adjudication in light of the foregoing observations. Appropriate order shall be passed within a period of 12 weeks from the date of receipt of the order. Nothing is expressed by us on merits. All the rights and contentions of the respective parties are left open. Rule made absolute.

Sd/-

(A. S. SUPEHIA, J)

Sd/-

(PRANAV TRIVEDI,J)

MAHESH/01