CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

Customs Appeal No. 50955 of 2021

(Arising out of Order-in-Original No. 12/2021/MKS/Pr.Commr./ICD-Import/TKD dated 26.07.2021 passed by the Principal Commissioner of Customs, New Delhi)

M/s. Composite Impex, **...Appellant**
1233/4, First Floor, Jain Mandir Marg,
Naiwala, Karol Bagh,
New Delhi

VERSUS

The Principal Commissioner of Customs (Import), **...Respondent**
ICD, Tuglakabad,
New Delhi

AND

Customs Appeal No. 50956 of 2021

(Arising out of Order-in-Original No. 12/2021/MKS/Pr.Commr./ICD-Import/TKD dated 26.07.2021 passed by the Principal Commissioner of Customs, New Delhi)

Shri Rajiv Dhuper, **...Appellant**
Partner in M/s. Composite Impex,
J-3/155, Rajouri Garden,
New Delhi

VERSUS

The Principal Commissioner of Customs (Import), **...Respondent**
ICD, Tuglakabad,
New Delhi

APPEARANCE:

Shri Alok Agarwal, Shri Sharad Srivastava, Shri Prachit Mahajan, Advocates for the appellant.

Shri Nagendra Yadav, Authorized Representative for the Department

CORAM:

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

Date of Hearing: 28.11.2024
Date of Decision: 15.05.2025

FINAL ORDER No's. 50683-50684/2025

JUSTICE DILIP GUPTA:

M/s. Composite Impex[1] has filed **Customs Appeal No. 50955 of 2021** to assail the order dated 26.07.2011 passed by the Principal Commissioner of Customs, New Delhi[2] rejecting the self-assessed transaction value of the goods covered under 30 Bills of Entry under rule 12 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007[3] read with section 14 of the Customs Act, 1962[4] and re-determining the same under rule 3 of the 2007 Valuation Rules. The order also confiscates the goods under section 111(m) of the Customs Act, but as the goods were not available for confiscation, the Principal Commissioner refrained from imposing any redemption fine. The order also confirms the demand of differential customs duty under section 28(4) of the Customs Act with applicable rate of interest under section 28AA of the Customs Act. The order also imposes penalty upon the appellant.

2. **Customs Appeal No. 50956 of 2021** has been filed by Rajiv Dhuper to assail that part of the order dated 26.07.2011 passed by the Principal Commissioner that imposes a penalty of Rs. five lakhs upon him under section 112(a)(ii) and section 112 (b)(ii)of the Customs Act and a penalty of Rs. Five lakhs upon him under section 114AA of the Customs Act as a partner of the appellant.

3. The appellant imported Automotive Windshield (Automotive Safety Glass) of assorted sizes for various models by classifying them under

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1. the appellant
2. the Principal Commissioner
3. the 2007 Valuation Rules
4. the Customs Act

Customs Tariff Item[5] 7007 21 90 during the period 2015-18. An investigation was carried out by the Special Intelligence and Investigation Branch[6] and a show cause notice dated 21.08.2020 was issued to the appellant alleging suppression of the actual transaction value and resorting to under-valuation relying upon the Excel Sheet printout taken from a pen drive of the data retrieved from 'WeChat' said to have been sent by one person named as Max of M/s. Dongguan Benson Automobile Glass Co. Ltd., China[7] to Rajiv Dhuper, partner of the appellant. The said Excel Sheet contains details, such as Invoice Number, CIF value, Container Number and payment details which are alleged to be of the imports made by the appellant from the supplier from 2015-2018. On the basis of a comparison of the said details with the declared value in the Bills of Entry, the show cause notice alleged that the appellant undervalued the imports to evade payment of duty. Accordingly, it proposed to reject the declared transaction value under rule 12 of the 2007 Valuation Rules and re-determine it under rule 3 read with rule 10 of the 2007 Valuation Rules. The relevant portions of the show cause notice are reproduced below:

> "**15. From the above facts of the case, scrutiny of the documents recovered from the Electronic/ Mobile devices of Shri Rajiv Dhuper, Partner of M/s. Composite Impex and his statements recorded during investigation in the matter, it appears that:-**
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> (i) M/s. Composite Impex (the importer) has imported "Automotive Safety Glass" wind shield under 30 Bills of Entry from M/s.

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5. CTI
6. SIIB
7. the Supplier

Dongguan Benson Automobile Glass Co. Ltd., China.

(ii) During investigation, incriminating documents like Excel Sheet (Page 1 to 4) containing actual negotiated prices of 30 past imports had been retrieved from the WeChat account of Shri Rajiv Dhuper. **From the perusal of said Excel Sheet, it was noticed that the actual value of "Automotive Safety Glass" wind shield was not correctly declared before the Customs at the time of Customs clearance, and that the importer has suppressed the actual transaction value to evade the Customs duties.**

(iii) The documents received on 'WeChat' revealed that the importer had indulged in suppressing of actual invoices depicting correct transaction value of the goods in order to evade proper duties, and used to present fabricated invoices for Customs clearances having lower than actual values. For evasion of Customs duty on the said goods. The actual values of 30 invoices mentioned in Excel sheet were found in respect of consignments imported from M/s. Dongguan Benson Automobile Glass Co. Ltd., China.

(iv) Shri Rajiv Dhuper, Parter of M/s. Composite Impex, in his statement dated 30.10.2018 recorded under Section 108 of the Customs Act, 1962 cetegorically admitted that the excel sheets recovered from his WeChat account was their account summary of purchases made by them from M/s. Dongguan Benson Automobile Glass Co. Ltd., China and payments made thereof. The said statement was reconfirmed by him on 01.02.2019 wherein he also stated that if any under-valuation was

found in their import they were ready to pay the differential duty, interest & penalty as applicable.

(v) The Gross weight of the 40 feet container mentioned in Excel Sheet retrieved from WeChat of Shri Rajiv Dhupar are almost in the range of 27270 Kg to 28600 Kg. The declared value of the imported goods at the time of clearance were between USD in the range of USD 34,300/- to 45,000/-."

(emphasis supplied)

4. The appellant filed a reply to the show cause notice and stated that the value declared at the time of clearance of imported goods was correct and the payments of the imported goods was made through proper banking channels. The appellant also stated that the rejection of the transaction value based on the printout of Excel Sheet retrieved from 'WeChat' of Rajiv Dhuper was not reliable and the facts were not corroborated by any other evidence. It was also stated that the Excel Sheet was neither signed nor stamped by the supplier, nor was its veracity verified during investigation. It was also stated that the statement made by Rajiv Dhuper on 30.10.2018 was taken under threat of arrest and coercion and, therefore, could not be relied upon. It was also stated that the statement was immediately retracted by a letter dated 01.11.2018. The appellant also stated that the extended period of limitation contemplated under section 28(4) of the Customs Act could not have been invoked in the facts and circumstances of the case.

5. The reply sent by the appellant did not find favour of the Principal Commissioner and the demand of differential duty with penalties was confirmed. The relevant portion of the order relating to the printout of

the Excel Sheet taken from a pen drive of the data retrieved from 'WeChat' is reproduced below:

> "**30.** I further find that during the course of search, Sh. Rajiv Dhuper voluntary opened mail id composite impex 50@gmail.com and during scrutiny of the said mail, some import related documents were noticed by officers and printout of same were taken. Further, the documents were retrieved from the resumed electronic device of Sh. Rejiv Dhuper by forensic examination. **One of the retrieved documents i.e. scanned copy of an excel sheet taken from WeChat conversation with supplier's representative having details of account summary of purchase details made by the importer, revealed that there was a huge difference in the declared value of the goods in the commercial invoice submitted along with the said bill of entry and the value of goods mentioned in the said excels sheet/documents resumed from the electronic device of the importer.**"
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> **(emphasis supplied)**

6. In regard to the under valuation of the goods imported by the appellant, the Commissioner observed as follows:

> "(i) I find that during investigation it was noticed that the actual value of "Automotive Safety Glass" wind shield was not correctly declared before the Customs at the time of Customs clearance, and that the importer has suppressed the actual transaction value to evade the Customs duties. **The documents received on 'WeChat' revealed that importer had indulged in suppressing of actual invoices depicting correct transaction value of the goods in order to evade proper duties, and used to present fabricated invoices for Customs clearances, having lower than actual values, for evasion of Customs duty on the said goods.** The actual values

of 30 invoices mentioned in Excel sheet were found in respect of consignments imported from M/s. Dongguan Benson Automobile Glass Co. Ltd., China.

(ii) **I find that Shri Rajiv Dhuper, Partner of M/s. Composite Impex, in his statement dated 30.10.2018 recorded under Section 108 of the Customs Act, 1962 categorically admitted that the excel sheets recovered from his WeChat account was their account summary of purchases made by them from M/s. Dongguan Benson Automobile Glass Co. Ltd. China and payments made thereof. The said statement was reconfirmed by him on 01.02.2019 wherein he also stated that if any under-valuation was found in their import they were ready to pay the differential duty, interest & penalty as applicable.**

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(xiii) **In view of the above discussion, I find that in the instant case, the evidences, as discussed hereinabove, read with the various statements by Sh. Rajiv Dhuper admitting the undervaluation as well as the incriminating documents retrieved from electronic devices, are sufficient to establish that the importer has undervalued the** impugned imported goods to evade payment of applicable customs duty.

32. xxxxxxxxxx. **Therefore, I find that the values declared in various Bills of Entry filed by the importer related to the imports made by him in respect of these 30 past Bills of Entry are liable for rejection in terms of Rule 12 of Customs Valuation Rules, 2007 (CVR 2007) read with Section 14 of the Customs Act, 1962.** Consequently, for the purposes of assessment of duty in respect of

> impugned imports made by the importer, assessable value is liable for re-determination in terms of Section 14 of the Customs Act, 1962 read with CVR 2007 and Section 17(4) of the Act, ibid."
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> **(emphasis supplied)**

7. The Principal Commissioner re-determined the value under rule 3(1) of the 2007 Valuation Rules and the relevant finding is:

> "**33.** xxxxxxxxx. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. **I find that the proforma invoice/commercial invoice raised by the supplier to the importer at higher value indicated to be the correct value (price actually paid as mentioned in the retrieved wechat excel sheet) and thus evidence the actual payment which was to be paid by the importer to the supplier. Therefore, I hold that the value in the said commercial invoice/wechat excel sheet has to be treated as the correct transaction value.**"
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> **(emphasis supplied)**

8. Regarding the invocation of the extended period of limitation under section 28(4) of the Customs Act, the Principal Commissioner made the following observations:

> "37. xxxxxxxxxx. **Regarding invoking of extended period, it is established that the importer has manipulated the invoice presented for clearance of goods and mis-declared the value in the Bills of entry by suppressing the actual invoice, which could only be unearthed during investigation.** From the foregoing paras, it is evident that the actual value of the imported goods was wilfully suppressed by the importer as detailed in Annexure to the show cause

notice, from the Customs Authorities in their respective import documents at the time of import with the sole intention of evading applicable Customs duty. Sh. Rajiv Dhuper vide his voluntary statement dated 12.10.2018, 30.10.2018 and 01.02.2019 admitted the undervaluation and was ready to pay any differential Customs duty, interest & penalty as applicable. **Further, recovery of Excel sheet of wechat depicting higher value of their imported goods from the email/We chat of the importer clearly indicates that the importer had intentionally suppressed the documents, willfully presented a fraudulent and incorrect invoice to Customs and mis-stated the transaction value of imported goods in the Bills of Entry, with clear intention to evade payment of correct customs duty. Sh. Rajiv Dhuper was actively involved in the import of these goods by M/s Composite Impex as discussed above and these facts were also admitted by him in his statements discussed above.** Thus I find that Sh. Rajiv Dhuper, active Partner of M/s Composite Impex was the mastermind of this fraud which he perpetrated by suppressing the actual transaction value of the goods and wilful under-valuation/ mis- declaration of value of the imported goods covered under Bills of Entry detailed in Annexure- A to the Show Cause Notice with the sole intention of evading payment of applicable Customs duties. The mis-declaration of value of imported goods is thus apparent and has been done with clear intent to evade customs duty. The importer has violated provisions of section 17(1) and Section 46 of the Customs Act 1962 by not filing truthful declarations in bills of entry and proper self-assessment under section 46(4) read with rule 11 of the Customs Valuation rules 2007. **Therefore, for the aforesaid acts of suppression of facts and mis-statement committed by the importer, the extended period of five years for demand of customs duty under sub-section 4 of Section 28 of the Customs Act, 1962 is invokable in this case. I find that the importer is liable to pay the differential customs**

> **duty with applicable interest section 28AA of the Customs Act, 1962, by invoking extended period of 5 years under Section 28(4) of the Customs Act, 1962.**"
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> **(emphasis supplied)**

9. Shri Alok Agarwal, learned counsel appearing for the appellant assisted by Shri Sharad Shrivastava and Shri Prachit Mahajan, made the following submissions:

(i) The Excel Sheet data retrieved from WE-CHAT and copied in a pen drive, being a secondary electronic evidence, is legally not admissible as evidence and cannot be relied upon to prove undervaluation in the absence of the statutory compliance of producing a mandatory certificate under section 138C of the Customs Act, which is pari material to section 65B of Evidence Act, 1872;

(ii) As per the Panchnama dated 25.10.2018 recorded for the data retrieval proceedings of Excel Sheet from laptop and one i-pad, no document was generated or printout taken, but another electronic device was created namely a pen drive from which the Excel Sheet was printed, but it is not accompanied by a certificate as required under section 138C(4) of the Customs Act. In the absence of such a certificate, the printout from the secondary electronic evidence of the Excel Sheet cannot be relied upon for confirmation of differential duty on account of alleged undervaluation;

(iii) Even otherwise, the said Excel Sheet relied upon by the department is vague and cannot be relied, as was also clarified by the supplier. The supplier, by a letter dated

04.10.2020, categorically denied involvement in the Excel Sheet allegedly retrieved from the We-Chat and stated that neither the company nor any employee had sent any Excel Sheet/Bill Report to the appellant;

(iv) The statement of Rajiv Dhuper under section 108 of the Customs Act cannot be read in evidence;

(v) The value declared by the appellant is the actual transaction value as per section 14 of the Customs Act read with rule 3 of the 2007 Valuation Rules and the Principal Commissioner wrongly rejected and re-determined the said value under rule 3 read with rule 10 of the 2007 Valuation Rules; and

(vi) The extended period of limitation could not have been invoked in the facts and circumstances of the case.

10. Shri Nagendra Yadav, learned authorized representative appearing for the department made the following submissions:

(i) The documents received on 'WeChat' revealed that the importer had indulged in suppressing actual invoices depicting the correct transaction value of the goods in order to evade proper duties, and presented fabricated invoices for customs clearances, having lower values for evasion of customs duty;

(ii) Rajiv Dhuper, partner of M/s. Composite Impex, in his statement dated 30.10.2018 recorded under section 108 of the Customs Act categorically admitted that the Excel Sheets recovered from his WeChat account was account summary of purchases made from M/s. Dongguan Benson Automobile Glass Co. Ltd., China and the payments made. The said statement was reconfirmed by him on 01.02.2019 and he also stated that if any under-valuation was found in the imports, the differential duty would be paid with interest and penalty;

(iii) Payment details and the values mentioned in the said Excel Sheets reflect that as against the total value of USD 1197510.73 of the imported goods imported through 30 Bills of Entry, an amount of USD1159484.58 had been already paid to M/s Dongguan Benson Automobile Glass Co. Ltd., China by M/s. Composite Impex but M/s Composite Impex declared an amount of only USD 691680.58 before the customs authorities in respect of the said Bills of Entries. It is, therefore, evident that M/s Composite Impex had undervalued the imports to evade payment of duty, as is evident from the data and the payment details in the said Excel Sheets;

(iv) The importer deliberately suppressed the actual transaction value of the goods covered under 30 Bills of Entries. Therefore, the values declared in various Bills of Entry are liable for rejection in terms of rule 12 of the 2007 Valuation Rules read with section 14 of the Customs Act. Consequently, the assessable value is liable for re-determination in terms of section 14 of the Customs Act read with the 2007 Valuation Rules;

(v) When the actual value of the goods imported is available in Excel Sheet recovered during the investigation, the said actual values of the impugned goods should be taken as the basis for re-determining the transaction value under rule 3 of the 2007 Valuation rules;

(vi) The submissions made on behalf of the appellant relating to section 138C of the Customs Act are mis-conceived; and

(vii) The extended period of limitation was correctly invoked in the facts and circumstances of the case.

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

12. The Principal Commissioner has rejected the declared transaction value of the goods imported under 30 Bills of Entry under rule 12 of the 2007 Valuation Rules and re-determined it under rule 3 read with rule 10 of the 2007 Valuation Rules. The Principal Commissioner has basically relied upon the data contained in the Excel Sheet printout taken from another electronic device pen drive. This Excel Sheet is said to contain data retrieved from the 'WeChat' said to have been sent by Max of M/s. Dongguan Benson Automobile Glass Co. Ltd., China to Rajiv Dhuper, partner of the appellant. It is on a comparison of the details in the printout of the Excel Sheet and the declared value of the Bills of Entry that the declared transaction value has been rejected under rule 12 of the 2007 Valuation Rules. The Principal Commissioner has also relied upon the statement made by Rajiv Dhuper on 30.10.2018 recorded under section 108 of the Customs Act in which, it is said that he admitted that the Excel Sheet contained the account summary of the purchases made and the payments made. The proforma

invoice/commercial invoice raised by the supplier to the importer at a higher value was taken to be the price actually paid as mentioned in the Excel Sheet and has, therefore, been taken to be the correct transaction value.

13. The first issue, therefore, that arises for consideration in this appeal is as to whether the printout of the Excel Sheet is admissible evidence in the absence of statutory compliance of producing a certificate under section 138C of the Customs Act.

14. This is for the reason that the printout was taken from a secondary electronic evidence. This issue was examined by a Division Bench of this Tribunal in **M/s. Trikoot Iron & Steel Casting Ltd.** vs. **Addittional Director General (Adjn.) Directorate General of GST Intelligence (Adjudication Cell)**[8] in which the provisions of section 36B of the Central Excise Act, 1944 came up for consideration. This section is pari material to section 138B of the Customs Act. The observations are as follows:

> "**18.** Section 36B of the Central Excise Act deals with cases where any document is required to be produced as an evidence in proceedings under the Central Excise Act and the Rules framed thereunder. Such certificate should be signed by a person occupying a responsible position in relation to the operation of the device in question or the management of the relevant activities. In such a case it shall be evidence of any matter which is stated therein. It specifically mandates production of a certificate:
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> (i) identifying the document containing the statement and describing the manner in which it was produced;
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> (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the

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8. Excise Appeal No. 55779 of 2023 decided on 09.09.2024

document was produced by a computer,

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

19. The Central Excise Act contains a specific provision that describes the manner in which the admissibility of computer print outs will be accepted as evidence in proceedings initiated under the Central Excise Act."

15. The Division Bench, thereafter, considered the two decisions of the Supreme Court in **Anvar P. V.** vs. **P. K. Basheer and others**[9] and **Arjun Panditrao Khotkar** vs. **Kailash Kushanrao Gorantyal & others**[10] and observed as follows:

"**22.** It transpires from the aforesaid two judgments of the Supreme Court in **Anvar P. V.** and **Arjun Panditrao Khotkar** that:

a. Any documentary evidence by way of an electronic record under the Evidence Act can be proved only in accordance with the procedure prescribed under section 65B of the Evidence Act. The purpose of this provision is to sanctify secondary evidence in electronic form generated by a computer;

b. 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) of section 65 of the Evidence Act are satisfied, without further proof or production of the original;

c. In view of the provisions of section 65(4) of the Evidence Act, a certificate must accompany the electronic record like computer printout, compactdisc, video compact disc or pen drive, pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence;

d. Only if the electronic record is duly produced in terms of section 65B of the

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9. AIR 2015 SC 180
10. AIR 2020 SC 4908

Evidence Act, that the question of its genuineness would arise. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if the requirements of section 65B of the Evidence Act is not complied with;

e. An electronic record by way of secondary evidence shall not be admitted in evidence unless the the requirements of section 65B of the Evidence Act has satisfied; and

f. This would not apply in a case where the appellant adduces primary evidence by making available in evidence the electronic records.

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31. The printouts, which are the sole basis for holding that the appellant had indulged in clandestine removal, were taken both on 04.07.2013 and on 15.07.2013 by placing the recovered hard disc and pen drive in the CPU.

32. It is, therefore, clear that the CPU did not contain the hard disk. The hard disk was in fact picked up from the corner of the room. No attempt was made by the department to admit the hard disk and the pen drive in evidence. The required certificate under section 36B (4) of the Central Excise Act was also not produced. Thus, no reliance can be placed on the printouts, in view of the two judgments of the Supreme Court in **Anvar P. V.** and **Arjun Panditrao Khotkar** and the three decisions of the Tribunal in **Agarvanshi Aluminium Ltd.** vs. **Commissioner of Customs (I), Nhava Sheva** [2014 (299) E.L.T. 83 (Tri.-Mum)]**, Popular Paints and Chemicals** vs. **Commissioner of Central Excise and Customs, Raipur** [Excise Appeals No. 52738 of 2016 decided on 06.08.2018] and **Global Extrusion Private Limited and Ors.** vs. **Commissioner of Central Excise & ST, Rajkot** [Excise Appeal No. 11963 of 2016 decided on 15.01.2024].”

16. A Bench of the Tribunal in **Agarvanshi Aluminium Ltd.** vs. **Commissioner of Customs (I), Nhava Sheva**[11], where the issue was with respect to section 36B of the Central Excise Act, also observed:

> "**12.** ...... it is clear that for admissibility of computer printout there are certain conditions have been imposed in the said section. Admittedly condition 4C of the said section has not been complied with and in the case of Premier Instruments & Controls (supra) this Tribunal relied on the case of International Computer Ribbon Corporation - 2004 (165) E.L.T. 186 (Tri.-Chennai) wherein this Tribunal has held that "computer printout were relied on by the Adjudicating Authority for recording a finding of clandestine manufacture and clearance of excisable goods. It was found by the Tribunal that printouts were neither authenticated nor recovered under Mahazar... The Tribunal rejected the printouts... Nothing contained in the printout generated by the PC can be admitted as evidence." In this case also, we find that the parallel situation as to the decision of Premier Instruments & Controls (supra).
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> **13. Therefore, the printout generated from the PC seized cannot be admitted into evidence for nonfulfillment of statutory condition of Section 36B of the Central Excise Act, 1944.**"
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> **(emphasis supplied)**

17. In **Popular Paints and Chemicals** vs. **Commissioner of Central Excise and Customs, Raipur**[12], the Tribunal observed:

> "**15.2. Thus, it has been clearly laid down by the Supreme Court that the computer printout can be admitted in evidence only if the same are produced in accordance with the provisions of Section 65B (2) of the Evidence Act. A certificate is also required to accompany the said of computer printouts as prescribed under section 65B(4) of Evidence Act.** It has been clearly laid down in para 15 of this judgment that all the safeguards as

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11. 2014 (299) E.L.T. 83 (Tri.-Mum)
12. Excise Appeals No. 52738 of 2016 decided on 06.08.2018

prescribed in Section 65B (2) & (4), 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 tempering, alteration, transposition, excision etc without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. We may add here that the provisions of Section 65B of Indian Evidence Act and Section 36B of Central Excise Act are pari materia.

15.3 It is evident from the appeal that the investigation officers while seizing has failed to take safeguards as mandated under section 36B of Central Excise Act. Further the cloning process of the hard-disks and retrieval of the data is admissible for want of cross examination of, Sh. Vipul Saxena, who has done cloning of the data from the computer system. **We, therefore, hold that the computer printouts cannot held to admissible evidence in terms of Section 36B (2) & (4) of the Central Excise Act in the case at hand.**"

(emphasis supplied)

18. In **Global Extrusion Private Limited and Ors.** vs. **Commissioner of Central Excise & ST, Rajkot**[13], the Tribunal observed:

"**19.** Ongoing through the aforesaid provisions, we find that Section 36B(2) provides the conditions in respect of computer printouts. In the present matter the computer was not shown to have been used regularly to store or process information for the purposes of any activities regularly carried on by the appellants. It was also not shown that information of the kind contained in the computer printout was regularly supplied by the appellant to the computer in the ordinary course of activities. Again, it was not shown that, during the relevant period, the computer was operating in the above manner properly. The above provision also casts a burden on that party, who wants

13. Excise Appeal No. 11963 of 2016 decided on 15.01.2024

> to rely on the computer printout, to show that the information contained in the printout had been supplied to the computer in the ordinary course of business of the company. We find that none of these conditions was satisfied by the Revenue in this case. **In the present case, the data was not stored in the computer but the officers had taken the printout from the Hard Disk drive by connecting to the computer. The officers had not obtained any certificate as required under Section36B of the said Act. It is also noted that none of the conditions under Section 36B (2) of the Act, 1944 was observed. In such situation, it is difficult to accept the printout as an evidence to support the allegations of the revenue. It is noted that the requirement of certificate under Section 36B (4) is also to substantiate the veracity of truth in the operation of electronic media. We also agree with the contention of the appellants that at the time of sealing and de-sealing of the external data storage device as well as the time of obtaining printouts therefrom, a certificate should have been obtained as per the provision of Section36B of the Act. No such certificate has been brought on record without which the evidentiary value of these printout get vitiated.** As no certificate from the responsible person of the Appellants was obtained by the department, the credibility of the computer printout gets vitiated."
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> **(emphasis supplied)**

19. The aforesaid decisions of the Tribunal, which are in the context of the provisions of section 36B of the Central Excise Act, hold that a printout generated from a secondary electronic evidence that has been seized, cannot be admitted in evidence unless the statutory conditions laid down in section 36B of the Central Excise Act are complied with. The decisions also hold that if the data is not stored in the computer but officers take out a printout from the hard disk drive by connecting it to

the computer, then a certificate under section 36B of the Central Excise Act is mandatory.

20. In the present case, the printout was taken from a secondary evidence namely the pen drive. It could not have been considered as evidence in the absence of a certificate under section 138C of the Customs Act.

21. The next issue that arises for consideration is as to whether the statement made by Rajiv Dhuper under section 108 of the Customs Act can be as considered has reliable under section 138B of the Customs Act.

22. This issue was examined by a Division Bench of the Tribunal in **Surya Wires Pvt. Ltd.** vs. **Principal Commissioner, CGST Raipur**[14]. The Division Bench examined the provisions of section 108 and section 138B of the Customs Act as also the provisions of sections 14 and 9D of the Central Excise Act and observed as follows:

> "**21.** It would be seen section 14 of the Central Excise Act and section 108 of the Customs Act enable the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to either in section 9D of the Central Excise Act or in section 138B of the Customs Act. A bare perusal of sub-section (1) of these two sections makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the

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

case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 9D of the Central Excise Act or sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of these two Acts shall apply to any proceedings under the Central Excise Act or the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

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28. It, therefore, transpires from the aforesaid decisions that both section 9D(1)(b) of the Central Excise Act and section 138B(1)(b) of the Customs Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 14 of the Central Excise Act or under section 108 of the Customs Act during the course of an inquiry under the Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 9D of the Central Excise Act and section

> 138B(1)(b) of the Customs Act have been held to be mandatory and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 14D of the Central Excise Act or under section 108 of the Customs Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence."

23. The Principal Commissioner has relied upon the data contained in the Excel Sheet and the statement of Rajiv Dhuper made under section 108 of the Customs Act for rejecting the transaction value under rule 12 of the 2007 Valuation Rules and section 14 of the Customs Act. In view of the above discussion, no reliance can be placed on them for rejecting the transaction value under rule 12 of the 2007 Valuation Rules.

24. The redetermination of the transaction value under rule 3 read with rule 10 of the 2007 Valuation Rules is also based on the data contained in the Excel Sheet. Such a re-determination, therefore, cannot also be sustained.

25. It would, therefore, not be necessary to examine the contention advanced by the learned counsel for the appellant that the extended period of limitation could not have been invoked in the facts and circumstances of case.

26. The impugned order dated 26.07.2011 passed by the Principal Commissioner that rejects the transaction value and re-determines it, therefore, cannot be sustained. The demand of interest and imposition

of penalty upon the appellant cannot also be sustained. Likewise, the imposition of penalty upon Rajiv Dhuper cannot also be sustained.

27. Thus, for the reason stated above, the impugned order dated 26.07.2021 passed by the Principal Commissioner is set aside and both the appeals are allowed.

(Order pronounced on **15.05.2025**)

(JUSTICE DILIP GUPTA)
PRESIDENT

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

Jyoti