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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75315 of 2022

(Arising out of Order-in-AppealNo.29/CUS(A)/GHY/2021 dated30.11.2021 passed by Commissioner(Appeals), CGST, Central Excise & Customs, Guwahati.)

Shri Daleep Kumar Verma
Proprietor of M/s. Shreeji Traders & Manufacture
(House No.20, Mata Rani Mohalla, Near A.S. Modern School, Khanna, Punjab.)
...Appellant

VERSUS

Commissioner of Customs (Preventive), Shillong
.....Respondent
(Customs House, North-East Region, M.G. Road, Shillong, Meghalaya)

WITH

Customs Appeal No.75342 of 2022

(Arising out of Order-in-Appeal No.26/CUS(A)/GHY/2021 dated 21.10.2021 passed by Commissioner(Appeals) of CGST, Central Excise& Customs, Guwahati.)

Shri Rohit Kumar Suri
(S/o Shri Darshan Kumar r/o H.No.4783/3, Sector 38, Chandigarh-160036.)
...Appellant

VERSUS

Commissioner of Customs (Preventive), Shillong
.....Respondent
(Customs House, North-East Region, M.G. Road, Shillong, Meghalaya)

AND

Customs Appeal No.75343 of 2022

(Arising out of Order-in-Appeal No.30/CUS(A)/GHY/2021 dated 15.12.2021 passed by Commissioner(Appeals) of CGST, Central Excise & Customs, Guwahati.)

Shri Karan Sehdev
Proprietor of M/s. K.S. Traders & Enterprises
(3rd Floor Prop No.1168, Shop no.314, Kucha Mahajani, Chandni Chowk, Delhi-110006.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Shillong
.....Respondent
(Customs House, North-East Region, M.G. Road, Shillong, Meghalaya)

APPEARANCE

Shri S.K.Verma, Advocate for the Appellant (s)
Shri M.P.Toppo, Authorized Representative for the Respondent (s)

CORAM:HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)

FINAL ORDER NO. 75300-75302/2023

DATE OF HEARING : 27 March 2023
DATE OF DECISION : 04 May 2023

Per : K. ANPAZHAKAN :

The Appellant Mr. Daleep Kumar Verma proprietor of M/s. Shreeji Traders and Manufacturers, (herein after referred as STM) are engaged in the business of job work of gold jewellery. They claimed that they receive the raw material (gold/gold jewellery) from their customers and convert the same into jewellery as per the specifications given by the customers. In the present case, they claimed that they received Gold from Mr.Karan Sahadev, proprietor of M/s. K.S.Traders, Chandni Chowk, Delhi (Co-Noticee , herein after referred as KSTE) for the purpose of making jewellery. For the job work purpose, they have appointed two persons named Mr. Rohit Kumar Suri, who is a co-appellant in this case and also Mr. Harshit Gakhar (Co-noticee) as employees. The business was set up in Imphal (Manipur).

2. Mr. Rohit Kumar Suri had booked one parcel containing 90 bangles through air cargo, Kolkata by Indigo Airlines on 17.05.2019 on behalf of the firm, vide Air Way Bill No.31270242373, having gross weight of 5.22 kgs. and net weight of 4.960090 Kgs.

3. The DRI had intercepted the parcel after booking, from the possession of Indigo Airlines. The officials had called Mr. Rohit Kumar

Suri and in his presence the parcel was opened and it was found to contain 90 bangles.An unsigned original copy of Tax Invoice bearing Number J-00037 dated 17/05/2019 was also found inside the parcel.Mr. Rohit Kumar Suri informed that these jewelleries came from Delhi for finishing work and are now being sent back. As he was not in possession of documents relating to inward/outward movement of the gold dealt by him, the 90 bangles were impounded and later seized under section 110(1) of the Customs Act, 1962.

4. The statements of Mr. Rohit Kumar Suri and Mr. Harshit Gakhar were recorded on 17.05.2019 and 07.06.2019.In his statement Mr. Rohit Kumar Suri informed that he received gold biscuits locally at the shop at Palace Compound near Advance Hospital, as per the instructions of Mr. Daleep Kumar Verma of STM and transformed the same into gold strips with the help of machine tools, available at his rented house at Imphal.The statements recorded from Mr Rohit Kumar Suri and Mr. Harshit Gakhar revealedthat the bangles were made out of the gold received by them from an unknown person in Imphal in the form of 30 gold biscuits having 165 gms each and the same were smuggled from Myanmar. The search of the premises of the firm at Imphal resulted in the recovery of certain other material including 1 Kg Silver bar, which was also seized by DRI, under section 110(1) of Customs Act, 1962, as there was no document available with them for its legal importation. Both of them were arrested on 17.05.2019, under section 104 0f Customs Act, 1962.

5.Mr. Karan Sehdev, Proprietor of KSTE inhis statement dated 22.10.2019 admitted that they have sent 30194.2 grams of gold to STM, Imphal and received back 25234.11 grams gold after job work and 4956.41 grams of gold jewllery after the job work is held with Imphal Customs, since 17.05.19. Thus Mr. Karan Sehdev, proprietor KSTE has owned the ownership of the gold sent for job work and accepted that the gold bangles seized by DRI, Imphal was part of the gold sent by him for job work to STM, Imphal.

6. A show cause notice was issued on 04.09.2020 to the Appellant and to other co-noticees by the DRI, Guwahati. The Ld.Adjudicating authority passed the Order-in-Original dated 16.03.2021 confiscating the Gold and silver bar. He also imposed penalties on the Appellants. The Appellants filed Appeal before the Commissioner of Central Excise & Customs (Appeals), Guwahati and the said Appeals were rejected by the Ld.Commissioner(Appeals) vide order dated 30.11.2021. Hence the Appellants are before us against the OIA, passed by the Commissioner (Appeals)

7.In their Grounds of Appeal, the Appellants raised various grounds. Before going into each one of them, we would like to discuss the two preliminary grounds raised by the Appellant.

8. The first ground raised by the Appellants is that the officers of DRI are not competent to initiate the proceedings under Section 124 of Customs Act 1962. In support of their claim they cited that the decision Hon'ble Apex Court in the case of Canon India Pvt.Ltd. v. Commissioner of Customs (Manu/SC/0168/2021). We find that this issue has been settled by the decision of the Hon'ble Madras High Court in the case of N. C. Alexender Vs Commissioner of Customs, Chennai, 2022 (381) ELT 148 (Mad) wherein the Hon'ble Madras High Court has held that officers of the DRI were competent to issue Show Cause Notice under Customs Act 1962 after the amendments to Section 3 of Customs Act 1962, by Finance Act, 2022. The Gist of the above said Order is reproduced below.

Show Cause Notice - By DRI officer - Validity of - Pursuant to amendment of Section 3 of Customs Act, 1962 by Finance Act, 2022, officers from Directorate of Revenue are explicitly recognized as Officers of Customs - Group 'B' officers can be appointed as "Officers of Customs" in terms of Section 3(i) of Customs Act, 1962 [presently Section 3(k)] - Show cause notices issued by officers of DRI cannot be assailed in view of validation in Section 97 of Finance Act, 2022 to pending proceedings - Writ petitions liable to be dismissed - Petitioners given liberty to work out their remedy before alternate forum - Section 3 of Customs Act, 1962. *[paras 183, 259, 260, 290, 295]*

Proper officer - Officers of DRI - Under Customs Act, 1962, there are different Power Centres for appointing persons as "Officers of Customs" for discharging their powers and functions (duties) imposed under Act and Section 3 recognizes classes of "Officers of Customs" - Under sub-section (2) to Section 4, Board can also authorize the officers mentioned therein to appoint "Officers of Customs" below rank of the Assistant Commissioner of Customs and other specified officers in Section 3 are from Group-A Cadre who mostly belong to Indian Revenue Service (IRS), either appointed by direct recruitment by Union Public Service Commission (UPSC) or those promoted from

Group-B Cadre - Thus, officers from Group-B who are already from Customs Department can be appointed as "Officers of Customs" - Similarly, Officers of Directorate of Revenue Intelligence (DRI) are appointed as "Officers of Customs" under notification issued under Section 4(1) of Customs Act, 1962 - Officers from Directorate of Revenue Intelligence (DRI) having been appointed as "Officers of Customs" under Section 4 ibid are "Proper Officer" for purpose of Section 2(34) ibid. *[paras 207, 208, 217, 240, 242]*

Precedent - Judicial Discipline - W.e.f. 8-4-2011, self-assessment is done by importer/exporter and only re-assessment done by 'proper officer' appointed under Section 2(34) of Customs Act, 1962 - Apparently, fundamental changes brought to manner of assessment under Section 17 ibid by Section 38 of Finance Act, 2011 with effect from 8-4-2011 not brought to attention of Supreme Court and therefore assumption in paragraph Nos. 12 to 15 in case of Canon India Private Limited [2021 (376) E.L.T. 3 (S.C.)] may require re-consideration insofar as pending cases before Supreme Court and other Courts - Law laid down by Supreme Court in Canon India Private Limited's case being declaration of law under Article 141 of Constitution of India, binding on this Court - However, in view of validations in Section 97 of Customs Act, 1962 vide Finance Act, 2022, show cause notices issued by DRI and consequential orders not to be set aside. *[paras 278, 284, 285]*

9. In view of the decision of the Hon'ble Madras High Court cited above, we hold that there is no substance in the argument of the Appellant and the Notice issued by DRI in this case is valid and legally sustainable.

10. The next ground raised by the Appellants is on limitation. The Appellants contented that the goods in question in this case were impounded/seized on 17.05.2019. When there is a seizure involved, as per Section 110 of the Customs Act, the notice must be issued within six months from the date of seizure, which expired on 16/11/2019 in this case. However, the notice in this case was issued only on 24.03.2020. Hencethey argued that the notice was hit by limitation and accordingly not sustainable.

9.1 For the purpose of easy reference, the relevant section under Customs Act 1962, is reproduced below.

The Section 110(2) reads as under:-

> **Section 110 (2)**
>
> Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:
>
> **Provided** that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six

months and inform the person from whom such goods were seized before the expiry of the period so specified:

Provided further that where any order for provisional release of the seized goods has been passed under Section 110A, the specified period of six months shall not apply.

10. From the above, we find that Section 110(2) read with Section 124 stipulates that if no Show Cause Notice issued within 6 months of seizure of goods, the goods shall be returned to the person from whose possession the goods were seized.

11. We find that the Adjudicating Authority has given a clear findings on this issue in the Order-in-Original. In the said Order, it is stated the investigation could not be completed within six months as it involved analysis of voluminous records related to smuggling of gold. It was not possible to issue the Show Cause Notice as stipulated under Section 110(2) of the Customs Act, 1962 i.e. within a period of six months from the date of seizure of the goods i.e. 90 Gold pieces of foreign origin and silver bar. Therefore, extension of time by another six months was sought from Commissioner, Customs (Preventive), NER, Shillong vide letter dated 09.11.2019. The Commissioner of Customs (Prev.), NER, Shillong, Customs House, M.G. Road, Shillong vide order in C.No.VIII(10)163/CUS/SH/2019/12051(A) dated 13.11.2019 extended the period for issuing Show Cause Notice by a further period of Six (6) months under the proviso to Section 110(2) of the Customs Act, 1962, ie, till 16.05.2020 with intimation to both the arrested accused.

12. From the above, we find that the Commissioner of Customs (Prev) NER, Shillong has granted extension of time for issue of the Show Cause Notice for a period of six months from 16/11/2019. The Show Cause Notice in this case was issued on 04.09.2020 . Further, we find that in view of COVID-19, Hon'ble Supreme Court has allowed exclusion of the period from 15/03/2020 to 02/10/21 for computation of the period of limitation for any proceedings, which is applicable to quasi-judicial proceedings like issue of Show Cause Notice also. Thus, we find that the Notice issued on 04/09/2020 was not hit by the limitation.

Accordingly, we hold that the grounds of limitation raised by the Appellant is not sustainable in this case.

13. The Ld.Counsel for the Appellants also raised the following Grounds:

13.1 <u>There was no foreign marking found on the seized gold and hence the seizure and subsequent confiscation are not valid:-</u>

The Appellant stated that neither the 90 gold bangles nor the one kg silver confiscated, have any foreign markings on them. The DRI intercepted the parcel booked by Mr. Rohit Kumar Suri, which was in possession of the Indigo Airlines. When the parcel was opened they found 90 gold bangles having gross weight of 5.22 kgs. and net weight of 4.960090 kgs. The bangles were open ended and has no foreign markings on it. They contended that these bangles were made out of gold received by them from M/s. KSTE, New Delhi. Mr. Karan Sehdev, Proprietor of KSTE in his statement categorically stated that he is the owner of the bangles and he had legally purchased the gold form the Indian market. They have sent the gold to M/s.STM, Imphal for converting the same into jewellery. Accordingly, M/s. STM have converted the gold into bangles and sent back the same in small parcels through air cargo on various dates. The Appellants stated that DRI has not recorded the statement of Mr.Daleep Kumar Verma, Proprietor of M/s. STM, who actually got the job-work of converting the gold into bangles. The Appellant further stated that DRI has alleged that the gold were received by Mr. Rohit Kumar Suri from unknown persons in Imphal in the form of 30 gold biscuits of165 gms. each and the same were smuggled from Myanmar. The Appellant stated that the above said allegation of the DRI was not substantiated or corroborated with any evidence. On the contrary, Mr. Karan Sehdev, in his statement categorically stated that he has sent the gold to M/S STM for job work and the gold were purchased locally from Indian market. His claim has not been countered by DRI.Accordingly, they contended that there is no substance in the allegation of DRI that the bangles were made out of

foreign origin gold imported from Myanmar and hence liable for confiscation.

13.2 During subsequent search, DRI also seized 1 kg. of silver bar from the house. The Appellants contended that the silver bar was having the marking of MMTC. They stated that MMTC is a Central Govt. refinery and it was purchased from India. The notice of DRI alleges that the silver bar was also of foreign origin, without any evidence to substantiate this claim.

13.3 Accordingly, the Appellants contended that there is no substance in the claim of the Department that the bangles and the silver bar were made from foreign origin gold. Hence, they contended that the confiscation of the gold bangles and silver bar are not sustainable.

13.4 In support of their claim, they have relied upon the decision of the Tribunal in the case of Commissioner of Customs (Preventive), Shillong v. Manisha Devi Jain [2019 (370) E.LT. 401 (Tri.-Kolkata)].The gist of the order is reproduced below:

> Confiscation - Gold carried by passenger travelling from Imphal to Kolkata confiscated on suspicion of being of foreign origin - Indian Origin remolten gold/gold ornaments could not be legally confiscated as its possession not prohibited under any provision of law - Seized gold not bearing foreign markings and did not have uniform weight/purity - Respondent belonging to respectable well to do family and regular Income Tax assessee - Seized gold rods made from gold ornaments belonging to her - Every piece of gold possessed by a person in India cannot be considered to be of smuggled nature - Possessor of such gold cannot be made to discharge onus under Section 123 of Customs Act, 1962 - Order permitting redemption of seized gold rods on payment of fine and reducing quantum of penalty not interfered with - Sections 111, 112 and 125 of Customs Act, 1962. *[paras 5, 6]*

13.5.They also relied upon the decision of the Tribunal in the case of J Suresh Vs CC (Prev), Vijayawada, in Appeal No 30571/2021, dated 16.11.2022, wherein it has been held that in the normal trade practice gold biscuits are available weighing 100grams or 1kg for international trade. In the present case DRI has alleged that gold biscuits each weighing 165 grams have been smuggled into the country from Myanmar. They argued that the weight of each gold biscuit has been taken as 165 grams only to tally the weight of the seized gold.

13.6. The Appellants also relied on the decision of the Tribunal in the case of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) wherein the appeal of Revenue was dismissed holding that the jewellery was not bearing any foreign marking, other than the statement of the passenger and no other proof was produced by Revenue to substantiate the claim that the jewellery was smuggled into India.

13.7 The Appellant contended that the confiscation of gold bangles on the ground that it was manufactured out of smuggled gold is not corroborated with any evidence, other than the statements of the Co Noticees.. On the other hand, Mr. Karan Sehdev during investigation deposed that he has sent raw gold to M/s. STM, Imphal for job-work. The gold bangles seized was accompanied with statutory invoice No.J-00037 dt.17.05.2019 of M/s. STM, Imphal. Hence, he argued that the confiscation of the gold and silver bar is not sustainable.

14. <u>Burden of proof under Section 123:-</u>

14.1 The Appellant stated that the gold/silver were seized by DRI on the reasonable belief that they were smuggled goods. Under Section 123 of the Customs Act, 1962, the burden of proof that they are not smuggled goods is on the person, who claims to be the owner of the goods. The contention of the department is that the onus in the instant case for proving that the gold biscuits/bars and the silver bar of foreign origin are not smuggled in nature lies on Shri Rohit Kumar Suri and Shri Harshit Gakhar from whose possession, the impugned goods were seized.However, Mr. Karan Sehdev, Prop. of M/s. KSTE, Delhi in his statement dated 22.10.2019*inter alia* stated that he is holding GSTIN 07CNSPS5929M1ZV and they sent gold for job-work to M/s.STM, Imphal. He further, deposed that they sent 30194.200 grams of gold to M/s. STM, Imphal for job-work and they have received back 25234.110 grams gold from the job-worker – M/s. STM. The goldof 4956.41grams dispatched by M/s. STM, Imphal vide their invoice No.J-00037 dt.17.05.2019 was seized by DRI, Imphal on 17.05.2019.

14.2 The Appellants stated that M/s. KSTE, Delhi received gold from M/s. V.K. Ornaments, Sirhind and M/s. Naresh Jeweller, Khanna. They submitted affidavits from Sh.Charanjit Singh – Prop. M/.s V.K.Ornaments, Sirhind and from Sh. Naresh Kumar, Prop. M/s. Naresh Jeweller, Khanna affirming that they supplied the said gold to the Noticee for job-work .

14.3 TheAppellants claimed that the foregoing factual position prima facie discharged the onus under section 123 of Customs Act, 1962 and substantiate that gold seized by DRI on 17.05.2019 was not smuggled in nature and was lawfully procured indigenously by the Noticee No.6 Sh Karan Sehdev Prop. M/.s KSTE, Delhi. Mr Karan Sehdev, in his statement dt.22.10.2019 categorically stated that they had sent the gold to M/s. STM, Imphal for job-work and showed the vouchers/invoices thereto to the department to substantiate receipt of gold by them from indigenous sources. But, the said vouchers/invoices were not resumed/considered by DRI officers while recording his statement.

14.4 The one piece silver bar weighing 1000 gram alleged to be of foreign origin, actually bears the marking "MMTC RAMP 1 KILO FINE SILVER 999.0,03104]". This is evident from the Annexure 'I' to show cause notice MMTC is a public sector company. The Government of India are holding 89.93% share in MMTC. It is incorrect to allege that the seized silver bar is of foreign origin when the marking prima facie reveals that it is of Indian origin.

14.5 Sh. Rohit Kumar Suri and Sh. Harshit Gakhar were employee of M/s. STM, Imphal and not owner of the seized goods. Sh. Rohit Kumar Suri and Sh. Harshit Gakhar in their statements dated 17.05.2019 stated that they were employees of M/s. STM and were getting salary of Rs.12,000/- & Rs.10,000/- per month respectively. Sh. Harshit Gakhar informed that he came to Imphal only ten days ago. Sh. Rohit Kumar Suri in his statement dt.07.06.2019 further stated that he was just an employee of Daleep Kumar Verma – Prop. M/s. STM. Shri Karan Sehdev has already claimed ownership of the goods during

investigation, but no credence was assigned to it. Thus, they contended that DRI did not appreciate the discharge of onus under Section 123 by Noticee No.6., M/S KSTE.

15. Cross-examination was not allowed to examine the experts' opinion:

15.1 The Appellants stated that Shri Akshay Kumar Paul, Goldsmith has given a Certificate dated 17.05.2019 certifying that the 90 pieces of gold of foreign origin in strip form with some design on one side was of high purity and also one silver bar was of high purity and of foreign origin. The Appellant contended that the said certificate is incorrect and misleading. The seized gold bangles and silver bar bearing marking "MMTC PAMP", were certified to be of foreign origin only based on purity. The said Sh. Akshay Kumar Paul failed to appreciate that MMTC is a Government of India owned company inter-alia dealing in metals. As to how the silver bar bearing marking of Indian company (owned by Government of India) can be of foreign origin has not been given in the certificate. They argued that Sh. Akshay Kumar Paul is not an expert to tender opinion in the case under reference. The purity of silver cannot be the basis to construe that the Gold and silver bar were of foreign origin.

15.2 The gold bangles seized has been certified to be of foreign origin based upon purity. Further, Sh. Akshay Kumar Paul is aged 24 years, neither his qualification nor experience in the line has been given. Hence, they contended that the expert opinion is prima-facie incorrect. They stated that their request for cross examination of Sh. Akshay Kumar Paul was not allowed by the Adjudicating Authority, to bring on the factual position.

16. Statement of co-accused cannot be relied upon :-

16.1 Shri Rohit Kumar Suri has studied only upto 10th class and Sh. Harshit Gakhar has studied upto 12th standard in government schools. They do not know English much. A typed statement dt.17.05.2019 in English was got signed from Sh. Rohit Kumar Suri and Sh. Harshit Gakhar. The Intelligence Officer, DRI, Imphal also got signed pre-hand

written statement from Sh. Rohit Kumar Suri on 07.06.2019 . Shri Rohit Kumar Suri and Shri Harshit Gakhar has retracted their statements which have been relied upon in this case. The satatements were got signed under pressure on typed document in English script and pre-handwritten statement in English, cannot be relied upon. Shri Harshit Gakhar joined as employee only about ten days before the seizure of the gold on 17.05.2019 . It is a settled law that statements does not have higher evidentiary value than facts on record.

16.2 In support of their claim, they relied upon the following decisions:

i) Triveny Spinning Mills (P) Ltd. & Ors Vs. CCE, Ludhiana [206 (201) ELT 220 (T), wherein it has been held that Confessional statement recorded under section 14 of Central Excise Act, 1944 cannot get higher evidentiary value than contemporaneous records.

(ii) Shabnam Synthetics Vs. CCE [2006 (202) ELT 379 (Tri.-Mum), wherein it has been held that documentary evidence to be preferred over statements.

(iii) Market Chase Advertising Vs. CCE [2008 10) STR 598 (T)] wherein it has been held that reply to show cause notice supported by documentary evidence to be preferred viz-a-viz statement given under section 14 of CEA.

16.3 In view of the above, they argued that it is incorrect to rely upon statement of co-accused in the instant case without any corroboration. They contended that it is a settled law that statement of co-accused cannot be relied without independent corroboration.

17. The Ld.Authorized Representative for the Department reiterated the points stated in the Order-in-Original passed by the Commissioner.

18. Heard both the parties and considered the submissions made by both the sides. We now discuss each of the grounds raised by the Appellants.

18.1 The Appellants stated that it is incorrect to confiscate the gold bangles on the ground that they were manufactured out of smuggled gold. Their contention is that Sh. Karan Sehdev, during the course of investigation has categorically deposed that he has sent the raw gold to M/s. STM, Imphal for job-work. The parcel containing the gold bangles seized was accompanied with statutory invoice bearing No.J-00037 dt.17.05.2019 of M/s. STM, Imphal. They have submitted the details of gold received and sent by M/s. KSTE, Delhi to M/s. STM, Imphal. Further, neither the gold bangles nor the silver bar bears any foreign markings. There is no evidence on record to show that the goods were smuggled into India from Myanmar. It is only an assumption of DRI that the gold bars of foreign origin were smuggled into India and later converted into gold bangles, without any supporting evidence. There is no evidence other than the statements of the Co Noticees, which were also retracted later. In view of the above, they contended that the gold bangles and silver bar, not having any foreign markings were not liable for confiscation. They have relied upon many decisions to support their argument. We find the following case laws squarely covers the case on hand.

18.2 The Tribunal in the cases of :-

(i) Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking – other than statement of passenger no other proof produced by Revenue to substantiate claim that jewellery was smuggled into India.

(ii) Commissioner of Customs (Prev), Shillong Vs. Manisha Devi Jain [2019 (370) ELT 401 (T) held that Indian origin remelted gold/gold ornaments could not be legally confiscated as its possession not prohibited under any provisions of law.

18.3 We find merit in the argument of the Appellants. The gold bangles seized from Indigo airlines, does not have any foreign markings. They were claimed by Mr Karan Sehdev of KSTE that they have sent the raw gold for job work to M/S STM, Imphal. The gold was purchased by them from indigenous sources, but DRI Officers have not taken into account the evidences submitted by them about their legal purchase in India. The goods were dispatched along with an Invoice raised by the job worker. Allthese documents indicate that the raw gold was indeed received by M/S STM, Imphal from M/S KSTE, New Delhi for job work and they were dispatched after completion of the job work by M/S STM, Imphal. There is no evidence available on record to prove that the gold were smuggled from Myanmar. Except the statements of the Co Noticces, which were later retracted, there is no other evidence available to establish the smuggled nature of the gold. In view of the above discussion and relying upon the cases laws cited above, we hold that the gold jewellery which were dispatched under proper Invoice are not liable for confiscation.

19.1 The next ground raised by the Appellant is regarding Burden of Proof as envisaged under Section 123 of Customs Act,1962 . As per this section, the burden of proving that the goods are not smuggled, lies on the person fromwhose possession the goods were seized. For the sake of easy reference, the said section 123 is reproduced below:

19.2 SECTION 123 – Burden of proof in certain cases

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person form whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may be notification in the Official Gazette specify

19.3 We find that Section 123 applies inter-alia to gold/silver bullion seized on the reasonable belief that they are smuggled goods . The burden of proving that they are not smuggled goods shall be on the person, who claims to be the owner of the goods so seized or from whose possession the goods are seized. The contention of the Department is that in the instant case, the onus of proving that the gold biscuit/bars and the Silver bar were not of smuggled in nature, lies on Shri Rohit Kumar Suri and Shri Harshit Gakhar from whose possession the impugned goods were seized. The Department contended that both Shri Rohit Kumar Suri and Shri Harshit Gakhar did not produce any document for their lawful possession of the recovered gold and silver bar. They themselves admitted that the seized gold has actually been smuggled into India from Myanmar without any legal documents in biscuit form and they have melted and made it in strip form in the guise of crude ornament (bangles).

19.4. The contention of the Appellant is that the gold bangles and silver bar were not of foreign origin. Section 123 of Customs Act is applicable only to foreign marked gold and silver. Since, there is no foreign mark available on the gold bangles and silver bars seized from the Appellants, the provisions of section 123 is not applicable in this case

19.5 The Appellants stated that Sh. Karan Sehdev, Proprietor of M/s. KSTE, Delhi in his statement dated 22.10.2019 *inter alia* claimed that he has sent the gold for job-work to M/s. STM, Imphal. A perusal of the details of the gold sent by M/S KSTE reveal that they have sent

30194.200 grams of gold to M/s. STM, Imphal for job-work and received back 25234.110 grams of gold after job-work from M/s. STM, during the period March 2019 to 17.05.2019. The gold bangles 4960.090 grams sent vide invoice No.J0037 dt. 17.05.2019 to M/S KSTE by M/s. STM was seized by DRI on 17.05.2019. Thus, it reveals that this is not the first time M/S STM are processing the gold and returning the same back to M/S KSTE. On many occasions earlier M/s KSTE have sent gold to M/S STM and received them back after the job work. It cannot be presumed that all the gold jewellery sent after job work on earlier occasions were also made out of smuggled gold. The present consignment covered by Invoice no. J 0037 dated 17/05/2019 was part of the gold received earlier and returned back now after job work. The documents submitted by the Appellants clearly indicate that the gold were purchased from indigenous sources. The provisions of section 123 are not applicable to indigenously procured gold. Hence, we find merit in the argument of the Appellants.

19.6 The Appellants relied upon many decisions to support their case. In the case of Sanjeeb Kumar @ Pappu Kumar vs Jt CC, Lucknow, 2019 (369) ELT 1177 (Tri-All), it has been held as under:

3. The Learned Counsel for the appellants submits that in terms of Section 123 of Customs Act, 1962 the onus is on the appellant to prove that the gold in question is not smuggled one, although appellants have failed to prove that gold is not smuggled one but the allegation of the Revenue that the gold is restricted item being third country origin has not been proved by the Revenue and no evidence has been brought on record by the Revenue that how the gold is in question has come to India through Nepal. In that circumstances, gold cannot be absolutely confiscated in the facts and circumstances of the case, therefore, gold is required to be released to the appellants on payment of redemption fine and penalty. He also relied on the decision of the Hon'ble Bombay High Court in the case of *State of Maharashtra* v. *Prithviraj Pokhraj Jain* reported as 2000 (126) E.L.T. 180 (Bom.).

4. On the other hand Learned AR appearing on behalf of the Revenue submits that in this case Shri Umesh Kumar in his statement has admitted that gold is being smuggled from Nepal by Shri Sanjeeb Kumar, therefore, Revenue has established that gold in question is smuggled one and is of third country origin. The appellants have failed to prove that the gold in question is not smuggled one. In that circumstances, the Revenue has rightly absolute confiscated the Gold in question.

5. Heard the parties.

6. Considering the submissions made by both the sides, we find that the appellants have failed to prove the source of procurement of gold, therefore, we hold that gold is

smuggled one but on the same time, Revenue is also failed to prove that gold is of third country origin and smuggled through Nepal. In fact, the Revenue has not adduced any evidence to that effect, whereas on the other side, Shri Sanjeeb Kumar, himself has categorically stated that he is not dealing with the purchase and sale of the gold. Therefore, the Revenue has failed to prove that the gold in question is of third country origin and have been imported/smuggled through Nepal. In that circumstances, the gold in question cannot be held as restricted goods and they can be released on payment of redemption fine and penalty as the goods are smuggled in nature. We also gone through the case law relied upon by the Learned Counsel for the appellants in the case of *Prithviraj Pokhraj Jain* (supra) wherein in Para 19 which is extracted below wherein the Hon'ble High Court observed as under -

"19. The burden was, therefore, on the prosecution to prove that the goods were smuggled. For this the prosecution relied upon the evidence of Hebbar who stated that he believed the goods to be smuggled, because watches and watch straps were of foreign origin, the import of which was heavily restricted and prohibited and they were found in huge quantity. The foreign origin of the watches is tried to be shown from the foreign markings on the watches. The question whether the foreign markings of goods can be treated as admissible in evidence was considered by Naik J. in Criminal Appeal No. 3 of 1966, decided on 22nd December, 1966. Among the property involved in that case were some gold slabs. The slabs bore the marking "Johnson Mathey 9990 London". Naik J. observed in his judgment that the markings do not speak for themselves and that evidence would be hearsay evidence. There was nothing to indicate that the markings were really done by Johnson Mathey in London. No presumption can arise in regard to the markings, unless there is evidence to show that those markings were made by a particular company in the ordinary course of business. A Division Bench of the Gujarat High Court has also taken a similar view in *Asstt. Collector of Customs, Baroda* v. *M. Ibrahim Pirjada,* 1970 Criminal Law Journal, 1305. There, the Gujarat High Court has held that mere markings cannot be taken as proof of the fact of foreign origin of the goods as such markings and labels would be hearsay evidence. With respect, I agree with the above view."

Relying on the said decision, without evidence, the benefit of presumption under Section 123 of the Customs Act, 1962 is not available to the Revenue.

19.7 The Appellants also relied upon the decision in the case of Balanagu Naga Venkata Raghavendra vs CC Vijayawada 2021 (378) ELT 493 (Tri-Hyd), where in it has been held that the burden under section 123 will not shift on the Appellants when the seizure of gold without foreign markings are seized from city. The relevant portion of the order is reproduced below.

14. The confiscation of the gold by the adjudicating authority was set aside by the Tribunal and on appeal by the Revenue the Hon'ble High Court of Kerala, in the above factual matrix, has overturned the decision of the Tribunal. Therefore, it was not merely the purity of the gold in question but also the statements made during the investigation which formed the basis of the reasonable belief of the officers. In the present case, none of the statements recorded by the Department admit to or even suggest that the gold was smuggled gold. It has also not been brought out in the show cause notice that the purity of the seized gold is such that it could only have been of foreign origin. It is true that the

conduct of the appellants was suspicious inasmuch as the gold pieces were being carried in newspapers and a letter was found written to one Shri Vijay in Trissur for requesting the gold to be handed over to the bearer of the letter. It is also confirmed by the DCM, Railways that the appellants had travelled from Trissur to Vijayawada by train. However, we note that Trissur is not even a port in itself. The gold was apparently collected from one Shri Vijay in Trissur. There were also several contradictions between different statements as recorded in para 16 of the show cause notice. All these would show that Shri Kanaka Ratnam (Appellant in Appeal No. 30496 of 2017) wrote a letter to Shri Vijay of Trissur to hand over gold to the bearer of the letter and both the letter and the gold were recovered from his son Shri Naga Venkata Raghavendra (Appellant in Appeal No. 30495 of 2017). Both the appellants had travelled by train from Trissur to Vijayawada. Naga Venkata Raghavendra was acting suspiciously when the Officers approached him. Subsequent statements were contradictory to each other. These factors by themselves cannot, in our considered opinion, constitute the basis for forming a reasonable belief that the seized gold was smuggled. Therefore, the Officers did not have a reasonable belief in the first place to assert that the seized primary gold was smuggled gold which is essential to shift the burden on to the accused under Section 123. The case of *Om Prakash Khatri* (supra) was different inasmuch as in that case while the foreign markings were missing on the gold in that case the carriers had admitted that they were carrying smuggled gold for Shri Khatri and that it was smuggled through Kerala and they were carrying it to Bombay and marks and numbers have been deleted to avoid being caught. They also admitted that they avoid air travel as there is a high risk of being caught. Coupled with these statements was the fact the gold of very high purity. The ratio of this judgment does not apply to the present case and the facts are quite different.

15. In view of the above, we find that the officers of the Department had no reasonable belief that the gold was smuggled and therefore they have not discharged their responsibility of forming reasonable belief under Section 123 without which the burden of proof will not shift to the person from whom the gold is seized.

19.8 In view of the above discussions and the decisions cited above, we hold that the burden under Section 123 of Customs Act, to prove that the gold is not smuggled one, does not lie on the Appellants, in this case.

20. The next ground raised by the Appellants is that they have been denied the right to cross examine the Expert who has given the certificate. The Appellants stated that Shri Akshay Kumar Paul, Goldsmith has given a Certificate dated 17.05.2019 certifying that the 90 pieces of gold were of foreign origin in strip form, based on its purity. They argued that Sh. Akshay Kumar Paul has no expertise to give that opinion. The purity of silver cannot be the basis to construe that the gold is of foreign origin. We agree with the claim of the Appellants. The purity of the gold alone cannot be a determining factor whether the gold is of foreign origin or not. As discussed in para 19

above, the Appellant has produced evidence to the effect that the gold were procured from domestic sources. Hence, we hold that no weightage can be given for the certificate of purity issued by the Expert, to establish its foreign origin.

21.1 The next ground raised by the Appellants is that the Appellant Rohit Kumar Suri and the Noticee Harshit Gatkhar have retracted their satements and hence the Department cannot rely on the retracted statements to prove that the gold were of foreign origin.They also stated that the retracted statements does not have higher evidentiary value than facts on record .In support of their contention they relied upon the decision of the Tribunal :

(i) Triveny Spinning Mills (P) Ltd. & Ors Vs. CCE, Ludhiana [206 (201) ELT 220 (T), wherein it has been held that Confessional statement recorded under section 14 of Central Excise Act, 1944 cannot get higher evidentiary value than contemporaneous records.

(ii) In the case of Shabnam Synthetics Vs. CCE [2006 (202) ELT 379 (Tri.-Mum), it has been held that documentary evidence to be preferred over statements.

(iii) In the case of Market Chase Advertising Vs. CCE [2008 10) STR 598 (T)], it has been held that reply to show cause notice supported by documentary evidence to be preferred viz-a-viz statement given under section 14 of CEA.

21.2 We find that the Impugned Order mainly relied upon the statements ofRohit Kumar Suri and the Harshit Gatkhar to establish the foreign origin nature of the gold. Other than the statements, there is no other evidence available on record to show that the gold were smuggled into the country from Myanmar. The silver bar is of Indian origin. It is incorrect to rely only on the statements of the co-accused without any corroboration, to prove the smuggled nature of the gold. It

is a settled law that the statement of the co-accused cannot be relied without any independent corroboration.

21.3 In the case of Commissioner of Customs (Preventive), Lucknow vs Shakil Ahmad Khan, it has been held that confiscation based on retracted statements not sustainable. The gist of the Order is reproduced below:

Smuggling - Burden of proof - Retracted confessional statements of co-accused - No efforts made to prove that confessional statements were voluntary - Accused were not examined during adjudication - *HELD :* Confiscation and penalty order based only on retracted statements of accused persons were not sustainable - It was contrary to settled legal position, illegal, arbitrary and liable to be set aside - Sections 108, 111, 112 and 123 of Customs Act, 1962. *[paras 22, 25, 26]*

Evidence - Confessional statement of co-accused - It is not substantive evidence against another co-accused - It can at best be used for assurance to Court - In absence of any substantive evidence, it was inappropriate to base conviction of accused on statements of co-accused - Section 108 of Customs Act, 1962. *[para 25]*

21.4 The Tribunal in the cases of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking – other than statement of passenger no other proof produced by Revenue to substantiate the claim that jewellery were smuggled into India.

21.5 In view of the above discussion and relying upon the the decisions cited above, we hold that the gold and silver bar cannot be confiscated based on the retracted statements alone.

22. Regarding penalty imposed under section 112 of the Customs Act 1962 , the Appellants stated that the gold was purchased from indigenous sources against statutory invoices. There is no evidence on record to show that the 90 gold bangles and silver bar were of foreign origin and smuggled into the country. In the absence of any evidence to establish that the gold and silver bar were smuggled ones, no penalty is imposable under Section 112 of the Customs Act 1962. They relied upon many decisions of the Tribunals and High Courts to support

their claim. We find merit in the argument of the Appellants. Section 112 of the Customs Act 1962, details the circumstances under which penalt is imposable under this section.For the sake of readyreference, the Section 112 is reproduced below:-

"SECTION 112

Penalty for improper importation of goods, etc. —

Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

[(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication

> of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]
>
> [(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;
>
> (iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;
>
> (v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]

23.From the OIO, we find that personal penalty under section 112(b)(i) of Customs Act,!962 has been imposed on the following persons.
(i) Rohit Kumar Suri – Rs 5,00,000
(ii) Harshit Gatkhar – Rs 5,00,000
(iii)Daleep Kumar Verma Rs 15,00,000
(iv)Karan Sehdev Rs 15,00,000

Under section 112(b)(i) penalty is imposable when the person is found to be dealing with goods for which prohibition is in force. The gold bangles and the silver bar dealt by the Appellants were established to be of Indian origin and hence not prohibited goods. Rohit Kumar Suri

and Harshit Gatkhar are employees of the Appellant STM. They have carried out the job work as directed by their employer Daleep Kumar Verma. The penalty provisions invoked against M/s. KSTE and its proprietor M/s. Karan Sehdev is legally not sustainable, as they have established that the gold sent by them to STM for job work was purchased from indigenous sources. There is no documentary evidence available on record to establish the role of Daleep Kumar Verma. Hence, we find merit in the argument of the Appellants that penalty is not imposable on them under section 1129B)(i) of Customs Act, 1962. In support of their claim that penalty is not imposabloe on them, the Appellants have cited the following decisions:-

(a) Anil Kumar Mahensaria v. Commissioner of Customs
[2008 (228) E.L.T. 166 (Del.)]
(b) A.R. Shah v. Commissioner of Central Excise
[2005 (186) E.L.T. 204 (Tri.-Mum)]
(c) Gita Times v. Commissioner of Customs, Kandla
[1999 (109) E.L.T. 598 (Tribunal)]

We find that the decisions cited above supports the arguments putforth by the Appellants. Accordingly, we hold that the penalty imposed on the Appellants under section 112(b)(i) of Customs Act, 1962 is not sustainable.

24. Other<u>Goods confiscated in the OIO :-</u>

24.1 One TVS Scooter, one lap top and some other items were also confiscated vide Sl. No 34,35 and 36 of the Order. Since, the violations as alleged in the Show Cause Notice are not established, the confiscation of the above said items are not sustainable
25. In view of the above discussion we hold that the confiscation of 90 gold strips and silver bar in para 32 and 33 of the OIO, not sustainable. The confiscation of TVS Scooter, one lap top and some other items as mentioned in Sl. No 34,35 and 36 of the OIO, not sustainable. The penalties imposed on the Appellants as mentioned in Sl No 38, 39,40

and 41 of the OIO, not sustainable. Accordingly we set aside the Impugned Order passed by the Commissioner(Appeals) and allow the appeals filed by the Appellants.

(Order pronounced in the open court on 04 May 2023.)

Sd/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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