

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

SINGLE MEMBER Bench-Court No – I

Customs Appeal No. 30571 of 2021

(Arising out of order-in-appeal No. VJD-CUSTOM-PRV-APP-087-21-22 dated 12.07.2021 passed by the Principal Commissioner of Central Tax & Customs (Appeals), Guntur).

J. Suresh, S/o J. Laxminarayana

Appellant

D. No. 3-1-247A/2,
Paiavvula Dasaradha Street
Ramu Quri, Near Sitara Centre
Vijayawada – 520012.

Versus

Commissioner of Customs (Prev.)

Respondent

55-17-3, C-14, 2nd Floor
Industrial Estate, Auto Nagar
Vijayawada- 520007, A.P.

Appearance

Sh. S. K. Verma, Advocate for the Appellant.

Sh. P. Amaresh, Authorised Representatives for the Respondent.

CORAM:

HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. A/30123/2022

Date of Hearing: 15.09.2022

Date of Decision: 16.11.2022

ANIL CHOUDHARY:

The appellant is in appeal against confiscation of one piece of gold bar weighing 476.640 gms. valued at Rs. 15,63,790/- under Section 111(a), (b), (d) and (l) of the Customs Act, 1962 without option of redemption, confiscation of cash Rs. 14,44,000/- under Section 121 of the Customs Act and imposition of consolidated penalty of Rs. 10 lakhs under Section 112(a) and 112(b)(i) of the Act. By the impugned

order-in-appeal, the adjudication order has been confirmed with the modification that the amount of consolidated penalty has been reduced to Rs. 6 lakhs.

2. Brief facts of the case are that the appellant J. Suresh is engaged in trading of gold/ silver/ bullion at Vijayawada having its shop at Pavani Gold Plaza, Sivalayam Street, Vijayawada.

3. That on the basis of some intelligence, Officers of DRI Hyderabad intercepted one Mr. T. Nandu on the road near Kaleswara Road, Vijayawada. Mr. T. Nandu was carrying black colour bag. On being checked by the Officers, he was found to be carrying Rs.32,75,000/-. On being interrogated by the Officers, he stated that he has collected the said amount from the appellant - J. Suresh, Prop. of Shri Hanuman Gold, at Vijayawada, after selling him one kg. gold in the form of two flat bars having '999' mark engraved all over it. On the same day on enquiry, Mr. T. Nandu stated that he had purchased the said 1 kg. gold previous day from some person in Chennai for cash, after paying Rs.32,64,000/-. It appeared to the Officers that this amount of Rs.32,75,000/- was the sale proceeds of smuggled gold, the said amount was seized under panchnama alongwith the bag.

4. Thereafter the Officers on the same day (22.01.2019) searched the shop premises of this appellant at Pavani Gold Plaza, Vijayawada. Upon search the officers found one gold bar weighing 476.640 gms. (in bar form) and also cash of Rs. 4,44,000/-. On being enquired this appellant agreed that he has purchased 1 kg. gold (in the shape of two bars) from Mr. T. Nandu for Rs. 32,75,000/- in cash.

Since morning he has sold about 523 gms. of gold to various persons and the balance lying with him have been found by the officers. The Officers did not found any incriminating documents. From the mobile of the appellant they found message sent by Mr. T. Nandu. The Officers got the gold evaluated by Sh. G. Venkateswara Rao, Government approved valuer who certified the gold bar as weighing 476.640 gms. and was of 24 carot 99.7% purity and valued at Rs. 15,63,379/-. The officers seized the gold bar on the presumption that it was smuggled, alongwith cash of Rs. 4,44,000/-.

5. Further investigation was transferred by DRI - Hyderabad to DRI - Vijayawada. Thereafter, the SIO recorded the statement of Mr. T. Nandu on 22.01.2019 who interalia stated that he was jobless and to earn money, he entered into purchase and sale of gold. He pooled money from his friends and relatives and thereafter he had gone to Chennai for purchase of gold as he had heard that smuggled gold is available at Walter Road, Chennai at cheaper rate. He enquired if gold was available and one person came to him agreed to sell gold of 999 purity for Rs. 32,64,000/-. He agreed to purchase and thereafter the said person asked to wait at a tea shop. After some time the said person came near the tea shop in car and after verifying the payment of Rs. 32,64,000/-, he delivered one kg. gold, and thereafter left in the car. After returning to Vijayawada he contacted Mr. J. Suresh, to sell him the procured gold. He contacted Mr. J. Suresh on his mobile number through whatsapp chat on 21.01.2019, he received O.K. response from Mr. J. Suresh. On 22.01.2019 in the morning Mr. T. Nandu came to his shop and delivered him said one kg. gold bars (500

gms. x 2) and collected Rs. 32,75,000/- from him. The said amount, which he received from Mr. J. Suresh have been seized by the DRI Officers from him.

6. Statement of this appellant was also recorded on 22.01.2019 before the SIO, Vijayawada wherein he affirmed contents of the panchnama drawn at his shop. Further stated that he knew Mr. T. Nandu who offered to sell gold procured from Chennai, also agreed that Mr. T. Nandu Mobile from Mobile No. 783393932 was in touch with him on whatsapp. He further affirmed the receipt of whatsapp message of Mr. T. Nandu to buy gold and thereafter purchased gold from Mr. T. Nandu totaling 1 kg. for Rs. 32,75,000/-. He further stated that he does not have any purchase documents for purchase made from Mr. T. Nandu. He further stated that out of 1 kg. gold purchased in the morning he has made some sales, out of which the balance 476.640 gms. have been found and seized by the officers. Both this appellant and Mr. T. Nandu were arrested on 23.01.2019 thereafter were granted bail. Within about ten days this appellant and Mr. T. Nandu retracted their statement which were recorded on 22.01.2019.

7. This appellant under summons, was again interrogated and his statement was recorded on 14.06.2019 wherein he interalia affirmed the panchnama dated 22.01.2019 as correct and also affirmed the purchase of 1 kg. gold bar for Rs. 32,75,000/- from Mr. T. Nandu. Further stated that he has already sold 523 gms. in retail to various persons in cash and the balance gold 476.640 gms. was found and seized under panchnama. He did not have any bills in support of sale/

purchase of gold. He further handed over to Rs. 10 lakhs to the officer as balance of the sale proceeds for sale of 523 gms. of gold, as the said amount has been realized by him in due course. The said amount of Rs. 10 lakhs was seized by the officer under separate panchnama dated 14.06.2019 in front of witnesses.

8. Earlier Mr. T. Nandu by his letter dated 30.01.2019 retracted his statement as well as contents of the panchnama dated 22.01.2019 and stated that the cash seized from him was not the sale proceeds of any smuggled gold. The officer observed that Mr. T. Nandu has not explained the source of said amount of Rs. 32,75,000/-. Further observed that this appellant in his subsequent statement dated 14.06.2019 has agreed that he had paid the said amount to Mr. T. Nandu against purchase of gold. The transaction of sale and purchase of gold between Mr. T. Nandu and this appellant was corroborated by the whatsapp conversation between them.

9. Under the aforementioned premises, it appeared to Revenue that the gold procured by Mr. T. Nandu from Chennai was of smuggled in nature (although not having any foreign marking), which Mr. T. Nandu sold to this appellant. It further appeared that gold must have been smuggled through off route (other than custom port). It also appeared that the nature of gold being smuggled is also corroborated from the fact that Mr. T. Nandu failed give the name and whereabouts of the person from whom purchased. It further appeared that inspite of retraction by Mr. T. Nandu, the transaction of sale of gold by Mr. T. Nandu to Mr. J. Suresh is proved as it has been affirmed by Mr. J.

Suresh and also corroborated by whatsapp messages exchanged between them. It further appeared to Revenue that Mr. J. Suresh was aware that the sale proceeds of smuggled gold are liable for confiscation and accordingly he handed over the balance of Rs. 10 lakhs to the officer on 14.06.2019, being sale proceeds of smuggled gold. It further appeared that under Section 123 of the Customs Act where any goods is seized under the provisions of the Customs Act on the reasonable belief that it is smuggled, the burden of proving that it is not smuggled goods, lies on the person from whose possession the gold is seized or on the person who claims to be the owner of the goods so seized.

10. Accordingly, vide show cause notice dated 05.07.2019 it was proposed to confiscate the gold recovered and seized from this appellant alongwith proposal to confiscate the cash recovered and seized Rs. 14,44,000/-, with further proposal to impose penalty under Section 112. Under the same show cause Mr. T. Nandu was also required to show cause as to why not the cash recovered from Mr. T. Nandu of Rs. 32,75,000/- be confiscated under Section 121 of the Customs Act with proposal to impose penalty under Section 112 of the Act.

11. This appellant contested the show cause notice wherein he interalia stated that admittedly it is a case of town seizure from his shop. Further, no foreign marking had been found on the gold seized from him. Thus, there is no presumption of smuggling of gold save and except on the vague statement of Mr. T. Nandu. Further, admittedly Mr. T. Nandu have also purchased gold from Chennai open market.

Admittedly, the said gold bars was cast in India, having no marking or any serial number of any foreign refinery. There cannot be any presumption of smuggling. Further the said gold was not seized from the border area or any customs station. Thus, the whole allegation of smuggling is only by way of assumption and presumption having no legs to stand. Admittedly, appellant has purchased two gold bars weighing 500 gms. approx. from Mr. T. Nandu. Admittedly, gold bar of 500 gms. are not made out of India. In the normal trade practice the gold bar/ biscuits are made weighing 100 gms. or 10 tolas or 1 kg. for international trade. Thus, there is no reasonable basis with Revenue on the basis of which it is alleged that the seized gold was smuggled. Alternatively, it is also urged that as per Revenue, they have already seized sale proceeds of 1 kg. gold amounting to Rs. 32,75,000/-. Thus, further seizure of gold from him is bad in law and on facts.

12. Mr. T. Nandu also contested the show cause notice and filed written reply inter alia stating that the said amount seized from him was not the sale proceeds of any smuggled gold. He has pooled the said amount to purchase a site at Amrawati Capital area. The panchnama and his statement recorded on 22.01.2019 is not correct, and the same was prepared under threat and coercion by the officers. Also stated that the panchnama was not prepared in presence of the witnesses and their signature was obtained by the officer later on. He also requested for cross examination of the panch witnesses.

13. The show cause notice was adjudicated by the Additional Commissioner who was pleased to absolutely confiscate the seized gold weighing 476.640 gms. valued at Rs. 15,63,379/- under Section 111(a), (b), (d) and (l) of the Act without giving any option to redeem. Further confiscated the cash amount of Rs. 14,44,000/- under Section 121 and also imposed consolidated penalty of Rs. 10 lakhs under Section 112 (a) and (b)(i) of the Customs Act.

14. The cash seized from Mr. T. Nandu of Rs. 32,75,000/- was also confiscated under Section 121 and consolidated penalty of Rs. 10 lakhs was imposed under Section 112(a) and 112(b)(i) of the Act.

15. Being aggrieved, this appellant preferred appeal before the Commissioner (Appeals) wherein the order of confiscation was confirmed and penalty under Section 112(a) and (b) was reduced to Rs.6 lakhs. Being aggrieved, the appellant have preferred appeal before this Tribunal.

16. Learned Counsel for the appellant urges that it is admitted fact that this appellant have purchased gold from Mr. T. Nandu at Vijayawada. Further admitted fact is that Mr. T. Nandu purchased gold from open market at Chennai for trading. Admittedly, there is no foreign marking on the gold. The only marking on the gold bars (500 x 2) is '999'. The gold of foreign origin normally consist either of 100 gms. biscuits shaped or tola bar (111.66 gms) or 1 kg. bar which contains the embossing and serial number given by the refiner. These markings reveal the nature of foreign origin of the gold. In the facts of the present case and in absence of any marking of foreign refinery nor

the bars being of the weight, which is usually prepared by the gold refiner(s) located outside India. There is no reasonable basis available with Revenue to form the opinion that the seized gold appears to be smuggled. The whole allegation of Revenue as to the smuggled nature of gold is based on the statement of the appellant and Mr. T. Nandu, which has been retracted soon thereafter.

16.1 Learned Counsel relies on the ruling of Division Bench of this Tribunal in the case of Customs Appeal Nos. 30495 – 30496/2017 Final Order No. A/30018-30019/2021 dated 15.02.2021, under similar facts and circumstances of town seizure, where the gold did not have any foreign marking, it was held that there is no reasonable basis available with Revenue to form the opinion that the seized gold was smuggled. In such circumstances, it was held that the burden of proof under Section 123 did not shift from Revenue on the appellants. Further, the order of confiscation and penalty was set aside. The Court below have recorded the finding that the only evidence available with Revenue is the retracted statement of this appellant and Mr. T. Nandu. It is further urged that in absence of any corroborative evidence and in view of the retraction, the order of confiscation is bad and fit to be set aside.

16.2 Learned Counsel also relies on the ruling of the Allahabad High Court in the case of **CC (Preventive) Lucknow vs. Shakil Ahmed Khan** reported in **2019 (366) ELT 634 (All.)** wherein it has been held that no reliance can be placed on the statement in absence of supporting evidence. It is further urged that it is a case of town seizure and not seizure in the Custom Port and near any international border.

Learned Counsel also relies on the ruling of this Tribunal in the case of **Sanjiv Kumar alias Pappu Kumar vs. JCC-2019 (369) ELT 1177** wherein the fact was that four gold bars were seized of 1 kg. each containing foreign marking at Lucknow Railway Station, on the basis of foreign marking it was presumed that the gold bars are of third country origin. The person/ carrier from whom the gold was recovered stated that they have received gold from Mr. Sanjiv Kumar. This Tribunal recorded the finding that appellant Mr. Sanjiv Kumar have failed to prove the source of procurement of gold having foreign marking, and hence upheld the presumption of gold being smuggled. Further observed that Revenue have failed to prove that gold is of third country origin and smuggled through Nepal as alleged. Further, this Tribunal observed that Mr. Sanjiv Kumar has stated that he does not deal in purchase / sale of the gold. Thus, Revenue has failed to establish that gold was smuggled through Nepal. Further, in the circumstances that gold in question cannot be held as restricted goods and can be released on redemption fine and penalty. It was further observed that the foreign marking on the gold bars do not speak for itself and such evidence at best is heresay evidence. There was nothing to indicate that the foreign marking was actually done as it appeared outside India. Further, observed that no presumption can arise in regard to marking, unless there is evidence to show that those marking were made by a particular company located outside India in the ordinary course of business. It was held that benefit of presumption under Section 123 of the Act is not available to Revenue. Accordingly, setting aside the order of absolute confiscation, it was held that gold is to be released on payment of redemption fine and further penalty was reduced from Rs.

15 lakhs to Rs. 1 lakh on each of the appellant. Accordingly, Id. Counsel prays for allowing the appeal with consequential benefits.

17. Learned Authorised Representative (AR) appearing for the Revenue relies on the impugned order. He further states that although it is a case of town seizure, but both Mr. T. Nandu and this appellant admitted to the smuggled nature of gold, though the statements were retracted soon thereafter. Further urges that even in the subsequent statement recorded on 14.06.2019 (after retraction) this appellant have again admitted the smuggled nature of gold in question and have also deposited the balance sale proceeds Rs. 10 lakhs with regard to the gold already sold by the time of seizure. Learned AR further stated that as the smuggled nature of gold has been accepted in the subsequent statement, the impugned order may be upheld.

18. Having considered the rival contentions, I find that admittedly it is a case of town and admittedly there is no foreign marking on the seized gold. Further admittedly the said person Mr. T. Nandu who sold the gold to this appellant, has procured the gold from Chennai - open market and thus was not involved in any alleged smuggling of gold. In such facts and circumstances, I hold that no presumption is available to Revenue to form a reasonable belief of the gold in question being of smuggled nature. Thus, I hold that the burden of proof under Section 123 of the Act is not shifted on the appellant. I further hold that Revenue has not been able to establish the smuggled nature of gold in question. In this view of the matter, I set aside the impugned order so far this appellant is concerned. Accordingly, by way

of consequential relief, this appellant shall be entitled to release of the seized gold and currency/cash.

19. The appeal is accordingly allowed with consequential benefits.

(Pronounced on 16.11.2022).

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Pant