CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10054 of 2022

[Arising out of OIO-AHM-CUSTM-000-COM-015-016-21-22 dated 29/11/2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

SHRI DHARMESH KUMAR HARIYANI **.....Appellant**
40-41 Sahjanand Palace,
Behind Sindhu Bhavan Thaltej
Ahmedabad
Gujarat

VERSUS

C.C.-AHMEDABAD **.....Respondent**
Custom House,
Near All India Radio Navrangpura,
Ahmedabad,
Gujarat

APPEARANCE:
Shri Hardik Modh, Shri Amit Laddha, Advocates for the Appellant
Shri. R. P Parekh, Superintendent (Authorized Representative) for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO.A / 11141 /2022

DATE OF HEARING:12.07.2022
DATE OF DECISION: 19.09.2022

RAMESH NAIR

This appeal is filed by the Appellant against the Order-In-Original No. AHM-CUSTM-000-COM-015-016-21-22 dated 29.11.2021 imposing penalty of Rs. 1,63,00,000/- under Section 112(b)(i) of the Customs Act 1962 in relation to his alleged role in the smuggling of Gold activity.

2. The brief facts of the case as per the department is that the officers of Airport Intelligence Unit, Ahmedabad found that Shri Jignesh Savaliya working as Duty Officer, M/s Globe Ground India on 04.06.2019, to be behaving in a

suspicious manner with a passenger in the Aerobridge of Bay No.32 and found to be in possession with yellow metals. The officers conducted personal search of Shri Jignesh Savaliya whereby it was found to him carrying 9 brown packets in the presence of panchas under panchanama dated 04.06.2019. The officers opened the packet and found the same contained 47 gold bars. The officers seized the said gold under Seizure memo dated 04.06.2019. Statement of Shri Jignesh Savaliya was recorded wherein he stated that the said gold bars were given to him by a person named Shri Lokesh Sharma and he was supposed to hand over the same to Shri Rutugna Trivedi outside the Airport terminal. The officers further carried out the investigation and the evidences in the form of statements of persons involved in smuggling of gold, documents recovered after searches carried out at various locations, documents recovered and retrieved from the Mobile phones of various persons involved in smuggling of gold, data storage devices recovered from the residence of Ms. Nita C Parmar and also the email recovered from account of Shri Jignesh Savaliya and Shri Jitendra Rokad reveal that a Gold smuggling racket was orchestrated and operated by Shri Rutunga Trivedi, his wife Smt. Hina Rutunga Trivediand their employee and key associate Ms. Nita C Parmar. This smuggling activity was aided by Shri Jignesh Savaliya, Asst. Duty Officer of M/s Global Ground India Pvt. Ltd., ground handling agency working at Sardar Vallabhbhai Patel International (SVPI) Airport, Ahmedabad, in as much as he received the gold from these carriers and brought them outside the airport by exiting from the cargo gates. It further emerges from the evidences that this smuggling racket was actively financed by Shri Jitendra Rokad, Mehul Bhimani, Raju Goswami, Vipul Joshi and Lalit Jain.

2.1 The smuggling of gold from Dubai to India was carried out with intent not to pay Customs Duty using the persons as carriers. Upon arrival at SVPI Airport, Ahmedabad the gold carried by the carriers sent by Shri Rutugna

Trivedi was handed over to Shri Jignesh Savaliya, either in the Aerobridge or in the ramp area of the airport. Shri Jignesh Savaliya had been concealing the gold in the dress worn by him and smuggled the same into India by exiting SVPI Airport, Ahmedabad and was handed over by him to Shri Rutugna Trivedi or the specific person sent by Shri Rutugna Trivedi and informed to Shri Jignesh Savaliya. Adopting the above modus operandi, Shri Rutugna Trivedi and his associates smuggled into India 4886.206 Kgs. Gold during the period from 07.03.2013 to 26.05.2019. The authenticity of the details of the gold smuggled into India by various carriers sent by Shri Rutugna Trivedi has also been corroborated by the travel details provided by the travel agent through whom the tickets were purchased for the carriers on the instruction of Shri Rutugna Trivedi & Ms. Nita C. Parmar and the dates of arrival of the carriers in India at SVPI Airport, Ahmedabad. The details recorded in the diary of Shri Jignesh Savaliya as well as in the WeChat messages recovered from his mobile phone were verified with the actual arrival dates of the persons as available in records of Airport and found to be correct.

2.2 With this background, show cause notices were issued proposing confiscation of the seized goods under Sections 111(d), 111(i), 111(I) and 111(m) of the Customs Act, 1962 and demanding customs duty and imposition of penalty under Section 112(a) & 112 (b) and Section 114A & Section 114AA read with Section 123 of the of the Customs Act. Appellant was also issued show cause notice whereby it was alleged that the Appellant had also given finance to Shri Rutugna Trivedi, which was used by him to procure Gold in Dubai and to smuggle the same into India. Thus it appears that Appellant was knowingly involved in smuggling of gold into India which he had reasons to believe the smuggle under Section 111 of the Customs Act, 1962. After following due process, the adjudicating authority vide impugned order dated 29-11-2021 confirmed the charges and demands proposed in Show

Cause Notice. He imposed the penalty of Rs. 1,63,00,000/- under Section 112(b)(i) of the Customs Act 1962 on the appellants. Being aggrieved, the appellants preferred appeal before this Tribunal.

3. Shri Hardik Modh and Shri Amit Laddha, Learned Counsel appearing on behalf of the appellant submits that Appellant was inter-alia engaged in business of lending business through M/s Manas Enterprises and D.H. Quickfin Pvt. Ltd.. Both these firms have been licensed by RBI and state of Gujarat respectively. Since the Appellant lent money to Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi as part of Business activities without having knowledge that the same fund was used for smuggling of gold activity. Being part of financial activity, the Appellant financed to Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi after obtaining collateral security as mortgage of immovable property.

3.1 He submits that Ld. Commissioner erred in holding that if the Appellant engaged in finance Business, he would have done documentation and the fund was given through banking channel. The Adjudicating authority is not an appropriate authority to look into whether the Appellant correctly financed in terms of RBI norms or not. If the Appellant violated any provisions of RBI Act or any other law, the Appellant would have been punished in the respective laws. Violation in any other law does not mean that the Appellant is liable for penalty under the provisions of Customs Act. The Appellant is liable for penalty under the Customs Act only if the department shows that the Appellant had violated provisions of Section 111 of the Customs Act.

3.2 He further submits that Ld. Commissioner erred in relying upon the statement of Shri Mehul Bhimani and Shri Jitendra Rokad recorded on 28.06.2019 and 29.06.2019. Upon perusal of these statements, nowhere it has been stated that the Appellant had knowledge about the use of the fund in smuggling gold. Shri Mehul Bhimani and Shri Jitendra Rokad retracted their statements since the same were recorded under coercive action. The said statements were retracted before the Jail Authority while both were in custody. Since their statements have been retracted, the same cannot be relied upon unless the conditions provided under Section 138B of the Customs Act have been applied with. He placed reliance on the decision of Hon'ble Punjab and Haryana High Court in the case of Jindal Drugs Pvt. Ltd. Vs. Union of India reported in 2016 (340) ELT 67.

3.3 He also submits that Ld. Commissioner heavily relied upon the documents retrieved from Pen Drive seized from residential premises of Ms. Nita Parmar on 26.06.2019. Basis on such documents, it was held that the Appellant financed to Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi for smuggling of gold. The Appellant denied that he financed them for smuggling of gold. The Appellant is not concerned with the documents/ emails retrieved from Pen Drive seized from residential premises of Ms. Nita Parmar. In absence of any documentary evidence to show that the Appellant financed them smuggling of gold, the impugned order imposing penalty based on the documents retrieved from third party cannot be sustained. He placed reliance on the following judgments:

- Raipur Forging Pvt. Ltd. Vs. Commissioner of Central Excise – 2006(335)ELT 297
- Commissioner of Central Exicse Vs. P.D. Industries Pvt. Ltd. -2016 (340) ELT 249.

3.4 He further submits that in the absence of any charges of malafide intention in as much as not having smuggled gold, penalty under Section 112(b) cannot be sustained. He placed reliance on the following judgments:

- Deepak Kumar Vs. Commissioner of Customs 2017(358)ELT 854 (T)
- Jaisukh Gobarbhai Savalia Vs. Commissioner of Customs 2019 (367) ELT 290 (T)
- (iii) A V Global Corporation Pvt. Ltd. Vs. CC 2018 (363) ELT 676 (T),

The appellant also filed a written submission dated 04.08.2022 post hearing then his counsel which is taken on record.

4. Shri R P Parekh, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

5. We have carefully considered the submissions made by both sides and perused the record. The appellant has challenged the penalty imposed upon him under Section 112(b)(i) the Customs Act, 1962 which reads as under:-

"112. Penalty for improper importation of goods, etc. - *Any person, -*

(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;

From the perusal of above provision, it will be seen that for imposition of penalty on a person under Section 112(b), the following conditions must be satisfied.

(i) The person must have acquired possession of or must be in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which are liable for confiscation under Section 111 of Customs Act, 1962.

(ii) The person must have knowledge or have reason to believe that the goods acquired by him or dealt with by him in the manner as mentioned above, are liable for confiscation under Section 111 i.e. he has knowledge or has reason to believe that any one or more of the contraventions mentioned in Clause (a) to (p) of Section 111 have been committed in respect of the imported goods acquired or dealt with by him. For imposition of penalty under Section 112(b) of Customs Act, 1962, it is also necessary to prove that the person had knowledge or had reason to believe that the goods acquired or dealt with by him are liable for confiscation under Section 111.

5.1 We find that as regard the role of Appellant Ld. Commissioner in impugned order held as under:

> *" I find that Noticee No. 17 has knowingly funded an amount of Rs. 3.25 Crores to Shri Rutugna Arvindkumar Trivedi in the activity of organized smuggling of gold. I have already come to the conclusion that such gold is covered under the category of prohibited goods and is liable for confiscation in terms of the provisions of Section 111 of the Customs Act, 1962 in my discussion at paras 119.20 to 119.20.8 hereinabove. Therefore, I find that Noticee No. 17 has concerned himself in selling or purchasing and dealing with any goods which he knew were liable to confiscation and thereby, rendered himself liable to penalty in terms of the provisions of Section 112(b)(i) of the Customs Act, 1962.*

5.2 We have also gone through the statements of persons recorded in impugned matter. Upon perusal of these statements nowhere it has been found that the Appellant had knowledge about the use of fund in smuggling of gold. Appellant has financed the fund against the mortgage of properties owned by Shri Mehul Bhimani, Shri Jitendra Rokad, Ms.Hina Rutugna Trivedi and Shri Rutugna Trivedi. Details of the property mortgaged to lenders were also furnished by the Appellant to the investigation authority during the investigation. We also reproduce the relevant paras of the Appellant's statement dtd. 30.08.2019 as under:

> *"Today on being specifically asked about one Shri Mehul Rasikbhai Bhimani and Shri Jitendra Rokad, I state that I know them since 2012, they were introduced by one on my client Shri Montubhai (Mahesh) Vyas, who belongs to Amreli. They (Mehul and Jitendra) contacted me for availing Bank finance for their Pharmaceutical Company in the name of M/s Aprica Pharmaceuticals. In this matter I further state that I have done financial consultancy for them viz., M/s Aprica upto 2016. In this connection, I also produce the relevant bills for the said period viz total finance of approx. Rs. 16 crores, which was financed from SBI, Navrangpura Branch. I hereby submit the copies of relevant bills along with ledger copies for your information.*
>
> *On being asked I further state that since I was in the finance business, they required some funds for their existing business, I arranged finance of total amount of Rs. 1 crore approx. during the period 2013-19 against the mortgage of flat of Jitendra Rokad at 202, Sparsh Residency, Tal- Ghatlodia, Sola, Ahmedabad & office of Mehul Bhimani at 304/305, Brooklyn Tower, Nr YMCA Club, Makarba, SG Highway, Ahmedabad. In the matter I here by also produce the ledger account copies for the said transaction for your reference.*
>
> *On being asked I state that I don't have any other business relations with Shri Mehul Bhimani and Shri Jitendra Rokad.*
>
> *Now, on being asked about one Shri Rutugna Arvindbhai Trivedi, I state that I know him and he was introduced by Shri Mehulbhai Bhimani & Shri Jitendra Rokad. As Rutugna Arvindbhai Trivedi wanted finance for his trading business & LED light business in India. On being asked I gave finance to them in the name of Hina Rutugna Trivedi of Rs. 25 lacs in 2013 against their Swagat City Bunglow, Adalaj, Gandhinagar on mortgage. There after in 2015-16, I have arranged further*

funds of Rs. 01 Crore against their office at 306/504 at Balaji Heights, on CG Road Ahmedabad on mortgage.

On being asked I state that I heve met Rutugna Arvindbhai Trivedi 3-4 times and last met around 1year back. Further on being asked about any business relations with Shri Rutugna Arvindbhai Trivedi , I state that I don't have any other business relations with him.

On being specifically asked I state that I have not received or dealt in any Gold dealing with Shri Mehul Bhimani, Jitendra Rokad and Rutugna A Trivedi.

The above facts reveal that the Appellant is inter-alia engaged in lending funds to various borrowers. Documents annexed with the appeal show that the Appellant financed to Shri Jitendra Rokad, Shri Mehul Bhimani and Shri Rutugna Trivedi by entering into proper documentations and mortgage of the properties offered by them. The said facts were mentioned by the Appellant while recording his statement on 30.08.2019 by the investigating authority (Page No. 529 of the Appeal) and filing of the reply to the Show Cause Notice.

"On being further state that since I was in the finance business, they required some funds for their existing business, I arranged finance of total amount of Rs. One Crore approx. during the period 2013-19 against the mortgage of flat of Residency, Tal-Ghatlodia, Sola, Ahmedabad & office of Mehul Bhimani Jitendra Rokad at 202, Sparsh at 304/305, Brooklyn Tower, Nr YMCA Club, Makarba, SG Highway Ahmedabad. In the matter I here by also produce the ledger account copies for the said transaction for your reference."

"Now, on being asked about one Sh Rutugna Arvindbhai Trivedi, I state that I know him and he was introduced by Shri Mehulbhai Bhimani & Shri Jitendra Rokad. As Rutugna Arvindbhai Trivedi wanted finance for his trading business & LED lights business in India. On being asked I gave finance to them in the name of Hina Rutugna Trivedi of Rs. 25 lacs in 2013

against their Swagat city. Bunglow, Adalaj, Gandhinagar on mortgage. There after in 2015-16, I have arranged further funds of Rs. 01 Crore against their office at 306/504 at Bala Heights, on CG Road, Ahmedabad on mortgage."

5.3 We find that Relevant pages retrieved from Pen Drive recovered from residential premise of Ms. Nita Parmar shows an amount of Rs. 2,66,302/- against name of the Appellant on 30.09.2013 as "interest on loan - Hariyani – 26.08.2013 to 30.09.2013". It is observed that the above entry reflected in the above paper does not show that the Appellant financed the amount for smuggling of gold. This page has been retrieved from pen drive of Ms. Nita Parmar. While recording her statement, not a single question was asked regarding such entry. Even statement of Shri Rutugna Trivedi was recorded on 14.10.2019 wherein he was also not asked regarding funding of this amount.

5.4 Statement of the Appellant in this context was recorded on 30.08.2019 (**Page No. 529 of the Appeal**) wherein he was questioned regarding finance given to Shri Jitendra Rokad, Shri Mehul Bhimani and Shri Rutugna Trivedi. On this aspect, the Appellant mentioned as under:-

> *"On being asked I state that I may have given money in cash to Sh Jitendra Rokad and Sh Mehul Bhimani at times on their requests in 2013 and I did not maintain any records for the same and no amount is pending to be received back.*
>
> *I am also shown another Page No.135 & 136 of the print outs taken from Pen Drive Drive No.3 marked as "Imation 16GB" under Panchnama dated 27.06.2019 and I read and understand the contents and after putting my dated signature on the, I explain that the document is in the tabular form with heading "Nivid Imports and Exports Expenses list" I find that the table has columns "Date, Description, paid in USD, paid in AED, paid in INR (To pay Jitubhai) & paid in FBU". Now my attention is invited to entry dated 30.09.2013 on page 135, which shows amount of Rs. 2,66,302/- paid in INR (to pay Jitubhai) as "Interest -Hariyani". On being specially asked I state that it relates*

to interest received by me on cash amount given to them i.e. Sh Jitendra Rokad and Sh Mehul Bhimani, in August 2013, the actual details of which I don't remember, the same is amount as discussed on page 60 above."

5.5 The impugned order also held that Shri Jitendra Rokad and Shri Mehul Bhimani in their statements dated 29.06.2019 deposed that the Appellant invested Rs.2 crore for gold smuggling activities. The finding of the adjudication authority is contrary to the facts. Shri Mehul Bhimani in his statement dated 29.06.2019 mentioned as under:-

> *"On being asked about investment of individuals for the entire gold smuggling activities, I state that I had invested more than Rs. 2 crores. Harshad Savalia who is my brother-in-law had also invested about Rs. 1 crore, JItendra Rokad had invested about Rs. 85 lakhs. Hariani, Chartered Accountant who is known to me had invested Rs. 2 crore, for which collateral securities were also provided to Mr. Hariani."*

5.6 Similarly, statement of Shri Jitendra Rokad dated 29.06.2019 wherein he mentioned as under:-

> *"On being asked about investment of individuals for the entire gold smuggling activities I state that Mehul Bhimani invested about Rs.2 crore, Harshad Savalia who is brother-in-law of Mehul Bhimani invested about Rs.1 crore, I myself invested about Rs.85 lakhs and Mr. Hariani, Chartered Accountant who is known to Mehul Bhimani has invested Rs.2 crore for which collateral security was also provided to Mr. Hariani. On being asked I state that I, Mehul Bhimani and Rutugna Trivedi, all partners of this entire activity, have earned equal profit i.e. 33% each."*

The above statement reveals that the Appellant invested money for interest whereas partners for carry out the alleged illegal activity were Shri Jitendra Rokad, Shri Mehul Bhimani and Shri Rutugna Trivedi who shared equal profit i.e. @ 33 % each as mentioned in their statements. The above statements reveal that the Appellant was not concerned where the amount was invested nor interested in profit sharing.

5.7 It was also found that, Shri Mehul Bhimani and Shri Jitendra Rokad retracted their statements on 01.07.2019 immediately upon receipt of first opportunity which was sent through Central Jail. The Respondent acknowledged such facts regarding retraction of the statements by Shri Jitendra Rokad and Shri Mehul Bhimani.

5.8 It is also pertinent to note that after recording the statement of the Appellant on 30.08.2019, the investigating authority did not record statement of Shri Mehul Bhimani and Shri Jitendra Rokad to ascertain the correct facts.

5.9 Similarly, statement of and Shri Rutugna Trivedi and Ms. Nita Parmar was recorded on 14.10.2019 wherein they were not even asked any question related to the sheet retrieved from the pen-drive recovered from her residence regarding sheet in dispute.

5.10 This is also undisputed that during the course of investigation, the Appellant was called for recording his statement wherein he clearly mentioned that he was not involved in the business of gold smuggling as well as he did not have any other business relationship with Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi. Relevant facts as mentioned regarding having no business relationship with the above 3 persons in his statement are as under:

> *"On being asked I state that I do not have any other business relations with Shri Mehul Bhimani and Shri Jitendra Rokad."*
>
> *"On being asked I stated that I have met Shri Rutugna Arvindbhai Trivedi on 3 to 4 times and last met him one year back. However, on being asked about any other business relationship with Shri Rutugna Trivedi I state that I do not have any other business relation with him."*
>
> *"On being specifically asked I state that I have not received or dealt with any gold with Shri Mehul Bhimani, Shri Jitendra Rokad and*

Shri Rutugna Trivedi. On being further asked I state that I do not recall any transfer of funds to or from Dubai through Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi."

5.11 It is also fact that Airport Intelligence Unit did not find incriminating documents against the Appellant to show prima facie that the Appellant financed money for smuggling of gold into India. Even no evidence whatsoever was found to substantiate the finding of the Respondent that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold.

The above facts stated by the Appellant in their statement nowhere disputed by the department. From the evidence available on record and statement of Appellant it is clear that he was in normal course of his business lending the fund. The business activity of financing of fund has been turned by the Ld. Commissioner into direct participation in the conspiracy to smuggle gold. For imposition of penalty under Section 112(b) of the Customs Act, 1962 the knowledge on part of the person has to be established. From the above statement of Appellant it is also clear that he had not confessed in his statement that he had knowledge about use of the funds provided to Shri Mehul Bhimani and Shri Jitendra Rokad for smuggling of gold. The Appellant had nowhere stated that this fund used by persons for import of smuggling of gold. During the investigation officers did not find any documents/ piece of paper or any other evidence against the Appellant to show that the Appellant financed money for smuggling of gold into India. Clearly, the Appellant did not have knowledge of use of fund financed on his pretext, if any.

5.12 Admittedly, the appellant is only arrange the finance in their regular course of business, appellant did not deal with alleged gold smuggling activity in question. Facts borne on record revealed that the appellant has maintained all along that it never had the possession of the impugned goods nor was in any way concerned with the carrying, removing, etc., of the consignments in question and hence, it was beyond their comprehension that the goods in question were *per se* liable for confiscation under Section 111(d) ibid. It is nowhere on record that the appellant, in his capacity, was knowingly involved in alleged activity of smuggling gold. Section embodies the phrase *"...which he knows or has reason to believe are liable to confiscation under Section 111..."* which is of specific importance in this situation. Revenue has nowhere ascertained as to the knowledge of the appellant whether he knew or had reason to believe that the goods in question were liable for confiscation. Undisputed peculiar facts of the case are that the appellant is neither the importer nor the owner who had acquired possession nor in any way concerned with the carrying, removing, etc., of the goods in question, and Revenue has nowhere ascribed knowledge of the appellant as to the confiscation.

5.13 Penalty under Section 112(b) can be imposed when a person 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. It is submitted that it is not the case of the Revenue that the Noticee was indulged in any of the activities as mentioned under Section 112(b) of the Customs Act. As the Appellant did not acquire possession of or in any way concern with import of gold, penalty under Section 112(b) ought not to have been imposed.

5.14 Section 112(b) of the Customs Act is identical to earlier Rule 209A of the Central Excise Rules, 1944 and Rule 26 of Central Excise Rules, 2002. Relevant extracts of the provisions of Customs Act, 1962 Central Excise Rules, 1944 and Central Excise Rule, 2002 are reproduced hereunder:-

"Section 112 <u>Penalty for improper importation of goods etc.</u>

(a) ****

(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 –*

<u>Rule 209A</u> of the Central Excise Rules, 1944:

"Rule 209A. Penalty for certain offences. –

Any person who acquires possession of, or is any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater."

<u>Rule 26 of the Central Excise Rules, 2002</u>

Rule 26 came to enacted which came in force with effect from 1st March, 2007. Rule 26 reads as under:

"Rule 26. Penalty for certain offences. - (1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.

(2) Any person, who issues -

(i) *an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or*

(ii) *any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of Cenvat credit under the Cenvat Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."*

The Hon'ble Bombay High Court in the case of **Commissioner of Central Excise Vs. Rakesh Kumar Rajendra Kumar & Co. – 2015 (325) ELT 506**while interpreting Rule 209A held as under:

> *"The sine qua non for a penalty on any person under the above rule is : either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act i.e. the act which could not have been done without handling or movement of excisable goods as mentioned in the rule. The words "who acquires possession" would indicate that the person sought to be penalized under this rule has to first acquire the possession and then do the activity of transportation etc. as contained in the rule. It is, thus, clear that the physical possession of the goods is a must for doing the activity of transporting referred in Rule 209A. The ratio laid down by this Court in Jayantilal Thakkar & Co. (supra) covers the issue. In the said judgment, it is held that in the given situation, if the assessee is only issuing invoices wherein there is no movement of the goods, they cannot be visited with penalty under Rule 209A."*

5.15 The Larger Bench of the Tribunal in the case of **Steel Tubes of India Ltd. Vs. Commissioner of Central Excise – 2007 (216) ELT 506,** after referring to the decision of the Hon'ble Bombay High Court in the case of **Jayantilal Thakkar and Co – 2006 (195) ELT 9 (Bom.)** held that for imposition of penalty under Rule 209A of the Central Excise Rules, 1944, the person must have dealt with excisable goods with knowledge that they are liable for confiscation.

5.16 Similarly, in the case of **R.C. Jain Vs. Commissioner of Central Excise and Service Tax – 2016 (334) ELT 115,** the Hon'ble Tribunal held that penalty under Section 112(b) of the Customs Act cannot be imposed if the assesse has not dealt with or transported goods physically in any manner.

5.17 The Tribunal in the case of **D. Ankneedu Chowdhry Vs. Commissioner of Customs – 2004 (178) ELT 578**held that "**in any other manner dealing with'** used in Section 112(b) of the Customs Act has to be read ejusdem generis with the preceding expression in the clause viz. carrying, removal or depositing etc. It is held that accordingly to the above doctrine, meaning of expression "in any other manner of dealing with" should be understood in sense similar or comparable to how preceding words viz. carrying, removing, depositing etc. are understood. In other words, "in any other manner dealing with" of the goods is also to some physical manner of dealing with the goods. In absence of the finding in the impugned order that the assesse has dealt with the goods physically or any allegation to this effect raised in the proceeding, penalty under Section 112(b) cannot be imposed.

5.18 We also find that the appellant cannot come within the ambit of Section 112(b) because appellants had never acquired possession or in any way concerned in any of the activities mentioned in the Section or any measure dealing with any goods which the appellants knew or had reason to believe are liable to confiscation. In the absence of the department having not proved the knowledge of the appellant in the activities relating to the smuggled gold, there were no grounds for imposition of penalty on him. It is now well established that *mens rea* is an important ingredient for imposing a penalty on the persons enumerated in Section 112(b) of the Customs Act. The evidence brought out by the department nowhere suggests that the appellants were aware that the goods in question were smuggled into the India. The penalty imposed on Appellant, therefore, cannot be sustained.

6. As per our above discussion and finding, we are of the considered view that the appellant is not liable imposition of penalty under Section 112(b) of

the Customs Act, 1962. Therefore, we set aside the penalty and allow the appeal with consequential relief.

(Pronounced in the open Court on 19.09.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Palak