Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Customs Appeal No. 10669 of 2024- DB

(Arising out of OIO-AHM-CUSTM-000-COM-015-016-21-22 dated 29/11/2021 passed by Principal Commissioner of Customs-AHMEDABAD)

SHRI DILIPGIRI PREMGIRI GOSWAMI **.........Appellant**
302, Golden Nest Apartment,
Shroff Road, Rajkot-360 001

VERSUS

PRINCIPAL COMMISSIONER OF CUSTOMS – Customs Ahmedabad **.........Respondent**
Office of the Pr. Commissioner of the Customs,
1st Floor, Customs House,
Nr. All India Radio,
Navrangpura,
Ahmedabad 380009

APPEARANCE:
Shri Hardik Modh, Advocate for the Appellant
Shri Girish Nair, Assistant Commissioner (AR) for the Respondent

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

Final Order No. 12784/2024

DATE OF HEARING: 06.11.2024
DATE OF DECISION: 22.11.2024

RAMESH NAIR

The appellant has challenged the impugned order–in-original No. AHM-CUSTM-000-COM-015-016-21-22 dated 29.11.2021 whereby the Learned Commissioner confirmed the charged levelled in the show cause notice and imposed penalty under Section 112(b)(i) of the Customs Act 1962 on the ground that the Appellant has financed Shri Rutugna Trivedi for smuggling of gold from Dubai and Sold in India. The Ld. Commissioner held that the appellant is concerned with selling, purchasing and dealing with the goods for which they knew that the same were liable for confiscation and rendered himself liable to penalty in terms of Section 112(b)(i) of Customs Act, 1962.

1.1 The brief facts of the case 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 Trivedi and 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 Vallabhvhai 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 others.

1.2 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.

1.3 After the detail investigation, 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. In Adjudication, the adjudicating authority vide impugned order dated 29-11-2021 confirmed the charges and demands proposed in Show Cause Notice. He imposed the penalty on Appellant under Section 112(b)(i) of the Customs Act 1962. Being aggrieved, the appellant preferred appeal before this Tribunal.

2. Shri Hardik Modh, Learned Counsel appearing on behalf of the Appellant submits that the respondent ought to have appreciated that there is no iota of evidence to show that the Appellant financed Shri Rutugna Trivedi and his associates for smuggling of gold in India. Statement of the Appellant was recorded on 09.10.2019 which is exculpatory.

2.1 He also submits that the statement of Shri Rutugna Trivedi was recorded on 14.10.2019 whereby he was shown the statements of various persons including the statement of the Appellant recorded during investigation. He was also shown the print outs of the documents retrieved from the pen-drive including the documents related to the Appellant whereby Shri Rutugna Trivedi after seeing, stated that he was unable to recall the details marked in the table. Shri Rutugna Trivedi did not make any adverse remark against the Appellant to show that the Appellant had knowledge regarding smuggling of gold into India. He even did not say in his statement that the Appellant financed him for smuggling of gold into India. The statement of Ms. Nita Parmar was simultaneously recorded on 14.10.2019 whereby she was shown print out taken from the pen-drive seized from her residence. After perusal of these documents, she stated that she could not recall the contents of the statement. Her statement is exculpatory. Statement of Shri Milan Raythatha, Partner of M/s. S.R. Tours & Travels was recorded on 20.06.2019 whereby he stated that he earlier worked with M/s. Travel Mentor situated at Rajkot for 7 years and thereafter, he started his own Tours and Travel business in the name of M/s. S.R. Tours & Travels. While recording his statement, he did not state that the Appellant booked air-tickets for Shri Rutugna Trivedi.

2.2 He further submitted that the Statement of Shri Manoj Mishra, Proprietor of Manish Tours & Travels was recorded on 14.06.2029 whereby he stated that he used to book flight tickets of Shri Rutugna Trivedi and or his associates and he received the payment from Ms. Nita Parmar. Statement of Shri Manoj Mishra was again recorded on 19.06.2019 whereby he reiterated the contents recorded in the earlier statement dated 14.06.2019. Statements of the above persons were recorded during the investigation whereby the requisite print out taken from the Pen-drive seized from the residential premises of Ms. Nita Parmar were shown to them. None of them said that the Appellant financed Shri Rutugna Trivedi for smuggling of gold into India. In the absence of any evidence showing involvement of the Appellant in financing Shri Rutugna Trivedi for purchase of smuggled gold, the finding of the impugned order cannot be sustained.

2.3 He also argued that even otherwise, the Appellant is not concerned with the documents/emails retrieved from the pen-drive recovered from the premise of Ms. Nita Parmar in the absence of any other documentary evidence to show that the Appellant was involved in business of smuggling of gold. Third party records cannot be relied upon in the absence of direct link of the transactions or corroborative evidence. He placed reliance on the following decisions:-

- Commissioner of C. Ex. Indore Vs. Prag Pentachem Pvt. Ltd. – 2018 (360) ELT 1025 (Tri. Del.)
- Commissioner of C. Ex. & S.T. Raipur Vs. P.D. Industries Pvt. Ltd. – 2016 (340) ELT 249 (Tri. Del.)
- Habib Uz Zaman Vs. Commissioner of Customs, New Delhi – 2021 (376) ELT 666 (Tri. Del

2.4 He further submits that Airport Intelligence Unit carried out search at factory and residential premise of the Appellant. No incriminating documents were found. Even no evidence whatsoever was found to substantiate the allegations of the Revenue that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold. There is no iota of evidence to even show that after smuggling of such huge quantity of gold, the same were sold in local market. In absence of any corroborative evidences, serious charges for abetting the offence for smuggling of gold into India cannot be sustained. Further statement of the Co-Appellants cannot be adopted as evidence to penalise the Appellant unless the same are corroborated by independent evidence. He placed reliance on the following decisions:-

- Shri Vyomesh Vinodbhai Patel Vs. C.C. - CUSTOM Appeal No. 10233 of 2022
- Shri Rajesh B. Bambhroliya Vs. C.C. - CUSTOM Appeal No. 10075 of 2022
- Shri Harshadbahi Kantibhai Savaliya Vs. C.C. - CUSTOM Appeal No. 10231 of 2022

2.5 He also submits that there is no evidence on record connecting the Appellant with commission of any offence in relation to the alleged gold smuggling activity. Merely because name of Appellant is reflecting in printout retrieved from the pen drive recovered from the third party ipso facto, does not make the Appellant in any way privy to the commission of any offence with reference to the alleged gold smuggling activity. He placed reliance on the following decisions:-

- Shri Vyomesh Vinodbhai Patel Vs. C.C. - 2022 (9) TMI 957 - AT
- Shri Rajesh B. Bambhroliya Vs. C.C. - CUSTOM - 2022 (9) TMI 1224 - AT
- Shri Harshadbahi Kantibhai Savaliya Vs. C.C. - 2022 (9) TMI 916 - AT

2.6 He also argued that Appellant during the hearing requested to grant cross examination of Ms. Nita Parmar and Shri Rutugna Trivedi since the incriminating entries found from the pen-drive recovered from the residential premises of Ms. Nita Parmar but the Ld. Commissioner did not give any proper opportunity to cross examine. The impugned order is totally against the provisions of law and principles of natural justice. The statements of the Co-Accused/Co-Noticee ought not to be relied upon in case the opportunity of cross-examination is not granted. He placed reliance on the following judgments:-

- Andaman Timber Industries Vs. CCE, 2016 (15) SCC 785
- Dharampal Satyapal ltd. Versus C.C.Ex 2015 (320) E.L.T. 3 (S.C.)

2.7 Without prejudice to the aforesaid, he also submits that the Ld. Commissioner imposed a disproportionate amount of penalty upon the Appellant. The investigating authority found evidence to the extent of interest amount of Rs.87,000. No further evidence has been found to show that the Appellant transferred huge amount of cash as mentioned in the impugned order. Therefore, the imposition of huge penalty disproportionate to the amount involved in the matter is legally not sustainable.

3. Shri Girish Nair, Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have considered the submission made by both the side and perused the records. 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;*

4.1 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

4.2 We find that the the role of the Appellant in the whole episode has been derived from pen drive and data storage devices recovered from the residence of Ms. Nita Chunilal Parmar. The Printouts taken from the pen-drive seized from the residential premises of Ms. Nita contain an entry "Dilipbhai[801674/- + 80167/- interest @2.5% paid." As per the revenue, the said entry expressly established that an amount of Rs. 8,81,841/- has been paid to Appellant under the head of interest. Further the travel documents retrieved from Pen-drive recovered from the premises of Ms. Nita Parmar contained the details of Cash payment made to the Travel agent for tickets booked for Shri Rutunga Trivedi. By relying the said details retrieved from the pen –drive seized from the residential premises of Ms. Nita Chunilal and Statement of persons it was held by the Ld. Commissioner that the Appellant was actively and knowingly involved in smuggling of gold into India.

4.3 We find that the Ld. Commissioner in the present case imposed the penalty on the Appellant only on the basis of the printout sheet retrieved from the pen-drive seized from the residential premise of Ms. Nita Chunilal and statements of persons. Except this the department nowhere produce any evidences to show that Appellant was involved in smuggling of gold activity. However statements of said persons remained uncorroborated during the investigation. Of course, no offence should be established merely based on the statement of third party and without corroborative evidence and without granting cross examination of person whose statement alone is relied upon. We have also gone through the statements of persons relied upon by the revenue and upon perusal of these statements we nowhere found that the Appellant had knowledge about the use of fund in smuggling of gold.

4.4 We also find that in the present matter Airport Intelligence Unit carried out search at the Factory and residential premise of the Appellant. No incriminating piece of paper, records, details were found to substantiate the allegations of revenue that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold. As per the department Shri Rutugna is the mastermind of the smuggling racket, however during the investigation Shri Rutugna has nowhere stated the name of Appellant as connected to his alleged activity of smuggling of gold. He nowhere stated that Appellant has funded the amount for smuggling of gold.

4.5 From the evidence available on record we find that Appellant was in normal course lending the fund. However, the 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 the part of the person has to be established. In the present matter department failed to do so.

4.6 We also find that the evidence on record is not sufficient to hold that the appellant was involved in alleged activity of smuggling of gold. It is well settled law that the statements of the co-noticee cannot be adopted as a legal evidence to penalize the accused unless the same are corroborated with material particulars by independent evidence. The statement of co-accused cannot be relied upon, particularly when appellant has denied his involvement in respect of the goods in question. In this connection, the following judgments are relevant and they supported the stand taken by the appellant:-

- Punam Chand Bhotra v. Collector of Customs - 1993 (63) E.L.T. 237.
- Jai Narain Verma v. Collector of Customs, New Delhi - 1995 (76) E.L.T. 421.
- Jaswinder Singh v. Collector of Customs, New Delhi - 1996 (83) E.L.T. 175.
- Mahabir Prasad v. Commissioner of Cus. (Prev.), I.N.B., Patna - 2000 (126) E.L.T. 803.
- Pradeep Shah Vs. Commissioner of Customs, Patna -2006 (197) E.L.T. 301 (Tri. - Kolkata)
- Vikram Singh Dahiya Vs. Comm. Of Cus.(Export), New Delhi – 2008 (223)ELT 619 (Tri. Del.)
- Surinder Kumar Khanna Vs. Intelligence Officer, DRI- 2018(362) ELT 935 (SC)
- Habib Uz Zaman Vs. Commissioner of Customs, New Delhi - 2021(376) ELT 666 (Tri. Del.)

- K.K. Jain Vs. Commissioner of Customs, Kandla – 2009(235)ELT 170 (Tri. Ahmd.)

4.7 We also find that there is absolutely no evidence on record connecting the appellant with the commission of any offence in relation to the alleged gold smuggling activity. Merely because name of Appellant was appearing in printout sheet retrieved from the pen drive of Ms. Nita Parmar, that would not ipso facto make the appellant in any way privy to the commission of any offence with reference to the alleged gold smuggling activity. It will be unfair to fasten the appellant with penal consequences merely on the basis of a printout sheet recovered from the third party and statements of third party. The said printout at the most shows that Shri Rutugna Trivedi has borrowed money from the appellant. Now how that borrowed money was accounted for by borrower and use thereof is not relevant to the appellant.

4.8 From the above-reproduced section 112(b) it can be seen that penalty can be imposed only if the individual is in knowledge of the act of smuggling. Further, for imposition of penalty under Section 112(b) of the Customs Act, 1962 the knowledge on the part of the person has to be established. In the present matter department failed to do so. During the investigation officers did not find any document/ piece of paper or any other evidence against the Appellant to show that the Appellant had financed the money for smuggling of gold into India. Even if it is assumed that the appellant has arranged the finance but appellant did not deal with alleged gold smuggling activity in question. Facts borne on record reveal that the appellant has maintained all along that he 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.

4.9 We also find that the 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. In the present case it is not the case of the Revenue that the Appellant 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. 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 appellant 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.

5. In view of above, we are of the considered view that the appellant is not liable for 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 22.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha