

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

REGIONAL BENCH – COURT NO. 02

Customs Appeal No. 10090 of 2016-SM

[Arising Out Of OIA-AHD-CUSTM-000-APP-119-120-15-16 Dated- 08/09/2015 Passed
Commissioner of CUSTOMS-AHMEDABAD)

Jyoti Jewellers

1204/F-3, Chandidham Road,
Manek Chowk, Ahmedabad,
Gujarat

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

WITH

Customs Appeal No. 10328 of 2016-SM

[Arising Out Of OIA-AHD-CUSTM-000-APP-119-120-15-16 Dated- 08/09/2015 Passed
Commissioner of CUSTOMS-AHMEDABAD)

Hitesh Dwarkadas Patel

Partner Of M/s Arvind Kantilal & Co,
17 Ratna Chamber, Seth Ni Pole Ratan Pole
AHMEDABAD, GUJARAT

.....Appellant

VERSUS

C.C.-Ahmedabad

Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

APPEARANCE:

Shri. P. P. Jadeja, Consultant for the Appellant

Shri. Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA MEMBER (JUDICIAL)

FINAL ORDER NO. 10018-10019 /2025

DATE OF HEARING: 02.01.2025
DATE OF DECISION:09.01.2025

In the instant case on information, an Angadia firm was intercepted on 16.11.2013 and 2 pieces of 1Kg each of gold were found in his possession. While one was released after detention and belonged to another party. The second one belonging to M/s. Jyoti Jewellers (the present appellant) and which was moved for job work to M/s. M.H. Karbawala & Co,

Mumbai under challan from M/s. Jyoti Jewellers was detained earlier and later seized on 06.05.2014. The lower authorities upheld confiscation, however, allowed release of the same on redemption fine of Rs. 2,00,000/- and imposition of penalty of Rs. 1,00,000/- on present appellant i.e. M/s. Jyoti Jewellers and also imposed penalty of Rs. 50,000/- on Shri. Hiteshbhai Dwarkadas Patel, partner of M/s. Arvind Kantilal & Co., under Section 112 (b) of the Customs Act, 1962 as he was carrying the above gold for the Angadia firm M/s. Arvind Kantilal & Co. The concurred findings in substance of both the lower authorities are as follows:

*"I find that the said gold bar of foreign origin was detained by DRI on 16.11.2013 from the premises of an Angadia firm in Ahmedabad for further investigation and during investigation, appellant 1 claimed the ownership of the said gold bar vide their letter dated 26.11.2013. As per Section 123 of the Customs Act, 1962, it is obligatory on the part of the person who is in the possession of the goods or claiming ownership of the seized goods, to prove that the goods are not smuggled goods. In the present case, appellant 1 was required to produce documents evidencing legitimate import of the said gold bars of foreign origin in India. Appellant 1 had produced the copy of Bill of Entry No.327575 dated 20.10.2013 of M/s. Kotak Mahindra Bank Limited, Coimbatore along with a copy of packing list. Appellant 1 has also submitted zerox copy of Invoice No.124 dated 15.11.2013 of M/s. Mahaveer Bullion, Kolhapur indicating sale of 1000 grams gold to them. From the said documents, co-relation of the said gold bar with the documents could not be established. Thus the said burden has not been proved (sic.). The last two digits on the gold bar were also not clearly visible. I also agree with the adjudicating authority that gold bars are restricted and subject to RBI Regulations. However no compliance has been made by the appellant 1, which is violation of Import Export Policy read with the provisions of the Customs Act, 1962. Thus the adjudicating authority has correctly ordered for confiscation of the said goods under Section 111(d) and for their valuation under Section 111(m) of the Customs Act, 1962. The adjudicating authority has also correctly imposed redemption fine keeping in view the margin of profit on the goods. According to Section 112(a) of the Customs Act, 1962, any person, who, in relation to any goods, does or omits to do any act which act of commission or omission would render such goods liable for confiscation under Section 111 of the Act, or abets the doing, or omission of such an act, shall be liable to penalty. I find that in this case act of omission and commission on part of appellant 1 has rendered the goods liable to confiscation under Section 111 of Customs Act, 1962. The appellant 1, as a consequence, is also liable to penalty under section 112(a) of the Customs Act, 1962." **(Emphasis supplied)***

Thus, it is clear that despite appellant 1 producing a Bill of Entry of import having been done under Bill of Entry No. 327575 dated 20.10.2013 through M/s. Kotak Mahindra Bank Limited. The seizure was upheld on the basis that the last two digits on the gold bar were not clearly visible. The appellant party has relied upon various case law to indicate that once there produce

documents, the onus of proof gets shifted on the other side to establish otherwise in this context, he placed reliance on the following decisions:-

- 2001 (127) ELT 415 (Tri.-Mum) - S.K. Chains Vs. CC(P), Mumbai
- 2012 (286) ELT 375 (Tri.-Mumbai) - Mahesh B. Mali Vs CCE Pune
- 2008 (226) ELT 641 (Tri.-Ahmd.) Rasilaben H. Rathod Vs. Commissioner of Customs, Ahmedabad
- 2002 (142) ELT 668 (Tri.-Kolkata) - Kapildeo Prasad Vs Commissioner of Customs

2. The advocate has also emphasized that no recording of their statements was done, nor of officials of M/s. Kotak Mahindra Bank or intermediary was done to establish as to how two last numbers got erased so as to not remain visible.

3. Department through its A.R on the other hand, denying the burden of proof was discharged and apart from reiterating the findings places reliance on 2022 (380) ELT 205 (Tri. Chennai)-RAVI NAKHAT VS. COMMISSIONER OF CUSTOMS, CHENNAI-II. Specially paragraph 5.7 & 5.8 which are reproduced below:

"5.7 Though the appellants contend that they have furnished documents for the purchase of gold and that they have discharged the burden as per Section 123 of the Customs Act, 1962, their contentions do not find merit as the invoices are not free from doubt. Section 123 reads as under :-

"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 from 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 by notification in the Official Gazette, specify."

5.8 To attract Section 123, the goods must be smuggled goods. The term 'smuggled goods' means goods of foreign origin and imported from abroad. In the present case, there is no dispute that the goods are of foreign origin. As already

discussed, the defacing of serial number on the gold bar itself indicates that it is smuggled gold. The appellants who claim the gold to have been legally procured have to produce documents evidencing payment of duty as well as documents evidencing their legal ownership/possession. At the time of booking the parcel, the appellants have not furnished the required documents for transportation of imported goods. The invoices produced by them appear to be concocted and afterthought as established by the department. When the serial number of the gold bar has been defaced and no documents have been furnished for transportation of the goods from Chennai to Kolkata while booking the parcel and the invoices being under the shadow of doubt, the case put up by the appellants that they have purchased the gold in a legal manner fails. The appellants have not been able to discharge their burden of proof required under Section 123 of Customs Act, 1962. The decisions relied by the Learned Counsel for appellants have no relevancy or applicability to the facts of the present case."

4. While reiterating all submissions in both Appeals filed and made during the PH held, Appellant also submitted further that the impugned O-I-O/O-I-A passed by authority is unjustified qua appellants, as the case is on incorrect base upon and Order is without justification. The O-I-O/O-I-A have not correctly appreciated the facts as per appellant's reply to allegations and findings as mentioned above in O-I-O/O-I-A. This case is based on "suspicion" and not on facts that seized gold is smuggled gold. Settled Principle that "suspicion, however grave it may be, cannot take the place of a fact" needs to be applied in this case. O-I-O/O-I-A have not followed this settled Principle of law. Revenue has not correctly appreciated that the seizure and confiscation of Gold Bar wt. 1000 gms is not supported by any evidence that Gold Bar wt. 1000 gms is improperly imported into India and in absence of compliance of such requirement, seizure of Gold Bar wt. 1000 gms worth Rs. 31,37,500/- is not justified or sustainable, and confiscation thereof allowing on duty, R/F and Penalty deserves to be vacated or quashed and set aside allowing substantial benefit to the Appellants.

5. The DRI's case is based on general Intelligence[Not specific for the Appellants], interception of Angadia at Ahmedabad Railway station, examination of parcels, detention of goods on 16-11-2013, seizure of goods on 06-05-2014, issuance of SCN on 09-05-2014 and then O-I-O dated 132-01-2015 and O-I-A dated 08-09- 2015. However, DRI has not recorded statement of any person in this case, though SCN has been issued to 2

parties. Annexure-A to SCN dated 09-05-2014 on page No. 90 in Appeal clearly shows that No statement of anyone is recorded/relied upon. Evidences on record are not sufficient to confiscate gold or impose penalty. Suspicion in this case by Revenue has tried to replace facts, which has resulted in erroneous orders passed by Adjudicating Authority against Appellants. Revenue has not proved fact of smuggling and Appellants have dealt with smuggled goods knowingly, hence such suspicion or allegations on assumption cannot be taken to be the proof of fact of smuggling for imposing penalty u/s 112(a) and 112(b) of the Customs Act 1962.

6. Shri Virendra Patel [Appeal No. C/10090/2016] has claimed seized 1000 gms Gold, which according to him is not liable to confiscation. It is a fact that out of seizure of 2000 gms Gold from the same Angadia of Appellant shri Virendra Patel, 1000 gms was released unconditionally on documents submitted by him. But, in subject SCN proposal was for confiscation of detained/seized gold 1000 gms v/a Rs. 31,37,500/-. This O-I-O dt. 12-01-2015 has ordered confiscation of 1000 gram of Gold valued at Rs. 31,37,500/- u/s 111(d) and 111(m) of Customs Act, 1962 and allowed on R/F of Rs. 2,00,000/- with Penalty of Rs. 1,00,000/- which is unjustified and unsustainable. When said gold came to Appellant Shri Virendra Patel, they have recorded its purchase into Books of Account with valid documents. However, Revenue expected Appellant to produce only Bill of Entry containing details of payment of duty thereon only as an acceptable proof that the seized Gold has been licitly imported into India. This being a town seizure, confiscation of Gold wt. 1000 gms is not supported by any evidence that said seized Gold wt. 1000 gms is smuggled into India and it is liable to confiscation under of Section 111(d) and 111(m) of the Customs Act 1962.

7. M/s Jyoti Jewellers [shri Virendra Patel] vide its challan No. 01 dated 01-11-2013 for making the Ornaments on Job Work basis to M/s M H Karbawala at 81-Shaikh Memon Street, Near Mumbadevi Temple, Zaveri

Bazar, Mumbai 400002. However, since their Kargar[Artisen] were not available, the said M/s M H Karbawala, were not able to make ornaments required and returned the same back to the Appellant M/s Jyoti Jewellers at Ahmedabad vide their Voucher No. 27 dated 15-11-2013. Copies of the Vouchers dated 01 of 995.0 -11-2013 and their stock register for gold, Voucher dated 15-11-2013 are submitted for ready reference as Annexure No I.

7.1 M/s Jyoti Jewellers [shri Virendra Patel] has submitted that gold was imported by Kotak Mahindra Bank in 2010 and appropriate duty thereon was paid, but it had come in hands of Virendra Patel much later from open market in the year 2013. Appellant's submission is that as per prevailing Trade practice in market, Gold of 1000 gms were received normally as sale purchase and accordingly Appellant had taken entry of stock in their Books of Account for 995.0 gold in their trading purpose. O-I-O has confiscated 1000 gms Gold which is not liable to confiscation, as it has not considered the fact that gold is legally imported gold received by shri Virendra Patel. This is case of town seizure and DRI seized Gold on suspicion that it is smuggled, without evidence of its smuggling. Foreign marks only on Gold are not sufficient for the confiscation in the adjudication of such town seizure cases. When smuggling of 1000 gms Gold is not proved, in town seizure, confiscation of Gold is not justified.

7.2 O-I-O/O-I-A have not correctly appreciated that entire case is made on erroneous suspicion that since last two digits of gold bar is not clearly visible, it did not tally with serial number mentioned in B/E. Thus, the base of the case and finding by adjudicating authority is incorrect and not having any valid justification. Appellant M/s Jyoti Jewellers also provided copy of packing list with the Bill of Entry and in packing list serial No. AF 9576 to 9600 is mentioned. M/s Jyoti Jewellers, Ahmedabad vide their letter dated 29.11.2013 submitted that the said gold bar was being returned by M/s M.

H. Karbawala & Co., Zaveri bazaar, Mumbai through angadia M/s Arvind Kantilal & Co. Vide their Voucher No.27 dated 15.11.2013 to whom the Gold Bar was sent for making ornaments and as their karigar [gold smith] was not available, they were returning Gold Bar back to them. They also submitted a letter in this regard from M/s M.H.Karbawala & Co., Mumbai dated 15.11.2013. Appellant state that Gold Bar was out of their accumulated stock and it was forwarded to M/s M. H. Karbawala & Co. by Appellant on 01-11-2013 by their challan with sr.No. AF9600. Such facts can be seen from the Annexure-I. Notice has informed the investigating officers that the said Gold Bar was forwarded by them and it was returned to them. As Gold Bar detained from Angadia firm was partially matching with Serial No. mentioned on Gold Bar in as much as the last two digits on the Gold Bar were not clearly visible and therefore Revenue has presumed and alleged that it could not be said with conviction that the import documents submitted by M/s Jyoti Jewellers, Ahmedabad matched with the seized Gold Bar. However, investigating DRI officers have chosen not to record anyone's statements after detention/seizure or confirm these vital facts either from M/s M.H. Karbawala & Co, Mumbai or M/s Kotak Mahindra Bank Ltd, to come to definite conclusion that seized Gold Bar was imported into India properly or improperly or otherwise and DRI has simply jumped to conclusion and assumed that Appellant has failed to produce documents showing licit import of the said seized gold. SCN/O-I-O/O-I-A are only on basis that as last two digits on Gold Bar were not clearly visible, it could not be said with conviction that import documents submitted matched with seized gold showing its licit import. The finding "cannot be said with conviction" can be viewed in favour of Appellants. This is not a definite conclusion with positive evidence. It is settled principle also that when there are two interpretation possible, interpretation beneficial to trade should be applied. In facts of case, investigation has doubted documents submitted, but has not come out with any contrary evidence. Therefore, Applying settled principles of law,

confiscation on such "suspicion" is not justified or sustainable under the Customs Act 1962.

8. Decisions relied by Revenue are on different facts and not applicable in this case. Decision 2022 (380) ELT-205 (Tri-Chennai)-Ravi Nakhat Vs Commissioner Customs, Chennai-II produced by the SDR during PH is a case where elaborate investigation was conducted, misdeclaration was established by evidences and statements were also recorded during and gold was confiscated absolutely. Thus, facts of that case & this case under consideration are totally different and not applicable in this case. In such case of 2024 (389) E.L.T. 444 (Cal.)- CC(P) vs Rajendra Kumar Damani @ Raju Damani also is a case wherein during elaborate investigation conducted, misdeclaration was established by evidences and inculpatory statements were also recorded, which were retracted later on during proceedings and gold was confiscated absolutely. Therefore, this case also is on different and it cannot be made applicable in these 2 Appeals by M/s Jyoti Jewellers and Hitesh Pate. Gold is not a totally prohibited item and Gold can be imported upon payment of duty on certain conditions to be followed by concerned importers. For town seizure cases, Appellant has submitted that after repeal of Gold (Control) Act and its Rules, no such elaborate records are required to be maintained, except the normal records to show sale and purchase of gold. Investigating DRI officers or appearing authorized representative of Revenue in Appeals has not been able to produce any such Rules or Regulations etc which mandates strict requirement of maintaining any records for purchases of gold, as was required in case of Notified Goods (Prevention of Illegal Import) Rules, 1969 read with Sections 11C, 11D, 11E, 11F and 11G of the Customs Act, 1962 or such Rules as is in Central Excise Act 1944, which mandates requirement of maintenance of records in a specific manner. The above views are supported by the following judgments:-

- In case of Dhanistha Gold v/s C.C., Ahmedabad 2019 (369) ELT-688(Tri - Ahmd), confiscation of gold was set aside holding that no statement of any person that gold was of smuggled nature and hence no reason to confiscate same and ultimately confiscation of seized gold was set aside in terms of Section 111 of Customs Act, 1962.
- In C(P), Kolkatta v/s Ashok Kumar Agarwal 2017 (348) ELT-555(Tri Kolkata), Confiscation of foreign marked gold bars was set aside holding that Respondent having produced purchase bill and seller confirmed sale of such gold to him, burden of proof under Section 123 of Customs Act, 1962 stands discharged and also holding that there is no legal requirement of mentioning markings of gold bars in sales bill and original importers themselves not showing such markings in delivery/sales documents issued by them and Revenue having failed to prove that gold bars not purchased by respondent and same procured from any other sources, confiscation not sustainable and further holding that Onus shifted to Department when assessee discharged his burden by producing bills showing purchase of gold in terms of Section 123 of Customs Act, 1962.
- In Nitya Gopal Biswas v/s CC(P) 2016 (344) ELT-209 (Tri-Kolkata), it has been held that reasonable doubt of smuggled nature of foreign marked gold may be sufficient for the purpose of seizure of gold, by virtue of Section 123 of Customs Act, 1962, but the same is not sufficient for confiscation when appellant has produced legal document of their licit acquisition and that Department not able to establish the smuggled nature of seized foreign marked gold, whereas claimant appellant has been able to discharge his burden by providing licit document of purchase of 60 foreign marked gold biscuits, further holding that in the light of liberalized policy of Central Government it cannot be held that all the foreign marked gold being bought and sold

in India is of smuggled nature and confiscation and penalties imposed were set aside.

- The Division Bench of Tribunal in the case of 2001 (127) E.L.T. 415 (Tri.-Mum.) - S.K. Chains v. CC(Preventive), Mumbai wherein seizure of foreign marked gold viz. 33 gold pieces seized from appellant duly recorded in firm's stock register and Gold claimed to have been acquired from a gold dealer firm is not approved holding that burden of proof on appellant discharged in terms of Sections 123 of Customs Act, 1962. [para 9]. Further, it has also been held in that case that admission of purchase of foreign marked gold biscuits from open market without receipt not indicates that gold under seizure is illegally imported, there being no Central Act in existence requiring maintenance of any documents indicating such receipts in terms of Section 110 and 123 of Customs Act, 1962.
- In 2002 (149) E.L.T. 427 (Tri.-Kolkata) - Girdhari Dubey v. C. C. (Prev.) Kolkata similar view is taken in Para 3(c) and (d), which is reproduced for reference :-

3(c) In view of our findings we would set aside the order of confiscation of 32 pcs. of gold also relying at the findings of this Tribunal in the case of SK. Chains reported in 2001 (127) E.L.T. 415 wherein in Para 10 of the reported decision the Tribunal has considered the effects of the liberalized policy as regards import and dealing in gold and thereafter concluded that that onus as placed under Section 123 was discharged in the facts of that case. We would also considering the onus under Section 123 has been discharged in the facts of this case by the appellants. If the Revenue wants that the gold dealers indulging in sale and purchase of foreign marked gold in India, should indicate the brand names and that discharge under Section 123 shall be only with respect to each brand then foreign marked gold should have been declared as one of the items under Chapter IVA of the Customs Act. We find that no such notification of placing foreign marked gold exists. Therefore the confiscation of the foreign marked gold for non satisfactory brand wise accounting as arrived at in the facts of this case was not called for.

3(d) Since we find no reason for sustaining the confiscation of 32 pcs. of foreign marked gold which has been claimed by Shri Giridhari Dubey we find no reason for imposition of any penalty on Shri Giridhari Dubey.

that the above view is in compliance to prevailing Rules in India. If revenue wants that gold dealers of foreign marked gold in India should indicate the brand names with respect to each brand then foreign marked gold should have been declared as one of items under Chapter IVA of Customs Act, 1962.

Thus, there is no mandatory requirement under prevailing law to mention brand or marks or numbers of foreign marked gold in the sale/purchase documents. Hence, confiscation ordered deserves to be set aside in this case. Shri Virendra Patel pray to set aside order of confiscation of 1000 grms Gold and allow the Appeal with consequential reliefs as per law. Appellant has substantiated that seized 1000 gms gold was out of his stock inventory of legally purchased Gold. Appellant discharged burden of proof u/s 123 of Customs Act 1962 by maintaining normal business daily account with relevant documents of purchase/sale showing Opening Balance Receipt issue closing stock, while dealing in Gold/silver purchased and sold. Thus, confiscation of 1000 gms Gold is not sustainable in facts of this case and deserves to be set aside.

9. Appellant has relied upon various decisions which are part of its submissions. Thus, When O-1-0/0-1-A observe that authorised Importers like MMTC do not provide import documents like Bill of Entry to each such purchaser and hence asking for such import Bill of Entry to prove legitimate import is quite harsh. Revenue should have accepted appellant's clarification and import documents, which they have produced while claiming seized gold during investigation. The allegations in SCN and findings thereon by O-I-O/O-I-A are not correct and not supported by any valid evidence for confiscation of seized gold are on assumptions and presumptions. O-1-0/O-I-A have not correctly appreciated that out of 2 Gold Bars, one was released by DRI in investigation considering the similar documents produced by Appellant. The documents produced by Appellant should have been accepted for gold Bar confiscated as well. Hence, confiscation of Gold Bar is not justified and deserves to be set aside and the amount of duty fine and penalty recovered from Appellants deserves to be allowed as consequential reliefs.

10. Revenue has recovered duty on market value, when it was required to be recovered on Tariff Value as per the Notification No. 26/2015-Cus(NT) dated 27-02-2015. Accordingly, total duty @ 10.30% would be Rs. 2,54,208/-, whereas Revenue has recovered duty Rs. 3,23,163/-. Thus, Rs. 68,955/- (Rs. 3,23,163 -Rs. 2,54,208 Rs. 68,955] is recovered, which is required to be returned to Appellant M/s Jyoti Jewellers through its Proprietor. Penalty is imposed u/s 112(a) of Customs Act 1962 on Appellant Jyoti Jewellers. However, Section 112(a) shows that Penalty u/s 112(a) under Customs Act 1962 can be imposed on any person for "act, omission or abetment" in improper import of goods which may not require any mensrea, whereas penalty u/s 112(b) ibid operates for smuggled goods after its improper import and requires mensrea. Appellant Jyoti Jewellers has no nexus with improper import of the seized gold. Hence no Penalty can be imposed on Appellant Jyoti Jewellers u/s 112(a) ibid. Ingredients required for imposing penalty are not existing to impose penalty on Appellant Jyoti Jewellers under Section 112(a) of Customs Act, 1962. Penalty Imposed on Appellant Jyoti Jewellers deserves to be set aside.

10.1 Penalty u/s 112(b) ibid operates for smuggled goods after its improper import and requires mensrea. In case of Appellant Shri Hitesh Patel, it is submitted that Section 112(b) provides that penalty can be imposed under this section only when any person has done any positive act or dealt with smuggled gold, which he knows or has reason to believe that such gold is liable to confiscation under section 111 of Customs Act 1962. Ingredients required for imposing penalty u/s 112(b) to impose penalty on the Appellant Shri Hitesh Patel, are not existing.

10.2 There is nothing on record to show that any of 2 Appellants had knowledge that seized gold was actually smuggled gold and it was liable to confiscation u/s 111 of customs Act 1962. There is nothing on record to suggest that Appellants had any role in smuggling of such gold seized and

confiscated subsequently. Therefore, there is no case for imposing any penalty on Appellants u/s 112(a) or u/s 112(b) of customs Act 1962. Penalty imposed on Appellants u/s 112(a) and u/s 112(b) of Customs Act 1962 are not justified and also deserves to be set aside. The Redemption Fine imposed is also not justified and deserves to be set aside as the seized gold bar was not liable to confiscation. Thus, appellants seeks to consider all submissions and to allow appeals with consequential benefits. The appellants have substantiated their cases for justice by setting aside confiscation of gold and duty, R/F and penalty recovered.”

11. This Court has considered the facts as well as the legal position submitted by both the sides in this regard. It is clear that at the relevant time, the foreign marked gold was not the prohibited item it was the rather restricted. This is the reason that the same has been released on payment of redemption fine of Rs. 2,00,000/- along with Customs Duty of Rs. 3,23,163/- and the penalty of Rs. 1,00,000/- imposed on the other appellant. While the appellants are not claiming that the gold was not of the foreign origin but they have produced a Bill of Entry of import, the same by Kotak Mahindra Bank and have claimed the purchase, to be legitimate and also duly indicated the same to be reflected in books of accounts and also in the challan while sending and receiving back the gold biscuits from the job worker who could not do the work due to his workers being not available.

11.1 The second appellant i.e. Shri. Hitesh Patel was considered Angadia involved and therefore has been subjected to penalty under Section 112(b). The department has directed confiscation despite Bill of Entry having been only on the ground that out of the 4 digits and credit Suisse ect., mentioned on the biscuits, two last numbers on the biscuits were non readable while the earlier two digits of the four on the biscuits were quit readable. The adjudicating authority has therefore considering that the burden of proof has

not been discharged upheld confiscation though has imposed nominal penalty while releasing the gold. This Court has considered the fact that last two numbers were not visible has been held against the party which considered this finding to be based on assumption and presumption. This Court finds that even if the department nurtured a doubt despite the import documents having been produced, it should have at least done some further investigation to linked or otherwise the gold biscuits with the import made by the Kotak Mahindra Bank. Instead of this no statement even of the accused (now appellant) has been recorded in the matter and neither has it been brought on record as to why last two numbers became invisible to the department. There is nothing on record to show if the same was erased with the malicious intention and if so they by whom? It is also not on record as to whether such lack of visibility of last two number was on account of any rubbing or corrosion over a period of time. Further the moment, gold is found accounted for the documents (like) Bill of Entry produced, the onus gets shifted on the department, as held in following case law.

- U.O.I Vs. Imtiaz Iqbal Pothiwala reported in 2019 (365) ELT 167 (Bom.)
- Ana Jamil Vs. C.C (P) Shillong reported in 2016 (342) ELT 248 (Tri.Kal,)
- Ashok K. Agarwal Vs. U.O.I-2016 (342) ELT 232 (Cal.)
- S. Ramki Vs. PRINCIPAL COMMISSIONER OF CUSTOMS, CHENNAI-III as reported in 2020 (372) ELT 372 (Tri-Chandigarh)
- Rajesh Verma Vs. C.C. as reported in 2021 (378) ELT 502 (Chandigarh)

Therefore, the production of any documents shifts onus on department. This was correct position in law even at the time, when foreign marked gold was a notified item under Section 123 of the Customs Act, 1962.

11.2 Further it is also seen that while releasing the gold biscuits in the form in which it was seized by the department no melting has been directed as per records. The vital question therefore arises that if the gold biscuit was seized in the form in which it was liable to seizure, then why not at the time of ordering its release the same was directed to be released under supervised melting to prevent the possibility of its being resold the market in the form of smuggled gold is removed. Again this Court is of the view that the matching of first two digits in figure running in thousand also by preponderance of probability shows that the gold was not smuggled, as not only last two digits of the tens were found (each lacking of visibility) but also the receipt of its import by Kotak Mahindra Bank was matching with the first two numbers. The Biscuit was very much of Credit Suisse and matching in other details. The probability that a smuggler will be able to procure the documents i.e. Bill of Entry of import by scheduled bank and that too of the same agency of credit to easy and that two of the matching in first to important digits out of four from smuggling channels is rather remote. Therefore, the onus was clearly shifted on production of the Bill of Entry on the department which has miserably failed in establishing that the gold biscuit was from smuggling channels and the Bill of Entry despite existence of so many co-related details was not of the seized biscuit. Therefore the submission made by the party that department's case is based on rather suspicion and is based on assumption and presumption carries weight in the light of factual peculiarities of the case. Department has relied upon the decision of RAVI NAKHAT VS. COMMISSIONER OF CUSTOMS, CHENNAI-II. 2022 (380) ELT 205 (Tri. Chennai)- to say that when serial number is erased in foreign marked gold and no documents evidencing its legal

procurement and payment duty is produced, then department was justified in holding that appellant had no right to claim redemption of gold. This case is clearly distinguishable as department was given the Bill of Entry in this case and goods were directed to be released after due consideration by the lower authority. And even onus has shifted on the departments.

11.3 The finding as above is again fortified by the ruling in 2019 (369) ELT 688 (Tri-Ahm.)- DHANISHTAH GOLD Vs. CC, AHMEDABAD, wherein, it was indicated non recording of statement of the relevant person after production of any proof of legitimate acquisition shifted onus on the department. Further in 2009 (248) ELT 141 (Cal.)-COMMISSIONER OF CUSTOMS (PREV) VS. PUNI DHAPA LOKESWARA RAO, HON'BLE CALCUTTA HIGH COURT held that if the preponderance of probability is not in favour of Customs authorities, the department cannot be said to have proved that gold seized was smuggled into India. In the instant case, therefore, the production of Bill of Entry which in higher probability related to the gold biscuits seized, the non recording of any statement of the relevant persons by the department coupled with finding being based on assumption and presumption makes the confiscation bad in law in the facts of this case.

12. The impugned order is therefore set aside and confiscation set aside. Appeals are allowed with consequential relief.

(Pronounced in the open Court on 09.01.2025)

(SOMESH ARORA)
MEMBER (JUDICIAL)