CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO. I

Customs Stay Application No. 70027 of 2020
in
Customs Appeal No. 70031 of 2020

[Arising out of Order-in-Appeal No. 535-539-CUS/APPL/LKO/2019 dated 31.10.2019 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow.]

Commissioner of Customs, Lucknow ......**Appellant**
5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

VERSUS

Shri Sanjay Soni ......**Respondent**
3rd Floor, Sapuipara, Near
Dolphin School, Bally, PS-
Nischinda, Howraj-711227(W.B.)

Present for the Appellant: Shri Anupam Kumar Tewari, Authorised Representative
Present for the Respondent: None

WITH

Customs Appeal No. 70067 of 2020

[Arising out of Order-in-Appeal No. 535-539-CUS/APPL/LKO/2019 dated 31.10.2019 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow.]

M/s Sandeep Gupta ......**Appellant**
60/50, First Floor, Nayaganj,
Kanpur-208001 U.P.

VERSUS

Commissioner of Customs (Prev.), Lucknow ......**Respondent**
5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

Present for the Appellant: Shri Ravindra Narayan, Advocate
Present for the Respondent: Shri Anupam Kumar Tewari, Authorised Representative

WITH

Customs Appeal No. 70083 of 2020

[Arising out of Order-in-Appeal No. 535-539-CUS/APPL/LKO/2019 dated 31.10.2019 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow.]

M/s Ashok Soni ......**Appellant**

64/65, Tripura Roy Lane, Salkiya,
Howrah & Shop At 39, Dhaka Patti
Bara Bazar Kolkata West Bengal
700007

VERSUS

Commissioner of Customs (Prev.), Lucknow ......**Respondent**
5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

AND
Customs Appeal No. 70258 of 2021

[Arising out of Order-in-Appeal No. 535-539-CUS/APPL/LKO/2019 dated 31.10.2019 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow.]

M/s Abhishek Soni ......**Appellant**
Shop at 18, Hans Pokhariya,
1st Lane Bara Bazar, Kolkata
West Bengal.

VERSUS

Commissioner of Customs (Prev.), Lucknow ......**Respondent**
5th Floor, Kendriya Bhawan, Sector-H,
Aliganj, Lucknow

APPEARANCE:

Present for the Appellant: Shri Debaditya Banerjee, Advocate

Present for the Respondent: Shri Anupam Kumar Tewari, Authorised Representative

CORAM:

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

DATE OF HEARING: 06/08/2021
DATE OF DECISION: 10.02.2022

FINAL ORDER NO. 70071-70074 / 2022

The brief facts are- Mr. Sanjay Soni who is aged about 40 years was travelling from Kolkata to Kanpur by CLGA-Ajmer Express; on 11th May 2018 at about 13.15 hrs. when the train arrived at Mughalsarai Station, the officers of DRI Varanasi intercepted Mr. Sanjay Soni, who was travelling on berth no. 36 of Coach B-1. They enquired from Mr. Sanjay Soni after giving introduction, if he was carrying any gold bars etc., upon which Mr. Soni accepted that he was carrying gold biscuits with him which are lying in his waist belt, and handbag. Mr. Soni was further asked if he was having any documents regarding the legal possession of gold to which he replied in negative. Thereafter, the officers detrained him and came with Mr. Soni to DRI office at Varanasi. In the personal search taken of Mr. Soni, the following was found: (i) his Aadhar Card-6577-1949-7383 (ii) Pan Card- BWOPS6563H (iii) Mobile Phone (LET Smart Phone-IMEI Number 862539030088425/ 862539030088433) with mobile SIM-7003805421/9007581279 & (iv) a sum of Rs. 1240/- were recovered, (v) from cloth waist belt, two rectangular pieces of yellow metal were recovered which appeared to be of gold (vi) from purple colour handbag (3) yellow metal rectangular pieces plus one cut piece. Further, on being asked if he has any document as to the licit possession of the gold, Mr. Sanjay Soni stated that he is not having any document. Thereafter, the Officers called the Government approved valuer Mr. Girdhar Gopal, who submitted his report as on 11.05.2018, as follows-

Sl. No.	**Description**	**Weight (grams)**	**(INR Value @ 32,000/- per 10 gram**
1.	Gold Bar(RAND Refinery) 99.50	998.600	31,95,520/-
2.	Gold Bar 99.50	998.700	31,95,840/-
3.	Gold Bar 99.50	998.700	31,95,840/-
4.	Gold Bar 99.50	998.600	31,95,520/-
5.	Gold Bar 99.50	998.700	31,95,840/-
6.	Gold Bar cut piece	200.900	6,42,880/-
	Total net weight	**5194.200**	**1,66,21,440/-**

One representative samples from sl. No. 1 & Sl. No. 6 were also prepared by cutting small pieces of weight 6.12 gram & 3.17 gram respectively with the assistance of the said valuer, for further chemical examination & were marked as Sample No. 01/02 & 02/02. Thus, a total of 05 pieces of gold biscuits & one cut piece of gold having total weight as 5194.200 grams totally valued Rs. 1,66,21,440/- were recovered.

2. On being questioned regarding the source of the gold, Mr. Sanjay Soni informed that four gold biscuits and the cut piece of gold (approx. weighing 4.2kg) was given to him by his brother-in-law Mr. Ashok Soni, resident of Salkiya, Howrah, having shop at Bara Bazar, Kolkata-700007, and the remaining one gold biscuit was given to him by Mr. Abhishek Soni (Verma) having his shop at Bara Bazar, Kolkata-700007. He further informed that out of the total gold 2.2kg received from Ashok Soni and 1kg received from Abhishek Soni was to be delivered to Sri Vishwanath Soni at Kanpur, who is also father-in-law of Mr. Abhishek Soni. The remaining 2kg was to be delivered to Shri Sandeep Gupta of M/s Lala Raj Kishore & Sons, Nayaganj, Kanpur.

3. On being further asked about origin of the recovered gold biscuits, Mr. Sanjay Soni stated that the same appears have been smuggled into India through Bangladesh and have been remoulded with different markings at Kolkata, so as to conceal the origin. He further stated that he was the carrier and would have received Rs. 5000/- per kg., apart from travel expenses. He also admitted that he has carried gold in the past also at the instance of Mr. Ashok Soni and have delivered to Mr. Vishwanath Soni and Mr. Sandeep Gupta,

Kanpur. He further stated that he knew that possessing and carrying gold in such manner was illegal, but he did it for money.

4. The officers of DRI on the belief and as per statement of Sanjay Soni that the gold has been smuggled to India through Bangladesh, through off routes in violation of the law, is liable for confiscation under Section 111 of the Customs Act. Thus Gold was seized under Section 110 of the Customs Act, under Panchnama and seizure memo dated 11.05.2018.

5. Mr. Sanjay Soni further stated that his main business was related to imitation jewellery but during the last three months, he has carried gold from Kolkata to Kanpur. They have also provided the Mobile Nos. of Mr. Sandeep Gupta(9935019600 & 8840793240 & Mr. Vishwanath Soni at Kanpur (9839362909). He further stated that during the last three months Mr. Ashok Soni of Kolkata used to send gold through him for delivery at Kanpur, by giving directions on whatsapp. He has delivered gold to Kanpur 7-8 times in the past. The officers retrieved the whatsapp message received by Sanjay Soni from Ashok Soni, where it was mentioned as '2.2 chacha & 2 sandip'. The officers also found photograph of Mr. Ashok Soni and visiting card of M/s. Lala Raj Kishore & Sons, Kanpur having details of mobile phone numbers of Mr. Sandeep Gupta, saved in the phone of Mr. Sanjay Soni. The officers arrested Mr. Sanjay Soni as it appeared he had committed offence punishable under Section 135 of the Customs Act, read with the provisions of Section 104 of the Act, with approval of the Competent Authority and thereafter he was produced before the Hon'ble Spl. CJM, Economic Offence, Varanasi on 12.05.2018, who remanded him to judicial custody.

6. The test report from the Chemical Examiner CRCL No. 35-CUS/CRCL/2018-19 dated 23.05.2018 was received, the sample tested as gold having purity of 99.51% and 99.54%.

7. In follow up action, the officers searched the premises of Sandeep Gupta, M/s Lala Raj Kishore & Sons at Kanpur on 12.05.2018, but nothing incriminating was recovered. The statement of Mr. Sandeep Gupta was also recorded, during search, wherein he denied having any relation with the seized gold and also did not identify the photograph of Mr. Sanjay Soni. The follow up search at the house of Mr. Vishwanath Soni at Kanpur could not be carried out, as the premises was found locked.

8. Mr. Sanjay Soni was further interrogated on 29.05.2018 in jail by the officers. On being shown the photograph of Sandeep Gupta as appearing in the copy of 'Aadhar Card', Mr. Sanjay Soni identified the photo as that of Sandeep Gupta of Kanpur, to whom the supply of part of the seized gold was to be made. Thus it appeared to Revenue that Mr. Sandeep Gupta is also involved in the purchase of smuggled gold and has deliberately not identified Mr. Sanjay Soni.

9. In the follow up action DRI-Kolkata visited the premises of Mr. Abhishek Soni on 12.05.2018 and 14.05.2018, but the shop was found closed and locked, Summons were served on Mr. Abhishek Soni, affixed on the side of the closed shop for his appearance, to which reply was received from Mr. Deepak Verma, brother-in-law of Mr. Abhishek Soni stating that Mr. Abhishek Soni has gone outside Kolkata, shall attend the DRI office on return. However, he did not appear before the DRI for examination.

10. On search by DRI- Kolkata at the shop premises of Mr. Ashok Soni on 12.05.2018, the shop was found locked. Thereafter, summons were issued for appearance of Mr. Ashok Soni on 15.05.2018. In search of residence of Mr. Ashok Soni at Salkiya-Howrah on 14.05.2018 he could not be found there, neither any incriminatory document were found in this search attended by his son Mr. Yogesh Soni. Mr. Yogesh Soni in his statement *inter alia* stated that Sri Sanjay Soni is his maternal uncle & he also knew Mr. Abhishek Soni as he is nephew of his father Mr. Ashok Soni. Both of them deal in jewellery. In response to summons, Mr. Yogesh soni replied stating that his father Ashok Soni has gone out of Kolkata and shall attend DRI office on return.

11. Further, the residence of Sanjay Soni was searched on 18.05.2018 at Sapuipara, Howrah, but nothing incriminating was recovered. Mr. Mahendra Bhama brother of Sanjay Soni who was present during search stated that he was aware regarding arrest of his brother Sanjay Soni by DRI-Varanasi. Further, Summons were issued by DRI for appearance of Mr. Ashok Soni & Mr. Abhishek Soni, but the DRI received the usual reply that as they are out of Kolkata, they shall attend on their return. But both of them did not appear before the DRI. Thus it appeared that they were deliberately avoiding the investigation. Thereafter, Revenue again issued Summons dated 29.06.2018 alongwith letter of same date, address separately to Mr. Ashok Soni & Mr. Abhishek Soni, intimating them regarding their complicity in the alleged smuggling of foreign origin gold based on the seizure of gold from Mr. Sanjay Soni and his statement recorded by the officers. They were also asked/directed on Summons to appear before the DRI-Varanasi on 5.07.2018 for

the explanation and recording of statement. However, both of them neither filed any written reply nor appeared before the DRI at Varanasi.

12. Mr. Sandeep Gupta appeared before DRI-Varanasi on 08.06.2018, stated that the jewellery shop M/s Lala Raj Kishore & Sons Nayaganj at Kanpur is being run by him. On being informed that Mr. Sanjay Soni identified his photograph as per his 'Aadhar Card', he admitted that he knew Mr. Sanjay Soni. He further on enquiry/declined to know Mr. Ashok Soni and also denied to have ever talked with him, but from the 'call details records' between Ashok Soni (9874659500) and that of Shri Sandeep Gupta (9935019600) it was apparent that they were in regular touch with each other during the period of 27th April, 2018 to 2nd May, 2018. Thus it appeared that they have communicated during this period seven times-call duration ranging from 16 seconds to 62 seconds. The call details of said number of Mr. Sandeep Gupta also revealed that he was in constant touch with Mr. Ashok Soni, Mr. Abhishek Soni & Mr. Vishwanath Soni during the period of 19th March, 2018 to 11th May, 2018. On being questioned by the officers Mr. Sandeep Gupta stated that he has no explanation with regard to the calls made between them. Thus it appeared to Revenue that there is truth in the statement of Mr. Sanjay Soni-as to receipt of gold from Mr. Ashok Soni for delivery to Mr. Sandeep Gupta. It also appeared that Sandeep Gupta was showing ignorance only to avoid the legal action against him.

13. In response to Summons, Mr. Vishwanath Soni appeared before DRI-Varanasi on 11.06.2018. In his statement recorded he

inter alia stated that he was a Goldsmith, but due to old age now he trades in gold jewellery. He admitted that mobile no. 9839362909 belongs to him and he is well known to Mr. Sanjay Soni/ Ashok Soni/ Abhishek Soni, and have been talking with them regularly. He also admitted that Mr. Abhishek Soni is his son-in-law. He is also known to Mr. Sandeep Gupta, Kanpur. He denied his involvement in the alleged gold smuggling. It appeared to Revenue that as he was in regular touch with Sanjay Soni/ Abhishek Soni and was also well known to Sandeep Gupta, on the basis of what'sapp message received by Sanjay Soni from Mr. Ashok Soni, it appeared that Mr. Vishwanath Soni was involved in receiving smuggled gold. In the course of further enquiry from the telecom operator it appeared that Mr. Sanjay Soni and Mr. Sandeep Gupta were using mobile number in the name of other person. The DRI also retrieved the copy of train tickets for the past travels made by Mr. Sanjay Soni from Kolkata to Kanpur by train, from the Website IRCTC. It further appeared that Mr. Abhishek Soni & Ashok Soni were the mastermind and Mr. Sandeep Gupta and Sri Vishwanath Soni also indulged themselves in the alleged smuggling/receipt of smuggled gold. Accordingly, SCN datd 5th July 2018 was issued on all the aforementioned five persons proposing confiscation of seized gold bars weighing 5194.200 gms valued at Rs. 1,66,21,440 under Section 111 (b) & (d) of the Customs Act alongwith seizure of the waist belt and handbag used for carrying. Further penalty was proposed under Section 112 (a) & (b) on all the persons for their alleged indulgence/involvement in smuggling of gold, directing show cause answerable before the Additional/ Joint Commissioner of Customs, Lucknow.

14. All the noticees/appellants contested the SCN.

15. Mr. Vishwanath Soni in his reply *inter-alia* urged that the show-cause notice is vague, lacks any specific allegation. The allegations in the SCN are only based on the statement of Mr. Sanjay Soni which is not reliable as the same have been taken while he was in detention by the Customs officers. Subsequently, Mr. Sanjay Soni was arrested and was produced before the Magistrate, who remanded him to judicial custody. Further, this appellant have not claimed the seized goods/gold. Neither any evidence have been given by Mr. Sanjay Sony regarding ownership of this noticee with regard to the gold seized. Further, the show cause notice is also vague for the intended confiscation, as such notice is required to be given either to the claimant or owner of the goods and in the alternative to the person from whom the goods are recovered/seized. Neither there is any allegation in the SCN that this noticee is the owner of the seized gold. In the course of investigation, the statement of this noticee was recorded, wherein he had *inter alia* stated that although he knows Mr. Ashok Soni who is maternal uncle of Mr Abhishek Soni (son-in-law of this noticee) and also Mr. Sanjay Soni, who is also related. Being relatives, he used to talk to them from time to time, which is normal and does not call for any adverse inference. So far Mr. Sandeep Gupta of Kanpur is concerned, he knows him being in the same trade, and as this noticee was friend of his father. They do talk at times being in the same line of trade being manufacture and sale of gold jewelry, etc.

15.1 As regards the WhatsApp messages, retrieved from the mobile phone of Mr. Sanjay Soni, he urged that he is not the person in the message – 'Chacha'. The said message is alleged to be received by Mr. Sanjay Soni from Mr. Ashok Soni. As per the relation, Mr. Asoka Soni is related to him as Samdhi, and similar is the position with Mr. Sanjay

Soni. Thus, the reference as Chacha in the message is not linked to him. It appears Mr. Sanjay Soni has taken his name before the Customs officers to divert the attention, and not to divulge the name of the actual recipient or owner of the gold in question. Further, the statement of Mr. Sanjay Soni is unsubstantiated, without any cogent evidence. Further, his evidence by way of statement is also not reliable, as he was not examined in the adjudication proceedings nor produced for cross-examination as required under Section 138B of the Customs Act. He further reiterated that he is not involved by any fig of imagination in the allegation of smuggling.

15.2 He further urged, It is evident from the show-cause notice that save and except the statement of Mr. Sanjay Sony, who is a co-accused, there is no other material or evidence in support of the allegations of Revenue. The statement of co-accused is not sufficient to implicate this noticee. It was also urged that the noticee is a poor artisan of old age, living in rented accommodation and having a monthly income of about 12,000 per month only. He has been a gold artisan/Goldsmith and presently due to his old age is unable to manufacture the gold ornaments himself. It was further urged that this appellant have not violated any of the provisions of Section 111 or any other provisions of the Customs Law, and accordingly, no penalty is imposable on him under Section 112 of the Customs Act.

15.3. It was also urged that the relied upon documents given to the appellant in the form of DVD are illegible and accordingly he prayed for hard copy of the RUD's-documents which was never supplied.

15.4 It was also urged that the foreign origin of the seized gold is not proved. Admittedly, out of the 5 gold bars of one Kg each, seized from Mr. Sanjay Soni, there is no foreign marking on four gold bars.

Only on one gold bar there is marking – 'rand refinery'. Admittedly, as per statement of Mr. Sanjay Soni he has received the gold bars at Kolkata from Mr. Abhishek Soni and Mr. Ashok Soni. In such circumstances, it is the onus of Revenue to lead evidence as to the smuggled nature of the gold. Admittedly, it is the case of town seizure as Mr. Sanjay Soni have been intercepted by the Customs officers at Mughal Sarai Railway Station, while he was on board the train. Further, there is no basis and it has been vaguely stated by Mr. Sanjay Soni, that according to his knowledge gold bars are brought from Bangladesh and thereafter, they are traded in Kolkata by method of erasure or removing the foreign markings.

15.5 In the facts and circumstances, this appellant having no manner of concern with the seized gold in question, there is no question of any violation of Section 7(1)(C), 11 and 46 of the Customs Act. The allegations are simply based on assumption and presumption, having no legs to stand. It was also urged that there is no evidence of any purchase or any money consideration moving from this noticee to the other noticee.

16. Mr. Sandeep Gupta noticee/appellant in his defence reply *inter alia* stated that he was introduced to Mr. Ashok Soni in the year 2015 during the marriage ceremony of nephew of Mr. Ashok Soni, held at Kanpur. Since then, he remained in touch with him by way of courtesy calls and for information on current prices of gold prevailing at the respective place. This noticee does not have any business relation with Mr. Ashok Soni, is not aware about the exact business activity of Mr. Ashok Soni. At the time of investigation, due to fear this noticee had stated that he did not know Mr. Ashok Soni or have not talked with him. As regards, the use of mobile No. 8840793240 it was stated that the

said no. is of Jio and belongs to his salesman-Mr. Vicky Gupta. As his shop is located on the 1st floor where there is difficulty in receiving the mobile network signals save and except Jio, at times he uses phone of his employee. There is no case made out that this appellant had obtained the said mobile number in a clandestine manner. So far the message received by Mr. Sanjay Soni from Ashok Soni through WhatsApp – '2 Sandeep', which have been explained by Mr. Sanjay Soni that 2kg was to be delivered to him (Mr. Sandeep Gupta of Kanpur). This noticee denied the allegation vehemently, that save except the statement of the Sanjay Soni, the same is not supported by any other cogent evidence. He further urged that Mr. Sanjay Soni has taken his name vaguely and he has got no manner of concern with the seized gold. That there is no evidence that this appellant had stuck any purchase deal for the gold with Mr. Ashok Soni or Abhishek Soni and/or have remitted purchase consideration for the same.

16.1. Under the facts and circumstances, no case of any alleged violation of any of the provisions under Section 111 or any other section of the Customs Act is made out against this noticee. Accordingly, the proposed penalty under Section 112 is fit to be dropped. As regards the allegation of foreign origin of gold, the same is also disputed, as disputed by Mr. Vishwanath Soni. Further, as this appellant have not claimed the seized gold in question, there is no onus on him under the provisions of Section 123 of the Customs Act. He further stated that the statement of Mr. Sanjay Soni is vague and not reliable evidence, in support of the allegations of Revenue.

16.2. He further urged that the foreign origin of the gold is not established. Only on one of the gold bars there is foreign marking- 'rand refinery'. On the other pieces of gold recovered from Mr. Sanjay Sony there is no foreign marking, and as such there cannot be any presumption of smuggling, when admittedly, it is the case of town seizure. Thus, under the facts and circumstances, there is no onus upon him under section 123 of the Customs Act, as neither the gold is recovered from him nor he has claimed the seized gold. Further, there is total absence of any evidence as to involvement of this appellant/noticee in any dealings with the other co-noticee, as regard the gold recovered and seized from Mr. Sanjay Soni.

17. Mr. Ashok Soni and Mr. Abhishek Soni filed a common reply in response to the show cause notice. At the outset, they requested for hard copies of the 'relied upon documents', urging that the files on the DVD are not opening. In spite of such categorical request, the Revenue did not bother to provide the 'relied upon documents' in spite of the repeated requests. Thus, the adjudication order against these appellants is bad as they did not have proper opportunity to meet the allegations of Revenue. It was further urged that the whole case is made out on the basis of statement of co-noticee Mr. Sanjay Soni. Admittedly, no incriminating documents were found from the premises of these noticees/appellants in the search conducted by the Revenue. The show cause notice nowhere mentions that they were the intended recipient of the seized gold. Further, they are nowhere related with the past travels undertaken by Mr. Sanjay Soni. Admittedly, Mr Sanjay Soni has himself purchased the tickets for his travels between Kolkata and Kanpur. It was further urged that the so-called WhatsApp message recovered from the mobile phone of Mr. Sanjay Soni is not reliable and/or admissible as evidence as the procedure for an electronic evidence as prescribed under section 138C have not been followed.

17.1 It is an established principle of law that the statement of co-accused cannot be used against another co-accused without corroborative evidence. They denied all the allegations in the show cause notice. The whole case of Revenue is made on the basis of the statement of the co-noticee and uncorroborated evidences, which is not sufficient for the serious allegation of smuggling made against these appellants. The whole case of Revenue be made on the basis of presumption and assumption. In absence of evidence of these persons importing the gold by way of smuggling, or in any manner having handled the seized gold, no allegation is made out, nor any case of violation of the provisions of the Customs Act as alleged. There is no case of imposing penalty on these appellants, is made out. It is further urged that the show-cause notice issued by the Additional Director of DRI, is without jurisdiction, as have been held by Hon'ble Calcutta High Court in the case of **Navneet Kumar vs. Union of India W.P. Nos, 3336(W) of 2018.**

> "Additional Director of Directorate of Revenue Intelligence is not entitled to invoke Section 124 of the Customs Act, 1962. The impugned show-cause notices are quashed as being without jurisdiction".

The appellant had also reserved the right to file supplementary or additional submissions, after receipt of the relied upon documents. They have also prayed for cross-examination of noticee No. 4-Mr. Vishwanath Soni, noticee No. 5-Mr. Sanjeev Gupta, but the same was not granted for no ostensible reason by the adjudicating authority.

18. The SCN was adjudicated by the Additional Commissioner, Customs (Preventive), Lucknow vide order-in-original dated 21st February, 2019 confirming the charges in the SCN. The gold seized was ordered to be confiscated in absolute terms with no option for redemption, under Section 111 (b)&(d) of the Act. Further, penalty

under Section 112 of the Act was imposed on all the noticees as follows: –

Name	Section	Amount
Shri Sanjay Soni	112(b)	Rs.15,00,000/-
Shri Ashok Soni	112(b)	Rs.15,00,000/-
Shri Abhishek Soni	112(b)	Rs. 12,00,000/-
Shri Vishwanath Soni	112(a)	Rs. 1,00,000/-
Shri Sandeep Gupta	112(b)	Rs. 2,00,000/-

19. Being aggrieved all the 5 co-noticees preferred Appeal before the Commissioner (Appeals), *inter alia* on the grounds that no penalty is imposable under section 112 of the Customs Act, as foreign/ nature of the seized gold is not proved, the presumption under Section 123 of the Customs Act is not attracted, the adjudication order is bad for not providing relied upon documents, and thus it is also hit by the Rules of natural justice. The Appellant Mr. Sanjay Soni had also urged that the absolute confiscation of the seized gold is bad, without the option of redemption is unjust, improper and against the law. Gold even otherwise is freely importable on payment of duty, and as such option of redemption be given to him-appellant, from whom the gold was seized. The statement recorded under Section 108 from this appellant cannot be used against him or any other appellants/co-noticees.

20. All the appellants also urged that the amount of penalty imposed is also unconscionable and very high.

21. The learned Commissioner (Appeals) was pleased to observe that there is no sufficient ground for absolute confiscation of the gold. Thus, he gave option to redeem the confiscated gold, valued at rupees

1,66,21,440/- on payment of redemption fine of Rs. 35 lakhs. Further observed that the appellant shall be liable to pay the applicable duty and charges in respect of the seized goods. He, however upheld the imposition of penalty on all the noticees/appellants.

22. Being aggrieved Mr. Sandeep Gupta, Mr. Ashok Soni and Mr Abhishek Soni have filed Appeals before this Tribunal. Revenue is in Appeal against Mr. Sanjay Soni, to whom release of the seized gold have been allowed on payment of redemption fine, duty etc.

23. Mr. Debaditya Banerjee appearing for Mr. Ashok Soni and Abhishek Soni *inter-alia* urges that no allegation is made out against these appellants, nor substantiated by any cogent evidence. The imposition of penalty on these appellants, simply on the basis of the statement of co-accused Mr. Sanjay Soni is bad and fit to be set-aside. The WhatsApp message recovered from the phone of Mr. Sanjay Soni is not reliable as the same does not satisfy the prerequisite prescribed under Section 138C of the Customs Act, as regard electronic evidence. These appellants have replied to all the summons issued by the Revenue. Thus, no case of non-cooperation with Revenue in the investigation is made out. The court-below have arbitrarily imposed and upheld the penalty which is not attracted under the provisions of Section 112 of the Act, as these persons have not violated any of the provisions of Section 111. The allegations of Revenue are bald and unsubstantiated. As regards the reliability of electronic evidence, relying on the ruling of this Tribunal in S.N. Agro Tech 2018 361 ELT 761, it is urged that, evidence in form of computer printouts, etc. recovered during the course of investigation may be admitted only subject to satisfaction of conditions prescribed in subsection (2) of section 138C of the Act. In absence of certificate, as required under this Section, such

electronic documents cannot be relied upon for confirmation of the allegations in the show cause notice. The allegation of none appearance on summons, even for the sake of argument, is considered to be an offence, cannot culminate into penalisation under Section 112 of the Act. There has to be specific violation of any of the provisions of Section 111 for imposition of penalty under Section 112. There being no evidence *prima facie* of smuggling of the seized gold, penalty is not imposable on presumptions and assumptions and/or on the vague statement of one of the co-accused. Admittedly, it is the case of town seizure, not attracting the provisions of Section 111. Reliance was also placed on the ruling of Hon'ble Supreme Court in the case of ***Dilip Kumar & Company reported at 2018 361 ELT 577 SC.*** wherein it have been *inter-alia* held that the words in the statute, when clear, plain and unambiguous and only one meaning can be inferred, courts bound to give effect to the said meaning, irrespective of consequences. In applying rule of plain meaning, any hardship and inconvenience cannot be the basis to alter the meaning of the language employed by the legislation, especially in fiscal statutes and penal statutes. Reliance is also placed on the ruling of the Apex Court in the case *of Vinod Solanki vs. Union of India* wherein it has held that on the sole statement of co-accused, another co-accused cannot be convicted or fastened with penalty etc. There has to be corroborative evidence in addition to the statement of a co-accused.

24. Accordingly he prays for allowing the appeals with consequential benefits.

25. Learned Counsel Mr. Ravindra Narayan Singh appears for Mr. Sandeep Gupta, *inter-alia* urges that there is no worthwhile evidence against this appellant in support of the allegations of Revenue. The

penalty under Section 112 (b) have been imposed mechanically without application of mind and is fit to be set-aside. The only evidence against this appellant is the statement of co-accused Mr. Sanjay Soni, and the fax message retrieved from his phone. This appellant had appeared at the investigation stage and his statement was recorded under Section 108, wherein he had *inter alia* stated that he had met Mr. Ashok Soni in the marriage of the daughter of Mr. Vishwanath Soni with Mr. Abhishek Soni. Thereafter, being in the same line of trade they used to talk from time to time as regard the market position and the prevailing rates of gold. It is further urged that this appellant have not entered into any deal with the other co-accused for receiving smuggled gold. The recovered WhatsApp message from the phone of Mr. Sanjay Soni is not reliable piece of evidence as the same is both vague and also does not satisfy the prerequisite as prescribed under section 138C of the Customs Act. Moreover, under the facts and circumstances, this appellant have not done any act of omission or commission attracting any of the provisions of Section 111 of the Customs Act, nor he has handled the seized gold in any manner. Thus, in any view of the matter the penalty imposed under Section 112 is bad and fit to be set-aside. Evidently, there is no incriminating evidence against this appellant.

26. The Learned Authorised Representative for Revenue opposes the Appeals of the aforementioned appellants, and relies on the impugned order. Further, in support of the Revenue Appeal against Mr. Sanjay Soni with respect to relief granted by Commissioner (Appeals)-holding that the seized gold is not liable for absolute confiscation and the same can be released on payment of redemption fine and duty. He *inter alia* urges that Mr. Sanjay Soni himself have stated that the seized gold according to his knowledge have been brought into India-Kolkata

through Bangladesh border, by off route. Thereafter, at Kolkata, the evidence of gold being of foreign origin is removed by melting etc. He also stated that he has received the Gold at Kolkata for delivery at Kanpur. Thus, he is only a carrier having instructions to deliver the gold he was carrying at Kanpur. Thus, what has been admitted need not be proved. Mr. Sanjay Soni, even at the time of recording of his subsequent statement while in jail custody on 29th May, 2018 have reiterated his earlier statement which was recorded by the Customs officers when he was intercepted on 11th/12th May, 2018, and the gold he was carrying as seized. It is further urged that the statement under Section 108 of the Customs Act is reliable in adjudication proceedings as held by Hon'ble Supreme Court in ***Naresh J Sukhwani vs. Union of India 1995 11 TMI 106*** wherein it has been held that the statement recorded by the Customs officials is not equivalent to the statement recorded under Section 161 of Criminal Procedure Code. Thus, it is a material piece of evidence collected. Such material can certainly be used in any proceedings under the Customs Act. It is further urged that Mr. Sanjay Soni has not discharged the onus under Section 123 of the Customs Act, as to the seized gold being not of smuggled in nature.

27. He further relies on the ruling of Apex Court in the case of Om ***Prakash Bhatia vs. Commissioner of Customs 2003 155 DLT 423 S.C.*** where it has been held that if there is any prohibition on import or export of goods in respect of which the conditions, subject to which the goods are imported or exported, have to be complied with. If the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. It is further urged that the reliance placed by the learned Commissioner (Appeals) on the

ruling of this Tribunal in ***Commissioner of Customs vs. Mazaharul Haq 2016 341 ELT 450*** where it has been held, giving option to redeem the confiscated gold on payment of redemption fine and penalty. It is urged that the said ruling of this Tribunal have been accepted by the committee of Commissioners, only on monetory ground. Thus, the said ruling of this Tribunal cannot be relied upon for redemption of gold in the facts of the instant case. Accordingly, he prays for setting aside the order of the Commissioner (Appeals) on this issue and restoring the order of absolute confiscation.

28. Having considered the rival contentions, I record my findings as follows: –

Regarding Mr. Ashok Soni, Mr. Abhishek Soni & Mr. Sandeep Gupta –

28.1 I find that other than the incriminating statement of Mr. Sanjay Soni there is no other worthwhile evidence against these appellants. These appellants and Mr. Vishwanath Soni have given cogent explanation, they being related and known to each other and being in the same line of business had been talking regarding rates etc. with each other. Thus, the call details records relied upon by the Revenue does not support the allegations of Revenue, in absence of transcription of the conversation between these persons. So far the WhatsApp message is concerned, which is retrieved from the phone of Mr. Sanjay Soni, alleged to have been received from Mr. Ashok Soni, the same is not reliable for non-compliance of the provisions of Section 138C of the Customs Act. Further, the message is also vague and incomplete. I further find that these appellants have not violated any of the provisions of the Customs Act including Section 111, and thus I hold that penalty under Section 112 of the Act is not attracted. Penalty cannot be imposed only on the basis of heresay evidence, or the incriminating statement of one of the co-accused in absence of other corroborative evidence, as has been held by Hon'ble Supreme Court in the case of ***Vinod Solanki versus Union of India.***

28.2 Accordingly, in view of my findings I set aside the penalty imposed on all the three appellants.

29. So far, the Appeal of Revenue against Mr. Sanjay Soni is concerned, I find that admittedly it is a case of town seizure. Out of the 5 gold bars and 1 cut piece seized from Mr. Sanjay Soni, there is foreign marking – 'rand refinery' only on one gold bar. There is no such foreign marking admittedly on the other pieces recovered and seized. Thus, I hold that in absence of any evidence brought on record as to the allegation of smuggling, the provisions of Section 123 of the Act are not attracted in the case of other 4 pieces and the cut piece of the gold bar seized. I hold Section 123 is attracted only in the case of one gold bar having foreign marking, as the person- Mr. Sanjay Soni from whom the foreign marked gold was recovered, have not been able to explain the licit source and have also stated that this gold may have arisen by way of smuggling into India through Bangladesh. Accordingly, modifying the order of Commissioner (Appeals), I uphold the absolute confiscation with respect to one piece of gold having the marking 'rand refinery' weighing 998.600 gram valued at Rs. 31,95,520/-, as per the valuation report.

30. So far, the other four pieces of gold bars having no foreign marking weighing 998.700 grams (3 bars) and 1 bar weighing 998.600 grams and the cut piece weighing 200.900 gms, I hold that these are not liable to confiscation, as admittedly it is the case of town seizure. I further hold that the provisions of Section 123 of the Customs Act are not attracted. Accordingly, I set aside the order of confiscation with

respect to these four gold bars and the cut piece and further order that the same is to be released to the person from whom they were recovered – Mr. Sanjay Soni. The penalty imposed under Section 112(b) is reduced to Rs. 5,00,000/-(five lakhs).

31. Under the facts and circumstances, I find that Revenue has not been able to substantiate the charge of smuggling save and accept the statement under Section 108 recorded from Mr. Sanjay Soni. Such statement also loses its evidentiary value as Revenue has failed to examine Mr. Sanjay Sony in the course of adjudication proceedings, as held Supreme Court in the case of Andaman Timber Industries.

32. In view of the aforementioned findings, the Appeals of Mr. Ashok Soni, Mr. Abhishek Soni & Mr. Sandeep Gupta stands allowed with consequential benefits. The Appeal of Revenue against Mr. Sanjay Sony stand allowed in part and the impugned order stand modified as indicated hereinabove. Stay Application also stands disposed of.

(pronounced in the open court on 10.02.2022)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

SB