CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD
REGIONAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 70179 OF 2023
(Arising out of Order-In-Appeal No. 07-CUS/APPL/LKO/2023 dated 02.01.2023 passed by Commissioner (Appeals).)

Shri Rajesh Kumar
Jalalpur Parshurampur,
PO Raniwan, Ambedkarnagar,
Uttar Pradesh-224 141. **Appellant**

Vs.

Commissioner of Customs (Preventive), Lucknow
5th and 11th Floor, Kendriya Bhavan, Sector H, Aliganj,
Lucknow,
Uttar Pradesh-226 024. **Respondent**

AND

CUSTOMS APPEAL NO. 70110 OF 2024
(Arising out of Order-In-Appeal No. 71-CUS/APPL/LKO/2023 dated 02.01.2023 passed by Commissioner (Appeals).)

Shri Parvez Khan Alias Parvez Ahmad
S/o-(L) Zahiruddin R/o- Iram Mahal,
Gadbhdiya, near Gabhadiya Police Chownki,
Sultanpur,
Uttar Pradesh-228 001. **Appellant**

Vs.

Commissioner Of Customs (Preventive), Lucknow
5th and 11th Floor, Kendriya Bhavan, Sector H, Aliganj,
Lucknow,
Uttar Pradesh-226 024. **Respondent**

Appearance:
Shri Sharvan Kumar Singh, Advocate for the Appellant.

Shri Santosh Kumar, Authorized Representative for the Respondent.

CORAM:
HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL.G.SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing: 03.12.2024
Date of Decision: 23.04.2025

PER : MR. ANIL G. SHAKKARWAR

FINAL ORDER NO :- 70211-70212/2025

Above stated two appeal viz Customs appeal no. C/70109/2023 filed by Shri Rajesh Kumar and Customs appeal no. C/70110/2024 filed by Shri Parvez Khan alias Parvez Ahmad are taken together for decision since they are arising out of a common investigation and are dealt with in common Order-In-Original No. 129/JC-ADC/2021-22 dated 31.03.2022 though impugned orders-in-appeal in the said appeals are different.

2. Brief facts of the case relevant for decision in these two appeals are that Shri Amit Kumar Soni and Shri Shahid Hussain who were travelling during the intervening night of 4th and 5th October, 2022 through a train between Howrah and New Delhi were intercepted by the officers of Revenue and were brought at an office situated in Varanasi and at the said office, search of the person of the said two travelers was conducted in presence of independent witnesses and on search gold weighing 2998.50 grams was recovered which was valued at Rs. 150,80,192/- by Government Valuer. Under the belief that the said gold may be liable for confiscation, the above stated gold was seized by Customs Officers under section 110 of the Customs Act, 1962 through a seizure memo dated 05.10.2020. In a statement recorded by Customs officers, Shri Amit Kumar Soni stated that said gold bars were handed over to him by Mr. Pintu Singh near Bara Bazar, Kolkata on the instructions of Mr. Rajesh Kumar who is appellant in the present case. The samples of seized gold were forwaded to Revenue laboratory called CRCL which has given its report dated 05.11.2020 about the purity of the seized gold as 99.72%, 96.20% and 96.61%. Shri Amit Kumar Soni and Shri Shahid Hussain were arrested on 06.10.2020 and were produced before Hon’ble Special Chief Magistrate, Varanasi who remanded them for custody for fourteen days. In the follow up action, officers of Revenue searched the residence of Shri Rajesh Kumar, the appellant where Indian currency of Rs. 1,01,25,600/- was recovered alongwith foreign currency of USD 3700 and Kuwait Dinar 1287/-. In addition, two small pieces of gold were recovered which weighed 4.9 gram and 4.72 gram. Officers of Customs seized Indian and Foreign currency alongwith gold. On 06.10.2020 statement of Shri Rajesh Kumar was recorded under section 108 of Customs Act, 1962 wherein Shri Rajesh Kumar stated that he runs a shop for foreign exchange business

and that seized gold which was seized from the possession of Shri Amit Kumar Soni and Shri Shahid Hussain belonged to him. After Shri Amit Kumar Soni was released from jail he retracted his statement that gold which was seized from his possession was of foreign region and was smuggled in country. On the basis of above stated investigations and further investigations a show cause notice dated 26.11.2020 was issued to seven persons including the present two appellants. In respect of Shri Rajesh Kumar, there were allegations in the said show cause notice that Indian currency valued at Rs. 1,01,25,600/- recovered and seized from the possession of Shri Rajesh Kumar was sale proceeds of smuggled gold and therefore was liable for confiscation under section 121 of the Customs Act, 1962. Further, seized currency and two gold samples recovered from the possession of Shri Rajesh Kumar were also liable for confiscation under Section 111 of Customs Act, 1962. In respect of Shri Parvez Khan, there were allegations that he was acting in a manner in handling, transportation and possession of smuggled gold and therefore he was liable for imposition of penalty under Section 112 of the Customs Act, 1962. Through the said show cause, Shri Rajesh Kumar was called upon on show cause notice as to why seized Indian currency as stated above, foreign currency as stated above and two gold samples as stated above should not be confiscated under Section 121 and 111 of Customs Act, 1962. Through the said show cause, Shri Parvez Khan was called upon to show cause as to why penalty should not be imposed upon him under Section 112 of the Customs Act, 1962. Shri Rajesh Kumar has submitted his reply dated 23.01.2021 to the said show cause notice. Shri Parvez Khan has submitted his letter dated 10.12.2021 to the above stated show cause notice. Shri Rajesh Kumar in his reply dated 23.01.2021 has stated that his statement was recorded under duress and subsequently at the earliest occasion, he has retracted that statement. He has further stated that when his premises was searched, there was no recovery of any smuggled gold. Further, he has stated that he had started a business of foreign exchange from 05.04.2019 and since no smuggled gold was recovered from his premises, the recovery of Indian currency cannot be treated as sale proceeds of smuggled gold. He further stated in his reply that there was no corroborative evidence to substantiate the charges of smuggling of gold. Shri Parvez Khan in his letter dated 10.12.2021 has stated that the seized gold did not have any foreign mark and therefore there were no reasons to treat the same as gold brought into India. He has further stated that the seized gold was Indian gold and therefore it is not established that he has acted in a manner to deal with smuggled gold. He further argued that for the said reason, he is not liable for imposition of penalty. Not appreciating the defence submitted by Shri Rajesh Kumar and Shri Parvez Khan, Original Authority through his Order-in-Original dated 31.03.2022 held the seized gold to be smuggled gold and ordered confiscation of the same under Section 111 (b) & (d) of the Customs Act, 1962. He further held that Indian currency seized from the premises of Shri Rajesh Kumar was sale proceeds of smuggled gold and therefore confiscated the same under Section 121 of the Customs Act, 1962. He also ordered confiscation of foreign currency and two samples of gold recovered from the premises of Shri Rajesh Kumar under Section 111 (b) & (d)of the Customs Act, 1962. He imposed penalty of Rs. 20,00,000/- on Shri Rajesh Kumar under Section 112 (b) of Customs Act, 1962. In respect of Shri Parvez Khan, he has imposed a penalty of Rs. 3,00,000/- on Shri Parvez khan under Section 117 of the Customs Act, 1962. Aggrieved by the said order, Shri Rajesh Kumar and Shri Parvez Khan filed separate appeals before Commissioner (Appeals). The appeal filed by Shri Rajesh Kumar was decided through Order-In-Appeal dated 02.01.2023. Shri Rajesh Kumar as argued before the Learned Commissioner (Appeal) that it was not established by the Original Authority that Indian currency recovered from his premises was sale proceeds of smuggled gold and that in fact, smuggling was not at all established in the entire order, therefore, the said Order-In-Original so far as it relates to confiscation of gold and it related to Shri Rajesh Kumar may be set aside. The Learned Commissioner (Appeal) did not appreciate the contentions and held that the Original Authority has rightly confiscated gold and Indian currency and rejected the appeal. Similarly, appeal filed by Shri Parvez Khan was decided through Order-In-Appeal dated 02.01.2023 and through the said order, appeal filed by Shri Parvez Khan before Commissioner (Appeal) was dismissed. Aggreived by the said two Orders-In-Appeals, present two appeals are filed.

3. On 03.12.2024, we have heard Shri Shravan Kumar Singh, Advocate on behalf of both the appellants. Shri Shravan Kumar Singh has submitted copies of two invoices. One invoice was invoice bearing no. 502 dated 15.07.2007 issued in the name of Shri Lalji, son of Shri Ram Bahore through which a gold bar of 99.40% purity weighing 1KG was sold by Vikas Gold and Silver, Sona Patti, Bara Bazar, Kolkata. Another copy of invoice bearing no. 545 dated 22.02.2008 issued by the same seller with the same purchaser selling two pieces of gold bar with 99.40% purity totally weighing 2KGs was submitted. Further, he has also submitted a copy of settlement agreement of family dispute which was entered into within the family and was on stamp paper of Rs. 100/- and was notarized and signed by one Shri Lalji and other 6 members on the other side including appellant Shri Rajesh Kumar. The copy of said family agreement indicates that it was notarized on 15.07.2020. He has further submitted that said agreement indicates that Shri Lalji who had purchased 3KGs of gold through above stated two invoices, was distributed fully to Shri Rajesh Kumar, appellant by Shri Lalji who is his father. He has also submitted a copy of Final order No. 75553/2024 dated 01.03.2024 passed by this Tribunal at Eastern Zonal Bench, Kolkata in the case of Shri Purnanand Ramchandra Mishra Vs. Commissioner of Customs and also a copy of Final order no.75678-75681/2024 dated 17.04.2024 passed by this Tribunal Bench at Kolkata in the case of Shri Neeraj Agarwal and others Vs. Commissioner of Customs. Learned counsel has also submitted his arguments in support of the grounds of appeal in respect of both the appellants. The copy of said

documents along with submission and arguments in support of grounds of appeal titled synopsis were submitted in he court and a copy of the same was handed over to the Authorized Representative of Revenue in the court. Revenue was given an option to file their response to the said submissions of learned counsel for the appellant within a period of one week. The arguments made by learned counsel for the appellant through the synopsis are recorded in the subsequent paragraphs.

4. Heard the learned counsel for Revenue. Learned counsel for Revenue has supported the impugned orders in appeal. In response to the submissions made by learned counsel for the appellant in the court stated in foregoing paragraph, a copy of which was given to Revenue and Revenue was given an option to submit their response within a period of one week as already recorded in the foregoing paragraph. The record does not indicate that within one week or after two weeks also Revenue has submitted any of their responses to the documents, case laws and arguments submitted by learned counsel for the appellant.

5. The learned counsel for the appellant has made following submissions in support of their grounds of appeal in respect of both the appellants:

(a) Revenue has seized Indian currency of Rs. 1,21,00,000/- under Section 121 of the Customs Act, 1962 without stating anywhere in the proceedings including show cause notice as to when the appellant had purchased alleged smuggled gold, to whom alleged smuggled gold was sold and when was alleged smuggled gold sold. He further submitted that appellant had submitted documentary evidence before the Authorities below that the cash belongs to foreign currency business and that appellant was not involved in any gold smuggling. He further submitted that there was no evidence established that the seized cash was sale proceeds of smuggled gold and therefore Indian currency seized and confiscated was outside the ambit of

Section 121 of the Customs Act, 1962. He relies on decision of this Tribunal in the case of Ramchandra Vs. Collector of Customs reported at 1992 (60 [E.L.T] 277) and stated that it was held in the said decision of this Tribunal that for arriving at a conclusion that Indian currency is sale proceed of smuggled gold, the condition such as establishment of sale, the person to whom sale is made and the quantity of gold sold to which customer has to be established. In the present case, he argued that no such evidence is brought on record and therefore Revenue has failed to establish that seized currency was sale proceeds of smuggled gold.

(b) The father of Shri Rajesh Kumar had purchased 3KGs of gold from M/s. Vikas Gold and Silver, Kolkata through two invoices bearing no. 502 dated 15.07.2007 and 545 dated 22.02.2008 and through the separation agreement entered in the year 2020, allotted permanently said 3KG gold to Shri Rajesh Kumar and the same gold was sent through Shri Amit Kumar Soni and Shri Shahid Hussain to Kolkata to be sold but since the sale did not take place, Shri Amit Kumar Soni and Shri Shahid Hussain were returning back with gold from Kolkata to Sultanpur and they were intercepted by officers of Revenue and gold was seized. At the time of seizure of gold, Shri Amit Kumar Soni and Shri Shahid Hussain were having photocopies of said two invoices no. 502 and 545 with them to establish licit source of possession of gold but the officers did not take cognizance of the same and seized the said gold.

(c) He further submitted that it was held by this Tribunal in the case of Shri Neeraj Agarwal and other decided through Final order no. 75678-75681/2024 dated 17.04.2024, that purity of 99.9% is required to consider a sample of gold to be gold of foreign origin. In the present case, he submitted that samples of three gold bars were of purity of gold as 96.2, 96.61 and 99.72% as tested by laboratory of department of Revenue as stated at paragraph 14 of the show cause notice dated 26.11.2020. He further submitted that none of the samples had more than 99.9% of purity and therefore the seized gold cannot be treated as gold of foreign origin.

(d) He further submitted that statements were recorded on 06.10.2020 and were recorded in the custody and same were retracted immediately after arrested persons were freed on bail.

(e) He has submitted that since the gold was not of foreign origin as it did not confirm the required purity of gold of foreign origin which is 99.9%, the said gold should not have been confiscated and therefore impugned order is not sustainable.

6. A copy of the said invoices alongwith copy of two invoices and one separation agreement were given to the representative of Revenue in court on 03.12.2024 and they were given liberty to file their response within a period of one week. Record indicates that Revenue has not filed any submission opposing the submissions made through the said synopsis alongwith copy of invoices and separation agreement.

7. We have carefully gone through the records of the case including both the appeal paper books, copy of show cause notice, copy of Order-In-Original, both the Orders-in-Appeal, grounds for appeal in both the appeals, submissions made by learned counsel for the appellant orally in the court and also through synopsis submitted in the court on 03.12.2024, copy of Final Order passed by this Tribunal in the case of Shri Neeraj Kumar Agarwal and others, copies of the two invoices bearing no. 502 and 545 and partition agreement dated 15.07.2020. We also noted that learned AR for the Revenue has reiterated the findings in the both impugned Orders-In-Appeal. We also note that a copy of synopsis alongwith copy of the above stated two invoices and copy of family settlement stated above were handed over to AR Shri Santosh Kumar in the court during the course of hearing on 03.12.2024 and Revenue was allowed to submit their response within a period of one week

from the date of hearing. We note that no such response filed by Revenue is available on record.

8. From the case record, we note that three gold bars totally weighing 2998.50gms were seized. The said gold bars were belonging to Shri Rajesh Kumar, the appellant. Samples of the said gold bars were taken and sent to Revenue laboratory which through test report dated 05.11.2020 informed the purity of gold to be 96.20%, 96.61% and 99.72%. The residential premises of Shri Rajesh Kumar, the appellant was searched and from his residence Indian currency of Rs. 1,01,25,600/- and two samples of gold weighing 4.9 and 4.72grams were seized. On contest by both the appellants, the original authority through the said Order-In-Original dated 31.03.2022 as held seized gold to be smuggled gold and confiscated the same absolutely under Section 111 (b) and (d) of Customs Act, 1962. Further, seized Indian currency of Rs. 1,01,25,600/- was absolutely confiscated under Section 121 of Customs Act, 1962. Two samples of gold weighing 4.9 and 4.72grams were confiscated absolutely under Section 111 (b) and (d) of Customs Act, 1962. Shri Rajesh Kumar was imposed with a penalty of Rs. 20,00,000/- under Section 112 (b) of Customs Act, 1962 and Shri Parvez Khan was imposed with a penalty of Rs. 3,00,000/- under Section 117 of Customs Act, 1962. In both the Orders-In-Appeals above stated part of Order-In-Original was upheld. For the sake of ready reference, we re-produce below following provisions of Customs Act, 1962:

(A) Section 2 (23)

In this Act, unless the context otherwise requires---

(23) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(B) Section 2 (39)

In this Act, unless the context otherwise requires---

(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113;

(C) Section 111 (b) and (d)

The following goods brought from a place outside India shall be liable to confiscation :

(a) ………….

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(c) …………..

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported,, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(D) Section 112 (b)

Any person,--

(a) ………………..

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111, shall be liable,---

(E) Section 117

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to penalty not exceeding [four lakh rupees]

(F) Section 121

Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceeds thereof shall be liable to confiscation.

(G) Section 123

(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 Govt. may by notification in the Official Gazette specify.

(H) Section 125

Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit;----

9. From the case record, we know that confiscated gold was having purity less than 99.9%. This Tribunal in its Final Order dated 17.04.2024 in the case of Neeraj Agarwal and others has held in paragraph 12 that gold of foreign origin has purity of 99.9%. By relying on the said decision of this Tribunal, we observe that the gold confiscated in the present case is having purity less than 99.9% and therefore the same cannot be held to be gold of foreign origin. We also note that the subject gold was not seized at any entry point of India nor was there any investigation in respect of the country from which it was brought into India, from whom it was purchased from a place outside India and therefore we hold that subject gold is not of foreign origin. The proceedings have held subject gold to be smuggled gold. As we see from definition of smuggling reproduced above, an activity that renders the goods liable for confiscation under Section 111 of the Customs Act, 1962 is activity of smuggling. Similarly, smuggled gold is one which is liable for confiscation under Section 111 of the said act. In the proceedings, the subject gold was

confiscated under Section 111 (b) and (d) of the Customs Act, 1962. Provisions of Section 111 (b) and (d) are reproduced above. The said provisions indicate that if the goods are imported through a route other than the route specified or notified and they are imported contrary to any prohibition then they are liable for confiscation. Further, definition of import is also reproduced above which means that bringing goods from a place outside India. In the proceedings at lower level, from which place outside India the subject gold was brought in has not been established. Therefore, we hold that subject gold is neither smuggled in nature nor was liable for confiscation. The Indian currency was confiscated under Section 121 of the Customs Act, 1962 which provide for confiscation of sale proceeds of smuggled goods. It is now established that the gold which was seized by interception or which was seized at the residence of Rajesh Kumar was not smuggled in nature because it was not liable for confiscation therefore the question of any smuggling involved in the whole proceeding does not arise. Revenue has also not established as to the said Indian currency being accumulated by sale of which smuggled goods and by sale to whom and when. Therefore, we hold that Revenue could not make out a case that either 2998.50gms of gold nor two samples of gold weighing 4.9 and 4.72 grams were liable for confiscation. Revenue also could not make out a case that Indian currency of Rs. 1,01,25,600/- was sale proceed of sale of smuggled goods. We, therefore, hold that gold weighing 2998.50 grams and 4.9 and 4.72 grams was not liable for confiscation and Indian currency was also not liable for confiscation. We note that Section 112 (b) deals with imposition of penalty on a person dealing with goods which are liable for confiscation. We have already held that goods were not liable for confiscation therefore Shri Rajesh Kumar was not liable to be imposed with the penalty of Rs. 20,00,000/. We also hold that Shri Parvez Khan was not liable to be imposed with a penalty of Rs. 3,00,000/-. We, therefore, hold that both the impugned Orders-In-Appeal are liable to be set aside and as a result those parts of the Order-In-Original dated 31.03.2022 which have merged into the said two impugned Orders-In-Original are also not sustainable. We hold that by producing above stated two invoices bearing no. 502 and 545, the appellant has discharged burden of proof required under Section 123 of Customs Act, 1962 since the copies of the same were handed over to the Revenue during the hearing of the appeal with an option to submit their response within a period of one week and in absence of any such submission by Revenue the burden is discharged by the appellant. Section 125 of Customs Act, 1962 requires adjudicating authority to give option to pay fine in lieu of confiscation where as in the present proceedings no such option was given. For said reasons also the order passed for confiscation of gold and Indian currency is not sustainable.

10. For bringing more clarity to the issue, we set aside confiscation of subject gold weighing 2998.50 grams and 4.9 and 4.72 grams. We set aside confiscation of Indian currency of Rs. 1,01,25,600/-. We set aside imposition of penalty of Rs. 20,00,000/- imposed on Shri Rajesh Kumar and we set aside penalty of Rs. 3,00,000/- imposed on Shri Parvez Khan. In above manner, we allow both the appeals with consequential relief to both the appellants.

(Order pronounced in open court on 23.04.2025)

Sd/-
(ANIL.G.SHAKKARWAR)
MEMBER (TECHNICAL)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

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