CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

1st Floor, WTC Building, FKCCI Complex, K. G. Road,

BANGLORE-560009

Regional Bench COURT-2

Customs Appeal No. 21393 of 2018

[Arising out of the Order-in-Appeal No.214/2018 dated 30.05.2018 passed by the Commissioner of Customs (Appeals), Bangalore]

Shri Ravi Kumar R.M.,
Partner,
M/s. Aishwarya Investments,
No.54, Kogilu Road,
Maruthi Nagar, Yelhanka,
Bangalore – 560 064 **.......Appellant**

VERSUS

Principal Commissioner of Customs,
Bangalore City Customs, CR Building,
Queens Road,
Bangalore – 560 001 **......Respondent**

Appearance:

Mr. M.S. Nagaraja, Advocate Appeared for Appellant

Mr. Rajesh Shastry, Authorized Representative for Respondent

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

FINAL ORDER No. 21162 of 2024

DATE OF HEARING: 04.06.2024

DATE OF DECISION: 03.09.2024

PER: P.A. AUGUSTIAN

Appellant is challenging confiscation of 1028.35 grams of gold and penalty of Rs. 9,00,000/- imposed on appellant under section 112(a) of the Customs Act, 1962.

2. Brief facts of the case are that as per specific intelligence report, Income Tax authorities conducted raid in the premises of the Appellant

and seized De-monetised currency notes, unaccounted cash and gold as per the provision of Income Tax Act, 1962. During investigation, statement of the Appellant was recorded and he stated that said gold was purchased from local jewelleries. Thereafter, the matter was transferred to DRI and statement was recorded under Section 108 of Customs Act, 1962. On conclusion of investigation, Show Cause Notice was issued to Appellant proposing confiscation of gold biscuit and penalty under Customs Act, 1962. In reply to show cause notice, appellant submitted the details of purchase of said gold and submitted that it was purchased by his family members including his father and wife from M/s. Thirumala Jewellery Bangalore. He had also produced 50 purchase bills and submitted that the gold bullion or jewellery are not procured from abroad. Thereafter Adjudicating authority vide order dated 25.10.2017 ordered confiscation of the gold and also imposed penalty of Rs.9,00,000/-. Aggrieved by said order, the Appellant filed an appeal before the Hon'ble Commissioner (Appeals) and Commissioner (Appeals) upheld the impugned order. Aggrieved by said order, present appeal is filed. Appeal filed by the Appellant was considered by this Tribunal and this Tribunal vide Final order No.21028 of 2019 dated 25.11.2019 upheld the impugned order and dismissed the appeal. Aggrieved by the Final order, Appellant filed Customs appeal before the Hon'ble High court of Karnataka and Hon'ble High Court of Karnataka vide judgment dated 01.08.2023 in C.S.T.A No.08 of 2020 set aside the final order and remanded the matter to this Tribunal with following direction:-

> "10. Admittedly, the invoices were available before passing the Order-in-Original. The Customs Department has all the authorized to summon and investigate into the matter. CESTAT is the last fact

finding authority. Therefore, in our considered view, the CESTAT ought to have satisfied itself with regard to authenticity of Invoices before pronouncing judgment on the appeal. In that view of the matter, we deem it appropriate to remit the matter to the file of CESTAT with a direction to record its satisfaction with regard to the authenticity of invoices by calling for Report from the Additional Commissioner of Customs, if required and thereafter consider the appeal on its merits".

3. Thereafter the matter came up before this Tribunal and this Tribunal directed the Ld. AR to file a report from the Respondent with regard to evidentiary value of the invoice submitted by the Appellant. When the matter came up for hearing again on 01.01.2024, Ld. AR submits that they have not received report from Commissionerate. Learned counsel for the Appellant submits that the gold is procured by appellant legally and there is no illegality as alleged for confiscation of the same. Learned counsel also draw my attention to the communication dated 11.01.2018 issued by M/s. Adya Jewellery and letter dated 20.01.2018 issued by Shri Thirumala Jewellery confirming that they have sold gold to appellant on tax invoice. Further Learned counsel submitted that the tax invoices in respect of 15 gold biscuits were submitted while filing reply to Show Cause Notice and as per said Tax invoices, gold were purchased from M/s Adya Jewellers and M/s Sai Thirunala Jewelers. It was further submitted that the remaining 2 gold biscuits listed under Sl. No. 16 & 17 in Annexure A to the SCN were procured from HDFC Bank. Since both the Gold Biscuits bear the name of the authorized Banks the licit import by them cannot be doubted. The Appellant had also submitted Sworn Affidavit executed on 23.11.2016 by Sri Ravi Kumar retracting his

statement recorded by the Customs Officers on 22.11.2016. The statement was retracted because the family members have shown the Appellant the Purchase Bills from the jewelers.

4. Further Learned counsel submits that when gold is not seized under Section 110 of Customs Act 1962, provision of Section 123 is not applicable. Learned counsel also submits that as per the letter dated 17.11.2016, Additional Director of Income Tax (Inv.) has reported about the gold which was seized by Income Tax and forwarded to DRI for necessary action. The seized gold remained in the custody of investigation officer of Income Tax Bangalore. Ld. Counsel also submits that the expression "deems it necessary" obviously means that the proper officer must have good reason to belief that subject goods are illegally imported or imported without complying with the conditions of import before seizure. Statutes often use expressions such as "deems it necessary", "reason to believe", etc. These expressions have been held not to mean the subjective satisfaction of the officer concerned. Such power given to the concerned officer is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law. Ld Counsel also relied the following decisions/Judgments in support of above:-

I. Tata Chemicals Ltd Vs Commissioner of Customs (Preventive), Jamnagar - 2015 (320) ELT 45 (SC)
II. Fomento Resources Pvt Ltd Vs UOI 2019 (367) ELT 897 (Bom)
III. Nikom Copper and Conductors Pvt Ltd Vs UOI 2021 (378) ELT 421 (Bom)
IV. Gian Chand and Others Vs State of Punjab 1983 (13) ELT 1365 (SC)
V. Babulal Amthalal Mehta Vs CC, Calutta AIR 1957 Supreme Court 877
VI. Commissioner of Customs, Chennai Vs AK Hamsa Mohideen 2012 (276) ELT 503 (Mad)

VII. UOI Vs Abdul Kader Abdul Gani Hasmani 1991 (55) ELT 497 (Guj)

VIII. State of Maharashtra Vs Laxman Singh Jalam Singh 2000(126) ELT 3 (Bom)

IX. CC & CE, Bhopal Vs DK Singh 2006 (199) ELT 202 (MP)

X. Naveed Ahmed Khan Vs CC, Bangalore 2005 (182) ELT 494 (Tri-Bang)

XI. Ram Lubhaya Vs CC, New Delhi 2002 (147) ELT 807 (Tri-Del)

XII. E Eswara Reddy Vs CC, Hyd II 2006 (196) ELT 410 (T-Bang)

XIII. UOI Vs Imtiaz Iqbal Pothiawala 2019 (365) ELT 167 (Bom)

(Hon Supreme Court dismissed SLP No 30893 30894/2018 vide Order dated 30.1.2020)

XIV. CC (Prev) Kolkata Vs Ashok Kumar Agarwal 2017 (348) ELT 555 (T)

XV. SK Chains Vs CC (Prev), Mumbai 2001 (127) ELT 415 (T)

XVI. Nand Kishore Somani Vs Commissioner CE, Cus.& ST- 2016 (333) ELT 448 (Tri-Kol)

[Confirmed by High court of Kolkata CC, CE & ST Vs Nanda Kishore Somani 2016 (337) ELT 10 (Cal)]

XVII. Ratan Kumar Saha Vs CC, Patna 2021 (375) ELT 435 (Tri Kol)

102-107

XVIII. CCE Vs Decent Dyeing Co- 1990 (45) ELT 201 (SC)

XIX. Hargovind Das K Joshi Vs Commissioner of Customs 1992 (61) ELT 172 (SC)

XX. UOI Vs Dhanak M Ramji 2009 (248) ELT 127 (Bom)

XXI. Roshni Mathurdas Kothadia Vs CC, Hyderabad 2019 (369) ELT 1784 (Tri Hyd)

XXII. Yakub Ibrahim Yusuf Vs CC, Mumbai 2011 (263) ELT 685 (Tri - Mum)

5. Learned AR reiterated the findings and submits that it was the responsibility of the appellant to prove that the gold has been legitimately import and not smuggled in to India. Learned AR requested for short time to make additional written submission. Thereafter when written submissions were made, learned AR also produced report from DRI

Bangalore along with statement from Sri M.P. Bharath Bhushan, partner of M/s. Sai Thirumalaa Jewellers. Ld. Counsel for the appellant vide letter dated 03.04.2024 made additional submissions. Since the Ld. AR produced additional evidence and the Ld. Counsel for the Appellant objected the same, the Appeal is again posted for further hearing.

6. Thereafter when the matter came up for hearing, Ld. AR submits that as per the statement recorded by DRI from Shri. M.P Bharat, certain questions were put to him and to a specific question, he stated that on perusal of the sale invoices produced by appellant, said sale invoices are not issued M/s Sai Thirumala Jewelers. Regarding role of M/s Adya Jewelers, it is a Proprietary firm belongs to his wife and he used to take day to day activities of said jewelry shop. Regarding invoice issued by M/s Adya Jewelers, the very same reply was furnished by him stating that it is not issued by M/s Adya Jewelers. Ld. AR further submits that the above said statement shows that the invoices produced by the Appellant is not genuine and on further verification of the premises of both M/s Sai Thirumala Jewelers and M/s Adya Jewelers, it is found that both the firms are not functioning. Ld AR also relied the decision in the matter of **M/s MD Akthar vs C. Ex & ST, Patna (2009 (238) E.L.T 304 (Tri. Kolkata)** which was upheld by the Hon'ble High Court of Patna **(2015 (323) E.L.T 136 (Pat)** and further upheld by Hon'ble Supreme Court (**2015 (323) E.L.T A 27 (SC).** As per the above decision, the Apex Court observed that the Department is not required to prove these cases with mathematical precisions.

7. On rejoinder, Ld. Counsel for the Appellant submits that though the Hon'ble High Court had remanded the matter to this Tribunal with a specific direction to verify the evidentiary value of invoices produced by

appellant, the method adopted by the Revenue to rebut the evidentiary value of the invoices is illegal and unsustainable. The Appellant had produced the copies of the tax invoices of 2016 and it was submitted before the Adjudication authority. The Adjudication authority has not made any attempt to find out the veracity of the invoices. Since the tax invoices were reflecting payment of VAT also, the genuiness of the said invoice could have been verified easily by approaching the VAT authority regarding the payment made by the supplier at the relevant time. However the Department adopted a short and easy method of issuing summons to non-existing firm and claiming that they have recorded statement from Shri. M.P Bharat in 2024 to the effect that the invoices of 2016 are not issued by them. Such outright denial of the existence of a tax invoices showing payment of VAT in 2016 cannot be considered as admissible evidence to reject the evidentiary value of such tax invoices. The Ld. Counsel also submits that as per Section 125 of the Customs Act, 1962, absolute confiscation of gold is illegal and even if it is assumed that it is illegally imported, the Adjudicating authority is bound to release the gold on payment of redemption fine as contemplated, since it is not a prohibited goods to import.

8. Heard both sides. It is an admitted fact that the gold was seized by income tax authorities and it is kept under their custody during pendency of the appeal. Facts being so, as held by the Constitutional Bench of Hon'ble Supreme Court in the matter of **M/s Dhyan Chand & others Vs State of Punjab (1983 (30) E.L.T 365 (SC)**, when the goods are not seized under Customs Act, 1962, the provisions of Section 123 shifting the burden of proof that the goods are smuggled goods are not attracted. The Customs Department is bound to produce credible material

evidence to show that the seized goods were smuggled goods and customs duty has not been paid. There is no evidence to show that the gold bars were smuggled into India. It is not a case that only authorized agencies are entitled to import gold with foreign marking. While authorized agencies could import gold bars on payment of customs duty, passenger of Indian origin coming to India were also permitted over a period of time to bring foreign marked gold. Such gold is sold in domestic market. Thus it is settled that gold with foreign marking is available for sale and it can be owned by person other than authorized agency in India. In the absence of any admissible evidence in the show cause notice to the effect that subject gold bars were smuggled into India and customs duty has not been paid, confiscation and imposing penalty is illegal and unsustainable.

9. Further on merit also, Appellant has placed before the adjudicating authority 4 Tax Invoices issued by M/s. Adya Jewellers for 4 gold bars of 100 Grams each, 11 Tax Invoices issued by M/s. Thirumala Jewellers for 11 gold bars of 100 Grams each and Certificate dated 11.01.2018 issued by M/s. Adya Jewellers. Confirming sale of 4 Gold Bullion under 4 Invoices issued in the name of Appellant. Appellant had also submitted latter dated 11.01.2018 issued by M/s. Adya Jewellery and letter dated 20.01.2018 issued by Shri Thirumala Jewellery confirming that they have sold gold to appellant on tax invoice. In any event, even though statement dated 18.01.2024 from Sri M.P. Bharath Bhushan has gone so far to say that the invoices of the year 2016 showing payment of VAT produced by the appellant were not issued by them, I cannot accept his bald statement to conclude that the gold in question was smuggled gold as conclusive on the point. I am, therefore, unable to hold that, by such a single statement

of Sri M.P. Bharath Bhushan, without any corroborative evidence has established that the entire gold in question in the present case were smuggled gold, that is to say, gold imported contrary to the restriction in force relating to the import of gold as per the terms of section 111(d) of the Customs Act, 1962.

10. Hence impugned order is set aside and appeal is allowed with consequential reliefs if any in accordance with law.

(Order Pronounced in Open court on 03.09.2024)

(P.A. Augustian)
Member (Judicial)

Ganesh