CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/21393/2018-SM

[Arising out of Order-in-Appeal No. 214/2018 dated 30/05/2018 passed by the Commissioner of Customs, Bangalore-I (Appeals)]

Ravi Kumar R M
Partner M/s. Aishwarya
Investments, No. 54, Kogilu Road
Maruthi Nagar, Yelahanka
Bangalore – 560 064
Karnataka

Appellant(s)

Versus

C.C-Bangalore
C.R. Buildings, Queens Road,
P.B. No. 5400,
Bangalore – 560 001
Karnataka

Respondent(s)

Appearance:

Mr. M.S. Nagaraja, Advocate
#1010, 1st floor
(Above Corp.Bank), 26th Main,
4th T Block, Jayanagar,
Bangalore – 560 041
Karnataka

For the Appellant

Mr. P. Gopakumar, Jt. Commr. (AR)

For the Respondent

Date of Hearing: 05/08/2019
Date of Decision: 25/11/2019

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 21028 / 2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 30/05/2018 passed by the Commissioner of Customs (Appeals) whereby the Commissioner has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that DRI, Bangalore gathered specific intelligence that a huge quantity of unaccounted cash in demonetized currency and some 'foreign' marked smuggled gold were secreted by a person, viz: Shri. Ravi Kumar R.M. a private real estate financier and partner of M/s. Aishwarya Investments in his office/residential premises situated at #54, Kogilu Road, Maruthinagar, Yelahanka, Bangalore – 560 064. Officers of DRI, Bangalore along with officers of DGIT (Income Tax Investigation) conducted search at the said premises and unearthed and unaccounted cash in demonetized currency to the tune of Rs. 3.5 Crores and 17 gold biscuits weighing 1578.35 grams (inclusive of 15 gold biscuits with foreign markings) valuated at Rs. 47 lakhs. The unaccounted cash and gold biscuits were seized as per the provisions of Income Tax Act, 1961.

2.1. Shri. Ravi Kumar R.M. in his statement recorded on 22/11/2016 under the provisions of Section 108 of Customs Act, 1962 stated that he and his father Shri. Mallikarjunappa were partners of the said firm, which was into the business of lending money on short term basis to landlords, farmers, small business people and small contractors. Further, he agreed with the seizure of unaccounted cash in demonetized currency and 17 gold biscuits and that he was neither in possession of any valid purchase invoice/documents nor of any customs duty paid challan for the 15 gold biscuits with foreign markings. He also stated that the said foreign marked gold biscuits were purchased from a person referred by M/s. Davanam Jeweller's to convert the huge demonetized cash available with them. Hence, a show-cause notice dated 11/05/2017 was issued to Shri. Ravi Kumar R.M. as to why, the 17 gold biscuit seized from his possession should not be confiscated under Section 111(d) of Customs Act, 1962 and penalty should not be imposed on him under Section 112 of Customs Act, 1962. Shri. Ravi Kumar R.M. in the reply to the show-cause notice has stated that the allegations are contrary to the facts and denied the same as baseless and the proposals to confiscate the seized gold and impose penalty as not sustainable and that he and his family members had purchased the said gold biscuits and he had purchased bills in respect of 15 gold biscuits weighing 1500 grams. He has also stated that he was coerced into giving the statements which were not voluntary and that he has retracted the same by executing a sworn affidavit.

2.2. After following the due process, the adjudicating authority passed Order-in-Original dated 30/11/2017 whereby the gold biscuits of foreign markings totally weighing 1028.35 grams valued at Rs. 30.62 lakhs were confiscated under Section 111(d) of the Customs Act, 1962 and imposed a penalty of Rs. 9,00,000/- (Rupees Nine Lakhs only) under Section 112(a) of the Customs Act, 1962 on Shri. Ravi Kumar R.M. Aggrieved by the said order, appellant filed appeal before the Commissioner by raising various grounds against the Order-in-Original and the Commissioner after considering the submissions of the appellants, rejected the appeal. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that in the present case Income Tax officers carried out search of the appellant's residential premises on 15/11/2016, found unaccounted cash in demonetized currency to the tune of Rs. 3.5 Crores and 17 gold biscuits weighing 1578.35 grams valued at about 47 lakhs. The Income Tax officers seized the cash and gold biscuits under Section 132 of the Income Tax Act, 1961 and the same continued to be in their custody as confirmed in para 8 of the impugned show-cause notice. He further submitted that the appellant's statement recorded by the Customs Officer on 22/11/2016 and 15/12/2016 were retracted by the appellant through Sworn Affidavit executed on 16/12/2016 and submitted the same along with reply to the show-cause notice. He further submitted that the appellant has also submitted purchase invoices in respect of 15 gold biscuits from Sl. No. 1 to 15 of the Annexure 'A' to the show-cause notice. The copies of invoices issued by M/s. Adya Jewellers and Sai Thirumala Jewellers, Bangalore have also been enclosed to the reply to the show-cause notice submitted to the adjudicating authority. He also submitted that the remaining 2 gold biscuits listed under Sl. No. 16 & 17 in Annexure 'A' to the show-cause notice were procured from (i) HDFC Bank 50 grams Fine Gold, and (ii) Credit Suisse One Ounce Fine Gold. The appellant has submitted that these two gold biscuits were purchased by the appellant's father more than 8 years ago and the relevant invoices could not be traced. He also submitted that the Jewellers who have sold 15 gold biscuits have issued valid tax invoices in the name of the appellant and on payment of applicable VAT on the sale of the gold. Accordingly, the appellants have proved licit purchase of gold from the gold jewellers by producing purchase invoices. Further the said

jewellers have furnished certificate dated 11/01/2018 and 20/01/2018 respectively confirming the details of sale of gold biscuits to the appellant and copies of those certificates have also been placed in the memorandum of appeal. He further argued that neither the appellant nor his family members have brought gold from abroad or procured the same from any other source other than the jewellers who are local authorized dealers and they have issued the certificate regarding the sale. He further submitted that the Additional Commissioner in the Order-in-Original has held that 6 gold biscuits having markings of MMTC, PAMP and HDFC bearing Indian Markings are not liable for confiscation and ordered release of the same subject to any action that the Income Tax authorities may take and the balance 11 gold biscuits totally weighing 1028.35 grams approximately valued at 30.62 lakhs were confiscated under Section 111(d) of the Customs Act. He further submitted that both the authorities have wrongly invoked Section 123 of the Customs Act, for the proposition that burden of proof that the gold biscuits seized under Section 132 of the Income Tax Act on 16/1/2016 were not smuggled goods, they were imported and Customs Duty has been paid on them, in on the appellant. He referred to the provision of Section 123 providing burden of proof and submitted that Section 123 of the Customs Act applies only to the goods seized under the Customs Act, 1962 whereas in the present case the goods have been seized under Section 132 of the Income Tax Act, 1961 and therefore Section 123 of the Customs Act is not applicable in the present case. Moreover, the appellant has produced VAT invoices issued by M/s. Adya Jewellers and Sai Thirumala Jewellers and their certificates confirming the sale/purchase of seized biscuits within the country and therefore the licit transaction of sale of gold biscuits within the country have been clearly established. He also submitted that it is a settled legal position that when the goods are not seized under the Customs Act, 1962, the provisions of Section 123 of the Customs Act, 1962 are not attracted. The burden of proof of licit import cannot be shifted to the person from whose possession the goods were seized. The burden of proof that the goods were smuggled goods and the Customs duty has not been paid on them lies on the Department. For this submission, he relied upon the following decisions:

a. *Gian Chand and others Vs. State of Punjab – 1983 (13) E.L.T. 1365 (SC)*
b. *Suresh Kumar Singh & Ors Vs. CC (Prev), Patna-I – 2019-TIOL-1352-CESTAT-KOL*
c. *Naveed Ahmed Khan Vs. CC, Bangalore – 2005 (182) E.L.T. 494 (Tri.-Bang.)*
d. *E Eswara Reddy Vs. Commr. of Customs, Hyd.-II – 2006 (196) E.L.T. 410 (Tri.-Bang.)*
e. *Mahesh B Mali Vs. Commr. of Central Excise, Pune – 2012 (286) E.L.T. 375 (T)*
f. *Kamal Kumar Vs. Commr. of Central Excise, Ghaziabad – 2005 (186) E.L.T. 506 (T)*
g. *Ram Lubhaya Vs. Commr. of Customs, New Delhi – 2002 (147) E.L.T. 807 (T)*
h. *Jitendra Pawar Vs. Commr. of Customs, Raipur – 2003 (156) E.L.T. 622 (T)*
i. *Manoj Kumar Vs. Commr. of Customs – 2004 (176) E.L.T. 811 (T)*

4.1. It is his further submission that once the appellants have submitted the copies of purchase invoices for purchase of gold biscuits from the local jewellers and also furnished certificate confirming the sale of gold biscuits on payment of VAT, then there cannot be any doubt or dispute with regard to bona fide transaction of purchase of gold from the authorized dealers. For this submission, he relied upon the following decisions:

a. *Commr. of Customs (Prev.), Kolkata Vs. Ashok Kumar Agarwal – 2017 (348) E.L.T. 555 (T)*
b. *S.K. Chains Vs. CC (Prev.), Mumbai – 2001 (127) E.L.T. 415 (T)*
c. *Nand Kishore Modi Vs. CC (Prev.), West Bengal – 2015 (325) E.L.T. 781 (T)*
d. *Nand Kishore Sumani Vs. Commr. of CE, Cus. & ST – 2016 (333) E.L.T. 448 (Tri.-Kol.) [confirmed by High Court of Kolkata in the case of Commr. of Cus., CE & ST Vs. Nanda Kishore Somani – 2016 (337) E.L.T. 10 (Cal)]*

5. On the other hand, learned AR defended the impugned order and submitted that in the present case gold was seized under joint operation by the Income Tax Investigation Wing and the Directorate of Revenue Intelligence. The gold was seized under the Income Tax Act along with demonetized currency. The Income Tax authorities had officially communicated the seizure of the gold to the DRI for further necessary action and thereafter the statement of the person from whose possession the gold was seized was recorded under Section 108 of the Customs Act, 1962 and after following the due process under the Customs Act only the show-cause notice was issued. He further submitted that in the case-laws relied upon by the appellant, the gold was seized by the Police under the State Government and handed over to the Customs under the Central Government and therefore the decisions relied upon by the appellant are not applicable in the present case. He relied upon the decision in the case of ***Gopaldas Udhavadas Ahuja Vs. Union of India reported in 2004 (176) E.L.T. 3 (S.C)*** wherein the Apex Court has distinguished the case of **Gian Chand and others** relied upon by the appellant and has held that invocation of Section 123 of the Customs Act is valid. The second contention of

the learned AR is that the invoices for purchase of gold biscuits produced by the appellant along with the reply to the show-cause notice are not valid invoices and the same were never produced during investigation and they are an afterthought. Moreover, the bills are not correlating with the gold seized as there are no identifying marks in the bills relating to the gold seized. He further submitted that the seized gold bearing foreign markings cannot be established as not smuggled. For this submission, he relied upon the decision in the case of ***ASA Kabeer Vs. CC, Chennai – 2001 (137) E.L.T. 55 (Mad.)*** wherein the Hon'ble High Court in para 12 to 14 has observed as under:

> *"12. It is the duty of the person, who is importing the duty payable goods to see to it that the correct description of the goods is entered into the receipt for the payment of custom duty and the same is very much wanting in this case and in the absence of the same, we find it difficult to accept the case of the Petitioner that the gold, that has been imported by Shamsudeen and the gold seized from the Petitioner were one and the same. Hence, we reject the contention of the Petitioner.*
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> *13. With regard to the Silver bars seized, it has been well established that the total weights noted in the three baggage receipts do not tally with the ingots and on that score alone, the contention of the Petitioner that the silver bars were duly imported and duty paid cannot be accepted. The Petitioner has failed to discharge the burden cast upon him and the argument advanced on behalf of the Petitioner that the silver bars were duly imported and duty paid cannot be accepted.*
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> *14. From the abovesaid discussions, we hold that the petitioner is disentitled to sustain his claim and the petitioner has not given a proper account of his possession of the gold bars and silver and the receipt produced do not relate to the goods seized and the petitioner has failed to prove the licit import of gold and silver and all these aspects were taken note of by the authorities concerned and hence, we*

answer both the questions in favour of the Revenue and against the Petitioner.

5.1. He also relied upon the decision of the Tribunal in the case of ***Rajaram Johra Vs. CC (Airport & Cargo), Chennai – 2016 (5) TMI 554 – CESTAT*** Chennai wherein said Chennai CESTAT has observed as under:

"11.2. The gold as stated above were found to be contraband goods and Customs believed that to be smuggled one when that carried foreign marking and no evidence of lawful import thereof was adduced before investigation, adjudicating authority as well as the Trial court. Appellant along with the accomplices miserably failed before the Trial Court to succeed and their trial ended in conviction with no return of the gold to them. The MO-1, 2 & 3 in that case which were the offending gold in the present appeal were ordered by the Magistrate to be returned to Customs. When cogent and credible evidence came to the surface demonstrating that the appellant was in possession of the contraband gold with foreign marking thereon and such goods were not lawfully imported, there is no scope at all for him to go out of the purview of Section 123 of the Customs Act, 1962. Therefore, all the 12 gold bars and 10 gold biscuits were lawfully seized by Customs and were liable to absolute confiscation."

5.2. He also relied upon the decision of this Tribunal in the case of ***Baburaya Narayan Nayak Vs. CC, Bangalore – 2018 (364) E.L.T. 811 (Tri.-Bang.).*** He further submitted that in all the three case-laws cited, it has been held that the person possessing the gold with foreign markings shall prove its licit possession through proper documents whereas in the present case, the appellant could not produce any proof of the licit possession through proper documents and the documents sought to be produced were produced during adjudication and not during investigation.

6. The appellant has also filed rejoinder to the argument raised by the AR wherein he has reiterated the earlier submissions.

7. After considering the submissions of both the parties and perusal of the material on record, I find that during the joint search operation by DRI and Income Tax official at the residence of the appellant, 17 gold biscuits were seized and out of 17 gold biscuits, 6 biscuits have markings of MMTC, PAMP and HDFC Bank on them. As per the RBI guidelines, the said organizations are authorized to import and sell gold. Therefore, the adjudicating authority has rightly held that the 6 gold biscuits were legally possessed and has not confiscated the same. As far as remaining gold biscuits are concerned, they have the foreign markings and the appellant while making statement to the DRI officer under Section 108 of the Customs Act has stated that they have purchased the said biscuits from M/s. Davanam Jewellers but the same has been refuted by the Davanam Jewellers when the Department made enquiry from them. Further I find that in his statement made twice before the DRI officer, he has not stated anything regarding the purchase of these biscuits from M/s. Sai Thirumala Jewellers and M/s. Adya Jewellers. He has not even named the jewellers in his statement at all. The invoices issued by these jewellers were brought on record for the first time while replying to the show-cause notice and therefore the Department could not investigate from the said jewellers regarding the authenticity of these invoices. Further I find that the retraction of the statement by a Sworn Affidavit is not valid because the said alleged affidavit was not produced before any authority and it was only executed before a Notary. Further I find that Hon'ble Kerala High Court in the case of ***Commr. of Customs, Cochin Vs. Om Prakash Khatri reported in 2019 (366) E.L.T. 402 (Ker.)*** has

considered the scope of Section 123 of the Customs act and has held in para 18 as under:

> *"18. We have considered the decisions relied on by both sides and are of the opinion that in case of seizure of gold, even without markings, the burden is upon the person, who has custody of the gold, under Section 123 of the Act, to prove that the gold was legally acquired. The statement recorded under Section 108 of the Act could be safely relied upon in the proceedings against respondents. In K.I. Pavunny v. Assistant Collector, (1997) 3 SCC 721 = 1997 (90) E.L.T. 241 (S.C.) the Hon'ble Supreme Court has held that a person summoned under Section 108 of the Act is "not the person accused of an offence" for the purpose of Section 24 of the Evidence Act. The primary guestion for consideration in that case was whether the retracted confession statement of the appellant is inadmissible in evidence under Section 24 of the Evidence Act. It is observed that even though the Customs officers have been invested with many of the powers, which an officer-in-charge of a police station exercises, while investigating a congnizable offence, they do not, thereby become police officers within the meaning of Section 25 of the Evidence Act and so the confessional statement by the admissible in evidence against them and it was ultimately held by the Hon'ble Supreme Court that the prosecution has proved the case based on the confession of the appellant given in Ext.P4 under Section 108 of the Evidence Act."*

7.1. Further I find that the case-laws relied upon by the appellant are not applicable in the facts and circumstances of this case because the appellant has stated in his statement that he has purchased the said gold biscuits from M/s. Davanam Jewellers and the said Jewellers has refuted the said statement. The purchase invoices from the local jewellers were not produced during the investigation. Therefore, the

Department could not verify the authenticity of those invoices.

8. By taking into consideration the facts and circumstances and the various decisions relied upon by both the parties, I am of the considered view that there is no infirmity in the impugned order which I upheld by dismissing the appeal of the appellant.

(Order Pronounced in Open Court on **25/11/2019**)

(S.S GARG)
JUDICIAL MEMBER

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