

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21358 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Ashwin Gold Pvt Ltd

Ground Floor, SD 16-A Block,
Special Economic Zone,
Kakkanad
COCHIN
KERALA
682037

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21357 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. Sanjay Subrao Nikam,

Managing Director of
M/s.Ashwin Gold Pvt Ltd
No.11/422, Sanjay Nivas,
Pallithazham, Mulamthuruthy,
KERALA – 682 314.

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21286 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. M.K. Babu,

Prop. Smijo Gold Works and
Jewellery
Elamkunnu Road,
Vallachira PO, Thrissur,
Kerala 680562.

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21296 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. T.R. Saji,

Munduplakkal House,
Kumbalampoika,
Pathanamthitta,
Ernakulam,
Kerala 689 661.

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21297 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. B. Jayakumar

S/o Balakrishnan Nair,
Lakshmi Bhavan
Elamakkara,
Ernakulam,
Kerala 682 026.

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21329 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. K.O. Anto

M/s. Kallarackal Jewellers,

Appellant(s)

VII/246, Central Junction,
Angamaly Kerala,
Opp. Railway Station,
Cochin 670001.
KERALA

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21331 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. Jeelson Davis,

Erumakaran House,
Anchery (South),
Trichur 680006.
Kerala

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 21332 of 2016

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

Mr. K. Venugopalan,

“Bhama” Kaliyangad Temple
Road,
RD Nagar, PO Kasargod,
Kasargod – 674 424.
Kerala.

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

WITH

Customs Appeal No. 20099 of 2017

[Arising out of Order-in-Original No. COC-CUSTOM-
PRV-COM-01-16-17 dated 30/05/2016 passed by
Commissioner of CUSTOMS(Preventive), Cochin]

M/s. Joyalukkas India Pvt. Ltd.

Door No.40/2096, A&B, Peeves
Triton Marine Drive,
Shanmugham Road,
Ernakulam,
Cochin – 682 031.
Kerala

Appellant(s)

VERSUS

**Commissioner of Customs
(Preventive)**

5th Floor, Catholic Centre,
Broadway,
COCHIN
KERALA
682 031

Respondent(s)

Appearance:

Shri P.A. AUGUSTIAN, ADVOCATE For the Appellants M/s.
Ashwin Gold Pvt. Ltd. and Shri Sanjay Subrao Nikam.

Shri K. Bindusaran, Consultant for the remaining appellants

Smt. D.S. Sangeetha, Addl. Commissioner(AR) for the Respondent

CORAM:

HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

HON'BLE MR. P DINESHA, JUDICIAL MEMBER

Final Order No: 20057-20065 /2022

Date of Hearing: 28/12/2021

Date of Decision: 17/02/2022

Per : P. DINESHA

A search was conducted by the Revenue at the Special Economic Zone (SEZ) unit of M/s. Ashwin Gold Pvt. Ltd. ('AGPL' for short) on 11/08/2014 which revealed that there was no stock of gold at the said premises. A show-cause notice dt. 05/05/2015 was issued, which proceeds on the premise that "on the basis of a specific information received indicating that the Managing Director of the said unit had clandestinely removed gold imported by the firm on 08/08/2014 to the SEZ to Domestic Tariff Area (DTA)" which presumably is the reason for the Revenue to initiate search proceedings. On the same day i.e. 11/08/2014, a

search was conducted at the Managing Director's (of AGPL) residence during which a statement of Managing Director i.e. Shri Sanjay Subrao Nikam was also recorded under Section 108 of the Customs Act. The above resulted in consequential searches on 12/08/2014 at the premises of M/s. Kallarakkal Jewellery at Angamaly, M/s. Smijo Gold at Vallachira, Trichur and also at M/s. Southern Gold Pvt. Ltd., Anchery, Tiruchur. Statements under Section 108 of one Shri E.N. Girish, Manager of M/s. Kallarakkal Jewellery was recorded and the Revenue had also recovered gold ornaments weighing 11095.90 grams. Similar statements of Shri Jackson A.T., Manager of M/s. Southern Gold Pvt. Ltd. and Shri M.K. Babu, owner of M/s. Smijo Gold were recorded. Thereafter, Revenue examined various firms and has recorded statements under Section 108 of the accountable persons of the above firms.

1.2 In the show-cause notice, the allegation based on the above statements are, inter-alia, that AGPL had violated various provisions / rules of SEZ, the

scope of the subject offence was not limited to the one within SEZ but also an offence of smuggling dutiable goods from a territory outside India into the Indian Customs territory; that by its activities, AGPL had imported 385512.5 grams of gold bars of 995 purity between 05/04/2012 to 08/08/2014; that the total export of ornaments by AGPL was 336727.464 grams (of 995 purity); that there was a shortage of 48785.036 grams of imported gold; that during search, neither the stock of gold was found nor was any permission for removal produced, nor did AGPL give any satisfactory explanation; that statements of various persons recorded under Section 108 revealed that the above 48785.036 grams of imported gold found short was smuggled out of the unit by the said Shri Sanjay Subrao Nikam, Managing Director of the AGPL which was also corroborated by the letter dt. 15/09/2014 of the Specified Officer, Cochin Special Economic Zone (CSEZ, for short) and that various searches had resulted in the recovery of gold/gold ornaments to the extent of 27598.711 grams. It was therefore

alleged in the show-cause notice that the above gold/gold ornaments recovered were liable for confiscation under Section 120 of the Customs Act, 1962 read with Ss. 111(b), (d), (j), (k) and (o) of the Act *ibid*, apart from the gold sold to M/s. Joyalukkas (I) Pvt. Ltd. which was liable for confiscation under Section 121 of the Customs Act, 1962 read with Section Section/s 111(b) and (o) *ibid*.

1.3 It has also been alleged that 4 kgs. of gold bars lying at the Air Cargo Complex, Nedumbassery consigned to the AGPL was also liable for confiscation under Section 111(d) and (o) *ibid* on the ground that the same was consigned to the non-functioning unit at CSEZ, imported into India with an intention of diversion from CSEZ, which appears to have been purchased and consigned to India from the sale proceeds of ornaments exported in the name of M/s. Ashwin Gold Pvt. Ltd. Consequently, it was proposed to recover duties of customs under Section 29(1) apart from penalties under Section 112(a) and 114A of the Customs Act, 1962 on the Managing

Director of M/s. Ashwin Gold Pvt. Ltd., penalty under Section 112 ibid on Shri K.O. Anto, Proprietor of M/s. Kallarakkal Jewellery, Shri Jeelson Davis, employee of M/s. Kallarakkal Jewellers, Shri B. Jayakumar, Consultant, Shri T.R. Saji, Assistant to Shri B. Jayakumar, Shri C.A. Collins, Director of M/s. Southern Gold Pvt. Ltd. and Shri M.K. Babu, Proprietor of M/s. Smijo Gold, M/s. Ajay & Co., M/s. Leo's Angel Gold, Trichur, Shri K. Venugopalan, Accountant for M/s. Kallarakkal Jewellery and S/Shri Ujval Jose, Joemon and Happy Kurien, Partners of M/s. Awesome Jewel Concepts, Trichur under Section 112(b) of Customs Act, 1962.

2.1. To, cut it short, AGPL and its MD Shri Sanjay Subrao Nikam were directed to show-cause as to why:

(i) 385512.5 grams of gold bars diverted from the premises of M/s. Ashwin Gold Pvt. Ltd., at CSEZ by Shri Sanjay Subrao Nikam, Managing Director of the firm, should not be confiscated under the

provisions of Section 111(b), (d), (j), (k) and (o) read with Section 120 of the Customs Act, 1962.

(ii) 11095.90 grams of gold ornaments seized from M/s. Kallarakkal Jewellery, Angamaly, being made of 10 kgs. of gold bars of 995 purity, smuggled out from M/s. Ashwin Gold Pvt. Ltd., should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act, *ibid*.

(iii) 6499.030 grams of gold articles seized from M/s. Smijo Gold, Trichur on 12-08-2014 being made of 6.5 kg of gold smuggled out from M/s. Ashwin Gold Pvt. Ltd., CSEZ on 08-08-2014, should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(iv) 4346.890 grams of gold articles seized from M/s. Southern Gold Pvt. Ltd., Trichur on 12-08-2014 and made out of 4 kgs. of gold smuggled out from M/s. Ashwin Gold Pvt. Ltd., CSEZ on 08-08-2014 should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(v) 4581.581 grams of gold articles seized from M/s. Ajay &Co., Trichur should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(vi) 1075.317 grams of gold articles seized from M/s. Leo's Angel Gold, Trichur should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(vii) An amount of Rs.2.85 crores lying with M/s. Joyalukkas (I) Pvt. Ltd. being the sales proceeds of 10 kgs. of smuggled gold purchased from Shri Sanjay Subrao Nikam, should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) read with Section 121 of the Act *ibid*.

(viii) 4 kgs. of gold bars lying at the Air Cargo Complex, Nedumbassery being imported into a non-existing unit and with the intention of diverting into the DTA should not be confiscated under the provisions of Section 111(d) and (o) of the Act *ibid*.

(ix) Penalty should not be imposed on M/s. Ashwin Gold Pvt. Ltd. and its Managing

Director Shri Sanjay Subrao Nikam, under the provisions of Section 112(a) and 114A of the Act *ibid*.

(x) Duties of customs amounting to Rs.30,86,721/- on the quantity of 11186.325 grams of imported gold bars diverted from their unit and not so far recovered, should not be demanded from them under Section 28 of the Customs Act, 1962 with interest leviable thereon under Section 28AA *ibid*.

2.2. Shri K.O. Anto, Proprietor of M/s. Kallarakkal Jewellery, Angamaly was directed to show-cause as to why:-

(i) 11095.90 grams of ornaments seized from M/s. Kallarakkal Jewellery, Angamaly which was made out of 10 kgs. of gold bars of 995 purity smuggled out from M/s. Ashwin Gold Pvt. Ltd., CSEZ on different occasions should not be confiscated under the provisions of Section 111(k) and (o) *ibid*.

(ii) Penalty should not be imposed on him under the provisions of Section 112(b) and 114AA ibid.

2.3. M/s. Joyalukkas Pvt. Ltd., Thrissur and its Managing Director Shri Joy Alukkas were directed to show-cause as to why:-

(i) 10 kgs. of gold bars of 995 purity supplied by M/s. Ashwin Gold Pvt. Ltd., CSEZ should not be confiscated under the provisions of Section 111(k), (o) and 121 ibid.

(ii) Penalty should not be imposed on them under the provisions of Section 112(b) ibid.

2.4. S/Shri Jeelson Davis, B.Jayakumar and T.R. Saji were directed to show-cause as to why penalty should not be imposed on them under the provisions of Section 112(b) ibid.

2.5. Shri K. Venugopalan, Accountant of M/s. Kallarakkal Jewellery, Angamaly was directed to show-cause as to why penalty should not be

imposed on him under the provisions of Section
114AA *ibid*.

2.6. M/s. Southern Gold Pvt. Ltd.,
Trichur was directed to show-cause as to why:-

(i) 4346.89 grams of gold seized from
them should not be confiscated under the provisions
of should not be confiscated under the provisions of
Section 111(b), (j), (k) and (o) of the Act *ibid*.

(ii) Penalty should not be imposed on
them under the provisions of Section 112(b) *ibid*.

2.7. Shri M.K. Babu, Proprietor of M/s.
Smijo Gold, Trichur was directed to show-cause as
to why:

(i) 6499.03 grams of gold seized from
them should not be confiscated under the provisions
of should not be confiscated under the provisions of
Section 111(b), (j), (k) and (o) of the Act *ibid*.

(ii) Penalty should not be imposed on
them under the provisions of Section 112(b) *ibid*.

2.8. M/s. Ajay & CO. was directed to show-cause as to why:-

(i) 4581.581 grams of gold articles seized from them should not be confiscated under the provisions of should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(ii) Penalty should not be imposed on them under the provisions of Section 112(b) *ibid*.

2.9. M/s. Leo's Angel Gold, Trichur was directed to show-cause as to why:

(i) 1075.317 grams of gold seized from them should not be confiscated under the provisions of should not be confiscated under the provisions of Section 111(b), (j), (k) and (o) of the Act *ibid*.

(ii) Penalty should not be imposed on them under the provisions of Section 112(b) *ibid*.

2.10. S/Shri. Ujval Jose, Joemon and Happy Kurien, Partners of M/s. Awesome Jewel Concepts, Trichur were directed to show-cause as to why penalty should not be imposed on them under the provisions of Section 112(b) *ibid*.

3. In response to the above show-cause notice, replies were filed denying the allegations but a further time was sought; but however, the adjudicating authority viz. the Commissioner of Customs (Preventive), Cochin proceeded to adjudicate based on the statements recorded and the materials available as a result of investigation and searches, and that has resulted in the impugned Order-in-Original. The Commissioner has confirmed the proposals given in the show-cause notice whereby the impugned demands have been raised as well as penalties which are assailed in these appeals by the appellants.

4. When the matter was taken up for hearing, Shri P.A. Augustian, Ld. Advocate appeared for the

appellants M/s. Ashwin Gold Pvt. Ltd. and Shri Sanjay Subrao Nikam; and Shri K. Bindusaran, Ld. Consultant appeared for Shri B. Jayakumar, Shri T.R. Saji, Shri M.K. Babu, Shri K.O. Anto, Shri Jeelson Davis, Shri K.Venugopalan, while M/s. Joyalukkas India Pvt. Ltd. remained unrepresented. On the other hand, Smt. D.S. Sangeetha, learned Addl. Commissioner (AR) appeared for the Revenue. We have heard the rival contentions and we have carefully considered the documents placed on record as well as various case law that were relied upon by both sides during the course of hearing.

5.1. Statements of Managing Director of AGPL Shri Sanjay Subrao Nikam have been recorded on 7 different dates right from the date of search and admittedly based on his statements alone, the consequential searches were initiated on 12-08-2014. In the earliest statement dated 11-08-2014 it is recorded inter alia that 10.5 kgs. of gold was received at his CSEZ unit on the Friday night on being cleared by the Customs on Friday, the

clearance related work was done by his CHA viz. M/s. Sorabji & Company Pvt. Ltd., Cochin and that on Saturday at around 9 O'clock, he took the above 10.5 kgs. of gold in his Activa scooter out of the SEZ without obtaining the permission of the authorities when a person named Jeelson, a staff of M/s. Kallarackal Jewellery came there in a white car with another person, to whom the above 10.5 kgs. of gold was given. In his next statement dated 13-08-2014, it is recorded that his confession made on 11-08-2014 that 10.5 kgs. of imported gold was handed over to the employee of Kallarackal Jewelry was a mistake and that 6.5 kgs. of gold was handed over by him on Friday night itself to M/s. Smijo Gold, Trichur, and on the same night he had given 4kgs. of gold to another gold manufacturing unit at Trichur. Interestingly, this statement dt. 13/08/2014, which is placed on record, has various corrections made but, no care is taken to ensure that the maker of the statement was aware of such corrections. This is a serious lapse which could

affect the veracity and consequently the evidentiary value of statement itself.

5.2. The next statement is dated 27-08-2014, wherein it is recorded that he had given two statements which he has stated to have gone through and reiterates that whatever the facts given in both his earlier statements were true and correct.

5.3. The next statement is dated 07-11-2014 wherein also, it is recorded that he had gone through the earlier statements which were true and correct. Out of the above, the inconsistency as to the recipient of 10.5 kgs. of gold has not been ironed out, nor is there anything brought on record as to the corrections as pointed herein above. Next statement is dated 13-01-2015, wherein also a reiteration is recorded to the effect that all the statements recorded from him earlier were true and correct. It is also recorded here that he had sold one power press machine and that all other machines were available in the SEZ unit. There is also a final

statement dated 16-01-2015, wherein it is also recorded inter-alia that he had imported gold and silver in the name of M/s. Ashwin Gold Pvt. Ltd. by paying appropriate customs duty on a few occasions.

6. Issue on merits of AGPL relating to 4 KGs of Gold:-

6.1. We shall first take up the issue of confiscation of 4 kgs. of gold lying at the Air Cargo Complex, Nedumbassery. The reason attributed in the impugned order, as given at paragraph 115 page 51 of the Order-in-Original, reads as under:-

“115. Regarding the 4 kgs. of gold bars sent from UAE to M/s. Ashwin Gold, lying un-cleared at Air Cargo Complex, Nedumbassery, it is seen on scrutiny that proper documents involved in genuine transaction such as purchase order issued by the importer, document regarding payment made to the overseas supplier etc. are absent. Further, Shri Sanjay had no facility to manufacture gold ornaments

in his unit within CSEZ as he had removed machineries like the power press machine used in the manufacturing of ornaments and hence, the only way in which Shri Sanjay could deal with the 4 kg of gold, if released to him, would be by removing the same out to DTA clandestinely as he was doing earlier. Moreover, the license of the unit of M/s. Ashwin Gold within SEZ was suspended and hence the said unit has ceased functioning within CSEZ. Neither, in his statements recorded under Section 108 of Customs Act, 1962 nor in his reply to SCN, has Shri Sanjay submitted any details/documents to prove either bonafide nature of the transactions or as to show how he intended to use it, especially when licence of his unit within SEZ was suspended and he himself had removed all essential machinery from there. In this circumstance, the import of 4 kg of gold by M/s. Ashwin Gold cannot be considered as a bonafide import for use by unit within CSEZ but acquires the character of a transaction where gold was attempted to be imported for removing it clandestinely to DTA without payment of Customs duty thus making it

liable for confiscation under Section 111(d) and (o) of Customs Act, 1962.”

6.2. This finding has been seriously challenged before us. Admittedly, the said gold bars were imported by AGPL, a SEZ unit and before it could reach its destination and enter into the relevant books of accounts, the same was confiscated. The revenue has never said that as on the date of the said import, AGPL did not have license or necessary authorization to import. The SEZ authority had not cancelled its license. In his order dated 05.12.2014 passed consequent to the directions dated 20.04.2014 of the Hon'ble High court of Kerala in W.P.(C) No. 34191/2014 (page 118, at page 119 paragraph 3(i) of the appeal memo), the Commissioner has recorded that the above import was made vide Bill No.176-0-11-7112 dated 10.8.2014. The OIO of the Development commissioner cancelling license is dated 27.03.2015 (page 132 of the appeal memo). Elsewhere in this order we have observed from the statement of Sanjay that all the machines were available in the SEZ unit

except one machine, which was sold. Hence, it was too premature to assume diversion, without there being any evidence on hand.

7. The Commissioner has in fact called the shots at a very early stage and in haste. Said gold was also confiscated on assumptions and presumptions which according to us, is also too premature, which action is discernibly contrary to the basic principles of jurisprudence inasmuch as the same being contrary to principles of natural justice, rule of law and fair trial. It is also the basic tenet of Indian Criminal jurisprudence that there shall not be any presumption of guilt and that an accused shall be presumed innocent until proved guilty. Even in the rarest of rare cases or the most heinous offences and in respect of habitual offenders as well, the trial courts would conduct trials separately and conviction in one case is never taken as the conclusive proof, to convict him in another case, without a trial. There is no allegation either in the show-cause notice or even in the impugned order

that the very import in the case on hand was improper or being contrary to any law which would make the goods liable for confiscation. Thus, the confiscation of 4 kgs. gold bars is unsustainable as the order suffers from serious legal infirmities as pointed out. We therefore cannot accept order of confiscation of 4kgs. gold which is clearly a case of abuse of process of law. On this score, the order confiscating 4 kgs. gold imported by the appellants M/s. Ashwin Gold Pvt. Ltd. cannot be sustained and therefore, the impugned order of confiscation of 4 kgs. gold is set aside.

JURISDICTION

8. Learned advocates appearing for the appellants raised a common preliminary objection on the jurisdiction, to contend that SEZ Act is a complete code by itself, any violation committed by a SEZ unit, the SEZ Act and Rules incorporate sufficient safeguards and therefore, customs authorities have no jurisdiction. They have urged that the Customs (preventive) Commissionerate of Cochin is not the 'Authorised Officer' nor are they

the 'Specified Officers' under SEZ Act 2006, in terms of S. 21(2) &(3) of the said Act. They have also submitted that vide Notification Nos. S.O.2665(E) & S.O.2667(E) dated 05.August.2016 the Ministry authorised the jurisdictional officers of customs central excise to perform some functions in respect of any violations to the SEZ Act, inside a SEZ unit, that too, after obtaining permission from the Development Commissioner. It was further argued that it was only w.e.f. 16.09.2014 did the Ministry identify correct jurisdictional officers [Notification 15/02 - customs (NT) dated 07.03.2002, as amended by Notification 78/14 - Customs (NT) dated 16.09.2014]. Hence, it is their case that the Commissioner of Customs (preventive), Cochin, Broadway, Ernakulam, never was authorised and hence had no jurisdiction at all to pass the impugned orders.

8.1 Ld. Counsel also relied on Ss.51 & 53 of the SEZ Act to urge that the provisions of this Act and the Rules there-under have the overriding effect over

the provisions contained in any other law, because of the non-obstante clause in the said section. In this regard, reliance is placed on the following decisions/orders:-

- i. M/s. Canon India Pvt. Ltd. Vs. Commissioner of customs (SC),
- ii. Commissioner of customs Kandla Vs. M/s. Agarwal Metals & Alloys (SC),
- iii. Essar Steel Ltd. Vs. UOI (Guj.)
- iv. Bharti J Gandhi Vs. UOI [2010(257) ELT 168 (Guj.)]
- v. Meenakshi International Vs. CC(I&G), Delhi [Final Order dt. 16/11/2016 in Customs appeal No.175/2011]
- vi. Charisma Jewellery Pvt. Ltd. Vs. CC(Airport) [2016(340) ELT 221 (Tri. Mumbai)]
- vii. Sangam International Vs. CC, Air Cargo(Export), New Delhi [Final Order No.53585-53590/2017 dt. 15/05/2017]
- viii. Bajirao Ghosalkar vs. CC(CSI, Airport) [2018(363) ELT 523 (Tri. Mumbai)]

- ix. Kishan Lal Jewels Pvt. Ltd. Vs. CC, Noida [Order in Cusoms misc. application No.70492/2019 dt 28/11/2019]
- x. Chetan Mayach Vs. CC (Prev.), Jaipur [2021(376) ELT 732 (Tri. Del.)]
- xi. Yakub Ebrahim Yuseph Vs. CC, Mumbai [2011(263) ELT 685 (Tri. Mum.).

8.2. The representative for the Revenue, on the other hand, seriously opposed the preliminary objection and placed reliance on the decision of the very same Gujarat High court in the case of UOI Vs. Oswal Agricomm Pvt. Ltd. [2011-TIOL-733-AHM-CUS], which has been considered by the coordinate Delhi Bench of CESTAT in the case of Shri Jatin Arora Vs. CC, New Delhi [2017(11) TMI 1119 – CESTAT, New Delhi] to hold that the customs authorities do have jurisdiction. It was countered by the Ld. Counsel for appellants that revenue has not accepted the above decision in Oswal Agricomm supra as they have preferred SLP which is pending.

8.3. It is useful here to refer to the findings of various benches on this issue. In Meenakshi's case (supra), the learned principal bench of CESTAT has observed and ruled as under :

"....6. After considering the facts of the case and the submissions of both sides, we find that during the relevant period, the customs did not have necessary jurisdiction within the territory of Special Economic Zone. Hon'ble Gujarat High Court in

Bharat J. Gandhi Vs. Union of India – 2010 (257) ELT 168 (Guj.) and Morgan Tectronics Ltd. Vs. CC, New Delhi – 2005 (316) ELT 276 (Tri. Del.) = 2014-TIOL-3113-CESTAT-DEL

make the matter clear. CESTAT, Delhi in the case of Morgan Tectronics (supra) has inter-alia in para 8 of its decision observed as under:

"8. Moreover, in terms of the Section 53(1) of the SEZ Act, 2005, the SEZ is deemed to be territory outside the Customs Territory of India, and the goods imported were meant for the unit in SEZ Noida. In our view, the Commissioner of Customs, Air Cargo, New

Customs House, New Delhi had no jurisdiction to confiscate these goods and impose penalty on the appellant and it is only the Joint/Dy. Commissioner/Asst. Commissioner of Customs, in Noida SEZ Unit, who had the jurisdiction to take necessary action. For this reason also, the impugned order are not sustainable.

6.1 Hon'ble Gujarat High Court in the case of Bharat J. Gandhi (supra) has inter-alia observed in its para 6 and 7 as under:

6 after SEZ Act, 2005 coming into force wherein specific authorities are provided. The court is of the opinion that the Customs authorities seems to have rendered functus officio so far as the matter pertaining to the conduct of a unit situated in SEZ is concerned.

7. In view of the decision of the Hon'ble Apex Court in the matter of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai (supra) until the authority issuing show cause notice is able to satisfy the court about its 'locus standi' and its jurisdiction, authority cannot be allowed to usurp the power to issue show

cause notice. Otherwise, the entire object and purpose of establishment of Special Economic Zone will stand frustrated”.

7. Considering the observations of Hon’ble Gujarat High Court and CESTAT quoted above, we find that customs did not have jurisdiction within Special Economic Zone established under SEZ scheme by the Ministry of Commerce, Government of India and present proceedings initiated by the customs were beyond jurisdiction. Therefore, impugned order is without proper authority of law and is hereby set-aside. Appeal is allowed with consequential relief to the appellant.”

[Emphasized in italics by us]

8.4. It is equally relevant here, to also understand the analysis drawn by Ld. Mumbai bench of CESTAT in the case of Charisma Jewellery (supra). We may even have to say that the analysis as to SEZ Act vis-à-vis customs authorities have been very subtly brought about in the order. In the case of Oswal Agricom (supra), however, the

Hon'ble High Court has examined the issue under writ jurisdiction. We also find that the following ratio laid down by the bench in Charisma Jewellery (supra), are worth reproducing:

“.....

10. *The appellant-company operates as a functional unit in a special economic zone; its approval, imports and procurement, utilisation thereof and removal for export or domestic consumption is also statutorily established. Likewise, the exemptions and charging of Duty are also unambiguously part and parcel of the special economic zones Act 2005. This statute came into force on 10th February, 2006 and, in doing so, replaced the Framework provided, for about twenty months, under the Customs Act, 1962 supported by exemption notifications under Central Excise Act, 1944. This scheme had been subsisting for long under the Foreign Trade Policy with supporting notifications under Customs Act, 1962 and Central Excise Act, 1944. All that changed with the notification of the*

Special Economic Zones Act, 2005 and with section 51 specifying :

‘51(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any other law than this Act.

With this it is unambiguously clear that a proceeding under the Customs Act, 1962 in relation to a unit or developer in a Special Economic Zone will fail owing to lack of jurisdiction. More so, when section 53 states

53(1) A Special Economic Zone shall, on and from the appointed day be Deemed to be territory outside the customs territory of India for the purposes of undertaking the authorised operations.

Authorized operations under the special economic zones Act, 2005 are the activities permitted to a developer by the Board of Approvals or those permitted to units by the Approval Committee. For units, the activities revolve around manufacture of goods or rendering of service. As the manufactures of gold products are authorised operations of the

appellant-unit, Section 53 would exclude the jurisdiction of the Customs Act, 1962.

11.....

12. Notwithstanding the above conclusions on the jurisdictional competence of the original authority, it is also seen that the proceedings have invoked Section 111 and Section 112 of the Customs Act, 1962. Jurisdiction is not merely territorial but also has to be in the context of the scope of the statute which is sought to be invoked. Sections 111 and 112 can, undoubtedly, be invoked where laws other than Customs Act, 1962 have been contravened but only in relation to imports. The definition of 'import' under section 2(23) of the Customs Act, 1962 is restricted to 'with its grammatical variations and cognate expressions, means bringing into India from a place outside India.' Notwithstanding the deemed status of being outside the Customs territory, zones are very much within the territory of India and the bringing out of goods from a zone fails to meet the definition of 'import' under Customs Act, 1962 and consequently fails the test of invoking the provisions of Sections 111

and 112. Even if the goods are subject to duty, Section 12 of the Customs Act, 1962 is not applicable owing to the definition of 'import'; the charging section is Section 26 of Special Economic Zones Act, 2005 which is outside the scope of invoking by the original authority. Colloquial comprehension of usage of export or import in relation to movement of goods to and from zones cannot substitute for the statutory definitions. Recourse to penal provisions without clear understanding of legalities is the surest mode of reverting to arbitrariness and lawlessness that preceded the dawn of Civilization.

13. Question that, then, begs an answer is whether alleged mystics of the appellants would have to be tolerated. That does not have to be so; the Special Economic Zones Act, 2005 allows duty free consumption of inputs and capital goods subject to conditions and these conditions are enshrined in the Special Economic Zones Rules, 2006. The activities of the units in the zones are also subject to review of annual performance by the legally constituted

Approval Committee. It would be well-nigh impossible for the units to remove finished products or inputs without detection at the time of such annual review. And shortage or failure to account for inputs is visited by recovery of duty and other penal action in accordance with the Special Economic Zones Act, 2005. There are adequate safeguards in that Act without the need to indulge in misadventure under the Customs Act, 1962 that does not extend to special economic zones. There are also provisions for action in the event of illicit removal by units. The notice issued by the Development Commissioner SEEPZ Special Economic Zone is testimony to it; proceedings thereon will suffice to safeguard the economic integrity of the nation.

....”

[Emphasized in italics by us]

8.5. The above two speaking orders have been subsequently, consistently followed in Sangam International (supra), Kishan Lal Jewels (supra), and Chetan Mayach (supra), to name a few.

9. *Per contra*, Revenue has relied on a decision of the Hon'ble Gujarat High Court in *Oswal Agricom* (supra) wherein the questions that were required to be determined in the case as notified at paragraph 18 of the said decision are:

1. *whether the customs authorities have the jurisdiction to issue any notice or to take any penal action under Section 111, 113 and 114, read with section 124 of the Customs Act, 1962 against any unit situated within Special Economic Zone.*

2. *Whether the report submitted by the customs house laboratory Kandla will prevail over the report submitted by the central Institute of plastic Engineering and Technology Ahmedabad and Chennai.*

9.1 The Hon'ble court has, after considering the pleas urged, observed as under:

“.....

32. *We have noticed that except the act or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992, no other offence including*

the offence if any committed under the Customs Act or any other Central Act have been declared as “notified offence” under sub-section (1) of Section 21. Similarly, no other officer or agency has been declared as “Enforcement officer” or “Agency” under sub-section (2) of Section 21 of the SEZ Act, 2005 for the purpose of the Customs Act or any other Central Act.

33.

34. But section 53 being limited to that extent of ‘authorised officer’, who was earlier empowered to perform certain jobs and chapter XA, the power of the customs authorities under the Customs Act, including the power to confiscate and imports penalty under section 111 to 114, as enumerated in Chapter XIV of the Customs Act, is not taken away.

35. Thus, we hold that the competent authorities under the Customs Act are still empowered to confiscate any goods under Sections 111 and 112 and impose penalty under Sections 113 and 114 in appropriate cases, even with regard to the units situated within the Special Economic Zone. The

competent authorities are also empowered to take penal action under any other Central Act if such violation is found to have been committed by any or other unit of SEZ including the writ petitioners, with regard to which no notification has been issued either under sub-section (1) or sub-section (2) of Section 21 or sub-section (1) or sub-section (2) of section 22 of the SEZ Act, 2005.....”.

9.2 The above ratio was followed by the CESTAT bench at New Delhi in the case of **Jatin Arora (supra)**.

10. In the backdrop of the above discussions, the primary question under consideration is, whether the authorities under the Customs Act enjoy jurisdiction over SEZ units. This question has, as will be noted from the cited precedent, troubled many a judge. In the cases of Meenakshi International, Charisma Jewellery, Sangam International, Bajirao Ghosalkar, Kishan Lal Jewels, Chetan Mayach and Morgan Techtronics, either co-ordinate division benches or

single members of this Tribunal have consistently held that the authorities under the Customs Act do not enjoy such jurisdiction. The only discordant note has been struck by a Division Bench in Jatin Arora's case (supra).

10.1. However, in our opinion, we are not required to reconcile between these orders of this Tribunal as there is, already available to us, guidance from a High Court on this question. We are required, therefore, to reconcile between two decisions of the Hon'ble Gujarat High Court in Bharti Gandhi dated 07.12.2009 and Oswal Agricom dated 06.07.2010. Whereas Bharti Gandhi holds that authorities under the Customs Act do not enjoy jurisdiction over SEZ units, Oswal Agricom reaches the opposite conclusion, but without referring to its own earlier decision in Bharti's case. In any case and in our opinion, it is not for us to weigh the relative merits of the reasoning adopted by these two judgements, both being rendered by a High Court, to which we must defer.

10.2. How then must we pick between the two judgments of the Gujarat High Court? In this state of precedent, it is clear that there is some ambiguity in the provisions under consideration as interpreted in the above judgments. The only way for us to resolve the precedential confusion is to thus rely on the rule of interpretation that in a taxing statute, any ambiguity is to be resolved in favour of the assessee. We find support for this view in **CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 (SC)**, in the following words: “...*On the other hand, if two reasonable constructions of a taxing provision are possible that construction which favours the assessee must be adopted. This is a well accepted rule of construction by this Court in several of its decisions...*”.

10.3. It is thus clear that the Supreme Court has laid down the principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". Although this principle so laid down was in the context of penalty, and Their Lordships

specifically stated so in so many words, it has been consistently followed for the interpretation about the statutory provisions as well. In another Supreme Court judgment, *Petron Engg. Construction (P.) Ltd. v. CBDT* [1989] 175 ITR 523/[1988] 41 Taxman 294 the above principle of law has been reiterated by observing as follows:

" Counsel submits that when two interpretations are possible to be made, the interpretation which is favourable to the assessee should be adopted. In support of that contention, learned counsel has placed reliance upon a few decisions of this Court in *CIT v. Madho Prasad Jatia* (1976) 105 ITR 179 (SC); *CIT v. Vegetable Products Ltd.* (1973) 88 ITR 192 (SC) and *CIT v. Kulu Valley Transport Co. P. Ltd.* (1970) 77 ITR 518 (SC) :
.. The above principle of law is well-established and there is no doubt about that. "

10.4.1. In this context, we also have the benefit of the majority order in the case of *M/s. Reliance Industries Ltd. v. Commissioner of Central Excise, Rajkot*, reported in 2014 (311) E.L.T.401 (Tri. –

Ahmd.), wherein on account of difference of opinion the matter was referred to a Third Member. In this order, six differences of opinion were referred to for the opinion of the Learned Third Member but only question No. 2 of these six is relevant insofar as the present appeals are concerned. The same reads as under:

“ *DIFFERENCE OF OPINION*

1.

2. *Whether Customs officer have jurisdiction to investigate the case and demand duty as held by the Member (Technical) or the issue is irrelevant and need not be considered as held by the Member (Judicial)....”*

10.4.2. The relevant observations of the Learned Third Member are reproduced below for the sake of convenience:

“88.5.1 *Before the creation of the SEZ Act, 2005, the working of Special Economic Zones was regulated by the provisions contained in Chapter XA of Customs*

Act, 1962. As per Notification No. S.O. 320(E), dated 14-3-2006, issued under Section 52(1) of SEZ Act, 2005, the provisions of Chapter XA of Customs Act, 1962 were made inapplicable to the working of the Special Economic Zones. There is, thus, no linking provision under the SEZ Act, 2005 making the provisions of Customs Act, 1962 applicable to the working of Special Economic Zones after 14-3-2006. Section 51 of SEZ Act, 2005 conveys that in the event of any inconsistency in the provision of any other law/instrument and the provisions of the SEZ Act, 2005 the provisions of SEZ Act, 2005 shall prevail. Under the above facts and circumstances, the issue raised by the Special Counsel on behalf of the Revenue that by virtue of Instructions dated 3-8-2006 issued by Ministry of Commerce & Industry, Govt. of India, the provisions of the Customs Act, 1962 will be applicable in the present case will not be the correct interpretation of law. It is observed from Section 27 of the SEZ Act, 2005 read with the Second Schedule to the SEZ Act, that provisions of the Income-tax Act, 1961 have been made applicable to the SEZ Act with

certain modifications. Further, Section 57 of the SEZ Act, read with the Third Schedule of the SEZ Act, provide for applicability of certain other enactments to the SEZ Act, 2005 from a notified date with certain modifications. No provision exists in the SEZ Act, 2005 for making the provision of the Customs Act, 1962 applicable to the working of Special Economic Zones under the SEZ Act, 2005. In the absence of any clarification from the Commerce Ministry on Instructions dated 3-8-2006 it is possible that the said instructions dated 3-8-2006 are applicable only to the enactments specified in Section 57 of the SEZ Act, 2005 because under Notification No. S.O. 320(E), dated 14-3-2006, issued by the Commerce Ministry under the SEZ Act, 2005 the provision of the Customs Act, 1962 have been specifically notified to be not applicable.

88.5.2 Further, it is observed from the provisions contained in Section 30 of the SEZ Act, 2005, read with Rules 34, 50 and 51 of the SEZ Rules, 2006, that no duty is demandable even under the SEZ scheme of working from a SEZ developer if the goods brought

into a SEZ area are removal to DTA for ‘Authorized Operations’ as defined in Section 2(c) of the SEZ Act, 2005. Any Customs/Central Excise Duty, on account of improper utilization or removal of goods to DTA can be demanded and recovered under the SEZ Act, 2005 and SEZ Rules, 2006. In this regard, it has to be seen whether any removals from SEZ area to DTA, made by the appellants, was within the scope of the Authorized Operations under the SEZ Act, 2005 or the SEZ Rules, 2006 or was an activity of clandestine clearance with intention to defraud Government exchequer and without the knowledge of the appropriate authorities created under the SEZ Act, 2005. Further, this distinction with respect to clandestine removal is required to be made in the light of the ‘Statement of Objects and Reasons’ contained in the beginning of the SEZ Act, 2005 and is reproduced below :

“Statement of Objects and Reasons :-

.....

*.
. .
.*

88.5.3 *In order to protect the genuine Special Economic Zones and Units a consultation machinery has been provided between different agencies as per the provisions contained in Section 12(1)(c), read with the first proviso to Section 22 of the SEZ Act, 2005. Such provisions for mutual consultations are essential for the working environment intended for Special Economic Zones as one of the functions of SEZ Development Commissioner, under Section 12 of the SEZ Act, 2005, is to guide the entrepreneurs and to ensure taking up of suitable steps to promote export from SEZ and to monitor the performance of the Developer and the units in the SEZ. In the absence of any consultation done by the Revenue with the SEZ authorities and no action taken by the SEZ authorities under the SEZ Act, 2005 holding that operations undertaken by the appellants were not 'Authorized Operations', no duty and interest on the goods removed from SEZ to permitted storage area or additional area for construction, can be demanded from the appellants under Sections 28 and 28AB of Customs Act, 1962. As already opined, Notification*

No. S.O. 873(E), dated 4-6-2007 will relate back to 19-4-2006 when Notification No. S.O. 568(E) was issued. Accordingly, I agree with the interpretation taken by Member (Judicial).

89. Point No. 2 :-

“Whether Customs officer have jurisdiction to investigate the case and demand duty as held by Member (Technical) or the issue is irrelevant and need not be considered as held by Member (Judicial).”

89.1 The jurisdiction of a Customs officer to investigate and demand the duty from the appellants has to be examined in the light of the provisions contained in the SEZ Act, 2005, read with the SEZ Rules, 2006 and the provisions of the Customs Act, 1962.

*.
. .*

89.2 From the above observations, it can be safely concluded that for any removals of the goods from SEZ area to DTA or within SEZ area under

intimation/approval of the appropriate authorities, if not properly accounted for or not brought back within the stipulated period, adequate recovery machinery exists under the SEZ Act, 2005 and SEZ Rules, 2006 to recover Customs/Central Excise dues. Accordingly, for all the situations mentioned at (i), (ii) and (iii) of Para 89.1 above, if approvals have been given by the SEZ authorities, the operations have to be treated as 'Authorized Operations' defined in Section 2(c) of the SEZ Act, 2005. Even if some of the removals/operations undertaken by the appellants are not authorized, but done with the approval/under intimation to the SEZ authorities, then also the power to demand/recover duties of Customs/Central Excise from SEZ, is vested with the authorities created under the SEZ Act, 2005 and SEZ Rules, 2006. This view is also fortified by the 'Statements of Objects and Reasons' given before the beginning of the SEZ Act, 2005. The spirit of these Objects and Reasons and the SEZ Act, 2005 is that SEZ and its units are required to be delicately handled to achieve the desired goals and SEZ/units cannot be exposed in their day to day

working to the strict scrutiny of the Customs Act, 1962 wherein an act or omission may make the goods liable to confiscation under Section 111 and Section 113 and that act or omission as amounting to 'smuggling' as per Section 2(39) of Customs Act, 1962. Having said that, however, a situation as per situation (iv) of Para 89.1 above, may still exist where strict action against a defaulter could be required.

89.3In case, Revenue was of the opinion that action under the Customs Act, 1962 was required then there was a need for discussions between the appropriate authorities created under the SEZ Act, 2005 and the investigating agency as per the provisions contained in the First Proviso to Section 22, read with Section 51 of the SEZ Act, 2005. This aspect of consultation with the Development Commissioner/ Officer has also been touched upon by Member (Technical) in Para 80 of his reasoning that such removals could have been regularized by Development Officer and that Customs officers could have waited before proceeding further. In the absence of any approval taken by investigating agency under

Section 22 and due to the fact that all operations undertaken by the appellants was after approvals and intimations to the appropriate authorities under the SEZ Act, Customs Officers had no jurisdiction to investigate this case and demand duty under Customs Act, 1962 when the entire proceedings relate back to 19-4-2006.....”

10.5. From the above well founded orders/decisions, we have to accept that the benefit of the interpretations, drawn consistently by various Benches, are in favour of the tax payer/ appellants herein, in these batch of cases, including the decision of the Hon’ble Gujarat High Court in Bharti Gandhi’s case (supra) which, both parties before us agree, has attained finality.

10.6 On this score alone, all the appeals should succeed and hence, we set aside the impugned order and the demands and penalties raised therein, against all the appellants before us. Admittedly, there is a permission letter placed on record permitting the appellant in Customs Appeal No.

21358 of 2016 viz. M/s. Ashwin Gold Pvt. Ltd. for outsourcing 50 kgs. of gold to one of its units in DTA. The alleged difference is of about 49 kgs. Hence, if telescoping of the above 50 kgs. is given, then there may not be any shortage. But, the Adjudicating Authority has ignored this aspect completely, which appears to be incorrect. But however, since we are satisfied that the Customs authorities lacked jurisdiction, we do not propose to enter into the merit or otherwise of other additions/demands raised on all the appellants, including penalties as well, as the same is inconsequential. The necessary and obvious fall out is that appeals need to be allowed with consequential relief/s, if any wherever applicable, as per law.

(Pronounced in open court on **17/02/2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

Raja/SD...