

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Customs Appeal No. 52084 of 2019

[Arising out of Order-in-Original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019 passed by the Commissioner of Customs, ACC Export, New Custom House, New Delhi]

Commissioner of Customs

ACC Export Commissionerate,
New Custom House,
New Delhi – 110 037.

...Appellant

Versus

M/s Shri Ashwini Kumar Alias Amanullah

3-B, 70/02, Shan-e-ilahi Apartment,
Zakir Nagar (Jamia Nagar),
New Friends Colony,
New Delhi – 110 025.

...Respondent

WITH

Customs Appeal No. 52121 of 2019

[Arising out of Order-in-Original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019 passed by the Commissioner of Customs, Air Cargo (Export), New Custom House, New Delhi]

Amanullah

3-B, 70/02, Shan-e-ilahi Apartment,
Zakir Nagar (Jamia Nagar),
New Friends Colony,
New Delhi – 110 025.

...Appellant

Versus

Commissioner of Customs

Air Cargo (Export),
New Custom House,
New Delhi – 110 037.

...Respondent

APPEARANCE:

Shri Sunil Kumar, Authorised Representative for the Department
Shri V.S. Negi, Advocate for the respondent/appellant.

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 19.10.2020

DATE OF DECISION: 10.11.2020

FINAL ORDER No. 51622-51623/2020

P.V. SUBBA RAO

Customs appeal No. C/52121 of 2019–CUS has been filed by Shri Ashwini Kumar alias Amanullah and Customs appeal No. C/52084 of 2019 has been filed by the Revenue assailing the same impugned order-in-original No. SKS/COMMR/ACE/06/2019 dated 10/05/2019. Hence both these appeals are being disposed of together.

2. Heard both sides and perused the records.

3. The facts of the case after filtering out unnecessary details are that a consignment was imported by Shri Ashwini Kumar alias Amanullah under Airway Bill no. 811609150526 through FedEx Courier at IGI Airport. As per the information provided by him a Courier bill of entry was filed by M/s FedEx declaring the imported goods as uninterrupted power supply systems (UPS) for computers. The consignment was opened and examined by customs officers and they found six gold bars weighing 6 kg concealed in the UPS. Another consignment was also imported by Shri Ashwini kumar alias Amanullah through the same courier under Airway bill no. 811609150515 declaring the goods as UPS which on opening was found to contain another 6 bars of gold weighing 6 kg. In all, 12 kg of gold was recovered from the UPS in the two consignments both of which were seized by the officers after following due procedures. The courier company M/s FedEx cooperated with the investigations and helped the officers locate the importer. The consignment was imported in the name of Shri Ashwini Kumar which was a pseudonym of Shri Amanullah as it came to light during investigation.

4. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorised by the RBI or by others

authorised by DGFT and to some extent by passengers. Gold cannot be imported through courier at all as per Regulation 2(2) (iv) of Courier Imports and Exports (Clearance) Regulations, 1998. Thus, the undisputed facts are that the gold was imported improperly:

1. Through courier which is not permissible;
 2. By Shri Amanullah who had no authorisation to import gold;
 3. Concealing it in UPS and without declaring that it was being imported; and
 4. Under a false name.
5. After recording statements and completing the investigations, a show cause notice was issued on 07/02/2018 by the Commissioner of Customs to Shri Amanullah as well as to the courier company M/s FedEx. Shri Amanullah was called upon to explain as to why :

- a) the impugned seized Gold Bars weighing 12000 gms valued at Rs. 3,56,64,000/- (Three Crore Fifty Six Lakh Sixty Four Thousand only) found to be concealed in the consignments covered under AWB no. 811609150526 and 811609150515 imported by Shri Amanullah alias Ashwini Kumar, 30B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi – 110 025 should not be confiscated under Section 111 of the Customs Act, 1962.
 - b) the eight UPS and the packing material used to conceal the Gold Bars weighing 12000 grams should not be confiscated under Section 118 and Section 119 of the Customs Act, 1962.
 - c) penalty should not be imposed on the importer Shri Amanullah alias Ashwini Kumar under Section 112(a), 114A and Section 114AA of the Customs Act, 1962."
6. M/s FedEx, the courier, was asked as to why penalty should not be imposed upon them under Section 117 of the Customs Act for their negligence.
7. Paragraph 25 of this show cause notice indicated that it was being issued under Section 28 and Section 124 of the Customs Act, 1962 without prejudice to any other action that may be taken against

any person whether mentioned therein or not under the provisions of the Customs Act, 1962 or any other law for the time being in force. Section 28 of the Customs Act is the provision for demanding duty which was has not been levied or not paid or short paid or short levied or erroneously refunded. Although Section 28 was invoked, the amount of duty was not quantified in the show cause notice. Section 124 of the Customs Act mandates that a show cause notice must be issued before ordering confiscation of any goods or imposing any penalty on any person. Thus, the show cause notice viewed the case as one not only of import in violation of law requiring confiscation of the goods but also one of evasion of duty.

8. Section 114A prescribes penalty for non-levy, short levy, non payment, short payment or erroneous refund arising out of a fraud, collusion, wilful misstatement or suppression of facts. Section 114AA provides for penalty for use of incorrect or false information in connection with the business under the Act.

9. Section 111 provides for confiscation of goods which have been improperly imported under various clauses. Section 112 provides for penalty for improper importation of goods which rendered them liable for confiscation under section 111. Section 125 of the Act provides for redemption of the confiscated goods on payment of fine.

10. Penalties under Section 114A (for non levy short levy, non-payment, short payment of duty due to certain reasons) and under Section 112 (for doing acts which render the goods liable to confiscation) are mutually exclusive. If a penalty is imposed under Section 114A, a penalty cannot also be imposed simultaneously under Section 112. Thus, if the importer mis-declared the goods resulting in short payment of duty, for instance, he will be liable for penalty under Section 114A. The goods so imported will also be liable for confiscation

under Section 111 which will render the importer liable to penalty under Section 112. However, if a penalty is imposed under Section 114A, no penalty can also be imposed under Section 112.

11. The Commissioner, in the impugned order, held as follows:

“(i) I confiscate the impugned mis-declared goods namely “12000 gms. of gold” seized vide Panchnama dated 09-10/08/2017 covered under AWB No. 811609150526 and 811609150515 having the market value of Rs. 3,56,64,000/- under the provisions of Section 111 (i), (l) & (m) of the Customs Act, 1962. I order redemption of the impugned goods on payment of Rs. 50 lakhs (Rupees Fifty Lakhs only).

(ii) I order confiscation of the computer UPS and the packing material used to conceal the “12000 gms. of gold” under Section 118 and Section 119 of the Customs Act, 1962, however, I give an option to the importer Shri Ashwini Kumar Alias Amanullah to redeem the said confiscated goods i.e. eight UPS and the packing material on payment of redemption fine of Rs. 50,000/- (Rupees Fifty Thousand only) under Section 125 of the Customs Act, 1962, alongwith payment of appropriate Customs duty under Section 28 of the Customs Act, 1962 as well as applicable interest under Section 28AA of the Customs Act, 1962.

(iii) I do not impose a penalty on Shri Amanullah alias Ashwini Kumar, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi – 110 025 under Section 112(a) of the Customs Act, 1962.

(iv) I impose a penalty of Rs. 1,35,70,152/- (Rupees One Crore Thirty Five Lakhs and Seventy Thousand One Hundred Fifty Two only) upon Shri Ashwini Kumar alias Amanullah, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi – 110 025 under Section 114A of the Customs Act, 1962 for the reasons, discussed supra.

(v) I impose a penalty of Rs. 1,00,00,000/- (Rupees One Crore only) upon Shri Amanullah alias Ashwini Kumar, 3-B, 70/02, Shan-e-ilahi Apartment, Zakir Nagar (Jamia Nagar), New Friends Colony, New Delhi – 110 025 under Section 114AA of the Customs Act, 1962 considering the facts obtaining in the case.

(vi) I do not impose any penalty upon M/s FedEx under Section 117 of the Customs Act, 1962 for the reasons, discussed supra.”

12. Neither side is aggrieved by the fact that the Commissioner has not imposed any penalty on the courier M/s FedEx under Section 117 of the Customs Act. Revenue is aggrieved by the fact that the Commissioner has confiscated the goods only under Section 111 (i), (l) & (m) and he should also have confiscated the goods under Section 111(d). Revenue is also aggrieved that the Commissioner allowed redemption of the gold under Section 125 after confiscation. It is their case that redemption should not have been allowed since gold is a prohibited good, it should have been absolutely confiscated. It is also the case of the Revenue that the Commissioner has not determined the duty payable under Section 28 and applicable interest in the impugned order and therefore the condition precedent for imposing a penalty under Section 114A has not been fulfilled. Therefore, he has wrongly imposed penalty under Section 114A. He should have instead imposed penalty under Section 112 of the Customs Act for improperly importing goods into India which rendered them liable for confiscation under Section 111. **Thus, Revenue’s prayer is for absolute confiscation of the gold (without an option of redemption) invoking an additional clause of section 111(d) and setting aside the penalty under Section 114A of the Customs Act on Shri Amanullah and imposition of penalty on him under Section 112.**

13. In Shri Amanullah's appeal, the following prayers have been made:

- (a) hold that the impugned goods are classifiable under Customs Tariff Heading 7108120071 and applicable duty on the goods payable is Rs. 48,53,514/-
- (b) hold that the penalty payable under Section 114A is Rs. 48,53,514/- which is equal to duty.
- (c) hold that once penalty is imposed under Section 114A no penalty should be imposed under Section 114AA
- (d) allow him to exercise the option of payment of fine and penalty under Section 28(5) and 28(6) of the Act.
- (e) alternatively quash the impugned order and remand the matter for re-adjudication including determination of the duty payable and penalty imposable.

14. Shri Amanullah had also filed Writ Petition (C) 8149/2019 in the Hon'ble High Court of Delhi mainly on the ground that the amount of Customs duty has not been prescribed in the impugned order-in-original and therefore no penalty can be imposed under Section 114A. The Hon'ble High Court was pleased to dispose of this writ petition on 29/07/2017 as follows:

"We have perused of order-in-original dated 10/05/2017 passed by the Commissioner of Customs (Air Cargo Custom, New Delhi). We see no reason to entertain this writ-petition mainly with the following reasons :

- (a) the value of the goods narrated on more than one occasion in the order-in-original and the rate of duty is ad valorem. Hence, the customs duty can be arrived at without going into, any more details;*
- (b) the order-in-original is an appealable order*

As efficacious alternative remedy is available to the petitioner, we find no reason to entertain this writ-petition. Hence, the same is hereby dismissed."

15. Learned Departmental Representative vehemently argued that gold is a prohibited good in terms of Section 2(33) of the Customs Act,

1962 and therefore it should have been absolutely confiscated without giving an option of redemption under Section 125 of the Act. He relies on the following case laws to assert that the gold bars which were imported in violation of the restrictions on import are prohibited goods in terms of section 2(33) of the Customs Act, 1962.

- (a) Bargavraj Rmaesh Kumar Mehtra [2018 (361) ELT (260) Guj]
- (b) Om Prakash Bhatiya [2003 (155) ELT 423 (SC)]
- (c) Sheikh Mod Omer [1983(13)ELT 1439 (SC)]

16. The relevant sections read as follows:

Section 2(33)

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with"

Section 125

Option to pay fine in lieu of confiscation (1) Whenever confiscation of any goods is authorised 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:**

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply:

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or

the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

17. Learned Departmental Representative argued that since import of gold is prohibited under the Foreign Trade (Development and Regulation) Act, 1992 except by banks authorized by Reserve Bank of India or those organization who have been permitted by DGFT and Shri Amanullah is neither a bank nor has been permitted by DGFT to import gold, the imported gold squarely falls under the category of prohibited goods. Learned Departmental Representative further argued that the mode of import of gold was also clearly improper. Courier Imports and Exports (Clearance) Regulations, 1998 expressly prohibit import of gold through couriers. Had he declared the imported goods as gold, the courier agency could not have filed a bill of entry at all. Shri Amanullah concealed the gold bars in UPS and declared to the courier company that he was importing UPS. Accordingly, the courier filed the bill of entry based on his wrong declaration. Further, he concealed his real identity and filed the papers in fictitious name of Ashwini Kumar. Only detailed investigation with cooperation from the courier agency revealed the identity of Shri Amanullah is the person who had clandestinely imported gold bars without declaring them as such. None of these facts are in dispute. Therefore, the Commissioner should have also confiscated the goods under Section 111(d) also as the gold was imported contrary to the prohibition imposed under Foreign Trade Development and Regulation Act. He should have also imposed penalty under Section 112 of the Customs Act. He submits that the penalties under Section 112 and 114A are mutually exclusive by virtue of the fifth proviso to Section 114A which reads as follows :-

"Provided also that where any penalty has been levied under this Section, no penalty shall be levied under Section 112 or Section 114".

18. Learned Commissioner has imposed a penalty under Section 114A instead of imposing a penalty under Section 112. He submits that an essential condition for imposing a penalty under Section 114A is the determination of duty under Section 28 which has not been done in this case. He also argued that although Section 125 of the Customs Act empowers the officer adjudicating the case to give an option to the owner to pay fine in lieu of confiscation, this was not the fit case to invoke the clause because gold is a prohibited good under Section 2(33). He also argued that the decision of the adjudicating authority to allow redemption of confiscated goods on payment of fine was incorrect as Shri Amanullah had not claimed ownership of the gold and confiscated goods can be released on redemption only to the owner.

19. Having considered the rival submissions, we find that the following issues need to be decided:

- i. whether the Commissioner has erred in not confiscating the gold bars under Section 111(d) also in addition to Section 111 (i) (l) and (m) as asserted by the Revenue;
- ii. whether the Commissioner has erred in not imposing penalty under Section 112 as asserted by the Revenue;
- iii. whether the Commissioner has erred in imposing penalty under Section 114A without determining the amount of duty payable under Section 28 as asserted by both sides;
- iv. whether the Commissioner has committed an error in allowing the redemption of the confiscated gold under Section 125 on payment of redemption fine and applicable duty since gold is a prohibited item for import as per Section 2(33);
- v. whether the Commissioner has erred in allowing redemption of gold to Shri Amanullah in the absence of a claim of ownership as alleged by the Department;

- vi. Whether Shri Amanullah is entitled to the benefit of Section 28 (5) and 28 (6) as claimed by him; and
- vii. whether commissioner has erred in imposing penalty under both Section 114A and 114AA as asserted by Shri Amanulla.

20. Section 111(d) provides for confiscation of ***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.*** "Import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India [Section 2(23)]. Thus, bringing any goods into India is an import whether through legal channels or by smuggling. "Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported, have been complied with [Section 2(33)]. Thus, it includes not only goods whose import is absolutely prohibited but also those whose import is 'restricted' subject to some conditions being fulfilled if such conditions are not fulfilled. It is undisputed that as per the Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade Policy applicable during the period, only banks authorized by RBI, international passengers to a limited extent in baggage and others authorised by DGFT could have imported gold. Shri Amanullah did not fall under any of these categories and import of gold by him was prohibited and therefore the gold bars were prohibited goods in terms of section 2(33). Improperly imported goods are liable for confiscation under Section 111 which reads as follows:

SECTION 111. Confiscation of improperly imported goods, etc. - *The following goods brought from a place*

outside India shall be liable to confiscation: -

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;
- (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) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (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;**
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance;
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an 1[arrival manifest or import manifest] or import report which are not so mentioned;
- (g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;
- (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;**
- (j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;
- (k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;
- (l) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;**
- (m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment,**

with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

(n) any dutiable or prohibited goods transited with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;
(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

21. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import is a prohibited good in terms of Section 2(33) and hence it was also liable for confiscation under Section 111(d) of the Customs Act as asserted by the Revenue. It is undisputed that Section 111 (i) (l) and (m) are also applicable in this case as the gold was found concealed in the package and it was not included in the declaration and the goods which were declared namely UPS do not correspond to goods which were imported namely UPS with gold bars inside them. Therefore, the smuggled gold bars are liable for confiscation under Section 111 (d) also although it will not make material difference because the gold was anyway confiscated under a same section invoking three other clauses.

22. Therefore, a penalty could have been imposed on Shri Amaanullah under Section 112. This section reads as follows:

112. Penalty for improper importation of goods, etc. —Any person,—

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(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,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;

(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

23. A penalty has been imposed in the impugned order under Section 114A which reads as follows:

114A. Penalty for short-levy or non-levy of duty in certain cases.—Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon under section 28AB, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty or interest, as the case may be, so determined

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the

amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AB, and twenty-five per cent. of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

24. Thus, a penalty under Section 112 cannot be imposed if a penalty is imposed under Section 114A. Both sides argued that section 114A cannot be applied without determining the amount of duty payable under Section 28. Section 114A provides for penalty or short levy or non-levy of duty in certain cases under Section 28. Section 28, which is section for demand of duty has been invoked in para 25 of the show cause notice but the amount of duty has not been quantified in it. The Show Cause Notice invoked both Section 114A and section 112. The argument of both the sides is that the amount of duty also should have been determined and specified in the order in original which without which no penalty could have been imposed under Section 114A. This was the exact argument taken by Shri Amanullah in the Writ Petition before the Hon'ble High Court of Delhi in this very case. The Hon'ble High Court of Delhi has dismissed the writ petition holding that the value of goods has been mentioned more than once in the order and the duty being on ad valorem basis it can easily be calculated. In view of

the decision of the Hon'ble High Court of Delhi, we find that not calculating the amount of duty payable in this case cannot vitiate the penalty under section 114A imposed by the Commissioner in the impugned order. Therefore, the penalty imposed under Section 114A is correct and calls for no interference. Consequently by virtue of the fifth proviso to Section 114A, no penalty can be imposed under Section 112. The Commissioner has correctly imposed penalty under Section 114A and consequently not imposed a penalty under section 112.

25. As far as redemption of the goods allowed by the Commissioner in the impugned order is concerned, Section 125 of the Act reads as follows :-

"SECTION 125. Option to pay fine in lieu of confiscation. — (1) *Whenever confiscation of any goods is authorised 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 :*

Provided *that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, no such fine shall be imposed:*

Provided *further that], without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.*

(2) *Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.*

(3) *Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.*

Explanation. — *For removal of doubts, it is hereby declared that in cases where an order under sub-section (1) has been passed before the date on which the Finance Bill, 2018 receives the assent of the President and no appeal is pending against such order as on that date, the option under said sub-section may be exercised within a period of one hundred and twenty days from the date on which such assent is received”.*

26. A plain reading of the above section shows that the Adjudicating Authority has no discretion in respect of goods which are not prohibited goods and he is bound to give an option of redemption. In case of prohibited goods, such as, the gold in this case, the Adjudicating Authority may allow redemption or may not allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. The reason for such discretion left to the adjudicating authority is evident. In case of prohibited goods, the nature of the goods and the nature of the prohibition vary and cases have to be dealt with exercising discretion. For instance, spurious drugs, arms, ammunition, food which does not meet the food safety standards, etc. are harmful to the society if released to the owner and they find their way into the market. On the other hand, there could be goods which, though prohibited, may not be harmful and releasing them to the owner on payment of fine may be an option. There is absolutely no bar in section 125 on the adjudicating authority releasing any goods whatsoever, which are prohibited or restricted on payment of redemption fine. **The adjudicating authority can allow redemption under section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.**

27. CBIC's instructions to departmental officers in para 9.4 of Chapter 30 of the Customs Manual 2018 also confirms this legal position. It reads as follows:

9. Adjudication of confiscations and penalties:

9.4 *Section 125 of the Customs Act, 1962 provides for option to pay fine in lieu of confiscation. The proviso to section 125 states that redemption fine shall not exceed the market price of the goods confiscated. This is the maximum penalty which can be levied. As per section 126 of the Customs Act, 1962 when any goods are confiscated, such goods shall thereupon vest in the Central Government. The officer adjudging confiscation shall take and hold possession of the confiscated goods.*

Whenever the confiscation of goods is authorized as per the sub-section (1) of section 125, of the Customs Act, 1962, the adjudicating authority MAY in the case of any goods where the importation or exportation is prohibited under this Act or under any other law for the time being in force, and SHALL, in the case any other goods, give to the owner of the goods (or from whose possession or custody such goods have been seized), an option to pay in lieu of confiscation such fine as the said officer / authority thinks fit.

28. Learned Departmental Representative argues that this was not a fit case for allowing redemption and the Learned Commissioner should not have exercised his discretion under section 125 to allow redemption even though there is no bar on he exercising this right. He relies on the following case laws in support:

- (a) Abdul Razak [2012 (275) ELT 300 (Ker)] affirmed in [2017 (350) ELT A 173 SC]
- (b) Samaynathan Murugesan [2009 (247) ELT 21 (Mad)] affirmed in [2010 (254) ELT A15 (SC)]

29. Countering these submissions, Learned Counsel for Shri Amanullah relies on the following case laws.

- (a) In RE: Ashok Kumar Verma [2019 (369) ELT 1677 (GOI)]
- (b) Atul Automations Pvt Ltd [2019 (365) ELT 46 (SC)]

30. We have examined all these case laws. In the case of Abdul Razak (supra), the appellant claimed that he has a right to redemption of the seized gold whose import was subject to restrictions which he did not fulfil. Hon'ble High Court of Kerala held that the appellant had no

such right and this position was upheld by the Hon'ble Supreme Court.

Relevant paragraphs of the judgment are as follows:

5. *Before us learned counsel for the appellant contended that Section 125 does not provide for confiscation of goods other than prohibited goods, and according to him, importers' conduct has no significance for considering whether the option exercised by importers to release the goods on payment of redemption fine and duty should be allowed or not. While the learned counsel for the appellant relied on the provisions of the Foreign Trade (Development and Regulation) Act, 1992, and Foreign Trade (Exemption from Application of Rules in Certain Cases) Order, 1993 to contend that gold is not a prohibited goods which can be released on payment of redemption fine and duty, learned Standing Counsel appearing for the Department relied on the judgment of the Supreme Court in Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in [2003 \(155\) E.L.T. 423](#), and contended that when import is permissible on satisfaction of certain conditions, the violation of the same will make the goods imported as prohibited goods within the meaning of Section 2(33) of the Act, which reads as follows :-*

"2(33) 'Prohibited goods' means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

6. *After hearing both sides and after considering the statutory provisions, we do not think the appellant, as a matter of right, can claim release of the goods on payment of redemption fine and duty. Even though gold as such is not a prohibited item and can be imported, such import is subject to lot of restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed. There is no need for us in this case to consider the conditions on which import is permissible and whether the conditions are satisfied because the appellant attempted to smuggle out the goods by concealing the same in emergency light, mixie, grinder and car horns etc. and hence the goods so brought is prohibitory goods as there is clear violation of the statutory provisions for the normal import of gold. Further, as per the statement given by the appellant under Section 108 of the Act, he is only a carrier i.e. professional smuggler smuggling goods on behalf of others for consideration. **We, therefore, do not find any merit in the appellant's case that he has the right to get the confiscated gold released on payment of redemption fine and duty under Section 125 of the Act.***

7. *This Writ Appeal is therefore dismissed.*

31. In the case of Samyanathan Murugesan (*supra*), the passenger imported gold in violation of the conditions and the gold was absolutely confiscated by the Additional Commissioner which decision was upheld by the Commissioner (Appeals). On appeal, CESTAT remanded the matter directing a reasonable opportunity be given to the passenger for redemption. This order of the CESTAT was challenged by the Revenue in the Hon'ble High Court of Madras who allowed Revenue's appeal and set aside the order of the CESTAT. The judgment of the Hon'ble High Court of Madras was upheld by the Hon'ble Apex Court.

32. In the case of Ashok Kumar Verma (*supra*) relied upon by the Learned Counsel, the issue pertained to baggage decided in a Revision Application by the Additional Secretary, Department of Revenue. Matters pertaining to personal baggage, rebate on exports and drawback do not fall in the purview of CESTAT [by proviso to section 129A (1) of the Customs Act] and no appeal against the order of Commissioner (Appeals) in such cases lies with the CESTAT. Instead, a revision application can be filed before the Government of India to decide such an application. The passenger in this case had not only not declared the gold but had ingeniously concealed the gold by converting it into a wire and stuffing it in the beading of the stroller bag. The gold was absolutely confiscated by the Commissioner (Appeals). Holding that the unusual method of concealment of the gold does not make a difference, GOI set aside the absolute confiscation of gold and allowed its redemption. Relevant portion of this order is as follows:

3. *From the revision application it is evident that the applicant does not dispute the Commissioner (Appeals)'s order regarding confiscation of the goods which were brought by him illegally from Dubai in violation of Customs Act and the Foreign Trade (Development and Regulation) Act, 1992 and his request is limited to a point that the confiscated gold may be released on payment of redemption fine and reasonable penalty.*

4. *Government has examined the matter and it is found that there is no dispute regarding the fact that the applicant had violated Section 77 of Customs Act, 1962 by not declaring gold bars to the Customs authorities on his arrival at Airport from Dubai. Accordingly, Commissioner (Appeals) has rightly upheld the Order-in-Original to the extent of confiscating the gold bars which were brought from Dubai with the intention to evade customs duty. However, the Commissioner (Appeals) has upheld Additional Commissioner's order of absolute confiscation of gold on the premise that the gold brought by the applicant had become prohibited when it was sought to be smuggled in by changing the form of gold into wire and by concealing the same in beading of his stroller bag. But he has not cited any legal provision under which the import of gold is expressly prohibited and has only stated that the applicant was not an eligible passenger to bring any quantity of gold as per Notification No. 12/2012-Cus. (N.T.), dated 17-3-2012 and thus an option for redemption of confiscated gold could not be given. But Government finds that the said notification is only a general exemption notification for several goods and gold is also one of many goods in respect of which concessional rate of duty is provided on fulfilment of condition Number 35. Thus, under this notification eligibility of the passenger is relevant only for determining the admissibility of concessional rate of duty and not for deciding the eligibility to import or not to import gold. The exemption from customs duty was never the issue in this case and it could not be given because the applicant did not declare the importation of gold at all and rather changed the form of gold into wire and by concealing the same in beading of his stroller bag with clear intention to evade customs duty. While the Government is fully convinced that unusual method of concealment of gold is a very relevant factor for determining the quantum of fine and penalty, it does not agree with the Commissioner (Appeals) that the gold had become prohibited only because of its unusual method of smuggling by changing the form of gold into wire and concealing the same in beading of his stroller bag even when the gold is not notified as prohibited goods under Section 11 of the Customs Act, 1962 or any other law. Prohibited goods is a distinct class of goods which can be notified by the Central Government only and the goods cannot be called as prohibited goods simply because it was brought by any person in violation of any legal provision with the intention to evade payment of customs duty. There is a clear difference between the prohibited goods and general regulatory restrictions imposed under the Customs Act or any other law with regard to importation of goods. While prohibited goods are to be notified with reference to specified goods only which are either not allowed at all or allowed to be imported on specified conditions only, regulatory restrictions with regard to importation of goods is generally applicable irrespective of the individual case like goods will not be imported without declaration to the Customs and without payment of duty leviable thereof, etc. Such restriction is*

clearly a general restriction/regulation, but it cannot be stated that the imported goods become prohibited goods if brought in contravention of such restriction. Apparently because such goods when imported in violation of specified legal provisions are also liable for confiscation under Section 111 of the Customs Act, 1962, the Apex Court in the case of *Om Prakash Bhatia v. Commissioner of Customs, Delhi*, [2003 \(155\) E.L.T. 423](#) (S.C.) has held that importation of such goods became prohibited in the event of contravention of legal provisions or conditions as such goods are also liable for confiscation under Section 111 of the Customs Act, 1962. If all the goods brought in India in contravention of any legal provision are also termed as prohibited goods, as envisaged in Section 11, Section 111(i) and Section 125 of Customs Act, then all such goods will become prohibited and other category of non-prohibited goods for which option of redemption is to be provided compulsorily under Section 125 of the Act will become redundant. Thus while any goods imported without payment of duty and in violation of any provision of the Customs Act is also certainly liable for confiscation under Section 111 of the Customs Act, but confiscated goods is not necessarily to be always prohibited goods. While there is no dispute in this case that the gold brought by the applicant from Dubai is liable for confiscation because he did not follow the proper procedure for import thereof in India and attempted to smuggle it without payment of customs duties, it is beyond any doubt that the gold is not a prohibited item under Customs Act. The Hon'ble Madras High Court, in its decision in the case of *T. Elavarasan v. CC (Airport), Chennai*, [2011 \(266\) E.L.T. 167](#) (Mad.), has held that gold is not a prohibited goods and a mandatory option is available to the owner of the goods to redeem the confiscated gold on payment of fine under Section 125 of Customs Act, 1962. Even the Hon'ble High Court of Andhra Pradesh in the case of *Shaikh Jamal Basha v. GOI*, 1997 (91) E.L.T. 1277 (A.P.), has also held that as per Rule 9 of Baggage Rules, 1979 read with Appendix-B, gold in any form other than ornament could be imported on payment of customs duty only and if the same was imported unauthorisedly the option to owner of the gold is to be given for redemption of the confiscated gold on payment of fine. **In fact the Commissioner (Appeals), Delhi and the Government of India have consistently held the same view in a large number of cases that gold is not prohibited goods as it is not specifically notified by the Government.** For example, the Commissioner (Appeals) in his Order-in-Appeal No. CC(A)Cus/D-I/Air/629/2016, dated 4-7-2016 in the case of *Mohd. Khalid Siddique* has clearly held that gold is not prohibited as it is not notified by the Government as prohibited goods. Therefore, the Commissioner (Appeals) has taken a totally different stand by upholding absolute confiscation of gold in this case. Accordingly the Commissioner (Appeals) should have provide an option to the applicant under Section 125 of the Customs Act, 1962 to redeem the confiscated goods on payment of customs duties, redemption fine and penalty and because it was not done so earlier, the

Government now allows the applicant to redeem the confiscated gold within 30 days from the date of issuance of this order on payment of customs duty, fine of Rs. 4,50,000/- and penalty of Rs. 1,75,000/- already imposed by the Additional Commissioner of Customs and upheld by the Commissioner (Appeals).

5. *Accordingly, the revision application is disposed of and the Commissioner (Appeals)'s order is modified in above terms.*

33. The Hon'ble Supreme Court in the case of Autul Automations Pvt Ltd. (supra) while deciding on the question of allowing redemption of imported used Multi-Functional Digital Copiers, drew a distinction between goods whose import is completely prohibited and those whose import is restricted and the restrictions are not met and allowed redemption of MFDs. Relevant paragraphs of this judgment are as follows:

2. *The respondents during October-November, 2016 imported certain consignments of Multi-Function Devices (Digital Photocopiers and Printers) (hereinafter referred to as "MFDs"). The Commissioner of Customs held that the imports were in violation of the Foreign Trade Policy framed under the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as the "Foreign Trade Act") and Rule 15(1)(2) of the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 (hereinafter referred to as "Waste Management Rules"). Redemption fine was imposed under Section 125 of the Customs Act, 1962 and the consignment released for re-export only. Penalty was also imposed under Section 112(a) along with penalty under Section 114AA of the Customs Act as also penalty was imposed on the Directors.*

3. *In appeal before the Tribunal, the respondents did not contest that the import was in violation of the Foreign Trade Policy having been made without the necessary prior authorisation. The Tribunal held that the MFDs did not constitute "waste" under Rule 3(1)(23) of the Waste Management Rules and had a utility life of 5 to 7 years, as certified by the Chartered Engineer. Release of the consignment was directed under Section 125 of the Customs Act as the respondents were held to have substantially complied with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j) except for the country of origin certificate. The Tribunal further noticed that earlier also, similar consignments of the respondent and others had been released at the Calcutta, Chennai and Cochin ports upon payment of redemption fine. The redemption*

fine was reduced as also the penalty under Section 112(a) of the Customs Act was reduced including that on the Director also. The penalty under Section 114AA was done away with.

4. *In the appeal preferred by the Revenue, the High Court held that the MFDs correctly fell in the category of "other wastes" under Rule 3(1)(23) of the Waste Management Rules read with Part B and Part D of Schedule III Item B1110 dealing with used Multi-Function Printer and Copying Machines. Adverting to the provisions of the Foreign Trade Act and the Foreign Trade Policy framed thereunder, it was held that the MFDs were not prohibited but restricted items for import. Section 11(8) and (9) of the Foreign Trade Act provided for confiscation and redemption of goods imported without authorisation upon payment of market value. The order for release of the goods was upheld subject to execution of a simple bond without sureties for 90% of the enhanced assessed value, with further liberty to the Director General of Foreign Trade (hereinafter referred to as "the DGFT"), along with directions.*

5. *Shri Maninder Singh, Learned Senior Counsel appearing for the appellant submitted that import of the MFDs without authorisation permit and in violation of the Foreign Trade Policy is not in dispute. The imported MFDs having been held to be "other wastes", documentation being incomplete under Part D of Schedule III of the Waste Management Rules, re-export was rightly ordered under Rule 15 of the Waste Management Rules while imposing redemption fine. Section 125 of the Customs Act could not have been relied upon, in the facts of the case, to hold that fine in lieu of confiscation would suffice for purpose of redemption permitting import. Even if the MFDs were a restricted and not prohibited item, absence of the necessary authorisation under the Foreign Trade Policy would give it the character of a prohibited item. The respondents had been habitual in the illegal import of similar consignments. Merely because on earlier occasions, similar consignments imported in violation of the law may have been released on payment of redemption fine, it did not vest a legal right in the respondent to claim similar relief always. The Customs authorities, in the facts of the case, cannot be said to have detained the consignment without justification.*

6. *Shri Mukul Rohatgi, Learned Senior Counsel appearing for the respondent submitted that MFDs were imported in October-November, 2016. The requirement of extended producer responsibility under the E-waste (Management) Rules, 2016 was deferred till 30-4-2017 by the Technical Committee under the Ministry of Environment and Forest. In any event, the respondent has obtained the same before release of the consignment. The question for disposal of the imported machine at this stage is premature as it has a utility life of 5 to 7 years. The consignment was not a prohibited but restricted item. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The discretionary power has to be tampered with*

reason and has to be read along with the Foreign Trade Act and the policy framed under the same. The Customs Department has consistently in the past been permitting the release of MFDs on levy of redemption fine. The discriminatory treatment with regard to the present consignment is unjustified. The DGFT had declined to issue authorization certificate. There was substantial compliance with the requirements of Rule 13 of the Waste Management Rules read with Schedule VIII Entry 4(j).

7. *We have considered the submissions on behalf of the parties. The MFDs were imported in October-November, 2016. They were detained by the customs authorities opining that the imports had been made in violation of the Foreign Trade Policy, 2015-2020 framed under Sections 3 and 5 of the Foreign Trade Act and the Wastes Management Rules.*

8. *Clause 2.01 of the Foreign Trade Policy provides for prohibition and restriction of imports and exports. The export or import of restricted goods can be made under Clause 2.08 only in accordance with an authorisation/permission to be obtained under Clause 2.11. Photocopier machines/Digital multifunction Print and Copying Machines are restricted items importable against authorisation under Clause 2.31. Indisputably, the respondents did not possess the necessary authorisation for their import. The Customs authorities therefore, prima facie cannot be said to be unjustified in detaining the consignment. Merely because earlier on more than one occasion, similar consignments of the respondent or others may have been cleared by the Customs authorities at the Calcutta, Chennai or Cochin ports on payment of redemption fine, cannot be a justification simpliciter to demand parity of treatment for the present consignment also. The defence that the DGFT had declined to issue such authorisation does not appeal to the Court.*

9. *Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993 provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made under Section 11 of the Customs Act also. Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist*

a fundamental distinction between what is prohibited and what is restricted. We therefore, find no error with the conclusion of the Tribunal affirmed by the High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the Customs authorities with fine under Section 112(a) of the Customs Act, 1962.

10. *The Central Government had permitted the import of used MFDs with utility for at least five years keeping in mind that they were not being manufactured in the country. The Chartered Engineer commissioned by the Customs authorities had certified that the MFDs were capable of utility for the next 5 to 7 years without any major repairs. Considering that at import they had utility, the High Court rightly classified them as "other wastes" under Rule 3(1)(23) of the Waste Management Rules, which reads as follows :-*

"Other wastes means wastes specified in Part B and Part D of Schedule III for import or export and includes all such waste generated indigenously within the country."

11. *Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule mentions used Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The respondents have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.*

12. *Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of "other wastes" shall be deemed illegal if it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly, the Customs Act does not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to authorisation. The High Court, therefore, rightly held that the MFDs having a utility period, the Extended Producer Responsibility would arise only after the utility period was over. In any event, the E-waste Rules, 2016 certificate had since been issued to the respondents by the Central Pollution Control Board before the goods have been cleared.*

13. *We therefore find no reason to interfere with the impugned orders. In the statutory scheme of the Foreign Trade Act as discussed, we further find no error in the penultimate direction to the respondents for deposit of bond without sureties for 90% of the enhanced valuation of the goods leaving it to the DGFT to decide whether confiscation needs to be ordered or release be granted on redemption at the market value, in which event the respondents shall be entitled to set off.*

14. *The appeals are dismissed.*

34. From Section 125, the Customs Manual, 2018 of the department and various case laws cited by both sides and discussed above, the following position is clear:

- (a) Allowing redemption of goods which are not prohibited is mandatory and the adjudicating authority has to allow it under Section 125.
- (b) Allowing redemption of goods whose import is prohibited is discretionary and the adjudicating authority may or may not allow it.
- (c) Import of gold is not absolutely prohibited but is restricted.
- (d) The owner or the person from who the goods are seized cannot claim as a matter of right that the prohibited goods must be allowed to be redeemed as held by Hon'ble High Court of Madras in the case of Samyanathan Murugesan and by Hon'ble High Court of Kerala in case of Abdul Razak. Both these judgments were upheld by the Hon'ble Supreme Court.
- (e) Although, as per Section 2(33) of the Customs Act, 'prohibited goods' includes restricted goods in respect of which the conditions have not been fulfilled, a distinction was drawn by the Government of India in the case of Ashok Kumar Verma (supra) and redemption was allowed of the gold which was smuggled by the appellant passenger ingeniously concealing it in the stroller of the bag. It has also been indicated in this order that Government of India has consistently held the view in many cases that gold is not prohibited but restricted and allowed redemption of confiscated gold.
- (f) The Apex Court has also drawn a distinction between goods whose import is absolutely prohibited and those whose import is restricted under the Foreign Trade (D&R) Act and redemption was allowed in the case of restricted goods.
- (g) Thus, while Section 125 allows the adjudicating authority the discretion to allow or not to allow redemption of prohibited goods. As far as gold, which is smuggled, is concerned, there appears to have been a gradual change in the approach of the Government. In the case of Ashok Kumar, Government of India allowed redemption of gold that was not only NOT Declared but ingeniously concealed in strolley bags. It has also been declared

in this Revision order that GOI had consistently held the view that smuggled gold can be redeemed.

35. The amount of redemption fine under section 125 cannot be higher than the market value of the goods but no minimum amount is prescribed. In this case market value of the goods is Rs. 3,56,64,000/- and a redemption fine of Rs. 50 lakhs has been imposed in the impugned order.

36. Thus, we find that not only can the gold which is concealed in the consignment and not declared be allowed redemption under Section 125, the Government of India has now been consistently taking such a view allowing redemption of even gold which is concealed. We find that the impugned order of the Commissioner is consistent with the stand of the Government of India. We also find the amount of redemption fine imposed is reasonable and the Commissioner has not exceeded his mandate in allowing redemption of the gold.

37. An argument has also been made by the Revenue that redemption can be allowed only to the owner of the goods and Shri Amanullah has not claimed ownership. This argument is untenable being contrary to the assertions of the Department in the show cause notice. If Shri Amanullah was not the owner of the goods and Shri Ashwini Kumar is a fictitious identity, the gold should have been confiscated as unclaimed gold. No penalty could have been imposed on Shri Amanullah. Investigation by the Department with the help from the courier agency has shown that Shri Amanullah was the importer of the gold and therefore the show cause notice was issued to him asking why the gold should not be confiscated. Therefore, we find no infirmity in allowing redemption of the gold to Shri Amanullah.

38. In Shri Amanullah's appeal, a prayer has been that this Tribunal shall determine the amount of duty payable. This is not necessary. The Hon'ble High Court of Delhi has already decided that the value of the goods has been mentioned in the impugned order more than once and the rate of duty is *ad valorem* and the amount of duty can easily be calculated which can be done by the officers as it is a simple case of arithmetic calculation. An appeal has also been made to allow the appellant benefit of the provisions of Section 28(5) and 28(6). On a specific query from the bench whether they had paid duty within the time mentioned under Section 28(5) and 28(6), learned Counsel answered in the negative. Therefore, we find no reason to pass any order on this count.

39. The last contention of Shri Amanullah in his appeal is that since penalty has been imposed under Section 114A, no penalty should be imposed under Section 114AA also upon them. We find that the ingredients of Section 114A and Section 114AA are different. Section 114A provides for non-levy of duty or short levy of duty due to certain reasons. There is no dispute that no duty was levied or paid on the imported gold concealed in the UPS by mis-declaring the nature of goods. Therefore, Section 114A has been correctly invoked in this case and a penalty has been imposed.

40. The penalty under Section 114AA is for use of false or incorrect materials in the transaction of any business for the purposes of the Act. The name of the importer as well as the nature of goods were misdeclared by Shri Amanullah based on which the courier company FedEx filed the Bill of Entry. Shri Amanullah also used false identity documents in the name of Shri Ashwini Kumar. All these are matters of record and not disputed.

41. Learned Counsel argued that they had not made any declaration directly before the customs officers but had only submitted wrong information to the courier agency who, in turn, have filed a wrong declaration before the customs officers in the form of an incorrect courier bill of entry. Therefore, they are not covered by section 114AA.

42. We do not find any force in this argument. The penalty is for knowingly or intentionally making signing, using or causing to be made signed or used any declaration statement or document in the assessment of any business for the purposes of the Act. The section does not say that it has to be made directly before the customs officers. In this case, the courier agency has no means of declaring the nature of goods or the name of the importer except on the basis of information and material provided by the importer. Shri Amanullah provided wrong information in the course of business under the Act. Therefore, his action is squarely covered by Section 114AA. The penalty imposed under Section 114AA and the penalty imposed under Section 114A are not mutually exclusive and penalty cannot be imposed simultaneously under both these sections.

43. In view of the above, we find:

- i. the gold bars should have been confiscated under Section 111(d) also in addition to Section 111 (i) (l) and (m) and we order so;
- ii. the Commissioner has correctly not imposed a penalty under Section 112 since he imposed a penalty under Section 114A and the two penalties are mutually exclusive;
- iii. the Commissioner has not erred in imposing penalty under Section 114A without determining the amount of duty payable under Section 28 as this issue has already been decided by the Hon'ble High Court of Delhi;
- iv. the Commissioner has allowed redemption of the confiscated gold under Section 125 on payment of redemption fine and applicable duty which is not only

permissible under Section 125 but is consistent with the current stand of the Government of India regarding smuggled gold;

- v. there is no force in the argument of the revenue that the gold should not have been released to Shri Amanullah in the absence of a claim of ownership because the show cause notice itself arises from the premise that Shri Amanullah is the importer and penalties have also been imposed on him;
- vi. Shri Amanullah is not entitled to the benefit of Section 28 (5) and 28 (6) as claimed by him because there is no evidence that he fulfilled the conditions for these sub-sections;
- vii. the commissioner has not erred in imposing penalty under both Section 114A and 114AA as both sections are independent of each other;

44. The impugned order is, accordingly, upheld except that confiscation of the imported goods should also be under Section 111 (d) in addition to Section 111 (i) (l) and (m). The appeal filed by the Revenue is allowed to this extent and rest of the prayers are rejected. The appeal filed by Shri Amanullah is rejected.

(Order pronounced in open court on 10/11/2020.)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**