21

TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/202 /2006-206, 529 /2006 - CU[DB]

Date **24/11/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :

1. MR. PRADEEP JAIN
2. MR. SANDEEP JAIN,
3. M/S. PANNALAL BANARASIDAS

54/1, PEEPAL WALIT KOTHI NAYAGANJ,
KANPUR. (U.P.)

M/S. PANNALAL BANARASIDAS

Appellant

Vs

COMMISSIONER OF CUSTOMS & CENTRAL EXCISE,
KANPUR

Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/498-503/ 2011 CU[DB]** dated 22.11.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
COMMISSIONER OF CUSTOMS & CENTRAL EXCISE,
117/7, SARVODYA NAGAR,
KANPUR

2. Adv. / Consult **MR.PRADEEP JAIN,ADVOCATE**
JAIN GLOBUS LAW FIRM,
370-371/2, IST FLOOR, SAHI HOSPITAL ROAD,
JANGPURA(BHOGAL), NEW DELHI.110014

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. MAHESH PRASAD KATTA,
E-41, SHIV BHOLE APPTS.,
P.NO.20, SECTOR-7, DWARKA,
NEW DELHI.

Assistant Registrar
(Customs Appeal Branch)

(*) Please see rest of the addresses at back.

M/S PIYUSH MARBLES PVT LTD
E-241, INDUSTRIAL AREA,
KISHANGARH, UTTAR PRADESH.

SH. ARVIND MISHRA
VILLAGE-RAWATPUR, TIKAULLI,
POST-SIKANDARPUR, DISTT.-UNNAO, U.P.

MR. K.K. ANAND,
A-5 BASEMENT, LAJPAT NAGAR-III,
NEW Delhi – 110 024

MR. PREM RANJAN, LGF – 6/33,
VIKRAM VIHAR, LAJPAT NAGAR-IV,
NEW DELHI – 110 024.

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Customs Appeal Nos. 202-206 & 529 of 2006

[Arising out of Order-in-Original No. 13/CUST/COMMR/ADJ/2005 dated 23.12.2005 passed by the Commissioner of Customs & Central Excise, Kanpur]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

---

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

---

M/s. Panna Lal Banarasi Das. Appellants
Shri Pradeep Jain
Shri Sandeep Jain
Shri Laxmikant Agnihotri
Shri Arvind Mishra
Shri Mahesh Prasad Katta

Vs.

CCE, Jaipur-II
Respondent

Appearance:
Shri K.K. Anand, Shri G.K. Sarkar and Shri Prem Ranjan, Advocates for the Appellants
Shri Sonal Bajaj, SDR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Mathew John, Member (Technical)

Date of Hearing : 31.05.2011
Date of decision : 22-11.2011

Final **ORAL ORDER NO**.C/498-503/11

Per Archna Wadhwa (for the Bench):

All the appeals are being disposed of by a common order as they arise out of the same impugned order passed by Commissioner of Customs, Kanpur vide which he has absolutely confiscated 36 gold biscuits of foreign origin assessed to be of total value of Rs.21,83,500.80, under Section 111(d) of Customs Act 1962. In addition penalties stand imposed on the following persons in terms of provisions of Section 112 (b)(i) of the Customs Act, 1962.

Name	Penalty
M/s. Panna Lal Banarasi Das	Rs.2 lakhs
Shri Pradeep Jain	Rs.1 lakhs
Shri Sandeep Jain	Rs.1 lakhs
Shri Arvind Mishra	Rs.50,000/-
Shri Laxmikant Agnihotri	Rs.50,000/-
Shri Mahesh Kumar Katta	Rs.1 lakh

2. As per facts on record, the officers of Customs and Central Excise Commissionerate, Kanpur kept surveillance on Kanpur railway station on 17.10.02. At about 11.15 hours, two persons

Shri Laxmikant Agrnihotri and Shri Arvind Mishra were intercepted by the officers and put to search. As a result 16 gold biscuits of foreign origin were recovered from the possession of Shri Arvind Mishra and 20 gold biscuits of foreign origin were recovered from the possession of Shri Laxmikant Agnihotri. To test the purity and country of origin of the said gold biscuits, the Government approved assayer Shri Gopal Das Agrawal was called, who after physically examining the gold biscuits opined that the same are of 24 caret purity and of Swiss origin. Inasmuch as the said two persons could not produce any documents showing the licit possession / import /purchase of recovered gold, the same were seized by the officers.

3. The statements of Shri Laxmikant Agnihotri and Shri Arvind Mishra recorded on 17.10.02 revealed that the said persons had brought the gold biscuits from Shri Mahesh Kumar Katta for and on behalf of M/s. Panna Lal Banarsi Das. They further deposed that Shri Pradeep Jain, partner of M/s. Panna Lal Banarsi Das had on 15.10.2002 handed over an amount of Rs.10.50 lakhs in cash to Shri Laxmikant Agnihotri and a sum of Rs.10.40 lakhs in cash to Shri Arvind Mishra to bring gold biscuits from Shri Mahesh Kumar Katta of Jaipur. They reached Jaipur on 16.10.02 and after purchasing the gold biscuits from Shri Mahesh Kumar Katta returned back to Kanpur on 17.10.02 when they were intercepted by the officers.

4. For post seizure investigations the officers visited the business premises of M/s. Panna Lal Banarsi Das on 17.10.02 and

resumed computer generated cash book for the period 1.10.02 to 15.10.02, ledger summary and monthly summary of cash book for the period April, 2002 to October, 2002 under a panchnama. Statements of Shri Sandeep Jain, ~~proprietor~~ partner of M/s. Panna Lal Banarasi Das was recorded admitting that on 9.10.2002, they had sent their employees to Jaipur to purchase gold from M/s. Saurabh Gems and Jewellers for whom payment of Rs. 22 lakh was made by them. From the scrutiny of cash book resumed by the officers, it was found that entry was made on 9.10.02, for Rs.22 lakhs in the name of Shri Laxmikant Agnihotri with narration "being cash paid for purchasing of primary gold from Mahesh Kumar Katta, Jaipur". But the entry could not be related to the trip made on 15.10.02 because there were similar trips made earlier on 9.10.02, 11.10.02 and 13.10.02 also as was stated by Shri Laxmikant Agnihotri and Shri Arvind Mishra. Further from statement of the Manager of M/s Surabh Gems & Jewellers, Jaipur it was clear that this amount related to two purchases of 18 gold biscuits each purchased on 11.10.02 under invoice No. 1387 and Invoice No. 1404 dated 11.10.2002.

5. During the course of further investigation statements of Shri Laxmikant Agnihotri and Shri Arvind Mishra were again recorded on 18.10.02. They admitted that Shri Pradeep Jain used to provide cash to them for handing over the same to Shri Mahesh Kumar Katta for which no receipts were exchanged either at the time of delivery of cash or at the time of taking possession of gold

biscuits. They also admitted that they did not have any bills or legal documents etc. pertaining to the recovered gold biscuits from them. Shri Laxmikant further deposed that entry made in cash book against entry dated 9.10.02 in his name showing payment of Rs.22 lakhs is not correct.

He was only given an amount of Rs.12.20 lakhs which he handed over to Shri Mahesh Kumar Katta on 10.10.02 in exchange of 18 gold biscuits of foreign origin.

6. In follow up action, the officers raided the residential premises of Shri Laxmikant Agnihotri and recovered certain papers like a delivery challan and a sale voucher of Shri M/s. Ram Pratap Jagdish Pratap Katta Jewellers, covering transactions in August, 2002.

Statement of Shri Mahesh Kumar Katta, partner of the firm M/s Ram Pratap Jagdish Pratap Katta and also proprietor of M/s. S.M. Jewellers, was also recorded wherein he stated that sale vouchers Nos. 203, 204 and 205 dated 16.10.02 were issued by M/s. S.M. Jewellers to Shri Laxmikant Agnihotri showing sale of total 36 gold biscuits. However, these invoices did not show the name of the purchaser. He also made reference to some previous sale of gold biscuits from his firm, showing the name of Shri Laxmikant Agnihotri.

7. Further statements of one Shri Prashant Tibrewal, Manager of M/s. Saurabh Gems and Jewellery was recorded on 22.10.02

deposing that he did not know the owner of M/s. Panna Lal Banarsi Das Jewellers; that a person visited him giving reference to Shri Mahesh Kumar Katta for purchase of 36 gold biscuits, which were sold to him under invoice No. 1387 and invoice 1404 both dated 11.10.02. As already explained it was apparent that these invoices related to purchases made in earlier trip and not in the trip on 15.10.02. Further, statement of Shri Pradeep Jain was recorded on 22.11.02 in which he admitted he is the owner of seized gold biscuits and that Shri Laxmikant Agnihotri and Shri Arvind Mishra were his employees. He also produced sales vouchers Nos. 203, 204 and 205 dated 16.10.02 issued by M/s. S.M. Jewellers and claimed that said bills cover the gold biscuits seized by the officers on 17.10.02. Statement of Shri Pradeep Jain was again recorded on 26.12.02 wherein he admitted the visit of Shri Laxmikant Agnihotri and Shri Arvind Mishra to Jaipur for purchase of gold biscuit / T T bars. He clarified that as per the trade practice cash for such transaction is arranged through Dalals and gold is delivered to the persons who provide the money. The gold used by the firm is entered in the record and that what he bought and delivered on commission basis is not entered in the records of the firm.

8. On the above basis, Revenue entertained a view that the gold biscuits recovered and seized from the possession of Shri Laxmikant Agnihotri and Shri Arvind Mishra were actually not covered by the three sale vouchers produced subsequently by Shri

Pradeep Jain and the cash entry of Rs.22 lakhs shown with the date 09.10.02. As such, the Revenue was of the opinion that the seized biscuits were smuggled. Accordingly, proceedings were initiated against them by way of show cause notice dated 9.4.03 proposing confiscation of the seized gold biscuits as also for imposition of penalties on various persons. This show cause notice culminated into the impugned order of the Commissioner.

9. We have heard Shri K.K. Anand, learned Advocate for the appellants along with Shri G.K. Sarkar and Shri Prem Ranjan and Shri Sonal Bajaj, learned SDR appearing for the Revenue.

10. We find in the present case that there is no dispute about seizure, ownership of the seized gold and the fact that the persons carrying gold did not have any documents to prove that these gold biscuits were licitly imported. M/s. Panna Lal Banarasi Das, a partnership of Shri Pradeep Jain and Shri Sandeep Jain has admitted the ownership of gold recovered and seized from the possession of Shri Laxmikant Agnihotri and Shri Arvind Mishra. The basic issue required to be decided in the present appeals is as to whether the biscuits in question recovered from the possession of the above two persons were legally imported biscuits or the same were of smuggled nature.

11. Admittedly, primary gold is one of the specified item in terms of the provisions of Section 123 of the Customs Act, 1962. As

such the onus to prove that the seized gold biscuits are legally imported biscuits is upon the person from whose possession the same are recovered or upon the person who claims the ownership of the same. M/s. Panna Lal Banarasi Das have produced on record three invoices bearing no. 203, 204 and 205 all dated 16.10.02 issued by the firm S.M. Jewellers of Shri Mahesh Kumar Katta. The said invoices were produced much after the date of seizure by Pradeep Jain on 22.11.02 in support of his claim that the same were legally procured primary gold. In the initial statement of Shri Sandeep Jain recorded on 17.10.2002 he stated that he had sent his employees to Jaipur on 9.10.2002 for purchase of gold from M/s Saurabh Gems and Jewellers, Jaipur and there was no mention of S.M. Jewellers at all. The above mentioned invoices 203, 204 and 205 dated 16.10.2002 did not show any name of the buyers. Further originals of these invoices were not produced at all. Shri Mahesh Kumar Katta in his statement recorded during the course of investigation has also claimed to have sold the said gold bars to M/s Panna Lal Banarasi Das.

12. The adjudicating authority has examined the said invoices and have not accepted the same as the proper documents for covering the gold in question. It is the contention of the appellants that merely because they could not produce the said documents at the time of seizure itself, the said sale invoices cannot be rejected as proper documents. For the above proposition, learned Advocate relies upon the various decisions.

13. We agree with the learned advocate that merely because the sales advice covering the transaction could not be produced before by Shri Arvind Mishra and Shri Laxmikant Agnihotri at the time of seizure of the gold biscuits, the sale advices produced subsequently cannot be rejected. However, we find that in the initial statement of Shri Sandeep Jain on 17.10.2002, he made reference to transaction with M/s Saurabh Gem & Jewellers, Jaipur only for which he had sent his staff on 9.10.2002. he was avoiding further summons for some time and the said sale invoices were submitted by Shri Pradeep Jain on 22.11.02. These invoices stand scrutinised by the adjudicating authority and it stands revealed that the rates shown for the same transaction in three vouchers are different Whereas the bill No. 203, the rate of gold per tola has been mentioned as Rs.6050/- per tola, the other two bills Nos. 204 and 205 show the rate of gold mentioned as Rs.6048/- per tola. Such small margin in rates of gold shown in the two bills could have been ignored but for the fact that the said vouchers produced by Shri Pradeep Jain are photocopies and not the original copies of sale vouchers. It is that the booklet contained the office copy of the sale vouchers pertaining to Shri Mahesh Kumar Katta, was handed over to the Customs officers on 22.10.02. However, the photocopies of the bills were retained by Shri Mahesh Kumar Katta and were subsequently handed over to Shri Pradeep Jain. Not only that there is no names of purchasers of the gold in the said three sale invoices, it is seen that on 16.10.02 total 14 sales vouchers were issued by M/s. S.M.

Jewellers to different parties for different quantities against cash sales. This is a strong factor which goes against the appellants. The absence of the name of the purchasers of the gold in question in the sale vouchers ~~produced~~ reflects upon the doubtful nature of the said sale vouchers. Merely the fact that because the total number of biscuits for the said three sales bills comes to 36 which happens to be the number of gold biscuits seized by the officers by itself is not a justifiable reason to conclude that the sales were covered under the said sales vouchers in the absence of name of the person to whom goods were sold. No explanation is coming from the appellant's side to justify the absence of name of the appellants' firm in the sales invoices and for not producing the original copy of the invoice. We strongly hold that the absence of the name of appellant's firm in the said sale invoices and the absence of original copies of invoices are factors leading us to conclude that the transaction of the gold biscuit between the appellant's employees Shri Arvind Mishra and Shri Laxmikant Agnihotri with Shri Mahesh Kumar Katta was not covered by the said sale vouchers. As such, the initial burden placed upon the appellants for proving that the gold biscuits in question were licitly imported into India does not stand discharged by them.

14. Shri Anand has made reliance upon various decisions of the Tribunal holding that with the Government's policy for allowing free import of the gold during the material period and there being no evidence on record to prove that seized gold was smuggled, the minor discrepancy in the documents produced by the appellants

should not result in any conclusion against them. However, we find that every case is required to be decided on the basis of evidence available on record in that particular case.

In the case of **Vimlesh Kumar Neema vs. CCE Ahmedabad** reported as [2007 (219) ELT 346 (Tri-Ahmd)], it is seen that the appellant's claim that purchase of the goods from M/s. C. Arvindkumar & Co. under the cover of proper bill and purchase of the same by M/s. K L Choksi, who had purchased it from M/s. Gitanjali Exports Corpn. who had in turn purchased the same from M/s. State Bank of India, who had imported vide Bill of Entry No. 238/2001, dated 15.1.2001 was established on record and in these circumstances the Bench concluded that the appellants having produced on record the entire evidence, sole factor that the payment was not made will not be a sufficient factor to hold the gold was illicitly imported.

15. Similarly in the case of Mool Chand Soni vs. CCE, Jaipur reported as [2006 (205) ELT 1142 (Tri-Del)], the Bench took note of the various factors leading to legal possession of the impugned gold biscuits which was proved beyond doubt. Similarly in the case of Jitendra Pawar vs. CC, Raipur reported as [2003 (156) ELT 622 (Tri-Del)], it was observed that the appellants produced evidence on record to show legal acquisition of the goods. In these circumstances, the Bench observed that mere foreign marks are not sufficient to establish the smuggled nature of the gold inasmuch as at the relevant time, gold was freely importable and available for sale and purchase. The other

decision relied upon by the appellants relates to the seizure of gold by the police and are to the effect that where the initial seizure is by the police and the goods are subsequently handed over to the Customs, Section 123 of the Customs Act, 1963 is not applicable and burden of proving the smuggled nature of goods is on the Revenue as decided in **Naveen Ahmed Khan vs. CC, Bangalore** [2005(182) ELT 494 (Tri-Bang)]. The ratio as declared in the said decision is not applicable to the facts of the present case inasmuch as the gold was admittedly seized by the customs officers.

16. As already observed, conclusion as to whether the gold in question is smuggled or not has to be arrived at based upon the appreciation of the evidence available in each and every case. The appellants in the present case have been trying to cover the transaction with three sale vouchers of M/s. S.M. Jewellers. Having examined the authenticity and genuineness of the said three vouchers, we have already arrived at a finding that the same cannot be held to be covering the transaction in question. As such, we are of the view that the adjudicating authority have rightly rejected the said evidence. Further, there being no other evidence produced, we hold that the appellants have not been able to discharge the onus placed upon them showing the legal importation of the gold in question. Consequently, it is held that gold biscuits in question are smuggled.

17. However, we have to examine whether the absolute confiscation of the goods ordered by the Commissioner is proper. Section 125 of the Customs Act, 1962 reads as under:-

> "**Section 125** - 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, 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.

18. As per the above Section, in the case of prohibited goods, the Adjudicating Authority may give an option to pay a fine in lieu of confiscation. In the case of goods other than prohibited goods, the Adjudicating Authority shall give such option to pay fine in lieu of confiscation.

19. The meaning of the expression 'prohibited goods' was examined by the Supreme Court in the case of **Om Prakash Bhatia Vs. CCE** reported in 2003 (155) ELT 423 (SC). In view of this decision, seized goods in respect of which restriction on import

subject to certain conditions are in force also are to be considered as "prohibited goods" as defined under Section 2(33) of the Customs Act. However, even in the case of prohibited goods there is a discretion vested in the Adjudicating Authority to allow redemption of such goods on payment of a redemption fine. It is held by the Courts in many cases in the context of Section 125 of Customs Act as well as in the context of other enactments which give similar discretion, that when discretion is given to a quasi-judicial authority, he shall exercise it in a positive manner unless the reason for exercising the discretion in a negative manner is recorded by the authority. The following decisions in the context of Section 125 of the Customs Act may be seen in this regard.

(1) **Suresh Kumar Agarwal Vs. CC** - 1998 (103) ELT 18 (AP)

(2) **Suresh Bhosle Vs. CCE -** 2009 (246) ELT 77 (Cal.)

20. It is also to be noted that in the case of any imported goods (other than gold) seized for the reason that the goods are not covered by proper import licence, option to redeem the confiscated goods on payment of a redemption fine is normally given except in cases where the goods may cause injury to society at large, may interfere with the public policy, may cause threat to security of the nation, etc. The nature of the prohibition and the nature of the goods have to be taken into account while exercising such discretion. There can be no such reason for absolute confiscation of gold after liberalised policy for its import has came into force

since 1991. It is also to be noted that in this case the seizure is not at the point of import, where there is higher onus on the importer to give proper declaration and to comply with import restrictions and to pay applicable duties.

21. Considering these aspects, we are of the view that absolute confiscation of the goods ordered by the Commissioner is not maintainable. Therefore, we give an option to the Appellants i.e M/s Panna Lal Banarasi Das to redeem the goods on payment of a redemption fine of 10% of the value of the goods for the seized goods i.e. on payment of Rs.2,18,350/- (Rupees Two lakhs eighteen thousand three hundred and fifty). While deciding this amount we have taken into account the long delay, since 2002, in releasing the goods to the owners. While redeeming the goods appellants have to pay Customs duties as applicable in terms of Section 125(2) of the Customs Act.

22. As regards penalty of Rs. 2.00 lakhs imposed upon M/s Panna Lal Banarasi Das having held that the seized gold in question was not licitly imported, we uphold the imposition of penalty upon him.

23. As regards the separate penalties of Rs. One lakh imposed on Shri Pradeep Jain and Shri Sandeep Jain, we find that they are partners of M/s Panna Lal Banarasi Das upon whom imposition of penalty imposition has already been upheld and as such the separate penalties are not justified. We accordingly set aside penalties imposed on them. As regards penalty of Rs.50,000/-

each on Shri Arvind Mishra and Shri Laxmikant Agnihotri, we find that they were employees of M/s Panna Lal Banarasi Das and were carrying on their duties as employees under the instructions of their master. As such penalties upon them are reduced to Rs.25,000/- each. Penalty of Rs. 1.00 lakh imposed on Shri Mahesh Kumar Katta who gave false evidence to aid M/s Panna Lal Banarasi Das for establishing the sale of smuggled gold biscuits under the cover of invoices issued by him is upheld.

24. All the appeals are disposed of in the above terms.

(Pronounced in the open Court on 22/11/11

(Archana Wadhwa)
Member(Judicial)

(Mathew John)
Member(Technical)

ss