CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Customs Appeal No. 30329 of 2023

(Arising out of OIA No. VJD-CUSTM-000-APP-082-2022-23 dt.03.02.2023 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur)

Tunuguntla Pavan Kumar
S/o Sri Ramakrishna Rao, D.No.28-1-69, Near Elephant Tree, South Bazaar, Ongole, AP – 523 001 **......Appellant**

VERSUS

Commissioner of Customs (Preventive) Vijayawada
D.No.55-17-3, C-14, 2nd Floor, Industrial Estate, Autonagar, Vijayawada, Andhra Pradesh – 520 007 **......Respondent**

and

Customs Appeal No. 30418 of 2023

(Arising out of OIA No. VJD-CUSTM-000-APP-081-2022-23 dt.03.02.2023 passed by the Commissioner of Central Tax & Customs (Appeals), Guntur)

Chinni Narasimha Rao
S/o Sri C. Venkateswarlu, MIG 345, HB Colony, Ongole, Prakasam Dist, AP – 523 001 **......Appellant**

VERSUS

Commissioner of Customs (Preventive) Vijayawada
D.No.55-17-3, C-14, 2nd Floor, Industrial Estate, Autonagar, Vijayawada, Andhra Pradesh – 520 007 **......Respondent**

Appearance
Shri M.V.S. Prasad, Consultant for the Appellant.
Shri M. Anukathir Surya, Authorized Representative for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. A/30270-30271/2024

Date of Hearing: 17.11.2023
Date of Decision: 08.04.2024

[Order per: ANIL CHOUDHARY]

The Appellant – Mr. Tunuguntla Pavan Kumar (TPK for short) is a partner in M/s Annapoorna Gold Smiths at Ongole, Andhra Pradesh and looks after of all the business transactions. The said firm is engaged in purchase of Gold metal or pure Gold from authorised dealers by making payment through banking channel – RTGS. They sell some of the Gold purchased to other customers under proper invoices and also get Gold ornaments made through Goldsmith on job basis and sell the ornaments in wholesale trade. The Appellant is registered under the GST provisions and they file regular monthly and other returns. The said firm is also income tax assessee and file their income tax returns regularly. The firm is maintaining proper books of accounts and records which are subjected to audit by the Chartered Accountant.

2. The other Appellant – Mr. Chinni Narasimha Rao (CNR for short) is a clerk assisting in the business of M/s Annapoorna Gold Smiths, Ongole.

3. From March 2020 to June 2020, their firm was almost non-functional due to the COVID-19 pandemic. As there was a decline in the severity of the pandemic during July 2020 and August 2020 and in anticipation of some demand for ornaments in the ensuing period, they planned to convert the stock of pure gold into ornaments so that they can sell on some profit. As on 18.08.2020, as per the Gold Metal stock register, they had a stock of 6303.804 gms of pure gold. Out of this, a quantity of 4872.105 gms of pure gold was given to different goldsmiths locally and at Chennai for conversion into ornaments and the balance stock of pure gold left with them was 1431.699 gms.

4. On 22.08.2020, Mr. TPK instructed Mr. CNR, an employee in their firm (co-noticee) to proceed to Coimbatore on 23.08.2020, to carry pure gold of 1431.699 gms and to purchase latest designs of ornaments at Coimbatore for which he agreed. Accordingly, a delivery challan bearing No. AGS/03 dt.22.08.2020 was raised in the name of Mr. CNR indicating that the said delivery challan was issued for the purpose of intended jewellery purchase for the value of pure gold covered by the said delivery challan. In terms of the said delivery challan, the total quantity of gold was 1431.699 gms and the total value of the said gold, inclusive of GST, was shown as Rs.75,88,005/-. Accordingly, Mr. TPK handed over the said gold weighing 1431.699 gms to Mr. CNR and asked him to go to Coimbatore in his car and approach Mr. Venkatesh of M/s JRV Jewellers, Coimbatore and hand over the said gold of 1431.699 gms

and purchase gold ornaments of the latest designs for the value mentioned in the said delivery challan. Mr. TPK also gave him laminated sheets containing photos of models/designs of ornaments to be purchased. Mr. TPK also asked his son Mr. T.P. Trinath to travel in the same car along with Mr. CNR. Accordingly, they proceeded to Coimbatore.

5. On 24.08.2020, Mr. CNR informed Mr. TPK over the phone that he enquired with M/s JRV Jewellers but no stock of gold ornaments was available with them due to paucity of workers/goldsmiths on account of the COVID-19 pandemic. Mr. TPK instructed Mr. CNR to just place the order for ornaments and return to Ongole along with the stock of gold.

6. However, in the afternoon of 25.08.2020, the officers of DRI, Vijayawada visited the residential premises of the appellant and searched the premises under search authorisation. During the search operation, the officers did not find any gold of foreign origin. They recovered some purchase and sales invoices and recorded the proceedings under a Panchanama. The business premises of the appellant viz., M/s Annapoorna Gold Smiths, was also searched and no foreign gold or incriminating documents were found.

7. That the officers of DRI, Nellore at about 11:00 AMon 25.08.2020 intercepted Nissan Sunny car bearing registration number AP 27 AQ 0927 at Venkatachalam toll plaza, NH16, near Venkatachalam village, Nellore district, coming from the direction of Chennai. The occupants of the car were Mr. Ravinuthala Kondaiah, Mr. Ravinuthala Pradeep, Mr. CNR and Mr. T. Pranav Trinath. On being enquired if they were carrying any Gold Mr. CNR admitted that he was carrying Gold on his person and not in the car. For lack of proper examination facilities and drawal of Panchanama, the occupants of the said car were detained and brought to the DRI office at Nellore for detailed examination etc. On reaching the DRI office Mr. CNR took out a packet wrapped in brown tape and handed over to the officers. On opening the said packet two small pieces of yellow metal and 2 bars were seen. There were no markings on the yellow metal. Mr. CNR admitted that the 2 bars and 2 small pieces (total 4 pieces) are remelted smuggled Gold. He further stated that the said Gold was purchased from Mr. Venkatesh of Coimbatore for an amount of Rs.76 lakhs, on behalf of his employer Mr. TPK of M/s Annapoorna Gold Smiths Jewellers, who had given him cash amount of Rs.76 lakhs.

8. The officers got the Gold pieces assayed by the valuer Mr. Mallikarjun, who after examination gave his report as follows: –

Sl.No.	Particulars	No. of bars/ pieces	Weight in gms	Purity %
01	Gold Bar	01 Bar	538.980	99.9
02	Gold Bar	01 Bar	842.550	99.9
03	Small Piece of Gold	01 piece	43.600	99.9
04	Small Piece of Gold	01 piece	6.480	99.9
Total			1431.61 grams	
Value			Rs.75,87,533/-	

9. Statement of Mr. CNR was recorded by the officers, who inter alia stated that on 23.08.2020 in the evening at around 7:00 PM Mr. TPK called him over phone and entrusted him to make a transaction (purchase of re-melted smuggled Gold of foreign origin), on his behalf at Coimbatore from a person named Mr. Venkatesh and to leave for Coimbatore the same night, for which he agreed. He was handed over a bag containing cash Rs.76 lakhs. He along with Mr. Pranav Trinath (Son of Mr. TPK), Mr. R. Kondaiah and Mr. R. Pradeep started for Coimbatore at around 23:30 hours on 23.08.2020 from Ongole and reached Coimbatore at about 16:00 hours on 24.08.2020. On reaching, he contacted Mr. Venkatesh, who came and met him and informed that his person would guide the car to a parking place. Then a person on bike came and guided them to a parking place after which, he handed over the bag with cash to the person on bike. Then after waiting for 2 hours in the parking place, the person on the bike returned and handed over 2 bars and 2 small pieces of Gold to him. He had wrapped the 4 pieces of Gold in small plastic cover and then wrapped that in newspaper and further wrapped in brown tape and had kept in his inner pant pocket. He further informed that the car bearing No. AP 27 AQ 0927 belongs to Mr. TPK, and that Mr. R. Kondaiah was hired only for driving of the car. Further, Mr. R. Pradeep was simply accompanying his father Mr. R. Kondaiah. That after receiving the gold, four of them started for Ongole from Coimbatore at about 20:00 hours on 24.08.2020 and on reaching Venkatachalam toll plaza, near Nellore, at about 11:00 hours on 25.08.2020, they were intercepted by the officers of DRI.

10. Mr. R. Kondaiah, in his statement stated that he was engaged for driving the car to Coimbatore and back; and that his son Mr. R. Pradeep was accompanying him due to the long journey.

11. Mr. T. Pranav Trinath informed the officers that he was simply accompanying Mr. CNR, as per instructions of his father. He was aware that Mr. CNR was carrying a bag, but was not aware of the purpose of the same. After reaching Coimbatore, Mr. CNR handed over the bag to a person on bike, who came after some time and gave him – Mr. CNR some items, who then wrapped

them in the form of a packet and kept in the pocket of his pants.

12. As it appeared to the officers that the Gold recovered from the possession of Mr. CNR being 2 gold bars and 2 small pieces of gold, totally weighing 1431.610 gms and valued at Rs.75,87,533/- and the same appeared to be smuggled in nature and liable to confiscation, accordingly, the gold in question was seized under the provisions of the Customs Act. The proceedings are recorded under Panchanama. On being asked Mr. CNR stated that the car belonged to Mr. TPK, who had in the recent past purchased the car from Mr. A. Prabhakar Rao and the transfer of ownership was under process. It appeared to the officers that the value of the car is Rs.4,68,000/- as mentioned in the Insurance Policy and as the said car appeared to be used for transportation of smuggled foreign origin Gold, it was also liable for confiscation and accordingly, the said car was also seized. The Panchanama proceedings concluded at about 17:30 hours on 25.08.2020.

13. In his subsequent statement, Mr. CNR, recorded on 26.08.2020, stated that this was the first time he was purchasing Gold. That he had visited Coimbatore twice that year but only for receiving finished ornaments and not for purchasing Gold. The reason for purchasing Gold from a distant place like Coimbatore was that gold was available at the cheaper price as compared to Vijayawada and as the gold purchased from Coimbatore is remelted from smuggled foreign origin Gold having purity of 99.9%. As they purchased gold without bill or any document, they got gold at a cheaper rate. Also stated that he did not have any documents to show the licit purchase of Gold, which was purchased on cash payment. He was aware that dealing and carrying smuggled good was prohibited under law but he resorted to such activity at the instructions of his owner Mr. TPK.

14. Pursuant to summons issued to Mr. TPK by DRI, Vijayawada, he appeared and his statement was recorded. He had also produced copy of IT returns for 2017–18 to 2019–20, copy of GST registration number of their firm and also informed that the turnover during the financial year 2019–20 was about Rs.10 crores. Questions regarding stock of Gold and books of account were also put by the officers, which were duly replied. While recording of the statement on 25.08.2020, no question was put to Mr. TPK regarding seizure of Gold weighing 1431.600 grams from his employee Mr. CNR at Nellore.

15. In response to summons issued by DRI, Vijayawada, the appellant appeared and furnished copies of certain documents namely purchase invoice,

purchase Ledger statement, item register statement, GSTR–3B returns and bank statements. Further, he stated that any other document, if required, shall be filed within a week's time. Further on subsequent summons dt.04.09.2020, this Appellant appeared before the DRI officers on 11.09.2020 and on this occasion also furnished copies of various documents like purchase invoice, Gold metal item register, Gold metal purchaser register, Gold metal sales register, Ledger account and car registration bearing number AP 27 AQ 0927. He further inter alia stated that he along with his wife Mrs. T. Sharmila are the partners in M/s Annapoorna Gold Smiths, which was started 12 years back. He looks after the entire business transactions of the firm. They are engaged in the business of dealing in Gold bullion on wholesale and retail basis. Gold is purchased through authorized dealers on making payment through banking channel and thereafter, sold in retail to various customers. Out of the stock in trade, Gold of 1431.600 gms has been seized by the DRI, which belongs to his firm. On 23.08.2020, he handed over 1431.699 gms of Gold metal out of his stock to his staff – Mr. CNR and had instructed him to go to Coimbatore and purchase ornaments against pure Gold. He had given the Gold to Mr. CNR under delivery challan No. AGS/03 dated 22.08.2020 and submitted a duly signed copy of the same. He had also instructed his son Mr. T. Pranav Trinath to go along with Mr. CNR in the car. He had instructed Mr. CNR to visit M/s JRV Jewellers at Coimbatore, whose proprietor is Mr. Venkatesh, mobile number 9843341209 to purchase ornaments against the same. On 24.08.2020, after reaching Coimbatore Mr. CNR informed him over phone that on visiting M/s JRV Jewellers, he found that no stock of ornaments were available due to non-availability of workers/ gold smiths due to prevailing COVID-19 situation. Thus, he instructed Mr. CNR to place the order for the ornaments with M/s JRV Jewellers and return to Ongole on the same day with the gold metal being 1431.699 gms. The said quantity of Gold metal is having purity of 99.9% and is duly supported by the gold metal register for the period 01.04.2020 to 31.08.2020, which is maintained on tally software. As per the gold metal register, on 23.08.2020, they had stock of 6400.00 gms of gold metal having purity 90.9%. Further stated that he knows Mr. Venkatesh of M/s JRV Jewellers, Coimbatore for the last 5 years and they have business transactions. Further during the year 2020-21, they had not had any transactions. He had delivered 4 pieces of Gold totally weighing 1431.6 gms, which were in the shape of square and rectangle to Mr. CNR under delivery challan.

16. On being enquired whether he had given cash of Rs.76 lakhs to Mr. CNR

for purchase of Gold at Coimbatore, he replied that the same was incorrect and he does not know why Mr. CNR had given such a statement, which is wrong and not correct. They had yet to file their GST return for August 2020 as the due date is in future, on 23.09.2020.

17. Further, the statement of Mr. TPK was recorded on 24.09.2020 on which date also, he furnished documents like ledger copies of M/s JRV Jewellers, M/s SVBC Gold, Sree Sarada Bullion and Jewellery Mart, VRV Gold and also copy of Income Tax returns. Further, he stated that for purchase of gold ornaments, he had sent Mr. CNR to Coimbatore earlier during June 2020 and again in August 2020. He had himself visited M/s JRV Jewellers, Coimbatore in the month of March 2020 to enquire about the latest ornament designs but had not placed any order at that time. He has met Mr. Venkatesh of M/s JRV Jewellers, Coimbatore several times at Chennai. He also stated that M/s JRV Jewellers had delivered ornaments against 6 invoices, copies of which were produced by him. On being questioned as to how much stock of Gold/jewellery was available at the time of search conducted in his house and shop on 25.08.2020, he replied that they had 6400 gms of metal stock – Gold on said date. Out of the said stock, 1431 gms was given to Mr. CNR for bringing ornaments from Coimbatore. 750 gms was given for job work for conversion to Mr. Debasis who resided at Chennai in the month of March 2020. Remaining 4220.00 gms was given to different Goldsmiths located in Ongole for conversion into ornaments. Further stated that they received the ornaments from the workers/Goldsmiths in first week in September 2020 except from Mr. Debasis and also stated that the stock register of gold ornaments will be produced within a week. Further stated that on 15.07.2020, gold metal available with them was 39.446 gms and during 16.07.2020 to 28.08.2020, he had purchased gold from M/s VRV Gold, Sree Sarada Bullion and Jewellery Mart and M/s SVBC Gold. Such gold purchased contains the mark of refinery assayers, whose name is embossed like Valcambi/Swiss/Argor. The maximum weight of each gold bar would be 100 grams and they would receive proportionate gold bars as per the weights mentioned in the invoice. Further, he stated that Mr. CNR had been working in their firm for the last 8 years.

18. In further summons issued, the Appellant – Mr. TPK appeared on 15.10.2020 before the officers and further furnished documents and depositions and his statement was also recorded. On being asked that he has tried to cover up the offence committed by him by producing a delivery challan dated 22.08.2020 and in fact not issued any document or delivery challan for the

transaction of supply of Gold other than sales, he replied that it was not correct and he had handed over the gold to Mr. CNR under delivery challan only.

19. In the course of investigation, statement of Smt. Padma Priya. V, the Proprietrix of M/s JRV Jewellers, Coimbatore was recorded on 23.11.2020 wherein she inter alia stated that they were engaged in the manufacture of Gold jewellery through various job workers and supplied the same to their customers. The day-to-day activities of the firm were looked after by her husband Mr. R. Venkatesh. The firm is registered under GST. They receive payment from the customers under RTGS only. The Gold required for manufacture of jewellery is purchased by them from firms like M/s Sri Varu Gold Bullion, Coimbatore, M/s Srinidhi Gold bullion, Coimbatore, etc. They send Gold to job worker under challan and after receipt of the job work goods like jewellery, they supply the same to the customers under their sales invoice. She has never sold Gold bullion to the customers. Further stated that Mr. CNR clerk of M/s Annapoorna Gold Smiths, Ongole had come to their firm M/s JRV Jewellers on 24.08.2020 and had requested for purchase of Gold around 1400 gms to 1450 gms on payment in cash. Since her firm was dealing with only Gold jewellery, she had asked her husband Mr. Venkatesh, who in turn identified the source of Gold from open market under cash payment. They were not able to recollect the name of the person, who sold Gold to Mr. CNR. They had learnt that Mr. CNR had purchased 1431.600 gms of remelted foreign origin smuggled gold from some unknown person on cash payment. For arranging the said transaction, they had received commission amounting to Rs.5,000/- by cash from Mr. CNR.

20. Further, on being asked to produce the copy of invoice, she stated that as they have not effected any sale of gold to Mr. CNR, no invoice is available with them. Further on being questioned, stated that she knows Mr. TPK, owner of M/s Annapoorna Gold Smiths, Ongole, who was a regular customer for gold jewellery. Depending on requirement, Mr. TPK, either personally or through his staff, visits their shop M/s JRV Jewellers. When asked to produce ledger copy of M/s Annapoorna Gold Smiths, Ongole, for the period 01.04.2017 to 31.08.2020, she stated that they do not have sufficient staff to prepare ledger, stock etc. Therefore, she has entrusted such work to her auditor and that payments received from M/s Annapoorna Gold Smiths is reflected in her firm’s Kotak Mahindra Bank account of R.S. Puram branch and her firm’s account with Indian bank, Raja street branch.

21. Further summons was issued to Mr. TPK and in response to which, he appeared on 30.12.2020 wherein he was confronted with the statement given by Smt. Padma Priya. V, Proprietrix of M/s JRV Jewellers, Coimbatore dated 23.11.2020. After going through the statement, he responded that it was not true that Mr. Venkatesh arranged for purchase of remelted foreign origin smuggled gold by his clerk Mr. CNR. He does not know why Smt. Padma Priya. V of M/s JRV Jewellers deposed like that and that she might have deposed out of confusion. He volunteered and deposed by way of reiteration that the seized Gold was sent through his clerk Mr. CNR under delivery challan to Coimbatore for purchase of Gold jewellery, in exchange of the metal which belonged to his firm. On being suggested that his deposition regarding the seized Gold was by way of an afterthought, to cover up his offence, in the light of the statement of Mr. CNR and Smt. Padma Priya, he replied that the same was not true and he does not know why they have deposed in this manner, which is probably due to confusion etc.

22. As it appeared to Revenue that the source of gold explained by Mr. TPK, being out of business stock, is not plausible and further, in view of the statement given by Mr. CNR and Smt. Padma Priya, that the gold is of foreign origin and smuggled in nature and is liable for confiscation, accordingly, SCN dated 25.03.2021 was issued requiring to show cause jointly to Mr. CNR and Mr. TPK, Appellants herein, as to why the 2 gold bars with 2 small pieces of gold totally weighing 1431.610 grams valued at Rs.75,87,533/- seized under Panchanama dated 25.08.2020, be not confiscated under section 111(d) & (o) of the Customs Act with further proposal to impose penalty under section 112 (a) and (b) of the Act.

23. Smt. Padma Priya. V, Proprietrix of M/s JRV Jewellers was also required to show cause as to why penalty shall not be imposed under section 112(a) & (b) of the Customs Act. Further, Mr. T. Rama Krishna Rao and Mr. TPK was required to show cause as to why the seized car bearing number AP 27 AQ 0927 valued at Rs.4,68,000/- should not be confiscated under section 111 of the Customs Act.

24. All the noticees contested the SCN by filing their written submissions. The SCN was adjudicated vide OIO dated 31.03.2022 by the Additional Commissioner, Krishnapatnam Customs House, who ordered confiscation of the aforementioned 2 gold bars and 2 small pieces of gold totally weighting 1431.610 gms seized from the possession of Mr. CNR on 25.08.2020 under

section 111(d) & (o) of the Customs Act, also ordered confiscation of the packing material under section 119 of the Act. Further, penalty of Rs.15 lakhs each was imposed under section 112(a) & (b) on Mr. CNR and Mr. TPK. Further penalty of Rs.5 lakhs was imposed on Smt. Padma Priya. V, Proprietrix of M/s JRV Jewellers and similar penalty was also imposed on her husband – Mr. R. Venkatesh. Further confiscation of car bearing number AP 27 AQ 0927 was also ordered under section 115 of the Act with the option to redeem in favour of Mr. T. Rama Krishna Rao – owner, on payment of redemption fine of Rs.1 lakh.

25. Being aggrieved, these appellants had filed appeals before the Commissioner (Appeals), who was pleased to reject the appeals upholding the OIO. Being aggrieved, appellants are in appeals before this Tribunal. Learned Counsel for the Appellants inter alia makes the following submissions, grounds of appeal.

25.1. The order of absolute confiscation is not tenable and bad in law in the absence of any evidence, except the initial statement of Mr. CNR, which is not reliable having been recorded under duress and in violation of the instructions of the Apex Court. The said statement of Mr. CNR read with the statement of Smt. Padma Priya. V, are contradictory to the extent as to who sold the Gold in question.

25.2. Further, there is no material evidence on record brought by the investigating agency with regard to the smuggled nature of the gold in question. Admittedly, the Gold pieces seized are not of standard weight, shape and size. The gold bars seized are admittedly of irregular weight and size having no foreign markings. It is known in the trade all over that foreign origin gold bars are either of 100 gms or of 1 kg and are of regular size and shape and also contain the markings of the refiner with unique serial number.

25.3. The statements of both Mr. CNR as well as Smt. Padma Priya and others have been recorded in gross violation of order dt.03.04.2018 given by the Apex Court in the case of Shafhi Mohammad vs The State of Himachal Pradesh in SLP (Crl.) No. 2302 of 2017. The DRI was also one of the investigating agencies specified to comply with the directions of the Apex Court. Further Hon'ble Madras High Court in the case of P. Murali vs SIO, Kolkata [2021 (4) TMI 312] have directed that the process of investigation of the concerned person be videographed and the data stored till the completion of the proceedings. Thus for non-compliance with the directions of the Apex Court, the statements have no evidentiary value and cannot be relied upon. It is a matter of record that the Appellants had disputed their statements as to its correctness and fairness in their reply to the SCN. The Adjudicating Authority was obligated to examine the person whose statements were recorded during enquiry, in the adjudication proceedings. The same having not been done, such statements are hit by the provisions of section 138B of the Act and have no evidentiary value.

25.4. It is further urged that Mr. CNR has nowhere stated in his deposition that he visited M/s JRV Jewellers, Coimbatore on 24.08.2020, which is in contrast to the statement of Smt. Padma Priya. V, who has stated that Mr. CNR had come to their firm and requested for sale of gold of 1400 to 1450 gms on cash payment basis. There is also contradiction in the statement of Smt. Padma Priya and Mr. Venkatesh wherein they state that they had facilitated the purchase of gold in question by payment in cash. Whereas, they failed to identify the seller and/or give his details, who agreed to sell at their instance. Further, the statement of Smt. Padma Priya that they received commission of Rs.5,000/- for facilitating purchase of gold in cash is also not corroborated with the statement of Mr. CNR. Thus it is evident that the statements of these persons is not voluntary and have been recorded as dictated by the officers. The said persons being under fear of arrest have given the statements as dictated by the officers.

25.5. It is further urged that other than statements there is no evidence brought on record in support of the allegations of Revenue.

25.6. Further urged that on the other hand, Mr. TPK, partner of M/s Annapoorna Gold Smiths, Ongole has laid cogent evidence in support of his contention that the seized Gold was out of his stock in trade and had been sent under challan through Mr. CNR, their employee, for conversion/purchase of gold jewellery in exchange of Gold. Admittedly, it was the COVID-19 pandemic time and the situation was disturbed all over the country. Thus, the cogent explanation was given as jewellery was not readily available in Coimbatore, the appellant – Mr. TPK had asked his employee – Mr. CNR to return to Ongole with the gold, which he had sent out for conversion to jewellery. It is evident on the face of the records that the appellant has admitted that they have turnover of Rs.10 crores per annum and in support thereof, they have produced copies of their accounts, financial statements like Balance Sheet, Profit & Loss account, copy of GST returns, etc. Such documents fully support the contention of the Appellant in regard to 1431 gms of gold sent for conversion to gold jewellery under challan through Mr. CNR. Such cogent evidence has been rejected by revenue arbitrarily, which is against the provisions of law.

25.7. It is also evident in the face of record that Mr. TPK, at the very first instance, when his premises were searched both office and residence on the same day i.e., 25.08.2020, nothing incriminating was found by Revenue and further on that very day, the appellant had produced copy of his records. Thus, the whole case of Revenue is made on assumptions and presumptions, having no legs to stand. This is also evident as Revenue has never questioned the Appellant – Mr. TPK as to the source of cash of Rs.76 lakhs allegedly sent by him for purchase of gold in cash. Further as per the statement of Smt. Padma Priya. V, she had stated that they do not sell Gold bullion nor they accept cash payments. In such a situation, there is no reason for Mr. CNR to approach them for purchase of gold on cash payment. The statement of Mr. Venkatesh that he made arrangements for purchase of gold from some unknown person, at the request of Mr. CNR is vague and evidently, a tutored deposition.

25.8. Further it is evident from the facts on record that no reason has been recorded for reasonable belief that the gold being seized on 25.08.2020 is of smuggled in nature.

25.9. Further as per records, Mr. CNR had been travelling whole night on 23.08.2020 and after spending the day at Coimbatore was again travelling the whole night on 24.08.2020 and was intercepted by the officers on 25.08.2020 at about 11:00 AM. Thus, evidently, Mr. CNR and others were badly tired due to their continuous journey and were in fatigue condition and also under mental pressure. Thus, the statements given at the relevant time of interception and seizure are also not reliable and cannot be said to be freely given. These persons being tired, is also recorded in the statements and has requested for rest. It is further evident from the record that Mr. CNR and others, from the time of interception till their detainment by the DRI officers in the DRI office, are not allowed to go home to take rest.

25.10. It is further urged that request made by Mr. TPK for giving opportunity to cross-examine the witnesses cum co-accused viz., Mr. CNR, Smt. Padma Priya, Mr. R. Venkatesh was not allowed arbitrarily. In this view of the matter also, the statements have lost their evidentiary value under section 138B of the Customs Act.

25.11. Learned Counsel further states that Apex Court in the case of Vinod Solanki vs UOI [Civil Appeal No. 7407 of 2008] have held as follows:

> *"34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as outcome of threat, etc., if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at findings as regards the voluntary nature of statement or otherwise of a confession, which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc., but the requirement is that it may appear to the court as such."*

25.12. It is further urged that the appellant by leading cogent evidence as to the source of gold seized by the officers, has discharged the onus under section 123 of the Act. The appellant in support produced his books of account and also records of purchase, sale, etc., has established that the seized gold was part of his stock in trade. Further, admittedly the seizure is by way of town seizure and is not seizure in Customs Port nor the person from whose possession the gold was seized had arrived in India from any foreign country. Thus, it was the onus of the Revenue to bring on record evidence in support of their allegation that the gold in question is of smuggled in nature. Revenue has not brought any iota of evidence to support their allegation save and except reliance placed on the retracted statements of Mr. CNR & Smt. Padma Priya. V.

25.13. It is further urged that SCN is bad and hit by limitation as admittedly, the SCN has been issued after more than 6 months from the date of seizure. Further, it is evident on the face of record that no extension was granted by the competent authority for issue of the SCN.

25.14. He further placed reliance on the following rulings:

a) Shantilal Mehta vs UOI & others [1983 (14) ELT 175 (Del)]
b) Ankit Agarwal vs CC, Kolkata [2020 (10) TMI 783 – CESTAT Kol.]
c) CC, Lucknow vs Sanjay Soni & Sandeep Gupta; Ashok Soni & Abhishek Son vs CC, Lucknow [2022 (3) TMI 367 – CESTAT All.]
d) Suresh Chand Garg vs Prl CGST, Jaipur-I [2023 (10) CENTAX 240]

26. Opposing the appeal, learned AR for Revenue relies on the impugned order. Further, he relies on the statement recorded from Mr. CNR at the time of

seizure. Further, referring to the ruling of Hon'ble Supreme Court in Gulam Hussain Shaikh case where it is held that statement recorded by Customs officers under section 108 of the Act is admissible as evidence. Further urges that the contention of Gold having been sent by the Appellant after drawing delivery challan, is by way of afterthought, there being glaring discrepancy in the stock record. Admittedly, Mr. CNR from whom the Gold was recovered and seized did not produce any document in support at the relevant time. Mr. CNR in his statement at the time of seizure had admitted that the Gold pieces being carried by him are of remelted smuggled gold of foreign origin. It is further evident that the accused will not testify against themselves unless they are caught red-handed. The remelted Gold was found to be 99.9% pure and certified by the approved gold/jewellery assayer in presence of the concerned persons. It is further urged that the Adjudicating Authority rightly refused to grant release of the Gold against redemption fine. The burden of proof is on the person as to the licit source of gold from whose possession the gold is recovered or on the person who claimed the ownership of the gold as held in the case of Om Prakash Khatri. The attempt of the Appellant to prove that the Gold seized was out of his business stock as supported by his stock register has been refuted by the Adjudicating Authority by giving the calculations. Further, as per the facts on record, the said Mr. CNR and others had travelled approximately 1600 kms by car which does not seem to be plausible simply for conversion of gold to gold ornaments. Gold being subject to restriction for import falls under the category of prohibited goods. Further urges that the retraction has been made by Mr. CNR and others only at the time of filing reply to SCN and not earlier and hence, such retraction is only by way of afterthought. He further refers to the calculation with respect to closing stock made by the Adjudicating Authority in para 76.3 of the OIO. Further urges that the Appellants have not been able to discharge the burden of proof as required under section 123 of the Act. He further places reliance on the following rulings:–

a) CC, Kerala vs Om Prakash Khatri [2019 (366) ELT 402 (Ker.)]
b) CC, Madras vs Nathella Sampathu Chetty [1999 (110) ELT 157 (SC)]
c) UOI & others vs Raj Grow Impex LLP & others [2021 (377) ELT 145 (SC)]

27. Having considered the rival contentions, I find that the owner of the gold in question Mr. TPK, at the very initial stage of being questioned by Revenue, has stated that the gold is out of stock in trade. Further, he has lead evidence that as per his stock register, he was having 6303.804 gms of gold. Thus, issue

of 1431.61 gms of gold, after adjusting the sales made till 23.08.2020 on the date on which gold in question was sent for conversion into ornaments through his employee – Mr. CNR, stands fully explained. I find that the Adjudicating Authority has made an attempt to compare the stock position as on 30.09.2020 which is not at all relevant and is wholly mis-conceived. In case of ascertaining stock position the relevant date is the date on which availability is claimed, which is fully satisfied in the facts of the present case. I further find that the appellant has also shown and accounted for the seizure of 1431.61 gms of gold by the DRI, in his books of accounts, which is also reflected in their balance sheet.

28. I further find that both Mr. CNR and Smt. Padma Priya. V, of M/s JRV Jewellers have retracted their statements in reply to SCN. Further, I find that these persons, in spite of the retraction being in the knowledge of Revenue, were not examined by the Adjudicating Authority in the adjudication proceedings. Thus the retraction goes un-rebutted. Further, it was the onus of the Revenue to establish that the statements were given voluntarily without any pressure or duress, as held by the Hon'ble Supreme Court in the case of Vinod Solanki (supra). It is an admitted fact that the seizure is by way of town seizure and further there were no markings on the gold bar/pieces indicating foreign origin. Further, it is evident from the report of the valuer that the bars are of irregular shape and size being of the weights – 538.980 gms/842.550 gms/43.6 gms/6.480 gms. Thus, the shape and weight of the bars also speak for itself that these are not of any foreign origin as it is known in the trade circle that gold of foreign origin is of standard weight and shape of 100 gm/1 kg and also has the marking of the refiner with the unique serial number. Thus, save and except the rebutted statements, there is no evidence brought on record by Revenue in support of its allegation of the gold being smuggled in nature. Further, I find in contrast to the statement of Smt. Padma Priya. V, Mr. CNR has nowhere stated that he visited the shop of M/s JRV Jewellers, Coimbatore on 24.08.2020. Mr. CNR also never stated that he has paid commission of Rs.5,000/- to M/s JRV Jewellers for facilitating purchase of gold in cash.

29. I further find that the appellants have submitted various documents in support of their contention as regards source of gold being extract of their books of accounts and registers, financial statements like balance sheet and profit and loss account, copy of GST returns, copy of challan issued for sending gold to Coimbatore through Mr. CNR. Such documents have not been found to be untrue. Accordingly, I hold that appellants have discharged the onus under

section 123 of the Customs Act.

30. I also find that the entire proceedings are vitiated as SCN has been issued after more than 6 months from the date of seizure.

31. In view of my aforementioned findings and observations, I allow the appeals and set aside the impugned orders. The appellant – Mr. T. Pavan Kumar shall be entitled to release of 1431.61 gms of 24 ct gold and if the same has already been sold, shall be entitled to the sale proceeds with interest, as per Rules. I also hold that Mr. T. Rama Krishna Rao, owner of car bearing No. AP 27 AQ 0927 shall be entitled to release of the vehicle and if the same has been disposed of, shall be entitled to receive sale proceeds with interest, as per Rules.

32. Appeals are allowed.

(Pronounced in the Open Court on 08.04.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Veda