

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75760 of 2021

(Arising out of Order-in-Appeal No.KOL/CUS/(PREV)/WB/AKR/219/2021 dated 02.03.2021 passed by Commissioner of Customs (Appeals), Kolkata.)

Shri Ajit Bhosle

(S/o Shankar Bhosle,
1/1, J, south Sinthee Road, Kolkata-700050)

Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

(15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE :

Mr. H. K. Pandey & Ms. Atika Sumran Ahmed, Advocate for the Appellant
Mr. Tariq Sulaiman, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.76091/2023

Date of Hearing : 6 July 2023

Date of Decision : 6 July 2023

PER R. MURALIDHAR

The Department officials visited the premises of the Appellant and conducted physical verification on 14/02/2017. As the Appellant was not present, Statement was recorded on 18/02/2018 wherein he has stated that he was a self-employed goldsmith/melter having his own workshop. On 23/02/2018, the Department officials opened the vault in the Appellant's premises and 12 pieces of gold (of foreign origin as per Department) were recovered. Apart from this, Indian currency of Rs.11,36,300/- was also recovered from the vault. The weight of these 12 cut pieces of gold was ascertained at 499.800 grams. The officials seized the 12 cut pieces of gold bar and Indian Currency of Rs.11,36,300/-. Thereafter, the Show Cause Notice was issued for confiscating the gold and currency found in the premises of the Appellant. After due process, the Adjudicating Authority ordered for absolute confiscation of 499.800 grams of gold bar valued at Rs.15,44,382/- and also absolute confiscation of Indian Currency of

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Rs.11,36,300/-. He imposed penalty of Rs. 2 Lakhs on the Appellant. Being aggrieved, the Appellant filed an Appeal before the Commissioner (Appeals) who has upheld the Order passed by the lower Authority and rejected the Appeal filed by the Appellant. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Advocate appearing on behalf of the Appellant submits that as can be seen from the Show Cause Notice, even before the vault was opened on 23/02/2018, the Appellant in the recorded Statement on 18/02/2018, has stated that he procures ornaments and gold bar for melting from various goldsmiths. He has stated that he has stored gold bar weighing about 450 grams and Silver of 200 grams and a cash amount of about Rs.11.5 lacs in the vault. This shows that the Statement was given by the Appellant based on the quantity of gold bar and cash held by him in the vault. The subsequent opening of the vault has resulted in almost the same quantity of gold and cash being recovered from there. The Learned Advocate submits that this itself proves that the Appellant was carrying genuine transaction and had come out with the correct statement which is tallying with the quantity seized by the Department. He further submits that in case of 12 cut pieces of gold bar, the Department has itself mentioned that one piece of gold bar was embossed "MELTER ASSAYER". This itself in no way corroborates the Department's allegation that the gold is of foreign origin. The Appellant in his statement has also stated that about 300 grams of gold has been given to him by his mother and about 150 grams of gold are his own property. He has also claimed that the cash recovered is also his own property. In his statement recorded on 24/04/2018, the Appellant has given the details of various persons from whom he has received the gold for melting. He has also given the details of his mother's address and has stated that he was given 350 grams ornaments by her. He has stated that Rs.11,36,300/- cash seized is his own property which is the earnings made by him during the last 15 years. The Appellant has provided the copy of the Trade Licence

of his Melting House, Profit & Loss Account, Balance Sheet, Fixed Assets Schedule, Income Tax Returns filed during the period 2013-14, to 2017-18. Considering all these aspects, the Learned Advocate submits that the Department has proceeded purely on assumptions and presumptions and there is no corroborative evidence brought in by the Department to support their allegation that the seized gold is of foreign origin. In all the recorded Statements, the Appellant has never stated that he has procured any gold of foreign origin. It is also to be noted that the gold has been seized in the working premises of the Appellant which has situated at Kolkata far away from any border town of India. Therefore, the Department cannot take the stand that on account of reasonable belief that the gold is of foreign origin, the seizure was affected. He relies on the following case laws:-

- (i) Aadil Majeed Banday Vs. Commissioner of Customs, Amritsar-2021 (378) E.L.T. 540 (Tri.-Chan.)
- (ii) Nand Kishore Modi Vs. Commr. of Cus. (Prev.), West Bengal-2015 (325) E.L.T. 781 (Tri. Kolkata).

3. He submits that the decisions of Tribunal are squarely applicable with the facts of the present case. He prays that the impugned OIA may be set aside and the Appeal may be allowed.

4. The Learned AR submits that Department has visited the premises of the Appellant on several occasions and he did not co-operate with the officials for proper verification of his premises. The Appellant was not in a position to explain properly the amount of seized cash found in the vault. The 12 pieces of gold are carrying the mark "MELTER ASSAYER". All these facts show that the Appellant was dealing with foreign origin gold. He has not given any proof towards receiving the gold bar of 300 grams from his mother. The AR reiterates the findings of the lower Authorities and justifies the confiscation of gold, cash and penalty imposed on the Appellant.

5. Heard both sides and considered the submissions.

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6. It is an admitted fact that the verification was conducted in the premises of the Appellant which is located in Kolkata which is not any border town of India. The Appellant has provided the details of Trade Licence of his Melting House, Profit & Loss Account, Balance Sheet, Fixed Assets Schedule, Income Tax Returns etc. Out of the 12 pieces of gold found in the vault, only one piece was with marking of "MELTER ASSAYER". There was no marking in the balance 11 pieces of gold bar. Therefore, on the basis of this one piece itself, the Department cannot come to a conclusion that all the 12 pieces are of foreign origin. When the Appellant has provided the details of his mother's address and has stated that he has given 330 grams of gold, it is seen that the Department has not carried out any verification to ascertain the veracity of this claim. The Department has also not made any efforts to verify the claims that he has undertaken melting works for various persons by making any enquiry from them. This shows that the Department has proceeded only on the assumption that the Appellant is not telling the truth and is dealing with gold of foreign origin. For such assumption, there is no place in law. So far as Indian Currency of Rs.11,36,300/- claimed by the Appellant as his own earning of the past 15 years is concerned, the Department has not made any effort to go through his Profit & Loss Account and other Asset Statements given by him to rebut this claim. In such a case, even in respect of seized cash, the Department has proceeded only on assumptions and presumptions.

7. In the case of Aadil Majeed Banday Vs. Commissioner of Customs, Amritsar-2021 (378) E.L.T. 540 (Tri.-Chan.), the Tribunal has held as under:-

12. *On hearing the parties, it is a fact on record that the gold in question has been seized when the appellant was travelling in domestic flight from Jammu to Srinagar, in that circumstances, the goods in question cannot be said as imported goods. The revenue is heavily relying on Section 123 of the Customs Act say that when any goods on the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the appellant. Admittedly, if revenue is having a reasonable belief that they are*

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smuggled goods, then the burden of proof that the goods are not imported lies on the appellant. But firstly, there should be a reasonable belief that the gold in question is smuggled one is to be established by the revenue to invoke Sec. 123 of the Customs Act. In the impugned order as well as adjudication order, nowhere it has been established that there was a reasonable belief that the goods in question are smuggled goods which is the bone contention to invoke Section 123 of the Customs Act, 1962. Further, the appellant has also brought on record that the marking on gold in question is freely available in the Indian market and at the website www.indiamart.com, the goods can be purchased by any Indian.

13. *In that circumstances, revenue has failed to discharge that they are initial burden that on reasonable belief that the goods in question are smuggled goods. Further, it has been found that only market enquiry was done for valuation and purity of the goods in question. No fact has been brought on record by way of testing of the goods in question that the marking made on the goods are genuine or not. As no such investigation has been done to establish that the goods in question are of foreign origin, therefore, the provision of Section 123 of the Customs Act is not applicable to the facts of this case.*

14. *Further, the appellant has never admitted that the goods are of foreign origin or has been smuggled. The case laws relied by the Ld. AR are not applicable to the facts of this case as in those cases, the person from whose custody the gold/jewellery has been recovered has been recovered have admitted that the goods are of foreign origin and brought in India through illicit means. In that circumstances, the absolute confiscation of the gold in question is bad in law. [Emphasis Supplied]*

8. In the case of Nand Kishore Modi Vs. Commr. of Cus. (Prev.), West Bengal-2015 (325) E.L.T. 781 (Tri. Kolkata), the Hon'ble Tribunal has held as under:-

4.1 *In view of the above observations and settled proposition of law every piece of gold possessed by a person in India cannot be considered to be of smuggled nature and that the possessor of such gold has to discharge the onus under Section 123 of the Customs Act, 1962, However, it may be a requirement from a person in a Customs area who imported gold as baggage. In the instant case the foreign marked gold was not seized from a customs area or a person coming from an international border. Accordingly, it is held that in the present appeals,*

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Revenue has failed to establish that seized gold was of smuggled nature.

5. *Appellant Shri Rajendra Kumar Damani has brought on record two bills suggesting the purchase of the seized gold biscuits from M/s. Anand Sales Pvt. Ltd. On investigation by the Customs officer Shri Nand Kishore Modi of M/s. Anand Sales Pvt. Ltd. has confirmed the sale of 22 pcs. of gold biscuits to Shri R.K. Damani and also that these gold biscuits were procured by him from ABN AMRO BANK, Russel Street Branch, Kolkata. It is true that no document of purchase of seized gold biscuits have been produced on the date of the panchnama or recording of of the first statement. But looking to the fact; that Shri R.K. Damani was not arrested when Shri Mahendra Bahadur did implicate Shri R.K. Damani as his employer; it has to be held that statements recorded on 14-2-2001 were not the correct representation of the facts. This is also fortified by the fact that recovery of gold biscuits was conflictingly shown to be from the pocket of Shri Mahendra Bahadur and as well as from the waste paper box. Under the existing factual matrix, appellant Shri R.K. Damani is able to discharge his burden of licit acquisition of gold biscuits by furnishing the purchase bills from the M/s. Anand Sales Pvt. Ltd. The confiscation of 22 pcs. of gold biscuits is required to be set aside and the same are required to be handed over to the rightful owner. As on merits, the case has been decided in favour of the appellants. There is no point in imposition of penalties. In view of the above observations and settled proposition of relied upon case laws appeals filed by the appellants are allowed with consequential relief, if any. [Emphasis Supplied]*

9. In view of the above, I set aside the OIA and allow the Appeal with consequential relief, if any, as per law.

(Operative part of the order was pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Pooja