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

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 75443 of 2023
(Arising out of Order-in-Appeal No. 59/CUS/CCP/2023 dated: 26.04.2023 passed by Commissioner (Appeals), GST, CX & Customs, Bhubaneswar.)

Shri Satish Kumar Subudhi
(Gouda Street, Big Bazar, Berhampur, Dist- Ganjam, Odisha - 760002.)

...Appellant

VERSUS

Commr. of Customs, Bhubaneshwar-I
(C.R. Building, Rajaswa Vihar, Bhubaneswar, Orisha – 751007.)

...Respondent

APPERANCE :
Mr. Amiya Patnayak, Consultant for the Appellant
Mr. Faiz Ahmed, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No. ...76064/2024

DATE OF HEARING : 04.01.2024

DATE OF PRONOUNCEMENT : 24.01.2024

PER: RAJEEV TANDON :

The present appeal has been filed by K. Satish Subudhi, son of late Shri K. Prasad Rao Subudhi Proprietor of M/s. Sankar Jewellers. This is the second round of appeal before this Tribunal in the matter. The present Appellant has been substituted in the matter who is the son of the original noticee Shri K. Prasad Rao Subudhi. The issue has its origin in the year 1999 when the Revenue seized 2332.800 gm of foreign marked gold. This gold was ordered to be confiscated by the Department vide Order-in-Original dated 18.10.1919 and order upheld in appeal vide Order-in-Appeal No.08/Cus/CCP/2022 dated 17.02.2022. This said order, in appeal proceedings was subsequently, set aside by the Hon'ble High Court of Orissa vide order dated 24.03.2022 and the matter remanded to Commissioner (Appeals) for deciding the issue afresh after adhering to the principles of natural justice. The Ld.

Commissioner (Appeals), once again upheld the order of the adjudicating authority. The operative part of the order reads as under: under :

> *"32. I have carefully examined the case records, grounds of Appeal and also the written submission made by the Appellants at the time of personal hearing as well afterwards and during cross examination and legal citations into consideration and on the basis of above facts and still observe that the officers visited the premises and sized the subjected Gold biscuits on a reasonable belief that they were of foreign origin and smuggled into India.*
>
> *33. The Appellants still could not convince lawful import or acquisition of the recovered gold. Based on initial statement, documents and sequence of documents and results of cross examination. I am of the view that the appellant does not have lawful possession over seized Gold and I am of the opinion that foreign gold in question was not imported into India by lawful means and thus the confiscation of the same is upheld and once it is proved, the Appellants have rightly been penalized."*

It is in this backdrop that the impugned Order-in-Appeal under challenge is the subject matter of the lis.

2. The brief facts of the case are :

3. That based on a specific information while keeping surveillance, the officers of the department intercepted one person named Satendro Panda on 08.08.199 at Cuttack bus stop. The said person had arrived from Berhampur. No sooner the person alighted from the ESS Coach and was about to board autorickshaw the officers on vigil at Badambadi Government Bus Stand, Cuttack, intercepted the above named accused. The personal search of the person led to recovery of 20 numbers of gold

biscuits of foreign origin collectively weighing 2332.800 gams, and valued at Rs.11,03,414.40/- secreted in two specially stitched pockets, attached to the waist of the trousers worn by the accused. The accused produced 4 bills bearing no. 9458, 9459, 9460 and 9461 all dated 12.08.1999 issued by Visakha Bullion Corporation (VBC) in support of legal acquisition thereof. The said Bills were issued in the name of Shri K. Prasad Rao Subudhi, Berhampur (two bills), Runa BPRM(one bill) and Pavithra BPRM(one bill). In his statement recorded under Section 108 of the Customs Act on 18.08.199, the said intercepted person Satendro Panda, informed the officers that the gold belonged to P. Roy Subudhi who had given him for delivering it to Babulal Babu of Cuttack at his residence. He also informed the officers that he worked for Sankar Jewellers, Badabazar, Berhampur that the said gold belonged to K. Prasad Rao Subudhi and it was as per the latter's directions that he was carrying the impugned gold.

4. In the course of investigations undertaken, the officers of the Department recorded the statement of Gunbantrai Seth, son of Babulal Seth, popularly known as Babulal Babu, Proprietor of Babulal & Company. Gunbantrai Seth informed the officers that neither did he know the accused Satendro Panda, nor did they know K. Prasad Rao Subudhi of Badabaza, Berhampur. He also denied having received 5 gold bars, through Satendro Panda on an earlier occasion. The officers of the Department, therefore under a reasonable belief that the intercepted gold was liable for seizure seized the interdicted gold, under Section 110 of the Customs Act. Gunbantrai Seth completely denied that the said 20 bars of gold biscuits of foreign origin were meant for him. The seized gold biscuits carried the foreign origin marks as "UBS Switzerland". Further, as it was noted by the seizing officers, that the Bills recovered from Santendro Panda on 18.08.1999, at the time of seizure did not carry any reference to the said "UBS" brand, they therefore felt that the legal possession of the gold biscuit was inexplainable, and the seized gold liable for confiscation under Section 111 of the Customs Act.

5. Subsequent, verification of the aforesaid four bills in question revealed them as not pertaining to seized foreign origin gold biscuits. In the meantime K. Prasad Rao Subudhi vide application received by the

Department on 23.08.1999 (five days post seizure) claimed ownership of the seized gold intimating that the seized 20 tolas of gold were procured from Bherunath Bullion Corporation (BBC), Vizag vide Bill no. 03101 dated 16.08.1999 and Bill no. 03137 dated 17.08.1999 and that they were sent to Cuttack for making of gold ornaments. K. Prasad Rao Subudhi, the appellant herein, requested the Department for the release of the seized gold as it was licitly procured by him, from the above named licensed Bullion Merchant. The Department however, turned down the said request stating that against the seized 200 Tolas of gold, the above named Subudhi (KPRS) had staked claim for 20 Tolas only and therefore, the same was unrelated to the present case.

6. In view of the above further enquiries were initiated and the appellant summoned repeatedly by the department for pursuing the investigations. Notably, KPRS did not make himself available to the Department for quite a while. In this regard it is noted by the Department as under :

> *"Although Sri Prasad Rao Subudhi was not responding to the various summons issued to him to facilitate investigation into the case, he was nevertheless effectively pursuing claim of innocence both on his part as well as on the part of Sri Satendor Panda, who had been arrested by filing various petitions like petition for grant of bail to Sri Satendro Panda in the Hon'ble ACJM (SPI) Court, Cuttack vide case No. 2(C) CC 120/99, in the Hon'ble Sessions Court, Cuttack vide criminal misc. case No. 840 of 1999, in the Hon'ble High Court of Judicature, Orissa vide criminal misc. case No. 4331 of 1999. Sri K.Prasad Rao Subudhi also filed a petition*

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1 - The Act

> *for Anticipatory bail in Criminal Misc. Case No. 4447 of 1999 in the Hon'ble High Court of Orisa and also filed OJC No. 13058 of 1999, inter alia praying for release of the seized gold, etc."*

7. It is noted from records that though KPRS did not make himself available to the authorities in pursuing the investigations he in the meantime approached various government authorities alleging harassment by the Departmental Officers. We note from records that despite the order dated 25.11.1999 of the Hon'ble High Court in OJC No. 13058/1999 directing KPRS to co-operate with the investigating officers so that the ongoing proceedings could be disposed of within a three month time period stipulated by the Hon'ble High Court, K. Prasad Rao Subudhi, appeared before the departmental authorities only on 13.01.2000 alongwith his lawyers when his initial statement under Section 108 of Customs Act was recorded by the authorities. We also note an interesting twist in this regard concerning the statement being given in telgu/english. This aspect has been clearly brought out in the show-cause-notice. The department has however termed it, as at the instance of the advocate's accompanying KPRS as per Hon'ble Court's directions. Be as it may to add another reason for disputing the statement tendered. We note that there have been some allegations made by the late noticee, in this regard. However, this being of no significance or relevance at this stage to the present appeal, we only make a mention of it on record so as to indicate the vitiated atmosphere in which the investigations were undertaken. Vide his letter dated 02.02.2000, we also note, that K. Prasad Rao Subudhi charged the Department of having presented and produced original bills alongwith attested true copies before the Deputy Commissioner on 09.09.1999 and that the originals were verified and returned to him, besides submitting true copies of other documents on 03.09.1999. The Department however, continued to summon K. Prasad Rao Subudhi for furnishing of original documents. In case the said documents were already tendered and verified by the Department, no fresh summons

were required to be issued thereto. Further, it is recorded in the notice that contrary to the general norms and in view of the belligerent attitude and continuous non co-operation of K. Prasad Rao Subudhi, a copy of his statement dated 31.01.2000 and 01.02.2000 were supplied to KPRS. We find from records that instead of co-operating in the smooth conduct of the enquiries, perhaps in pursuance of the legal advice tendered by his advocates or of his own wisdom, K. Prasad Rao Subudhi preferred to communicate with the department through letters implicating the officers of misconduct and the like. In fact we take note of the deep anguish and frustration of the investigating officers, having recorded as under in the show cause notice.

"From the above it is as clear as day light that Shri K. P. Rao Subudhi has obstructed in the conduct of the investigation in every possible manner and has not produced the documents and other evidences called from him in the various summons issued to him from time to time."

8. Investigations initiated by the Department against Visakha Bullion Corporation (VBC) inter alia, revealed that the gold bars delivered against Bill No. 9458, 9460, and 9461 were not of UBS brand and that the said gold was procured from the State Bank of India, Hyderabad and all sales were made at the shop counter against the said bill/ invoice. (reference statement of MA Sriranga, MD of VBC dt. 30.08.1999.) Enquiries were further conducted by the Department with the State Bank of India when it was informed that the concerned branch of the bank had sold only PAMP and RAND brand of gold and that they had thus far not sold any UBS brand of gold at all. This therefore, led to the irrefutable conclusion that the seized gold bar bearing UBS marks did not pertain to the bills tendered by Satendro Panda towards his claim for licit acquisition of the same.

9. On the other hand Shri Bherunath Bullion Corporation (BBC) vide their certificate dated 23.08.1999, while certifying the purchase of the said gold bars by K. Prasad Rao Subudhi enclosed a photocopy of the invoice to indicate that they in turn the procured gold was from the stocks of M/s. MMTC Ltd., Visakhapatnam. A copy of invoice bearing No. 306/MMTC Gold/99-2000 dated 16.08.1999 was enclosed in support. To check up the veracity of this delivery challan/invoice issued

by M/s. MMTC Ltd., enquiries were carried by the department from M/s. MMTC Ltd., Visakhapatnam. MMTC Ltd., in turn delivered a certified copy of this very delivery challan/invoice bearing No. 306/MMTC Gold/9902000 dated 16.08.99 to the department. It is noted that a casual glance at the two copies of the one and the same document reveal that "UBS" has been interpolated in the photocopy of the invoice produced by Sri Bherunath Bullion Corporation, Visakhapatnam, whereas this "UBS" inscription in ink and hand written, does not exist in the certified copy of the invoice received directly from MMTC Ltd. As admittedly by the appellant, the word "UBS" have been interpolated in the delivery challan/invoice of MMTC Limited with the objective of linking the invoice to the seized gold.

10. We note that for a variety of reasons the conduct of smooth investigation into the present matter were badly obstructed, in the proceedings before the lower authorities. The noticee continued to maintain that they had procured 20 Nos. (200 Tolas) of customs, cleared (licitly acquired) gold biscuits from BBC Vizag vide Bill No. 03101 dated 18.08.1999 and Bill No.03137 dated 16.08.1999. It is also on record that despite multitude of summons given to the said appellant, to produce the original copy of the said 2 bills/invoices, their receipt is nowhere acknowledged by the department and continues to be hotly contested by either side. The appellant also claimed ownership of the said 20 gold biscuits weighing 200 Tolas and that mentioning of 20 Tolas instead of 20 bars of gold biscuits, in his correspondence with the department was essentially a typographical error. To the aspect of the delay in the adjudication process we find it largely on account of the ad-interim stay obtained by the appellant, in the conduct of further proceedings in the case. This stay was finally vacated with the appellant withdrawing their writ petition, vide order dated 27.02.2017.

The 4 Bills of Visakha Bullion Corporation (VBC) 9458, 9459, 9460 and 9461: all dated 12.08.1999.

11. In follow up investigations about the four bills of VBC, to ascertain their connection with the seized gold, we note that S.V. Raju of Visakha Bullion Corporation, Visakhapatnam vide his letter dated 23.8.99 addressed to the Joint Commissioner of Customs (Preventive), Customs House, Visakhapatnam has intimated that they had procured

gold from State Bank of India, Hyderabad and that normally the bars supplied by the State Bank of India, Hyderabad bear the description:

1. SUISSE 10 TOLAS: 999.0; ESSAYEUR: FONDEUR
2. SOUTH AFRICA REFINERIES ETC.,
3. SUISSE, PAMP, SWITZERLAND.

11.1 He admitted to have issued the four bills No. 9458 to 9461 were to three persons viz. Sri Prasad Subudhi, Sri Rana and Sri Pabitra. In their subsequent letter, it is maintained by VBC that they do not remember, as also no record is available as to the description of the gold bars sold against bill Nos. 9458 to 9461 all dated 12.8.99. However, the Assistant General Manager, of SBI, Hyderabad vide his letter dated 25.8.99 confirmed that their branch had not thus far sold UBS Brand gold at all. Thus it is clear that the four bills of VBC tendered by Sri Panda to account for the legal possession of the seized/cinfiscated gold biscuits of foreign origin, are unrelated to the gold biscuits under seizure (which has "UBS" brand marked on each biscuit), as VBC have claimed to have purchased the said gold biscuits from SBI, Hyderabad and SBI, Hyderabad had never sold any "UBS" Brand gold to VBS. Thus the question of sale of "UBS" Brand gold by VBS to Sri Subudhi under cover of the aforesaid four bills of VBS i.e. Bill No. 9458 to 9461 all dated 12.8.99 does not arise at all.

12. In view of the above, the four bills aforesaid, produced by Sri Panda at the time of the seizure of 20 foreign marked gold biscuits cannot be accepted as valid documents in support of licit procurement/purchase of the gold biscuits and certainly do not pertain to the seized/sold confiscated.

The two Bills of Bherunath Bullion Corporation (BBC) – 3101 dated 16.08.1999 & 3137 dated 17.08.1999

13. It is the departments contention that repeated attempts to verify the authenticity of the Bill Nos. 03101 dated 16.8.99 and 03137 dated 17.8.99 by the department came to a naught on account of alleged lack of co-operation of the noticee. The contents of the application dated 23.8.99 filed by the appellant for the release of seized gold biscuits also could not therefore be checked out.

14. The department further points out to the inherent contradictions in the statement tendered by the appellant before the authorities. Thus

while at one place in his statement dated 31.01.2000 the appellant has admitted to have given the seized gold to Satendro Panda and go to Babulal Babu, where he would advise to whom the said gold is to be handed over, at other place in the said statement the appellant denies any knowledge about the said Babulal Babu, in support of their case, thus generating inherent contradiction.

15. It is further brought on record that instead of cooperating with the investigations to decide the authenticity of the bills of BBC, so as to decide status of his application for release of seized gold biscuits, the appellant filed several petitions in various courts and wasted precious time for conduct of expeditious and a thorough enquiry.

16. Having elaborated on the factual matrix of the case at great length, we note that for the invoices of VBC, as were recovered by the department from Satendro Panda the accused in his initial testimony before the officers has stated that they were wrongly handed to Satendro Panda who had carried them by mistake in a hurry. The appellant has subsequently denied the said invoices as a cover for the licit possession of the seized gold. He thereafter handed over to the department (within five days of seizure) two other invoices that issued by BBC, which the department upon verification found were issued in favour of the appellant. A copy of the same was collected from the office premises of BBC by Vizag Customs and sent to the seizing Commissionerate. Copy of this communication is reproduced hereunder:

46 ~~ANNEXURE 5(C)~~

ANNEXURE- 6(c)

FAX/SPEED POST

OFFICE OF THE COMMISSIONER OF CUSTOMS
Custom House, Port Area, Visakhapatnam - 530 035

F.No.S6/29/99-TIU Dt.26.08.99.

To
Shri S.S.Lenka,
Jt.Commissioner of C.Excise& Customs(Prev),
O/o the Commissioner of Central Excise&Customs,
Bhubaneswar- I Commissionerate,
Rajeshwarivihar, Central Revenue Building,
BHUBANESWAR - 751 004.

Sir,

Sub: Seizure of 20 Nos. of Gold Biscuits of foreign origin from Shri K.Prasad Rao Subudhi of Berhampur – Verification of Bills – Reg.

* * *

Please refer to your fax C.No.VIII(10)/11/CUP/BBSR-I/99 dated 25.8.99 on the above subject.

As required by you an enquiry was conducted with M/s.Bherunath Bullion Corporation, Visakhapatnam about the Bills bearing Nos. 03101 dt. 16.8.99 and 03137 dt. 17.8.99. The duplicate copies of the bills bearing Nos. 03101 dt. 16.8.99 and 03137 dt. 17.8.99 issued by M/s.Bherunath Bullion Corporation were available with them. Duplicate copies of these bills available with M/s.Bherunath Bullion Corporation have been obtained and enclosed for necessary action at your end.

Photocopy of a letter dt. 25.8.99 written by Shri Mukesh Kumar Jain of M/s. Bherunath Bullion Corporation, Visakhapatnam, in this regard, which is self explanatory is enclosed for necessary action at your end.

A photocopy of the invoice No. 306/MMTC GOLD/99-2000 dated 16.8.99 from M/s.MMTC, Port Area, Visakhapatnam, regarding the sale of gold to M/s.Bherunath Bullion Corporation, Visakhapatnam is also enclosed for necessary action at your end.

Yours faithfully,

(PIYUSHA PATNAIK)
JOINT COMMISSIONER OF CUSTOMS(PREV)

Encl: as abve.

17. Subsequently the department undertook further verification of the sales transaction of this sale made to BBC by MMTC. Upon verification this was corroborated. To a specific query of non mention of "UBC" brand on these document, both Raj Kumar Jain of BBC and MMTC confirmed that it was not their practice of indicating the brand of the gold sold on the invoice. Further, both the parties did not deny transaction of "UBS" brand of foreign marked gold biscuits. No further investigations are said to be undertaken by the department either with BBC or MMTC, thereby indicating conclusivity and acceptance of the evidence tendered. The copies of the said three documents are scanned and are as under:

26/08/1999 17:18 0891-562613 CUSTOMS VSP PAGE 04

ANNEXURE

4/2

" SRI SAMBHAVNATHAYANAMAH "

BBC

SREE BHERUNATH BULLION CORPORATION.

Regd. Office : B-7,Pavan Palace,
Opp. T.S.R Complex, Dwarakanagar
Visakhapatnam - 16 (A.P)
Phones : 596701,596702

APGST No. VSP/03/01/3286 CST No. VSP/03/01/1790

To :M/s. K.PRASAD RAO SUBUDHI GOUDA STREET BERAMPUR Bill No :03101

Date :16/08/99

S.No.	DESCRIPTION	UNIT	QUANTITY	RATE	AMOUNT
1.	TEN TOLA GOLD BARS	10	1166.400	47750.00	477500.00

Rupees Four lac seventy seven thousand five hundred only Rs. 477500.00

All Disputes Subject to Visakhapatnam Jurisdiction Only.

E.& O.E

For SREE BHERUNATH BULLION CORPORATION

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26/08/1999 17:18 0891-562613 CUSTOMS VSP PAGE 03

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ANNEXURE-

Receiver signature Authorised Signature

" SRI SAMBHAVNATHAYANAMAH "

BBC

SREE BHERUNATH BULLION CORPORATION.

Regd. Office : B-7,Pavan Palace,
Opp. T.S.R Complex, Dwarakanagar
Visakhapatnam - 16 (A.P)
Phones : 596701,596702

APGST No. VSP/03/01/3286

CST No. VSP/03/01/1790

To :M/s. K.PRASAD RAO SUBUDI GOUDA STREET BERAMPUR

Bill No :03137

Date :17/08/99

S.No.	DESCRIPTION	UNIT	QUANTITY	RATE	AMOUNT
1.	TEN TOLA GOLD BARS	10	1166.400	47650.00	476500.00

SREE B...

Rupees Four lac seventy six thousand five hundred only. Rs. 476500.00

ANNEXURE - 7

ANNEXURE -

MMTC LIMITED

(A GOVT.OF INDIA ENTERPRISE)

P.B. No. 132, MMTC BHAVAN, PORT AREA, VISAKHAPATNAM - 530 035

Domestic Sale of Gold / ~~Silver~~

DELIVERY CHALLAN / INVOICE

No. 306 / MMTC GOLD/ 99-2000

Date 16-8-99

Value of Delivery : Rs 5667376

Payment Received vide : Previous cred Bal

Issued To M/s. BHERUNATH BULLION CORPORATION, B-7, DWARAKANAGAR, VISAKHAPATNAM.

Sl. No.	Denomination Gold/~~Silver~~	No. of Pieces	Net Weight	Remarks
1.	~~TEN TOLA GOLD BISCUITS~~ U.B.S. Bars	119	13.8801 kg	
2.	~~TEN GRAM GOLD MEDALLIONS~~			
	PAYMENT PARTICULARS Previous cred Bal IB credit 42,00,000 SBI OB 21,00,000 Rs. Basic Price = 5639180 APGST @ 0.5% = 28196 5667376	16/8/99		

Received the goods as above in order

Sree Bherunath Bullion, Visakhapatnam
Signature & Name 16/8/99

for MMTC LIMITED

16/8/99
~~Dy. Manager~~ / Manager

17.1 The department has however discounted this evidence on the following two grounds :

(1) That in private sector, it is extremely easy to generate a computer invoice, even in the absence of sales.

(2) That the word inscribed "UBS" on the copy of the MMTC invoice tendered by the appellant during investigations was in effect inscribed manually with the words UBC.

18. We do not find sufficient merit in the two grounds of the department for the following reasons :

(i) That the department did not carry any further investigations at the end of BBC, therefore to now cry foul of the two invoice submitted by appellant is not open to them.

(ii) That the appellant has admitted that "UBC", manual inscription referred supra were of their own accord to indicate the nexus with the said gold for their records.

(iii) MMTC have admitted to be dealing in sale of "UBC" brand of foreign marked gold.

(iv) MMTC as well as BBC both owned up to the sales as indicated in the said invoices.

19. We note with disdain that one amongst other grounds to implicate the appellant is the fact that the Babulal Babu too had been subjected to investigations concerning seizure of five foreign marked gold biscuits. However, we brush this aspect of the investigations as totally unrelated to the present matter and hence of no consequence to the issue at hand. Another ground in support of the departments' stand taken by the Ld. Authorized Representative Sri Faiz Ahmed is concerning the financial health of the appellants and to state that they did not have enough resources to make such large cash purchases. Other than a bland statement to this regard, we find that the department falls woefully short to adduce any evidence to buttress this stand. While it is an admitted position by the appellant that the two purchases were made in cash, the department failed to further probe into this area of investigations. As the appellant themselves have disowned the theory

of procurement from VBC, we refrain from considering any aspect relating the seized gold to the said four invoices of VBC initially recovered from Satendro Panda at the time of recovery of the gold from him.

20. We find that it remains a matter contentious between the department and the appellant, that only photocopies of two invoices of BBC - No. 03101 dated 16.08.1999 and 03137 dated 17.08.1999 were made over to the authorities and original not produced by the appellant, while the latter claims to have made it over to the Deputy Commissioner, who had personally verified the same. The fact that copy of the said invoices each were procured by the department from the end of BBC, sets to rest any doubts in this regard, in the purported absence of the originals/invoices. It is also not the case that the two invoices were tendered quite later during the investigation process, as it is on record that the appellant, at the time of claim of ownership of seized gold within days of seizure (gold seized on 18.08.1999 while ownership claim application and BBC invoices received by the department on 23.08.1999), itself tendered the said invoices – virtually hinting at proximate time span in the matter. Also we find not enough merit in disregarding the application indicating "20 Tolas" in lieu of "200 Tolas" in one of the application tendered by the appellant, which error the appellant have described as to a clerical one. We also find no substance in the departments plea of reading exceptionally into the act of interpolating "UBS" in the MMTC issued delivery challan/invoice, which the appellant indicates was for reason of their own internal consumption.

21. MMTC has admittedly raised the invoice in question in favour of BBC which the department sourced upon investigations done with BBC and a copy of which was made over to the department by the appellant during investigations. Also, BBC has submitted before the authorities that sales were normally made against manual invoices, but computerized billing was resorted to by them on the basis of customer's request. We note it is these computerized invoices that the department laid its hands on while conducting immediate follow up with BBC.

22. As to the repeated abuse of summons by the appellant and the department therefore arriving at the conclusion that it was so because

the noticee was aware of the fact of investigations going in a direction against his interest, we feel that such assumption on the past of the department is hypothetical and pure conjecturing and no legal principle permits them to derive such an inference from the circumstances. Before arriving at such generalizations the onus would lie on the department to establish their contention. While we do not appreciate in the least, the abuse of summons by the appellants, we note that his stance in this regard has been twofold – (a) That he was repeatedly harassed by the department for which he had filed complaints and grievances with the authorities both within and outside the department and (b) that he was mortally scared and very much afraid to approach the authorities and that is why he had taken court's approval to be subjected to questioning in the presence of his advocates. Such conduct can necessarily not mean to indicate guilt or any wrong doing. It could also be for a variety of other reasons as well. Also the fact that if there were no previous gold transactions done by the appellant, it could not mean to infer that the appellant was disentitled in so doing or the very fact of doing so was a transaction of illegality in dealing with foreign marked gold. Such surmises by the department are bereft of any sound logic and are certainly impetuous.

23. We also note that during the cross-examination of three key witnesses rendered, as per the directions of the Hon'ble High Court, the department has not been able to churn out any new fact, as could make out a convincing case for the revenue. There has been no dispute of the evidence tendered by way of delivery challan/invoices/bills of MMTC and BBC submitted by the appellant. Rather, the cross-examination has only fortified the case in this regard. We also take note of the fact of the department dishing out a list of past cases as registered against the appellant and the orders passed by the department in this regard. We would like to emphatically mention herein that we are not expected to get swayed by past breaches, if any, on part of the appellant. We are also unaware of the fact, that the status of such cases, as placed on record was final or the matters were still being litigated before the various judicial /quasi judicial bodies. We categorically assert that in deciding an issue at hand, courts are only bound by the evidence as available and placed on record in the disputed matter under

consideration and not to be carried away by any other proposition lacking empirical evidence. We thus take no cognizance of past offences, if any, booked against the appellants, in an attempt to issue them a character certificate or to prejudice the present case.

24. We also note that both sides have brought out several perfunctory issues on record in the matter which have no bearing with the case in order to ascertain the legality or illegality of seized/confiscated foreign marked gold biscuits. Such attempts at digressing and distracting from the issue at hand are certainly required to be demonized and we for sure denounce the same, discrediting the efforts of either side in this direction. We also note that the appellant has laid significant emphasis on certain aspects of the investigation and conclusions or observations as noted in the order in appeal or the investigation or the original order pointing them out by way of non application of mind or latches etc. As the arguments on the said pleas are shorn of merits of the issue we cease to take note thereof and hence refrain from any observation thereon.

25. We also take cognizance of the following case of laws for the propositions as under :

(i) ***V.K. Jain & Sons Vs. Commr. of Customs – 2003 (160) E.L.T. 910 (T)***

> *"once the seller has admitted to have sold the gold in question to the Appellant, that fact by itself is sufficient to show the legal acquisition of the gold by him and the onus placed upon the Appellant under provisions of Section 123 is discharged to the requisite extent."*

(ii) ***S.K. Chains Vs. Commr. of Customs (Prev.) – 2001 (127) E.L.T. 415 (T)***

> *"the appellant had given the source of acquition of the foreign mark gold proving lawful acquisition, the burden casted upon the appellants has been discharged."*

> In the said order it is also held that the admission of the manager of the appellants, to the effect that they were

purchasing foreign marked gold biscuits from the open market without receipt, by itself is no indication that the gold under seizure was not legally imported.

(iii) ***Sri Samir Kumar Roy & Others V. CC (Prev.) West Bengal – 2001 (135) E.L.T. 1036 (T)***

"Onus as placed under Section 123 was discharged when the appellants produced the sale/purchased vouchers showing the sale of the goods from the gold dealers who admitted having sold the same. In absence of any requirement of law requiring the gold dealers enjoying the sale/purchase of foreign marked in India, to indicate the brand name of the same in the sale/purchase the sale documents produced by the appellants cannot be dismissed on the said ground. In the instant case also, we find that the entire chain of sequence starting from importation of gold biscuits of M/s Kan Karan Impex, its sale to M/s Chauhan Zevares and further sale to Shri Kapildeo Prasad, is established. As such taking the said factor into accounts, I am of the view that the onus cast upon the appellants under the provisions of Section 123 stands fully discharged. The confiscation of the gold biscuits is not called for. Accordingly, I set aside the same. ….. For the similar reasons, there is no warrant for imposition of penalties upon the various persons. The same is, accordingly set aside."

26. Under the circumstances and for reasons as discussed, we are of the view that the appellant's have satisfactorily discharged the burden cast upon them in law, under Section 123 of the Customs Act and have demonstrated the licit possession of seized gold. On the other hand the department has failed in irrefutably demonstrating any falsity in the

evidence supplied by the appellant noticee. Thus, for want of the same the seizure and the ultimate confiscation of the 20 gold bars is not warranted. It being therefore unlawful is liable to be set aside. For reasons thus, we quash and set aside the orders passed by the lower authority and also set aside the order of confiscation of gold and imposition of penalty and allow the appeal with consequential relief as per law.

(Pronounced in the open court on 24.01.2024)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pinaki