

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

REGIONAL BENCH – COURT NO.2

Customs Appeal No.75154 of 2022
Customs Appeal No.75155 of 2022
Customs Appeal No.75156 of 2022

(Arising out of Order-in-Appeal No.Kol/Cus(port)/AKR/880-885/2021 dated 31.12.2021 passed by Commissioner (Appeals) of Customs, Kolkata)

Shri Rjendra Kumar Damani @ Raju Damani (Noticee No.1)

Shri Sanatan Behra @ Hari (Noticee No.2)

Shri Bhola Ray @ Bholi Ray (Noticee No.3)

12D, 12th Floor, Ankur Apartment, 10, Lord Sinha Road, Kolkata-700071

Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

15/1, Strand Road, Kolkata-700001

Respondent

Appearance:

Mr.Shovendu Banerjee, Advocate for the Appellant

Shri S.Chakraborty, Authorized Representative for the Respondent

WITH

Customs Appeal No.75879 of 2022
Customs Appeal No.75094 of 2023

(Arising out of Order-in-Appeal No.Kol/Cus(port)/AKR/880-885/2021 dated 31.12.2021 passed by Commissioner (Appeals) of Customs, Kolkata)

Commissioner of Customs (Preventive), Kolkata

15/1, Strand Road, Kolkata-700001

Appellant

VERSUS

Shri Amit Jalan, S/o Shyam Sunder Jalan (Noticee No.5)

Flat No.103, 14/15 Bengur Avenue, Block C, Kolkata-70065

Shri Ashok Jalan, S/o Late Madan Lal Jalan (Noticee No.6)

AC-13, Sector 1, Salt Lake, Kolkata 700064

Respondent

Appearance:

Shri S.Chakraborty, Authorized Representative for the Appellant

Shri Debaditya Banerjee & Mr.Wattan Sharma, both Advocates for the Respondents

Customs Appeal Nos.75154,75155 & 75156/2022
& Customs Appeal Nos.75879/2022 & 75094/2023

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO...75052-75056/2023

DATE OF HEARING : 22 .02.2023

DATE OF PRONOUNCEMENT : 03.03.2023

Per Ashok Jindal :

These appeals are against the adjudication Order-in-Original No.35/ADC(P)/CUS/WB/2020-21 dated 16.09.2020.

2. In the instant case appeals are filed against common adjudication order No.35/ADC(P)/CUS/WB/20-21 dated 16.09.2020 passed by Additional Commissioner of Customs (Preventive), Custom House, Kolkata which was confirmed by the Commissioner (Appeals) vide Order-in-Appeal No.KOL/CUS(PORT)/AKR/880-885/2021 dated 31.12.2021. The adjudicating authority vide order No: 35/ADC(P)/CUS/WB/20-21 dated 16.09.2020 (i) absolutely confiscated 11 pcs gold bars collectively weighing 10500.80 grams, valued at Rs.3,15,02,400/-; 9 pcs gold coins collectively value at Rs. 2,07,000/- and 509.100 grams of silver granules, valued at Rs. 19,448/ u/s 111(b) & 111(d) of the Customs Act, 1962 (ii) absolutely confiscated the seized Indian currency amounting to Rs.1,59,76,5000/- u/s 121 of the Customs Act,1962 (iii) penalty of 70,00,000/- on the Noticee No. 1 and penalty of Rs. 10,00,000/- each upon the Noticee No. 2 and 3 U/s 112(a) & 112(b) of the Customs Act, 1962.

3. Noticee No.1 is the main appellant and Noticee No.2 and Noticee No.3 are employees of Noticee No. 1. The Noticee No.2 and Noticee No.3 works as office assistance who are neither related with the seized goods nor they have any knowledge regarding the procurement of origin of the goods seized by the department.

4. The facts of the case, in short are that the DRI officers conducted searches at 3 different places on 06-08-2018 and recovered and seized the following:- (a) 9 nos. of gold coin valued at Rs.2,07,000/-, 509.100gms. of silver granules valued at Rs.19,448/-, Indian currency amounting to Rs.38,80,800/- and some other things as mentioned in the search list dated 06-08-2018 from the premises at 72, Manohar Das

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Street, Kolkata. (b) 11 pieces of gold bars collectively weighing 10500.800gms. valued at Rs.3,15,02,400/-, Indian currency Rs.69,99,500/- and some other things from the premises at 17, Pageyapatty, Kolkata-700007. In addition, Rs.15,00,000/- was also recovered and seized from the possession of one person named Shri Abhishek Kumar Agarwal who was found in the said premises and has got no relation with the Noticees. (c) Indian Currency Rs.51,00,000/- from the residence of Noticee No. 1 at Ankur building, flat no.12D, Lord Sinha Road, Kolkata.

5. The said 11 pieces gold bars, 9 nos. of gold coins and 509.100gms of silver granules were seized under section 110 of the Customs Act 1962 on the reasons to believe that those were of foreign origin and Smuggled into the country rendering them liable to confiscation under the provisions of the said Act. The Indian currency amounting to Rs.1,59,76,500/- was seized on the reasons to believe that the same was the sale proceeds of smuggled goods and as such, liable to confiscation under section 121 Customs Act 1962.

6. Statements of Noticees were recorded under threat and coercion on 6-08-2028 and 7-08-2018. Thereafter all the Noticees were arrested. The Noticee No.1 vide prisoner petition dated 13.08.2018 retracted the statements.

7. That three samples duly drawn from seized 11 pcs gold bars on 6.8.18 were chemically tested by the Custom House Laboratory and vide their report -Lab Ref No: 1689-1691/SZD(G)730-732 dated 21-8-2018, it was certified by the chemical laboratory that the yellow metallic bars under seizure were found to be gold of purity 99.5% (for two samples) and 99.6% (for one sample). The test report dated 20-12-18 certified the purity of the silver as 99.9%. vide Test report dated 23-9-2018 of Chemical examiner, Custom House Laboratory, it was informed that the 09(Nine) pcs of yellow metallic coins believed to be gold of foreign origin under seizure were found to be gold of purity ranging between 91.5% and 91.8% by weight.

8. Two persons named Shri Ashok Kumar Jalan alias Pappu Noticee No.5 and Sri Amit Kumar Jalan, Noticee No.6 were also examined in connection with a separate case of seizure of 8 Kgs gold effected by

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DRI, Kolkata in the month of June, 2019. Their statements were recorded on 10.6-2019 & 11.6.2019. The said persons allegedly given statements to the effect that they have sold smuggled gold to the Noticee No. 1. The said persons thereafter retracted the statements. It is pertinent to mention herein that the Noticee No. 1 in any of his statement has ever admitted or said that the Noticee No. 1 has purchased any gold from the said persons. The Noticee No. 1 had never entered any into any business relation with the said persons. The department also has not been able to prove or even able to produce any evidence that the said persons have sold any gold to the Noticee No. 1.

9. A common show cause notice being DRI F.No: DRI/KZU/AS/Enq-115(Int-34)/2018 dated 28-7-2019 was issued to the Noticee no.1 and also to Noticee no.2 and Noticee no.3, Abhishek Kumar Agarwal Noticee no.4, Ashok Kumar Jalan, Noticee no.5 and Amit Kumar Jalan, Noticee no.6 which was adjudicated by the Additional Commissioner of Customs(Preventive) and an order dated 16-09-2020 was passed holding the goods liable to absolute confiscation and imposing penalty of Rs.70,00,000/- on the appellant and Rs.10,00,000/- on each of the two appellant No.2 and 3 and Rs.2.50 lakh on Noticee no.4 and Rs.20 lakh on each of the Noticee no.5 and 6. The said order was confirmed by the Commissioner of Appeals vide order dated 31.12.2021 so far the present appellants are concerned.

10. With regard to Noticee No.5 & Noticee No.6, the Id.Commissioner (Appeals) dropped the proceedings and refrained from imposing penalty on them. Aggrieved from the said dropping proceedings against Noticee No.5 & Noticee No.6, Revenue is in appeal.

11. The Ld.Counsel for Noticee Nos.1,2 & 3, submits as under :

12. Department failed to prove that the gold is of foreign origin:-

There is no foreign marking in the seized gold and admittedly the purity of gold of foreign origin never below 99.99% whereas, as per chemical examiner, purity of seized gold bars certified to be 99.5% to 99.6%, hence the gold has to be released. In this context reliance is placed upon, inter alia, the following decisions:

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- (i) NAND KISHORE SUMANI Vs. COMMR. OF CUS., C. EX. & S.T., SILIGURI, 2016 (333) E.L.T. 448 (Tri. Cal)

Confiscation - Gold bars - Smuggling - Evidence - Ten gold bars not having foreign markings seized from a vehicle outside Customs premises allegedly smuggled from Bangladesh - No evidence of seized gold bars being of foreign origin - Weight of foreign origin gold bars is standard whereas none of the gold bars having identical weights or carrying any foreign markings - No documentary evidence of defacing of foreign markings done by appellants - Purity of gold of foreign origin never below 99.99% whereas, as per chemical examiner, purity of seized gold bars certified to be 99.92% to 99.96% - Supply of gold to appellants confirmed by proprietor/seller and photocopies of purchase bills submitted - Any information received regarding smuggled nature of seized gold based on hearsay not corroborated by any oral or documentary evidence - Seized gold not of foreign origin and not of smuggled nature -Confiscation not justified - Sections 111(b) and 111(d) of Customs Act, 1962. [para 5]

Against this order department has preferred an appeal the said appeal got dismissed and the order of the Learned Tribunal was upheld by the Hon'ble High Court at Calcutta reported in 2016 (337) E.L.T. 10 (Cal.)

- (ii) RAM NARESH CHAURASIYA Vs. COMMISSIONER OF CUSTOMS (PREV.), PATNA, paras 18 & 19

- (iii) RAM NATH SAH Vs. COMMISSIONER OF CUSTOMS, PATNA 2007 (219) E.L.T. 546 (Tri) para 4

B. Currency seized from appellant not established to be representing the sale proceeds of smuggled goods. Confiscation of currency under Section 121 of Customs Act, 1962 not sustainable.

It is stated herein that for upholding the seizure of Indian currency for violation of Section 121 the following ingredients must be satisfied (i) there must be a sale (ii) the sale must be of smuggled goods (iii) the

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sale must be by a person having knowledge or reason to believe that the goods were of smuggled origin (iv) the seller and purchaser and the quantity of gold must be established by the Customs authorities. The department in the instant case has failed to prove any of the ingredient in the instant case. In this context reliance is placed upon, inter alia, the following decisions:-

- (i) RAMCHANDRA Vs. COLLECTOR OF CUSTOMS 1992 (60) E.L.T. 277 (T) paras 5 & 6
- (ii) COLLECTOR OF CUSTOMS, NEW DELHI Vs. SUDHIR ELECTRONICS 2000 (123) E.L.T. 1054 (T) para 17

C. Retracted statement and statement of co-accused without any corroborative evidence has got no evidentiary value.

Admittedly the Noticee No. 1 has retracted the statement and the statement of Noticee No. 2 and 3 are not voluntary and those were typed by DRI officers in their office computer as per their own wish in their own words and not based on Noticees' reply during recording of statements. The said statements are dictated, as may be evident from the statements dated 6th & 7th August 2018 of the Noticee vis-à-vis the words and language of the Panchnama dated 6.8.2018 in respect of 2nd floor of 17 Pageyapatty, Kolkata, that the statement dated 6.8.18 is simply an affirmation obtained from the Noticee No. 2 and 3, in the same words and language as mentioned on the said Panchnama dt 6.8.2018. There is no difference in both the script typed on the said Panchnama and on the statement dated 6.8.18. The same is simple cut and paste of the script of said Panchnama dt 6.8.18 in the statement of the Noticee No. 3, typed on 6.8.2018. Hence the statement cannot be said to be voluntary when the same is in the words of DRI officer recording/typing the statement of the Panchas. The Noticee No. 3 and the Panchas cannot use the same words, as is evident here. Hence, no reliance could be made on such statement which is typed and recorded in the words of the DRI officer. Otherwise also the statement of co-accused cannot be relied upon without other corroborative evidence. In this context reliance is placed upon, inter alia, the following decisions:-

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- (i) COLLECTOR OF CUSTOMS, NEW DELHI Vs. SUDHIR ELECTRONICS 2000 (123) E.L.T. 1054 (T)
- (ii) JINDAL DRUGS PVT. LTD. Vs. UNION OF INDIA 2016 (340) E.L.T. 67 (P & H) para 19
- (iii) SUPERINTENDENT OF CUSTOMS Vs. BHANABHAI KHALPABHAI PATEL 1995 (76) E.L.T. 508 (S.C.)

13. The Ld.Advocate appearing on behalf of the Noticee Nos.5 & 6, submits that the statements were recorded during the course of investigation, much later of seizure of smuggled gold and currency were retracted by the Noticee Nos.5 & 6 and there is no corroborative evidence except the statement made during the course of investigation, which were retracted. In that circumstances, the Ld.Commissioner (Appeals) has rightly dropped the penalty against Noticee Nos.5 & 6.

14. On the other hand, the Id.Authorised Representative, opposes the contentions of the Id.Counsel and submits that the said gold is notified items under Section 123 of the Customs Act, 1962. Therefore, the burden of proof that the same is not smuggled one, is upon the person from whom the gold is seized and Noticee has failed to discharge the said burden. He further submitted that the retraction of statement made by the Customs Officer is having evidentiary value. In support of his contention, he relies on the following case laws :

- (i) Phoenix Mills Ltd. Vs. Union of India : 2004 (168) ELT 310 (Bom.);
- (ii) Percy Rustomji Basta Vs. State of Maharashtra : 1983 ELT 1443 (SC) ;
- (iii) Vinod Solanki Vs. Union of India & Anr.- Civil appeal No.7407 of 2008 (Arising out of SLP © No.3537 of 2008) ;
- (iv) Kuber Tobacco Products Ltd. Vs. Commissioner of Central Excise, Delhi-2013 (290) ELT 545 (Tri.-Del.) ;
- (v) Naresh J.Sukhawani Vs. Union of India : 1996 (83) ELT 258 (S.C)
- (vi) Surjeet Singh Chhabra Vs. Union of India & Others : 1997 (89) ELT 646 (S.C.) ;
- (vii) Sunny Kakkar Vs. Principal Commissioner of Customs (Prev.), New Delhi, Customs Appeal No.52094 of 2018-CESTAT Principal Bench

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(viii) Ramesh Lakhabhai Patel & Naresh Savaliya Vs. Commissioner of Customs, Ahmedabad, Customs Appeal No.10070 & 10071 of 2020-DB.

15. Heard the parties and considered the submissions made from both sides.

16. On careful consideration of the submissions made by the parties, we find that during the course of investigation, the gold was seized, which is deemed to be believed as foreign origin and the currency seized is to be believed the sale proceeds of smuggled gold of foreign origin.

17. We take note of the fact that during the course of investigation, it is the fact on record that there is no mark found on the gold seized. Moreover, purity of gold was also found 99.5% and not 99.9%. Further, during the course of investigation, the Noticee No.(1) has made a statement stating that the source of procurement of the said gold is made from an old jewellery purchased in exchange of cash during the long period of time and due and the stock of gold was melted through the said old jewellery and converted into gold bars. The said fact has not been verified by the Revenue. In such circumstances, The Tribunal in the case of Ram Nath Sah Vs. Commissioner of Customs, Patna reported in 2007 (219) ELT 546 (Tri.-Kolkata) has observed as under :

“4. After hearing both sides and perusal of the case records, I find that the seizure report does not indicate any foreign marking on the gold. The purity is also not of 999 generally found with the foreign origin gold. The seizure report also does not indicate the individual weight of the gold pieces. As such, this is a case where the benefit of doubt requires to be extended to the appellants as there is no conclusive proof that the gold is of foreign origin and smuggled. Accordingly, the impugned order is set aside and the appeals are allowed.”

18. Further, in the case of Ram Naresh Chaurasiya Vs. Commissioner of Customs (Prev.), Patna reported in 2019 (365) ELT 940 (Tri.-Kolkata), this Tribunal has held as under :

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16. I find from the records that the appellant Shri Ram Naresh Chaurasia, in support of his statement, has filed an affidavit sworn in by Shri Paras Kumar Chourasia who is the father-in-law of his elder brother, Shri Harish Kumar Chowrasia, wherein he has stated that he had gifted the gold bar weighing 199 gms to his daughter in the year 1985 in the "Khooincha Ceremony". It has also been stated in the affidavit that the gold bar was brought from Raxual and since it was purchased almost 30 years back i.e. in year 1985, he could not produce any document in support of his statement. It has also been stated by him in para 2 of his affidavit, that again in the year 1993, he gifted 100 grams of gold bar on the occasion of birth of his granddaughter (Daughter's daughter). This gold was also purchased by him from Raxaul.

17. I find from the records that the Ld. Adjudicating Authority in his discussion and findings observed that the appellant was asked to submit legal documents of the recovered and detained primary gold weighing 199 gms and 100 gms each. Shri Yogendra Prasad Chaurasia, father of Shri Ram Naresh Chaurasia, has submitted that one piece of primary gold weighing 199 gm, was given to his elder daughter-in-law (wife of Shri Harish Chaurasiya) by her parents on occasion of her marriage. Another piece weighing 100 gm was given to his granddaughter again by her daughter-in-law's parent, resident of Parsa, Nepal. The same facts was reiterated by Shri Ram Naresh Chaurasiya in his interrogatory statements dated 11-1-2016 and 25-5-2016.

18. I find that there is no dispute with the said two Gold Bars recovered from the residential premises owned by the appellant's father and the appellant and his brother Shri Harish Kumar Chaurasia were residing along with their respective families in the said premises. There is no dispute that the said gold bars did not have any foreign marking. No further investigation has been made by the Department thereafter. Thus, the department could

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not adduce any evidence whatsoever to prove that the said two gold bars were smuggled in the two countries. Therefore, the presumption regarding the smuggled nature of seized gold under Section 123 of the Customs Act, is not invocable.

19. *In view of the ratio of law laid down by the Hon'ble Supreme Court in the case of Gyan Chand v. State of Punjab - [1983 \(13\) E.L.T. 1365](#) (S.C.), neither seized gold could be legally confiscated under Section 111(b) of the Customs Act, 1962 nor any penalty could be imposed on the appellant. Accordingly, the impugned orders are set aside to the extent of seizure of gold bar and penalty against Shri Ram Naresh Chaurasia. Appeal is allowed with consequential relief to the appellant."*

19. Further, in the case of Jay Nath Shaw Vs. Commissioner of Customs, Patna reported in 2007 (218) ELT 710 (Tri.-Kolkata), this Tribunal has observed as under :

"4. *After hearing both sides and on perusal of the case records, I find that the weight of the four pieces of gold bars are respectively 148.5 gms., 106.8 gms., 104.3 gms., and 136.2 gms. The seizure memo records the marks on these gold bars as symbol of tiger head R-R "Sidhnath" in Hindi. , The purity is found to be around 995 considering the facts that the impugned gold did not have foreign markings and the weight of each of the bar is different and not a standard weight and the purity is not 999, it is difficult to believe that the impugned gold was foreign made and smuggled. The Department also has not verified the version given by the appellants that the gold was being carried to Varanasi for exchange for ornaments. The Department's version of recovery from the rectum is also not supported as contended by the Ld. Advocate by any Doctor's certificate or X-Ray.*

5. *Considering the entire facts and circumstances of the case, I am of the view that the benefit of doubt needs to be extended in this case to the appellants as the impugned gold is not*

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conclusively proved to be of foreign origin and smuggled. Hence the impugned order is set aside and the appeals are allowed with consequential benefit to the appellants."

20. We further take note of the fact that the Hon'ble High Court of Calcutta in the case of Nand Kishore Sumani Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri (supra), the Hon'ble High Court has observed as under :

"7. It is true that as per the above provisions of Section 123 of the Customs Act, 1962 it is not required that gold should contain foreign markings and even gold in primary form or jewellery could also be covered as per the language of the provision. But whether onus of Indian origin on any primary gold or jewellery bearer is cast upon the person in possession of such gold. It may be appreciated that when the provisions of Section 123 of the Customs Act, 1962 were enacted the Gold Control Act was also in operation and gold was considered to be a very sensitive commodity. There was subsequent liberalisation in import policy with respect to gold and even foreign marked gold was allowed to be imported through baggage and through Banks on fulfilling certain conditions. On licit import these foreign marked gold bars can be freely bought and sold in India. However, if any person is found to carry a foreign marked gold in India without a bill then by simply having foreign markings on the gold it cannot be said that the same is of smuggled nature. Once the holder of such gold produces a bill, subsequently, then also the confiscation made by Revenue has been held to be improper by CESTAT in the case of Kapildeo Prasad v. CCP, Patna (supra) decided by this Bench. Following observations have been made by this Bench in Paras 12, 13 & 14 of this case law :

"12. The gold biscuits seized from Shri Awadesh Kr. Thakur have been confiscated by the adjudicating authority after rejecting the documentary evidence produced by the appellants showing the legal purchase of the same from M/s. Chauhan Zevares Pvt. Ltd.

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and by referring to certain discrepancy in the said document of the seized gold biscuits. However, I find that the discrepancies referred to by the adjudicating authority are not real inasmuch as he has held that whereas the sale voucher shows the goods to be "T.T. Bars", the seized gold is biscuit. He has thus observed that such descriptive variation between the biscuits and the bars raises a reasonable doubt regarding the genuineness of the transaction. The appellants have contended that biscuits and the bars are synonymous terms used by the persons dealing in gold and are interchangeable "T.T. Bars" represent ten tola bars which are also referred to as biscuits. The Commissioner in his impugned Order has nowhere observed as to what is the difference between a biscuit and a bar. Similarly, as regards weight, I find that there is a variation of about 2 gms. in the weight of all the sixteen pieces of gold. The standard 10 tola bars weigh 116.640 gms., and as such, the total weight of 16 pieces of biscuits would come to 1866.240 gms., which is reflected in the sale voucher of M/s. Chauhan Zevares. Similarly, it is a matter of common knowledge that the standard purity of gold is 999.00. As such, as rightly contended by the learned consultant, the small variation in the weight or in the purity of gold is attributable to the human error and cannot be made the basis for rejecting the sale voucher of M/s. Chauhan Zevares who have admitted to have sold the goods to the appellants. This has also been observed by the Commissioner that M/s. Chauhan Zevares have subsequently stated that they were not sure that the gold under seizure was the same as was purchased from them. Naturally a person who has sold the gold, cannot confirm whether the gold seized by the Customs Officers from that person, is the same gold or not. But the said statement made by M/s. Chauhan Zevares further confirms that the sixteen pieces of gold were, in any case, purchased by Shri Kapildeo Prasad from the said M/s. Chauhan Zevares Pvt. Ltd.

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13. The Tribunal in the case of *S.K. Chains v. Commissioner of Customs (Prev.)*, Mumbai reported in [2001 \(127\) E.L.T. 415](#) (Tri. - Mum.) observed as under : -

"7. Thus, today there exists a very peculiar situation. On the one hand the Customs Act considers it necessary to ask a person to establish the legality of the origin of the gold seized from him while on the other hand in pursuance of the relaxations made in the Import Policy and the Baggage Rules framed under that very Act, there is a flood of foreign marked gold in the town. Such gold changes hands several times on importation. Since the repeal of the Gold (Control) Act in 1968, there is no legal requirement for the buyers and sellers of gold to maintain any register nor is there any requirement to issue invoices under any Central Act."

14. In the case of *Sri Samir Kumar Roy & Others v. C.C. (Prev.) West Bengal, Calcutta* - decided by the Tribunal in Order No. A-475-478/Kolkata/2001, dated 4-7-2001 [[2001 \(135\) E.L.T. 1036](#) (T)], the Tribunal has considered the effect of liberalised policy as regards the import and dealing in gold and thereafter, concluded that onus as placed under Section 123 was discharged when the appellants produced the sale/purchase vouchers showing the sale of the goods from the gold dealer who has admitted having sold the same. In the absence of any requirement of law requiring the gold dealers enjoying the sale/purchase of foreign-marked gold in India, to indicate the brand names of the same in the sale/purchase vouchers, 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

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of the gold biscuits is not called for. Accordingly, I set aside the same.

15. Inasmuch as the confiscation of the gold biscuits has been set aside, the confiscation of the truck is not called for. For the similar reasons, there is no warrant for imposition of penalties upon the various persons. The same is, accordingly, set aside."

7.1 *In the light of the above relied upon case law in the case of foreign marked gold also it was held by this Bench that appellant has discharged the onus when the bills covering the foreign marked gold bars are furnished. In the present case the seized gold bars do not bear foreign markings, do not have uniform weight/purity and appellant has shown the purchase bills covering the said gold bars having assorted size, weight and purity. The person who sold the seized goods has also confirmed to have supplied the same to Shri Nand Kishore Somani. In his statement, reproduced in Para (23) on Page 16 of the Order-in-Original dated 6-2-2014, Shri Ajay Kr. Saraff of M/s. Saraff Jewellers has confirmed to have supplied the gold bars made out of jewellery, purchased by him. Minor mismatching of difference in weight as calculated by the Adjudicating authority will not make the bills as an afterthought. There could be non-observance of provisions of some other enactments like income-tax or sales tax laws but the same cannot be grounds for confiscation of goods under Section 111 of the Customs Act, 1962 when there is no iota of evidence that seized gold bars are of foreign origin or smuggled into India. Suspicion/presumption howsoever strong cannot take the place of an evidence.*

8. *In view of the above observations and the settled proposition of law, present appeals filed by the appellants are allowed by setting aside the order-in-original dated 6-2-2014 passed by the Adjudicating authority with consequential relief, if any."*

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21. In view of the above judgements, as the noticees have explained the source of procurement of gold, which is not denied by the Revenue, further having no mark on the gold and purity of gold is also not in conformity of the foreign gold, the benefit of doubt goes in favour of the notices.

22. We also take note of the fact that the statement recorded during the course of investigation was retracted by the Noticee No.(1)(2)(3), the same are not admissible in absence of any corroborative evidence as held by the following decisions :

(i) Collector of Customs, New Delhi Vs. Sudhir Electronics : 2000 (123) ELT 1054 (T),

(ii) Jindal Drugs Pvt. Ltd. Vs. Union of India : 2016 (340) ELT 67 (P & H) ;

(iii) Superintendent of Customs Vs. Bhanabhai Khalpabhai Patel : 1995 (76) ELT 508 (S.C.).

23. We also take note of the fact that the currencies seized from the Noticee No.(1),(2) & (3), were not established by the Revenue with corroborative evidence to show that the same are the sale proceeds of smuggled gold. In that circumstances, reliance is being placed on the following decisions :

(i) Ramchandra Vs. Collector of Customs : 1992 (60) ELT 277 (T) ;

(ii) Collector of Customs, New Delhi Vs. Sudhir Electronics : 2000 (123) ELT 1054 (T).

24. We further take note of the fact that the cases relied upon by the Revenue has been considered by the Tribunal in the case of Commissioner of Customs (Preventive) Vs. Shri Amit Jalan & Shri Ashok

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Kumar Jalan vide Tribunal's Final Order No.75032-75033/2023 dated 6th February, 2023 wherein this Tribunal observed as under :

"8. On merits also, I find that except the statements recorded by the DRI dated 10.06.2019 and 11.06.2019 which were retracted by the Respondents on the first opportunity available on 12.06.2019 before the Ld.CMM, Kolkata, no other corroborative evidence has been brought on record. In that circumstances penalty on the Respondents are not imposable. The case laws relied upon by the Ld.Authorized Representative are not applicable to the facts of the present case. In the case of Surjeet Singh Chhabra (supra) there was an evidence of recovery of gold in the possession of the accused apart from the statement recorded under Section 108 of the Customs Act, 1962. In that circumstances, the decision is not applicable. The remaining cases relied upon by the Ld.Authorized Representative are not applicable to the facts of the present case.

9. Further I find that in the case of Rajendra Prasad (supra), this Tribunal has observed as under:-

"4. Shri R.K. Roy, learned JDR, countering the arguments of the learned Consultant, reiterates the findings of the original authority and the appellate authority. He submits that the corroborative evidence can be used as a substantial evidence, as held by the Honourable Supreme Court in the case of Naresh J. Sukhawani v. Union of India reported in 1996 (83) E.L.T. 258 (S.C.) wherein it was held that the statement of the co-accused, recorded under Section 108 of the Customs Act, 1962, inculpatng himself as well as the petitioner can be used as a substantive evidence. Shri Roy has also invited my attention to the decision of the Honourable Tribunal in the case of Mohmedbhai Asrafbhai Kimsarwala v. Collector of Customs reported in 1991 (52) E.L.T. 573 (Tribunal), wherein it was held that the statement of an accomplice without corroboration would not be sufficient to prove the guilt, and when there is a knowledge of involvement, personal

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penalty can be imposed. It was also held that before acceptance of the statement of the accomplice, some corroboration from some independent source is called for.

5. After hearing both sides and on going through the Order-in-Original and the Order-in-Appeal, it is observed that the appellants were penalised solely on the statement of Shri Shiv Kumar Sharma, the driver. Except the statement of Shri Shiv Kumar Sharma, there is no other independent evidence to corroborate the statement of the coaccused. It is an accepted legal proposition which has been accepted by the Apex Court in various judgments that the statement of coaccused, when not corroborated by any independent evidence, cannot be taken as a Gospel Truth. Therefore, reliance on the statement of the co-accused without corroboration is unacceptable in law. The reliance of Revenue on the judgment of the Hon'ble Supreme Court in Naresh J. Sukhawani is of no avail inasmuch as the statement of the co-accused in that case inculcates himself as well as the petitioner. In the instant case, the co-accused shifted the entire guilt on the appellants. In view thereof, the personal penalties imposed on the appellants are not warranted. Therefore, I have no hesitation in holding that the personal penalties are required to be set aside. Accordingly, I do so."

10. Further, in the case of Sachin Kumar (supra), the Tribunal held as under:-

"6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant Sachin Kumar was a transport agent who arranged the truck for the exporter and appellant No. (2) Venugopal acted as a CHA for clearance of the goods at the NMPT, Mangalore and appellant No. (3) Ravichandra arranged the CHA and the container. Further, I find that the goods were stuffed at the KSDL factory, Bangalore in the presence of Mr. Hashim, Director of the exporter company and Superintendent of Central Excise and thereafter it was sent to

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Mangalore and from Mangalore it was exported. Subsequently, DRI got intelligence that the exported goods were falsely declared as 'Mysore Detergent Cakes' by illegally concealing red sanders and thereafter the vessel containing the container was called back from Columbo and it was seized by the DRI. During the investigation DRI recorded the statement of Mr. Hashim, Director of exporter company and also the appellants. In the statement of Mr. Hashim, he has clearly stated that he was responsible for smuggling of red sander wood logs and the appellants were not knowing about their smuggling plan. All these appellants were based at Mangalore whereas the truck was stuffed with Mysore Detergent Cake at Bangalore in the presence of the Director of the company and the Superintendent of Central Excise. Further, I find that both the authorities in their orders have admitted that there is no direct proof of the complicity of the appellants and there is suspicion against each of the appellant and on the basis of that suspicion, the appellants have been imposed penalties. It is pertinent to note that the Tribunal in various decisions cited supra by the Learned Counsel for the appellant has consistently held that for imposing the personal penalty under Section 114(i) of the Customs Act, 1962, there should be acceptable legal evidence on record about the acts of commission or omission by the appellant. Further in order to hold that the appellant has abetted in the commission of the offence, there has to be a knowledge on the part of the appellant regarding the illegal activities of the exporter whereas in the present case no corroborative evidence has come on record which pinpoint that the appellant had the knowledge of the illegal activities of the exporter company. In the case of Commissioner of Customs, Mumbai v. M. Vasi cited supra, the Tribunal has held that abetment presupposes knowledge of the proposed offence and in the absence of knowledge penalty under Section 112 on the charge of aiding or abetting would not sustain. Further in the case of Shree Renuka Sugars Ltd. v. CC, Mangalore cited supra, the Tribunal has held that on the basis of mere suspicion against CHA,

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penalty cannot be imposed. Further, I find that the decisions relied upon by the Learned DR are not applicable in the facts and circumstances of the present case because in the present case, penalties have been imposed on the appellant merely on the basis of suspicion without any evidence on record and the suspicion cannot take the place of proof. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the same by allowing the appeals of the appellants. Penalties imposed on the appellants are also set aside."

11. Further, in the case of Kisan Ratan Singh (supra), The Hon'ble Bombay High Court held as under :-

"7. According to prosecution, the statements of both accused were voluntarily and correctly recorded without use of any force or inducement. The Trial Court after considering the evidence recorded and the facts and circumstances of the case, has held that the statements recorded under Section 108 have not been independently corroborated. The Trial Court has held that without an independent corroboration or without any evidence the statements recorded of accused under Section 108 has no evidentiary value, more so when there has been a retraction. I am in agreement with the conclusion arrived at by the Trial Court.

8. Admittedly, panch witness of the panchnama recorded on 4th February, 1991, when the gold and Indian and Foreign currencies were allegedly seized, have not testified. Even the persons, who typed the panchnama, and PW-1 says it was one G.H. Shaikh, has not testified. Moreover, the panchnama is written in English but the panch witnesses have signed in Hindi and Gujarati. Panchnama also does not record whether the panch witnesses knew English. PW-1 also says both panch witnesses are from N.M. Joshi Marg as per panchnama Exhibit P-2 and Customs that N.M. Joshi Marg was 4 to 5 km away from the said premises.

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How did the panchas then land at the said premises? That is a mystery. Therefore, I am unable to believe the panchnama as produced was really prepared. To add to this, PW-2 says he does not know the details of panchnama because he was not party to panchnama. PW-2 also says PW-1 had called the panch witnesses and they were taken from "our" office to the said premises. If that was so, why were the panch witnesses not examined. PW-2 also says, though he was a member of the search party, he does not remember the mode of transport that was used to go to the said premises from their office. One can understand he may not remember the vehicle details but "mode of transport" is unbelievable. If I have to accept the submission of Ms. Mane that dehors the panchnama, in view of the confession recorded under Section 108, the Court can still convict the accused, then I ask myself why should they even take any panch witness and why should any one go through the trouble of recording of panchnama and producing the panch witness at the time of trial. Moreover, if I have to simply accept the statement recorded under Section 108 as gospel truth and without any corroboration, I ask myself another question, as to why should anyone then go through a trial. The moment the Customs authorities recorded the statement under Section 108, in which the accused has confessed about his involvement in carrying contraband gold, the accused could be straightaway sent to jail without the trial Court having recorded any evidence or conducting a trial.

9. Various Courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. For this, I find support in State of Maharashtra v. Harshad Vaherbhai Patel & Ors. [2012 (1) Bom.C.R. (Cri) 500] and unreported judgment of this Court in Shri Malki Singh v. Suresh Kumar Himatial Parmar in Criminal Appeal No. 228 of 1999 delivered on 29-11-2019 [2020

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(371) E.L.T. 642 (Bom.)]. Paragraph 8 of Malki Singh's judgment reads as under :

"8. It is no doubt true that under section 104 of the Customs Act, 1962, the Customs Officer is vested with power to arrest if he has reason to believe that any person has committed an offence punishable under sections 135 or 135A of the Customs Act. Under Section 108 of the Customs Act, the Customs Officer is also vested with power to summon persons to give evidence documents and all persons so summoned are bound to attend, on being summoned. The statement made to the Customs Officer is not hit by Section 25 of the Indian Evidence Act, 1872, the position of law being very well settled that the Customs Officers are not police officers and resultantly, a statement made to the Customs Officer is not hit by Section 25. At the same time, the position of a retracted confession is also well settled :- without any independent corroboration it cannot sustain a conviction and retracted confession may form basis of conviction without corroboration if it is found to be perfectly voluntary, true and trustworthy. The Court is duty bound to examine whether the statement referred to as a confessional statement meets the test of truthfulness and being voluntary in nature. In absence of any independent material brought on record by the appellant, the Chief Metropolitan Magistrate was perfectly justified in acquitting the accused no. 2. In absence of any evidence corroborating the statement of the accused no. 2 made before the Customs Officer on 24th March, 1996 under Section 108 of the Customs Act, the statement in isolation do not warrant conviction, particularly when it is retracted with a plea of coercion."

10. Ms. Mane relied on the judgment of the Apex Court in *Ramesh Chandra v. State of West Bengal* [AIR 1980 Supreme Court 793] to submit that customs officers are not police officers and the statement recorded under Section 108 of the Customs Act, 1962, is admissible in evidence. I have to be candid that I

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have no quarrels with the preposition submitted by Ms. Mane. The issue is, can that statement be accepted blindly without corroboration, and the answer is no."

12. In view of the above discussion, I hold that the Ld.Commissioner(Appeals) has rightly dropped the penalty against the Respondents as there is no corroborative evidence on record in support of the statement made before DRI Officers which were retracted on first available opportunity before the Ld.CMM and no cross-examination of any witness has been granted to the Respondents. Therefore I do not find any merits in the Appeals filed by the Revenue.

Accordingly, the same are dismissed."

25. As in this case, the Noticee No.(5) & (6) have been implicated on a later stage when investigation was going on in some other cases and the Noticee Nos. (1), (2) & (3) never made any statement regarding procurement of impugned gold from the Noticee No.(5) & (6). Moreover, the admission made by Noticee No.(5) & (6) during course of investigation was retracted on the first available opportunity. In that circumstances, relying on the above cited decisions in the Noticee No.(5) & (6) itself, we hold that no penalty is imposable on Noticee No.(5) & (6).

26. In view of the above discussions, we conclude our findings as under :

(a) As the Noticee No.(1), (2) & (3) have submitted the smuggled/procured gold in question is made out of old jewellery purchased in cash and the said fact has not been denied by the Revenue by any cogent evidence, therefore, we hold that the gold in question is not liable for confiscation and hence, the same is required to be released.

(b) We further hold that as the Revenue has failed to establish the fact that the cash recovered from the Noticee No.(1) (2) & (3) are

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the sale proceeds of the smuggled gold, therefore, the cash seized cannot be confiscated. Accordingly, the same is required to be released.

(c) No penalties are imposable on the Noticee No.(1), (2) & (3).

(d) We hold that in view of the Tribunal's Final Order No.75032-75033/2023 dated 6th February, 2023, the Id. Commissioner (Appeals) has rightly dropped the proceedings, we do not find any infirmity for dropping penalty against Noticee No. (5) & (6). Therefore, the said part of the order is upheld.

27. In view of the above, the proceedings initiated by the impugned show-cause notices are set aside by allowing the appeals filed by Noticee No.(1), (2) & (3) and by dismissing the appeals filed by the Revenue against Noticee No. (5) & (6).

(Pronounced in the open court on 03.03.2023)

Sd/

(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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