

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

REGIONAL BENCH – COURT NO.1

Customs Appeal No.75324 of 2023
Customs Appeal No.75325 of 2023
Customs Appeal No.75326 of 2023
Customs Appeal No.75327 of 2023

(Arising out of Order-in-Appeal No.Kol./Cus/CCP/KS/386-394/2023 dated 12.05.2023 passed by Commissioner of Customs (Appeals), Kolkata)

Shri Shreyas Agarwal

3, Chetan Street, 3rd Floor, Burrabazar, Kolkata-700007

Shri Dhan Kishore Agarwal

3, Chetan Street, 3rd Floor, Burrabazar, Kolkata-700007

Shri Param Hans

1186, Kucha Mahajani, Chandni Chowk, North Delhi, Delhi-110006

Shri Anurag Jalan

CD 303, Salt lake City, Kolkata-700064

Appellant

VERSUS

Commissioner of Customs (Prev.), Kolkata

15/1, Strand Road, Kolkata-700001

Respondent

APPEARANCE :

Shri Amit Awasthi, Advocate for the Appellant

Shri Faiz Ahmed, Authorized Representative for the Respondent

CORAM:

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

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

FINAL ORDER NO...76044-76047/2023

DATE OF HEARING : 16 .06.2023

DATE OF PRONOUNCEMENT : **12.07.2023**

Per Ashok Jindal :

The appellants are aggrieved from the impugned order, which is as under :

" (a) I order for absolute confiscation of the seized (i) 4 pcs gold bars of foreign origin weighing 4000 gms and valued at Rs. 1,62,00,000/- (Rupees one crore sixty two lakh) only recovered and seized from the premises at Room No. 405, 61, Manohar Das Street, Kolkata- 700007 (ii) 4 pcs gold bars and 5 pcs cut pieces of gold bars collectively weighing 6356.05 gm valued at Rs.

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2,57,42,002/- (Rupees Two crore Fifty Seven lakh Forty two thousand and two) only recovered and seized from the premises of Roopam Sarees, 3, Chetan Seth Street, Kolkata- 700007, under Section 111(b) and 111(d) of the Customs Act, 1962;

(b) I order for confiscation of the seized wrapping and concealing materials i.e. shredded pieces of newspapers used for wrapping / concealing the gold bars, cut pieces of the gold bar having no commercial value under Section 119 of the Customs Act, 1962;

(c) I order for confiscation of the seized Indian currency amounting to Rs. 20,16,100/- (Rupees Twenty lakh Sixteen thousand and one hundred) only under Section 121 of the Customs Act, 1962;

(d) I impose penalty for Rs. 4,50,000/- (Rupees Four lakh fifty thousand) only upon Shri Anurag Jalan Under Section 112(b) & Section 114AA of the Customs Act, 1962;

(e) I impose penalty for Rs. 25,000/- (Rupees Twenty five thousand) only upon Shri Shreyash Agarwal under Section 112(b) of the Customs Act, 1962;

(f) I impose penalty for Rs. 50,000/- (Rupees Fifty thousand) only upon Shri Dhan Kishore Agarwal Under Section 112(b) of the Customs Act, 1962;

(g) I impose penalty for Rs. 25,000/- (Rupees Twenty five thousand) only upon Shri Shri Param Hans, under Section 114AA of the Customs Act, 1962."

2. The facts of the case are as under :

2.1 Specific intelligence was gathered to effect that a syndicate under control of one Shri Anurag Jalan was actively involved in smuggling of gold and silver from Bangladesh through the Indo Bangladesh border in the district of North 24 Parganas, West Bengal. The smuggling foreign origin gold and silver were subsequently melted and converted into bar/other forms by the said Shri Jalan for further sale in the Indian

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market. Intelligence also suggested that those smuggled gold and silver were secreted at different premises at Burrabazar area of Kolkata by Shri Anurag Jalan.

2.2 On the basis of aforesaid intelligence simultaneous searches were conducted on 22.01.2020 at the following premises, 1) premises of M/s Roopam Sarees at 3rd Floor, 3 Chetan Seth Street, Kolkata-700007, 2) Jalan Bullion and Jewellers, Jalan Arcade, 2nd Floor, 43, Nalini Seth Road, Kolkata-700007, 3) Room No.405, 4th Floor, 61, Manohar Das Street, Sonapatti, Kolkata 700007.

2.3 The premises of M/s Roopam Sarees at 3rd floor, 3 Chetan Seth Street Kolkata 700 007 were searched by one team of DRI officers in the presence of Shri Dhan Kishore Agarwal Director of M/s Roopam Creations Pvt. Ltd & property of M/s Roopamr Sarees and Shri Shreyash Agarwal Manager of M/s Roopam Sarees along with two independent witnesses on 22.01.2020. and recovered seven packets containing four(04) numbers of gold bars and five cut pieces of gold bar believed to be gold of foreign origin collectively weighing 6356.05 grams and valued at Rs. 2,57,42, 002/- (Rupees Two crore Fifty-seven lakh Forty-two thousands and two only). As Shri Dhan Kishore Agarwal and Shri Shreyash Agarwal failed to produce any licit documents in support of possession/acquisition, dealing with the recovered gold admittedly kept secreted in the premises, the same were seized under Section 110 of the Customs Act 1962 on the reasons to believe that those were smuggled into India from Bangladesh in contravention of the provision of the Customs Act, 1962 and liable for confiscation under Section 111 of the Customs Act, 1962.

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2.4 Another team of DRI officers along with two independent witnesses visited the office premises of M/s Jalan Bullion and Jewellers, 43 Nalini Seth Road, Jalan Arcade, 2 Floor, Kolkata 700007 owned by Shri Anurag Jalan. Shri Anurag Jalan was found present in the said premises. On search the following goods were recovered.

- (i) 23 (twenty three) number of bags made of HDPE and cotton having foreign marking upon them containing Silver granules believed to be of foreign origin totally weighing 418.700 kgs. and valued at Rs.1,95,11,420/-
- (ii) 505 pieces of mixed white coloured silver coins collectively weighing 10.082 Kgs. Valued at Rs.4,20,668/-
- (iii) 20 pieces of gold coins believed to be made of gold of foreign origin collectively weighing 91.9 grams and valued at Rs.3,51,701/-
- (iv) Indian currency notes of denomination of Rs. 2000, Rs. 500, Rs. 200 & 100 totally amounted to Rs. 20,16,100/-

2.5 As Shri Anujrag Jalan failed to produce any licit document in support of legal possession, acquisition dealing with the goods as mentioned above. Accordingly, all those were seized under Section 110 of the Customs Act, 1962 on the reasons to believe that those were smuggled into India from Bangladesh in contravention of the provision of the Customs Act, 1962 and liable for confiscation under Section 111 of the Customs Act, 1962. Indian currency of Rs. 20,16,100/- (Rupees Twenty Lakhs Sixteen thousand of one hundred) recovered from the said premises were also seized under Section 110 of the Customs Act,

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1962 on reasons to believe that those were sale proceeds of gold and silver smuggled earlier and liable for confiscation under Section 121 of the Customs Act, 1962. The mobile phones recovered from the possession of Shri Anurag Jalan were also seized under Section 110(3) of the Customs Act, 1962 on the reasons to believe that those would be useful and relevant for further Investigation.

2.6 Another team of DRI searched the premises at Room No. 405, 4th Floor, 61, Manohar Das Street, Sonapatti, Kolkata – 700007 owned by Shri Anurag Jalan. Shri Baikunth Prasad, who according to Shri Anurag Jalan, lives at the said premises and was in possession of keys of the said residential premises accompanied the officers to Room No. 405, 4th Floor, 61, Manohar Das Street for search. From the almirah in the said premises four(04) pieces of gold bars collectively weighing 4000.00 grams and valued at Rs. 1,62,00,000/- was recovered. As Shri baikunth Prasad failed to produce any licit documents in support of possession/acquisition, dealing with the gold bars. Therefore, the same were seized by DRI under Section 110 of the Customs Act, 1962 on the reasons to believe that those were liable for confiscation under Section 111 of the Customs Act, 1962.

2.7 Statement of Shri Dhan Kishore Agarwal was recorded under Section 108 of Customs Act, 1962 on 22.01.2020, wherein he inter alia stated that the said seven packets containing 4 pcs of gold bars and 5 pcs of cut pieces of gold bars totally weighing 6356.05 gm from the chamber of his manager Shri Shreyas Agarwal at 3, Chetan Seth Street, was sent by his son in law, Shri Anurag Jalan through one on his employee, Shri Baikunth Prasad; That he had not enquired from Anurag

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Jalan about the source of the gold; that he only allowed Shri Jalan to keep the gold in his shop as he was his son in law; that previously on two occasions also Anurag Jalan sent similar number of packets of gold to his shop through his employee Baikunth Prasad; that as per his instructions, Shreyas Agarwal received packets of gold on those two occasions also and kept in the safe of the office; that on those occasions Anurag Jalan took back those packets of gold on the next day through his employee Baikunth Prasad.

2.8 Sri Shrevas Agarwal in his voluntary statement under Section 108 of Customs Act, 1962 has inter alia stated that on direction of his employer Shri Dhan Kishore Agarwal he kept the packets containing 4 pcs of gold hars and 5 pcs of cut pieces of gold bars totally weighing 6356.05 gm in his custody. The said gold was delivered to him by Baikunth Prasad, an employee of Shri Anurag Jalan; that against query Shri Anurag Jalan told him that he was facing some problem in keeping those gold with him for the time being but assured to take back the gold as early as possible; that he had not asked the Anurag Jalan about the source of the gold; that previously on two occasion in January, 2020 he kept some packets of gold in similar quantity in the same safe as per instructions of Dhan Kishore Agarwal; that those packets of gold were also sent by Shri Anurag Jalan through Baikunth Prasad; that however, on those two occasions Shri Anurag Jalan took back those packets of gold on the next day.

2.9 Shri Anurag Jalan in his voluntary statement under Section 108 of Customs Act, 1962 has inter alia admitted that he is the owner of the seized gold weighing 6.356 kgs and 4 kg seized from the premise of

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Roopm Saree and from the room No. 405, 61, Manohar Das Street, Kolkata-07 respectively; that he had no documents in support of licit acquisition and/ or possession of the said gold as the same has been smuggled from Bangladesh; he received the said gold on 21.01.2020 and morning of 22.02.2020 in two parts from carriers of two suppliers namely Babuda and Kalam of Basirhat, North 24 Parganas; after receiving the gold bars with foreign marking, his staff Baikunth Prasad melted the same in nearby melting firms at Burrabazar and made gold bars and delivered a portion to Roopam Saree as per his instruction; that apart from the above two suppliers he also had another supplier of smuggled gold namely Biman Debnath of Siliguri (Phone 9474331608); that he had no further details about the suppliers; In response to a specific question about seizure of 3 kg smuggled gold from two carriers at Siliguri on 23.01.2019, Shri Anurag Jalan admitted that those carriers were coming from Shri Buman Debnath for delivery of the gold to him; In response to another question regarding seizure of 4 kg gold bars at Gaya Railway Station on 10.01.2020, Shri Anurag Jalan admitted that he was supplier of those gold bars weighing 4 kgs, which were made from foreign origin gold smuggled from Bangladesh; that as per his instructions, his staff Shri Dilip Singh handed over the said gold bars to the carriers from the 4th floor premises at 61, Manohar Das Street, Kolkata on 09.01.2020 afternoon; that Dilip Singh was his staff, he used to receive smuggled gold with foreign markings on his behalf and reshaped it after melting; That thereafter Dilip used to hand over the reshaped gold bars to representative of the buyers as per his instruction; that after interception of 4 kgs gold at Gaya Railway Station

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by DRI, Patna on 10.01.2020, he got information that the intercepted persons divulged details of his delivery / storing place of smuggled gold at Burrabazar, Kolkata therefore he requested his father in law to allow him store the gold bars at his above mentioned Saree shop.

2.10 Voluntary statement of Shri Baikunth Prasad was recorded on 22-01-2020 under Section 108 of the Customs Act, 1962. In his statement. Shri Baikunth Prasad inter alia submitted that he was working in the office of Shri Anurag Jalan at 2nd floor of jalan Acrade 43, Nalini Seth Road, Kolkata and staying in the room No. 405, 4 floor, 61. Manohar Das Street, Sonapatty. Kolkata 700007: that in the said room at Manohar Das Street another employee of Shri Anurag jalan, Shri Dilip Singh also used to stay with him; that some persons used to come to the shop of Shri Anurag jalan and deliver gold biscuits; that Shri Dilip Singh used to get those gold biscuits melted from different melting workshops of Burrabazar to form gold bars that Shri Dilip Singh used to keep those gold bars in the almirah of room No. 405 of 61, Manohar das Street Sonapatty and deliver to other persons; that he also used to accompany Dilip Singh to the gold melting workshops sometimes; that after 10 January 2020. Anurag Jalan looked visibly worried and sent Dilip Singh to his native place, that after that Dilip Singh used to contact him from a new mobile number 8481927656 instead of his old mobile number 8017979210.

2.11 Shri Baikunth Prasad further submitted that after departure of Shri Dilip Singh, he was entrusted with the job of receiving smuggled gold biscuits from different persons, got those gold biscuits melted from different melting workshops to form gold bars and either keep those

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gold bars in the almirah of room No. 405, Manohar Das Street or deliver the same to Ashu Babu at the shop of Roopam Saree which belongs to Shri Dhan Kishore Agarwal, the father in law of Shri Anurag Jalan; that before 21.01.2020 on two earlier occasions he got the gold biscuits melted from the workshops to form gold bars and delivered those gold bars to Ashu Babu of Roopam Saree, that later as per instructions of Shri Anurag Jalan, he had delivered those gold bars to some unknown persons after taking delivery from Roopam Saree; that on 21.01.2020, after getting the gold biscuits melted into gold bars, as per instruction of Shri Anurag Jalan he delivered five packets to Ashu babu of Roopam Saree and kept six packets of gold bar in the almirah of Rook No. 405, Manohar Das Street; that from those six packets, as per instructions of Shri Anurag Jalan he had delivered another two packets of gold bars to Roopam Saree on 22.01.2020;

2.12 On 17.02.2020, Shri Anurag Jalan visited DRI office and submitted a file titled GST Silver purchase 2019-20 of Jalan Bullion & Jewelers. The file contains documents related to purchase of Silver by the firm during the period of April, 2019 to January, 2020. All the invoices were related to purchase of goods described as (i) Silver Grains (purity 9995+) (ii) Silver Bar/grains Fineness 999, (iii) Silver granule 0.9999 or (iv) silver [999%].

2.13 In support of legal purchase of the gold bars seized on 22.01.2020 by DRI, Shri Anurag Jalan submitted two invoices of one Prithvi Gold of Delhi. In the said two invoices quantities of gold was mentioned as 6450.910 gms and 4000 gms respectively. There was no mention of number of pieces of gold bars in any of the invoices. The

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purity of gold was also not mentioned in any of the invoices. In invoice dated 15.01.2020, value of 10 gm gold was mentioned as Rs. 39820/ However from the internet it was found that market value of 10 mg gold on that day was Rs. 38460/- for 22 carat gold and Rs. 40390/- for 24 carat gold Similarly, in the invoice dated 16.01.2020, value of 10 gms gold was mentioned as Rs. 39840/- However market rate of 24 carat gold on that day was Rs. 40800/- per 10 gm and Rs. 38850/- per 10 gm for 22 carat gold.

2.14 For further investigation in the matter summon was issued on 03.09.2020 to the proprietor of Prithivi Gold from whom gold bars were stated to be purchased by Shri Anujrag Jalan. The summons was sent through speed post as well as by email The summons sent by post was returned undelivered by the postal authority with remarks after much inquiry it was ascertained that the addressee left the place. However against summons sent through email a reply dated 03.09.2020 received from Shri Param Hans, Proprietor of Prithvi Gold. By the said letter it was intimated that Prithvi Gold is a broker only. He had purchased the gold from Kratika Jewellers and sold the same to Jalan Bullion & Jewellers. He only earned the brokerage amount which was the difference amount between sale and purchase price.

2.15 Under cover of his letter dated 08.09.2020. Shri param Hans also forwarded among others an unsigned Tax invoice purportedly of Kratika Jewellers. As per that unsigned invoice total 9520.800 gms gold bar were sold to Prithvi Gold on 14.01.2020 total value of which was shown as Rs. 3,82,94,086/- In the said invoice, there is also no mention of mode of payment. From the Ledger Account of Prithvi Gold, also

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submitted by Shri Param Hans, it is found that payment was stated to be made to Kartika Jewellers through bank on following different dates

05.02.2020- Rs. 10,00,000/-

06.02.2020- Rs. 9,50,000/-

13.02.2020- Rs. 7, 00,000/-

13.02.2020- Rs. 2,90,000/-

Total Rs 29,40,000/-

However, from the bank statement of Prithvi Gold copy of which was also submitted under cover of letter dated 08.09.2020, it was found that on the above mentioned dates same amount was paid to following different firms. No payment was made to Kratika Jewellers or its proprietor Anil Kumar.

05.02.2020 NK Ente- Rs.10,00,000/-

06.02.2020- Riddhi - Rs.9,50,000/-

13.02.2020 NK Ente- Rs.7,00,000/-

13.02.2020 Riddhi – Rs.2,90,000/-

2.16 Shri Anurag Jalan also submitted print out of his cash ledger, cash book and cash summary. As per the cash ledger submitted by him the closing balance was Rs. 20,19,514/- as on 22.01.2020. Total amount of Indian Currency recovered and seized from the premises of Jalan Bullion & Jewellers on 22.01.2020 was Rs. 20,16,100/-. It is also found from the cash ledger that there was no receipt of cash throughout the month of January. An amount of Rs. 19,15,824/- was shown to have been received on 22.01.2020 itself. This single entry on the date of search raised doubt about the authenticity of the transaction. It may be mentioned that on the date of search on 22.01.2020, Shri Anurah Jalan

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failed to give any account of the currency notes recovered from the premises. It appears that all the transactions shown in the ledger was created afterwards to substantiate his claim on the money as legal.

2.17 Shri Anurag Jalan submitted one gold sale memo dated 13.01.2020 issued by Ranjana Tibrewal. As per the said sale memo. 20 gold coins weighing 92 Grams were sold to Jalan Bullion & Jewellers for a total price of Rs.3,33,224/- for giving evidence and submit documents. In reply letter dated 26.12.2020 received from Smt Tibrewal, some documents such as gold purchase memo issued by Jalan Bullion & Jewellers, bank account details and copy of ITR for the AY 2020-21 was submitted by Smt Tibrewal. She claimed to have received those 20 pcs gold coins during her marriage in the year 1988 as Shri Dhan sold the same as she was in need of money. She also requested to spare her from appearing personally. From the bank statement of Smt Tibrewal maintained with Indian Overseas Bank it is found that immediately after receipt of Rs.3,33,224/- through RTGS on 10.02.2020, Smt Tibrewal paid Jalan Bullion & Jewelers Rs.3,50,000/- on 12.02.2020 through cheque. On further investigation, it was found that Smt Ranjana Tribrewal is the sister of Shri Anurag Jalan and she had other monetary transactions with Jalan Bullion & Jewellers as well.

2.18 In support of legal procurement of the silver coins, Shri Anurag Jalan submitted copies of journal voucher dated 17.01.2020 & 20.01.2020, bills dated 17.01.2020 of S K Coins Maker and two letters dated 15.01.2020 & 18.01.2020 of Jalan Bullion & Jewelers. It was claimed that total 10 kg Silver was supplied by Jalan Bullion & Jewellers to S K Coins Maker for manufacturing coins. The manufacturing charges

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were Rs. 600/- per kg and total Rs. 6000/- was paid by Jalan Bullion & Jewellers to S K Coins Maker. Interestingly nowhere in the bills of S K Coins Maker the number of Pcs of silver coins manufactured by them were mentioned, only total quantity of 10 kg were mentioned in their two bills. In this connection it is also to mentioned, only total quantity of 10 kg were mentioned in their two bills. In this connection it is also to mention that after examining the seized silver coins, govt. approved assayer Shri AB Kundu Jewellers declared that our of 505 pieces mixed white coloured coins of different shapes & sizes. 352 coins weighing 4806.420 gms were made of pure silver and silver content of the rest coins i.e. 153 pieces coins weighing 5726.000 gms were 80%. However, nowhere in the bills submitted by S K Coins Maker there is mention that there were two different types of coins having different purity. In each of the two letters of Jalan Bullion & Jewellers also there is mention of sending 5 kg pure silver for making coins.

2.19 On completion of investigation (i) Shri Anurag Jalan, (ii) Shri Baikunth Prasad, (iii) Shri Dhan Kishore Agarwal, and (iv) Shri Shreyas Agarwal, were Show Caused proposing confiscation of the seized goods and imposition of penalty upon them under provisions of Customs Act, 1962. Shri Param Hans, Proprietor Prithvi Gold, was asked to show cause notice as to why penalty shall not be imposed upon him under Section 114AA of the Customs Act, 1962 for submitting false documents before DRI officers in course of investigation.

2.20 The Adjudicating authority passed the order mentioned in paragraph (1) herein above.

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2.21 The said order was challenged before the Id.Commissioner (Appeals), who upheld the order passed by the Adjudicating authority.

2.22 Against the said order, the appellants are before us.

3. The Id.Counsel appearing on behalf of the appellants, submits that it is alleged that on the basis of reasonable belief, the appellants were involved in smuggling of gold and silver from Indo Bangladesh border through District of 24 Parganas, West Bengal. This allegation is purely on figment of imagination that the subject golds bullion were smuggled and subsequently melted and converted into bar another form for further sale in the Indian market. The said allegation was fostered with the grounds that the subject gold and silver as per the alleged intelligence of DRI was secreted at different premises. As such to pithily encapsulate the details of searches and the alleged recovery at three different premises.

3.1 As per the show-cause notice, it is the submission that it is undisputed fact that there was in town seizure and it is not the case of the Revenue that the goods are recovered from the border or there is any link of smuggling of smuggled gold in question from Bangladesh.

3.2 The case of the Revenue is only on the basis of certain statements recorded during the course of investigation. But the Revenue has failed to adduce any positive, affirmative and tangible evidence to establish the charges that the goods were actually smuggled from Bangladesh and has proceeded on unwarranted assumptions and presumptions.

3.3 It is the submission that it is a settled law that the reasonable belief cannot be formed on mere pretense or suspicion. In this case, the Panchnama drawn by the DRI is a narration like a caged parrot

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wherein without there being any iota of evidence, the allegation has been raised on a mere suspect of alleged smuggling from Bangladesh.

3.4 He also submitted that there is no evidence to the contrary put up by the DRI and the entire gold bullion being of Indian origin along with the silver granules, which were cohesively covered by the proper document of title and the claim of the appellant cannot be faulted with and all along, it is the settled law that the benefit of presumption under Section 123 under the Customs Act, 1962 does not go in favour of the Revenue because there is the absence of formation of reasonable belief and above all a seizure and no foreign marking on the impugned gold nor any case of defacing or any interception at International Border.

3.5 It is also submitted that the statements of Shri Anurag Jalan and Shri Bakunth Prasad, were also recorded under duress, coercion and illegal detention and custody and used to cause prejudice.

3.6 Shri Anurag Jalan has retracted his statement on first available opportunity on 25.01.2020. It is submitted that it is a fact that the subject statement of Shri Anurag Jalan has already been examined and demolished by this Tribunal in the case of Balwant Raj Sone & Others vide Final Order No.75455-75457/2023 dated 18.05.2023.

3.7 He further submitted that in respect of admissibility of content of statement, it is well settled law that any statement made under Section 108 of the Customs Act, 1962, should be supported by materials other than the statement itself.

3.8 It is the submission that the appellants claimed through letter dated 12.02.2020 that the goods under seizure has been legally purchased and the documents in support thereof were furnished to the

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Revenue wherein the appellants claimed for vacating the seizure of gold bullion along with the silver granules, coins and Indian currency for which cash ledgers and documents were submitted to the Department and requested to verify the same.

3.9 It is the submission that there is no evidence of marking on the gold and undisputedly, the gold in question was of lower purity and silver coins/silver granules were procured through Bank and all the same were recovered by proper tax invoice/documents of title in favour of the appellants.

3.10 It is the submission that the gold in question is of Indian origin and the same have been purchased from one M/s Prithvi Gold under cover of proper GST Invoice on payment of part consideration through banking channel and M/s Prithvi Gold through his Proprietor, Shri Parmhans, submitted the documents and vide their letter dated 08.09.2020, clarified that the gold have been sold to Jallan Jewellers. Therefore, he submitted that the purity of gold was examined and has varied from 99.5% to 99.7%. The impugned gold was not found to be purity of 24 carots and the impugned gold bullion being in cut pieces without any marking cannot be presumed to be of foreign origin or smuggled.

3.11 He further submitted that in the absence of credible formation of reasonable belief has been built a case against the appellants on reasonable suspect without discharging the burden of Section 123 of the Customs Act, 1962. To support this contention, he relied upon the decision of the Hon'ble Supreme Court in the case of Ramesh Kumar

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Baid, which was followed by the High Court of Allahabad in the case of Jaimata Ji Enterprises.

3.12 He further submitted that the term "smuggling" has not been defined under Customs Act and the said issue has been examined by the Hon'ble High Court of Delhi in the case of Shanti Lal Mehta Vs. Union of India & Others reported in 1983 (14) ELT 1715 (Del).

3.13 He further submitted that the statement of Shri Anurag Jalan taken into custody, does not have any evidentiary value in the absence of independent corroboration. To support his contention, he relied on the decision of the Hon'ble High Court of Bombay in the case of Union of India Vs. Kisan Ratan Singh reported in 2020 (372) ELT 714 (Bom.) and he also relied on the decision of the Hon'ble Supreme Court in the case of Vinod Solanki Vs. Union of India reported in 2009 (233) ELT 157 (SC) and also he relied on the decision of the Hon'ble High Court of Madras in the case of Chennai I Vs. Sainul Abideen Neelam reported in 2014 (300) ELT 342 (Mad.). He also relied on the decision of the Hon'ble Supreme Court in the case of Sitaram Sao Vs. State of Jharkhand reported in (2007) 12 SCC 630.

3.14 He further submitted that the allegation of alleged smuggling from Bangladesh is the complete story of DRI without there being any evidence to the contrary and simply the case is based on wild inferences.

3.15 He further submitted that the Revenue has relied on the statements of Shri Apu Debnath and Shri Sanju Roy, who are in case intercepted by the DRI, Siliguri, who were coming from Coochbihar in separate show-cause notice wherein Shri Anurag Jalan was only required

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to show-cause for invocation of penal provisions. The said matter has been argued and pending for decision before the adjudicating authority.

3.16 He further submitted that in the name of deposition, there was yet another case of interception of gold of Indian origin by the DRI, Patna, wherein two persons in the name of Shri Rajesh Kumar Yadav and Shri Umanath, were the employees of M/s Gandhi & Sons, Jaounpur. The said case along with along with the statement of Shri Anurag Jalan dated 22.01.2020, has been evaluated by this Tribunal in the case of Balwant Raj Soni & Others (Final Order No.75455-75457/2023 dated 18.05.2023) and also presumption of Section 123 does not go in favour of the Revenue in the absence of any independent evidence of smuggling from Bangladesh other than the statement itself.

3.17 With regard to Shri Dhan Kishore Agarwal & Shri Sreyash Agarwal, it is argued that the entire goods are owned and claimed by Mr.Anurag Jalan, being a registered bullion merchant and Shri Dhan Kishore Agarwal and Shri Sreyash Agarwal were closed relatives and there was absolutely no contumacious conduct or any deliberate violation of the fiscal statute on the part of the three appellants to invoke penal proceedings.

3.18 In view of the above submissions, the Id.Counsel for the appellants prayed that the impugned order as mentioned in Paragraph (1) herein above, is to be set aside.

4. On the other hand, the Id.A.R. for the Revenue reiterated the findings of the impugned order and submitted that it is the case of smuggling of gold and the gold is being notified items under Section

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123 of the Customs Act, 1962, the appellants are duty bound to disclose the source of procurement of the said gold from licit means, which they failed to do so. In that circumstances, the order of the absolute confiscation of the gold in question and cash seized during investigation and the penalties imposed on the appellants, is to be sustained.

5. Heard both sides and considered the submissions.

6. After going through the arguments advanced by both sides and after going through the impugned order and after going through the reports placed before us, we find that the following issues have been raised under consideration :

Issue No. (1)

Whether in the absence of formation of reasonable belief, the presumption under Section 123 of Customs Act, 1962, goes in favour of the Revenue or not ?

We find that in this case, it is alleged against the appellants on the basis of formation of reasonable belief that they were involved in smuggling of gold and silver from Bangladesh and therefore, search was conducted on the premises of the appellants, wherein certain gold bar/pieces were recovered and it was alleged that they believed to be a foreign origin and clearing being a notified items under Section 123 of Customs Act, 1962. Therefore, onus on the appellants to show that they have procured the said gold from licit means or not.

7. We have gone through the judgement of this Tribunal in the case of Shri Balwant Raj Soni dated 18.05.2023, whether the question of presumption under Section 123 of the Customs Act, 1962 goes in favour of the Revenue or not and this Tribunal has observed as under :

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"15. The Appellant stated that the gold pieces/bars were seized on the reasonable belief that they were smuggled into India from Bangladesh. The Adjudicating authority has relied upon the decision of the Hon'ble Supreme Court in the case of Gopal Das Uddhav Das Ahuja v. UOI reported in 2004 (176) ELT 3 (SC) for effecting the seizure on the ground of 'reasonable belief'. However, the said case is distinguishable on the ground, firstly, that the subjected case was during the breathing period of Gold Control Act, wherein possession of primary gold even unmarked had a thrust of burden upon the Assessee. When the Gold Control Act was repealed without a saving clause, the said decision under the Gold Control Act has no relevancy under the Customs Act. Currently under the Customs Law, the burden has been thrust upon the Department and the presumption under Section 123 of the Customs Act has no application in the present case, as the gold seized is of Indian origin.

16. The Appellants have relied upon the decision of the Hon'ble Supreme Court in the case of Tata Chemicals Ltd. v. Commissioner of Customs (Preventive), Jamnagar reported in (2015) 11 SCC 628, which has explained the meaning of the word 'reason to believe' as under:-

"reason to believe" by opining it to be not the subjective satisfaction of the officer concerned, for "such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with their strains imposed by law" and that such belief must be that of an honest and reasonable person based upon reasonable grounds. Further, if the authority would be acting without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open for the Court to examine the same, though sufficiency of the reasons for the belief cannot be investigated.

In view of the above, the Appellants stated that to form a 'reasonable belief' that the goods are smuggled from Bangladesh,

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there must be irrefutable evidence to prove that allegation. In the present case there is no such evidence available to prove that the goods were of foreign origin and smuggled into India from Bangladesh.

17. *The Appellants also relied upon the following decisions in support of their argument that the 'reasonable belief' must be supported with other independent corroborative evidences.*

(i) *In Assistant Collector of Customs v. Charan Das Malhotra, 1971 (1) SCC 697, Shelat J., has held reasonable believe to be relevant and not extraneous.*

(ii) *In Kewal Krishan V. State of Punjab, AIR 1967 SC 737, Kapur J., while dealing with identical provisions had clarified that confiscatory power based on 'reason to believe' has to be exercised only on the satisfaction based on certain objective material.*

18. *The Appellants relied upon judgment of the Hon'ble Supreme Court in the case of Sita Ram Sao Vs State of Jharkhand reported in (2007) 12 SCC 630, wherein the Hon'ble Apex Court defined the word 'Corroboration' as under:*

"34. The word 'corroboration' means not mere evidence tending to confirm other evidence. In DPP Vs Hester (1972) 3 AIR ER 10.16, Lord Morris said: "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it is completely credible....."

19. *The Appellants also relied upon the decision of the Hon'ble Delhi High Court in the case of Shanti Lal Mehta Vs UOI and Others reported in 1983(14)ELT1715 (DEL), which elaborately*

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dealt with Town seizures. The relevant portion of the Order are reproduced below:

19.1 The Appellants stated that ' Reasonable belief' must be at the time when the goods are seized and not subsequent to seizure.

"54. *The other question which was argued before me was that the customs officer did not act on any reasonable belief when he searched the petitioner's premises on 15-12-1967 and seized the goods. Section 110 opens with the words "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods". What is the meaning of "reasonable belief"? Did the officer entertain reasonable belief in the facts and the circumstances of this case? This is the other question to be decided. The Supreme Court has said that reasonable belief is a pre-requisite condition of the power of seizure that the statute confers on the officer. (See Collector of Customs v. Sampathu Chetty, AIR 1962 S.C. 316). The preliminary requirement of Section 110 is that the officer seizing should entertain a reasonable belief that the goods seized were smuggled.*

55. *Reasonable belief as required by Section 110 refers to the point of time when the goods in question are seized and not to a stage subsequent to the act of seizure. (M.G. Abrol v. Amichand, AIR 1961 Bom. 227). The condition precedent that there was such a reasonable belief anterior to the seizure must exist before the presumption under Section 123 can be invoked."*

19.2 Smuggled goods — Reasonable belief cannot be based on presumption.

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"58. *The second reason for entertaining a reasonable belief is that the seized goods were not accounted for by the petitioner on 15-2-1967 when the officer seized the goods from his possession. The seized goods consisted of 20 items of ornaments and diamonds. Out of these six items were released before the show cause notice was issued. One item was released at the adjudication stage. Six items were released by the Board on appeal. Only 7 items have been confiscated. These consist of 2 packets of diamonds and 5 ornaments. The petitioner claimed that they belonged to the queen mother of Nepal. A letter was written to queen mother. On her behalf a reply was received that she had given certain ornaments to the petitioner for polishing, remaking etc., though not for sale. But this was done later on. The letter was written on 3-7-1967. The reply was received on 24-7-1967. But at the time of seizure all that the officer had before him were 2 packets of diamonds and 5 ornaments. Neither the diamonds nor the ornaments had any foreign markings or label to suggest to the customs that these were smuggled goods. In the search list these two packets of diamonds are described as "appearing to be diamonds". This shows that the customs officer did not believe them to be diamonds on any reasonable ground. The ornaments had no foreign label or making. They were ordinary ornaments as are worn in this country. There was nothing peculiar about them. Nothing extraordinary. On this material could any reasonable man entertain a belief that these were smuggled goods*

59. *The belief must be such as any reasonable man in the circumstances of the case would entertain about the existence or non-existence of a thing. Simply because the goods were not accounted for at that time does not necessarily mean that the goods were smuggled goods.*

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Unaccounted goods may be stolen goods. Reasonable belief could be entertained either on the basis of some external indicia or on the basis of some internal information that the goods had been illegally imported into India from Nepal or some other foreign country either without payment of duty or in contravention of any restriction or prohibition imposed by statute. There was nothing to suggest the foreign origin of the goods. There was nothing to suggest the illegal importation of the goods into the country.

60. *The goods must be smuggled goods. The word 'smuggled' means that the goods were of foreign origin and they had been imported from abroad. Only then does the presumption under Section 123 arise. The goods themselves did not suggest that the petitioner was an old smuggler or a dealer in smuggled goods. If there was such information with the customs, they ought to have disclosed it. The goods themselves did not suggest any illicit importation. Nor was there any inscription on the goods which could be the basis of the reasonable belief that the goods were of foreign origin. There was nothing in the appearance of the goods to suggest that they had been newly manufactured and brought into this country very recently from another country. In a word there was nothing absolutely from which inferences about their origin or recent import could arise. It was not a case where large quantity of gold with foreign markings was found hidden in the trousers of the accused as happened in *Hukma v. State of Rajasthan*, AIR 1965 S.C. 476.*

61. *In fact there is a finding by the Board in favour of the petitioner supporting his contention that there could be no reasonable belief in the mind of the officer when he seized the goods. On the penalty of Rs. 25,000/- imposed on the petitioner the Board observed : "there is no definite*

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evidence to show that the appellant knew or had reason to believe that those items were smuggled. In the absence of this evidence the penalty imposed is not justified. The Board accordingly remits the personal penalty in full". If the petitioner did not know that the goods were smuggled, how could the customs officer reasonably believe that the goods were smuggled. The petitioner knew better.

62. *The customs officer merely thought that as the goods had not been accounted for these are smuggled goods. At the time of seizure what happened was this. The petitioner was present at the shop. He told the customs officer that they were duly entered in his account books but his accountant had gone to the income tax officer. The officer did not wait for the man to arrive to explain the entries to him. He seized the goods and took them away. This was not a case of reasonable belief. It was a case of suspicion. A case of speculation. A case of guess work.*

63. *As a result Section 123 did not apply to the case. There was no reasonable belief. No presumption could be raised under Section 123. There was no obligation on the petitioner to prove that the goods were not smuggled. The burden of proof was wrongly cast on him. The entire inquiry was vitiated."*

20. *From the above discussion, we observe that the 'reasonable belief' on which the DRI officers presumed that the gold bars/pieces were of smuggled nature is not supported by any corroborative evidence. There is no document available on record to establish that gold bars/pieces were smuggled into India from Bangladesh. The impugned order has concluded that the said gold bars/pieces were smuggled into India only on the basis of assumptions and presumptions without any concrete evidence to substantiate this claim. Hence, we hold that material evidence*

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available on record does not establish that the gold bars/pieces were smuggled into India without any valid documents. Accordingly, answer to question (i) above in para 13 above is negative.

21. The next question to be answered is whether the burden of proving that the goods are not smuggled rest with the Appellants. The Appellants No 1 and 2, Partners of Gandhi & Sons have claimed that they have purchased the gold from M/s Chandan Enterprises Delhi under the cover of Invoices 3 and 5 dated 01/01/20 and 03/01/20 respectively. They contended that they have made part payment for the gold purchased from M/s Chandan Enterprises and the balance could not be paid as the gold pieces were seized by DRI. Since gold is not of foreign origin, section 123 is not applicable in this case as the gold bars/pieces were purchased domestically.

22. Section 123 of Customs Act 1962 puts the burden of proving that the gold is not smuggled one, on the person who claims ownership of the gold. For the sake of easy reference, the said section 123 is reproduced below:

22.1 SECTION 123 – Burden of proof in certain cases

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

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(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may be notification in the Official Gazette specify

22.2 We find that Section 123 applies inter-alia to gold/silver bullion seized on the reasonable belief that they are smuggled goods . The burden of proving that they are not smuggled goods shall be on the person, who claims to be the owner of the goods so seized or from whose possession the goods are seized. The contention of the Department is that in the instant case, the onus of proving that the gold bars/pieces were not of smuggled in nature, lies on the Noticees from whose possession the impugned goods were seized. The Revenue contended that both Rajesh Kumar Yadav and Umanath did not produce any document for their lawful possession of the recovered gold bars/pieces at the time of seizure in Gaya Railway Station on 10/01/20.

22.3 The contention of the Appellants is that the gold bar/pieces were not of foreign origin. Section 123 of Customs Act is applicable only to foreign marked gold. Also the gold bars/pieces sized is not of 99.99 purity. Since, there is no foreign mark available on the gold bars/pieces seized from the Appellants, the provisions of section 123 is not applicable in this case.

22.4 The Appellants relied upon many decisions to support their case. In the case of Sanjeeb Kumar @ Pappu Kumar vs Jt CC, Lucknow, 2019 (369) ELT 1177 (Tri-All), it has been held as under:

"3. *The Learned Counsel for the appellants submits that in terms of Section 123 of Customs Act, 1962 the onus is on the appellant to prove that the gold in question is not smuggled one, although appellants have failed to prove that gold is not smuggled one but the allegation of the Revenue that the gold is restricted item being third country origin has not been proved by*

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the Revenue and no evidence has been brought on record by the Revenue that how the gold is in question has come to India through Nepal. In that circumstances, gold cannot be absolutely confiscated in the facts and circumstances of the case, therefore, gold is required to be released to the appellants on payment of redemption fine and penalty. He also relied on the decision of the Hon'ble Bombay High Court in the case of State of Maharashtra v. Prithviraj Pokhraj Jain reported as [2000 \(126\) E.L.T. 180](#) (Bom.).

4. *On the other hand Learned AR appearing on behalf of the Revenue submits that in this case Shri Umesh Kumar in his statement has admitted that gold is being smuggled from Nepal by Shri Sanjeeb Kumar, therefore, Revenue has established that gold in question is smuggled one and is of third country origin. The appellants have failed to prove that the gold in question is not smuggled one. In that circumstances, the Revenue has rightly absolute confiscated the Gold in question.*

5. *Heard the parties.*

6. *Considering the submissions made by both the sides, we find that the appellants have failed to prove the source of procurement of gold, therefore, we hold that gold is smuggled one but on the same time, Revenue is also failed to prove that gold is of third country origin and smuggled through Nepal. In fact, the Revenue has not adduced any evidence to that effect, whereas on the other side, Shri Sanjeeb Kumar, himself has categorically stated that he is not dealing with the purchase and sale of the gold. Therefore, the Revenue has failed to prove that the gold in question is of third country origin and have been imported/smuggled through Nepal. In that circumstances, the gold in question cannot be held as restricted goods and they can be released on payment of redemption fine and penalty as the goods are smuggled in nature. We also gone through the case law relied upon by the Learned Counsel for the appellants in the case of Prithviraj Pokhraj Jain (supra) wherein in Para 19 which is extracted below wherein the Hon'ble High Court observed as under -*

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"19. The burden was, therefore, on the prosecution to prove that the goods were smuggled. For this the prosecution relied upon the evidence of Hebbar who stated that he believed the goods to be smuggled, because watches and watch straps were of foreign origin, the import of which was heavily restricted and prohibited and they were found in huge quantity. The foreign origin of the watches is tried to be shown from the foreign markings on the watches. The question whether the foreign markings of goods can be treated as admissible in evidence was considered by Naik J. in Criminal Appeal No. 3 of 1966, decided on 22nd December, 1966. Among the property involved in that case were some gold slabs. The slabs bore the marking "Johnson Mathey 9990 London". Naik J. observed in his judgment that the markings do not speak for themselves and that evidence would be hearsay evidence. There was nothing to indicate that the markings were really done by Johnson Mathey in London. No presumption can arise in regard to the markings, unless there is evidence to show that those markings were made by a particular company in the ordinary course of business. A Division Bench of the Gujarat High Court has also taken a similar view in *Asstt. Collector of Customs, Baroda v. M. Ibrahim Pirjada*, 1970 *Criminal Law Journal*, 1305. There, the Gujarat High Court has held that mere markings cannot be taken as proof of the fact of foreign origin of the goods as such markings and labels would be hearsay evidence. With respect, I agree with the above view."

Relying on the said decision, without evidence, the benefit of presumption under Section 123 of the Customs Act, 1962 is not available to the Revenue."

22.5 The Appellants also relied upon the decision in the case of *Balanagu Naga Venkata Raghavendra vs CC Vijayawada* 2021 (378) ELT 493 (Tri-Hyd), where in it has been held that the burden under section 123 will not shift on the Appellants

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when the seizure of gold without foreign markings are seized from city. The relevant portion of the order is reproduced below.

"14. *The confiscation of the gold by the adjudicating authority was set aside by the Tribunal and on appeal by the Revenue the Hon'ble High Court of Kerala, in the above factual matrix, has overturned the decision of the Tribunal. Therefore, it was not merely the purity of the gold in question but also the statements made during the investigation which formed the basis of the reasonable belief of the officers. In the present case, none of the statements recorded by the Department admit to or even suggest that the gold was smuggled gold. It has also not been brought out in the show cause notice that the purity of the seized gold is such that it could only have been of foreign origin. It is true that the conduct of the appellants was suspicious inasmuch as the gold pieces were being carried in newspapers and a letter was found written to one Shri Vijay in Trissur for requesting the gold to be handed over to the bearer of the letter. It is also confirmed by the DCM, Railways that the appellants had travelled from Trissur to Vijayawada by train. However, we note that Trissur is not even a port in itself. The gold was apparently collected from one Shri Vijay in Trissur. There were also several contradictions between different statements as recorded in para 16 of the show cause notice. All these would show that Shri Kanaka Ratnam (Appellant in Appeal No. 30496 of 2017) wrote a letter to Shri Vijay of Trissur to hand over gold to the bearer of the letter and both the letter and the gold were recovered from his son Shri Naga Venkata Raghavendra (Appellant in Appeal No. 30495 of 2017). Both the appellants had travelled by train from Trissur to Vijayawada. Naga Venkata Raghavendra was acting suspiciously when the Officers approached him. Subsequent statements were contradictory to each other. These factors by themselves cannot, in our considered opinion, constitute the basis for forming a reasonable belief that the seized gold was smuggled. Therefore, the Officers did not have a reasonable belief in the first place to assert that the seized primary gold was smuggled gold which is*

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essential to shift the burden on to the accused under Section 123. The case of Om Prakash Khatri (supra) was different inasmuch as in that case while the foreign markings were missing on the gold in that case the carriers had admitted that they were carrying smuggled gold for Shri Khatri and that it was smuggled through Kerala and they were carrying it to Bombay and marks and numbers have been deleted to avoid being caught. They also admitted that they avoid air travel as there is a high risk of being caught. Coupled with these statements was the fact the gold of very high purity. The ratio of this judgment does not apply to the present case and the facts are quite different.

15. *In view of the above, we find that the officers of the Department had no reasonable belief that the gold was smuggled and therefore they have not discharged their responsibility of forming reasonable belief under Section 123 without which the burden of proof will not shift to the person from whom the gold is seized."*

8. Therefore, relying on the decision of this Tribunal in the case of Shri Balwant Raj Soni (supra), we hold that the Revenue has no reasonable belief that the gold was smuggled. Therefore, they have not discharged the responsibility for forming the reasonable belief under Section 123 of the Customs Act, 1962 without which the burden of proof will not shift on the appellants from whom the gold has been seized .

9. We further take note of the fact that there is no mark showing that the gold of foreign origin and purity of gold also remains between 99.5 % to 99.7 %, whereas the normal foreign origin gold will be of purity of 99.99 %.

10. In that circumstances also, without coming to the belief that the gold is of the purity of 99.9 %, it cannot be alleged on presumption that it is smuggled one.

Issue No.(2)

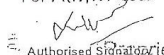
(2) whether the evidences available on record prove that the gold bar and pieces were smuggled into India from Bangladesh without any legal documents or not ?

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In this case, the appellant has produced two invoices for procurement of the same, which are extracted below :

S. No.	Name of Product	HSN / SAC Code	UOM / Quantity	Value of Unit/Rate	Total Amount
1.	Gold BAR	7108	6450=310	39826/- Per 10gms	2,56,875.24/-

Total Invoice Amount in Words <i>Two Crores Sixty Four Lacs Fifty Eight thousand one hundred & fifty Rupees only</i>		Total Amount Before Tax <i>256875.24/-</i>
Add : CGST <i>X</i>		
Add : SGST <i>X</i>		
Add : IGST <i>77062.6/-</i>		
Tax Amount : GST <i>77062.6/-</i>		
Freight & Loading Charges <i>X</i>		
Total Amount After Tax <i>2,45,875.24/-</i>		

Bank Details : Bank Name : <i>Federal Bank</i> Branch Address : <i>Fatehpur</i> Bank Account Number : IFSC Code :	Terms & Conditions : 1. Goods once sold will not be taken back. 2. Our responsibility ceases as soon as the goods leave out godown. 3. All disputes subject to Ghaziabad Jurisdiction only.	Certified that the particulars given above are true and correct For PRITHVI GOLD  Authorized Signatory
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(Common Seal)



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S. No.	Name of Product	HSN / SAC Code	UOM/ Quantity	Value of Unit/Rate	Total Amount
1	Gold Bar	7108	4000.000	39840/-	1,59,36,000

Reverse Charges : Yes/No Invoice No. : PH/ 57 Invoice Date : 16-1-2020 State : Delhi State Code 07		Transport Name : By hand Transportation Mode & Vehicle Number : Date of Supply : 16-1-2020 Place of Supply : Delhi	
Name : Jalan Bullion Jewellers Address : 43, Nalini Sethi Road R.N.20 1 st Floor Singapatti KOLKATA -7 GSTIN : 19ACEPJ4168Q1ZX State : KOLKATA (WB) State Code 19		Name : Address : GSTIN : 19ACEPJ4168Q1ZX State : KOLKATA (WB) State Code 19	
Total Invoice Amount in Words one crore sixty four lacs four teen thousand & eighty rupees only		Total Amount Before Tax 15936000 Add : CGST Add : SGST Add : IGST 478080/- Tax Amount : GST 478080/- Freight & Loading Charges Total Amount After Tax 1,64,14,080	
Bank Details : Bank Name : Federal Bank Branch Address : Fatehpuri Bank Account Number : IFSC Code :		Certified that the particulars given above are true and correct For PRITHVI GOLD [Signature] Proprietor	
Terms & Conditions : E. & O. E. 1. Goods once sold will not be taken back. 2. Our responsibility ceases as soon as the goods leave out godown. 3. All disputes subject to Ghaziabad Jurisdiction only.		(Common Seal)	



11. The above said invoices clearly depicts that Shri Anurag Jalan has procured the gold from M/s Prithi Gold owned by Shri Param Hans, Delhi and to that effect, the above two invoices have been produced. Therefore, Shri Param Hans has also stated that they have sold the gold

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to Shri Anurag Jalan of Jalan Bullion and Jewelers and also produced the purchase and sale registered copy of the balance sheet and profit and loss account and the invoices for purchase of the gold from M/s Kritika Jewellers. He also produced the GST Registration of Kritika Jewelers at Kucha Majani Chandni Chalk, Delhi and has also produced the Aadhar Card and PAN Card, but no investigation was conducted by the investigating authority to ascertain the fact that the gold in question is not sold by M/s Prithi Gold to the appellant. Moreover, the appellants have discharged their onus under Section 123 of the Customs Act, 1962 by producing invoices in support of their claim that they are the owners of the gold in question. In view of the above evidences and discussions, we hold that the appellant has discharged the onus that the source of procurement of gold. Therefore, Issue No.(2) is answered in favour of the appellants.

Issue No. (3)

Whether on the basis of retracted statements of the co-noticees and the retractions thereof, can be relied upon to establish the guilty of the appellants when the procedure prescribed under Section 123 of the Customs Act, 1962, was not followed or not ?

The Revenue has also relied upon the various statements recorded during the course of investigation. The statement of Shri Anurag Jalan was also recorded but the same has been relied upon by the Revenue to allege that the gold in question is smuggled one.

12. Further, we take note of the fact that the Revenue has relied upon the retracted statement of Shri Anurag Jalan, the said issue was also examined by of this Tribunal in the case of Shri Balwant Raj Soni (supra) and it was held by this Tribunal as under :

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"23. The next question to be answered is whether the retracted statements of the co-accused can be relied upon to establish the guilt of the Appellants, when the procedure prescribed under section 138B of the Customs Act was not followed. The Appellants stated that the retracted statements does not have higher evidentiary value than facts on record. They contended that the findings in the impugned order are based mainly on the basis of the statements of the co-accused, without any independent, corroborative evidence. The Order passed by the Adjudicating Authority confiscating the gold bars/pieces and imposing penalty on the Appellants, mainly on the basis of the statements of the co-accused, is not sustainable in law.

24. In support of their claim, the Appellants relied upon the following decisions:

i) *Mohtesham Mohd. Ismail Vs. Special Director, Enforcement Directorate- 2007(220)ELT 3 (SC) .*

That a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. A confession purported to have been made before an authority would require a closure scrutiny. It is therefore, now well settled that the Court must seek corroboration of the purported confession from independent sources.

ii) *Prakash Kumar Vs. State of Gujarat- (2007) 4 SCC 266 .*

The confession of co-accused by itself is not sufficient to hold the other accused guilty. It has been held repeatedly by this

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Court that the confession of a co-accused is a fragile and feeble type of evidence and it could only be used to support the other evidences, if any, adduced by the prosecution.

iii) Assistant Collector of Customs Vs. Amrik Singh 2014 (301) ELT 170 (P&H) The question arises whether the admission of co-accused under Section 108 of the Customs Act can be basis of conviction of other co-accused. The Ld. Trial Court has rightly held that statement of co-accused under Section 108 of the act against the co-accused with a weak type of evidence and conviction of co-accused cannot be based on the uncorroborated statement of co-accused.

iv) Anisur Rahaman Vs. Commissioner of Customs (Prev.) West Bengal 2003 (160) ELT 816 (Tri-Kolkata).

Non-appearance before DRI Officer in response to summons is not a ground for holding that the appellant is guilty-The entire case is based upon the statement of the Driver which is in the nature of uncorroborated statement of a co-accused and cannot be made the sole-basis for penalizing the appellant.

v) Jahed Mondal Vs. Commissioner of Customs (Prev.), West Bengal-2002 (149) ELT 319 (Tri.-Kol.) Para 8 & 11.).

Penalty has been imposed upon Shri Jahed Mondal based upon the statement of Bablu Biswas who was intercepted by the Customs Officer from whose possession one gold biscuit has been recovered. Penalty cannot be imposed on the basis of confession of co-accused unless corroborated by other evidences. Non-

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appearance in response to Summons cannot be a factor or criteria in determining the guilty conduct of the appellant.

vi) Narayan Das Vs. Commissioner of Customs, Patna- 2004 (178) ELT 554 (Tri.-Kolkata) Para-6.

Mere inculpatory statement of the co-acused about the purchase of gold from the appellant cannot be the basis of imposing penalty under Section 112(b) of the Customs Act, 1962 in the absence of any other corroborative evidence.

25. The Appellants further submits that the statement of the co-accused in this case cannot be considered as relevant in view of non-compliance of the mandate under Section 138B of the Customs Act, 1962 by the Adjudicating Authority which is pari materia with Section 9D of the Central Excise Act, 1944. In the case of Flemingo DFS Pvt. Ltd., Vs. Commissioner of Customs, Visakhapatnam reported in 2018 (363) ELT 450 (Tri-Hyderabad), it has been held that if Revenue chooses not to examine any person in the adjudication proceedings, it amounts to giving up that witness and such statement cannot be considered relevant. Since the co-accused person whose statement has been relied upon in this case was not examined in adjudication proceedings, his statement could not have been considered relevant against the Appellant. Reliance was placed in the case of Haricharan Kurmi reported in AIR 1964 SC 1184, wherein it was held that even otherwise the statement of co-accused can only be considered for corroboration of any tangible evidence and in the

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instant case, there is no tangible evidence to seek corroboration from statement of co-accused.

26. The appellants submits that Adjudicating Authority should have first examined the person whose statements have been relied upon to form an opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence. This was mandatory. The statement of any person cannot be relied upon directly as has been held by the Hon.ble High Court in the case of G-Tech Industries – Vs. Union of India- 2016 (339) ELT 209 (P&H). In the said decision the rationale behind the mandate contained in Section 9D of the Central Excise Act, 138B of the Customs Act, 1962 has been mentioned as below:

"Para 15- The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement recorded during inquiry/investigation, by the Gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion. It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D (1) mandates that the evidence of the witness has to be recorded before the Adjudicating Authority, as in such an

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atmosphere, there would be no occasion for any trepidation on the part of the witness concerned."

27. *The Appellants submits that the Adjudicating Authority, therefore, should follow the procedure to rely on the statement as relevant for proving the truth of the contents of the statement, to admit the statement in evidence. In this case, the said mandate has not been followed and hence the statement of the co-accused in this case cannot be said to be voluntary and his statement also cannot be said to be true and correct and shall not be taken as evidence.*

28. *The Appellants submits that after examination by the Adjudicating Authority the question of cross-examination would arise as has been held in Prakash Raghunath Autade- Vs. Union of India – 2022 (380) ELT 264 (Bom.).*

29. *The Appellants further relied upon the decision of the Tribunal in the case of S. Mohanalal reported in 1987 (29) ELT 63 (Tri-Madras) wherein the Tribunal held that "it will be unfair to fasten the appellant with penal consequences merely on the basis of a statement recorded from a third party to the effect that Gold Pellets under seizure were eventually intended to deliver to the Appellant". In the case of Sourav Goyal reported in 2020 (373) ELT 676 (Tri.-Del.), it was held by the Tribunal that the statement of the co-noticees unless corroborated by any independent evidence do not constitute the legal evidence and there is no justification for imposition of penalty on the Appellant.*

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30. *In the present case, the Appellants submits that only on the basis of the statement of the co-accused inference has been made about the smuggled nature of the gold bars/pieces. The Appellants relied on the decision in the case of Surinder Kumar Khanna- Vs. Intelligence Officer, DRI- 2018 (362) ELT 935 (SC) on the facts identical with the facts of the Appellant's case wherein the Hon'ble Apex Court has held as under:*

Para-14 – "In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The Appellant is therefore entitled to be acquitted of the charges levelled against him."

31. *We find that the Impugned Order mainly relied upon the statements of the Noticees 1 to 5 to establish the foreign origin nature of the gold. Other than the statements, there is no other evidence available on record to show that the gold were smuggled into the country from Bangladesh. It is incorrect to rely only on the statements of the co-accused without any corroboration, to prove the smuggled nature of the gold. It is a settled law that the statement of the co-accused cannot be relied without any independent corroboration.*

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31.1 In the case of Commissioner of Customs (Preventive), Lucknow vs Shakil Ahmad Khan, it has been held that confiscation based on retracted statements not sustainable. The gist of the Order is reproduced below:

Smuggling - Burden of proof - Retracted confessional statements of co-accused - No efforts made to prove that confessional statements were voluntary - Accused were not examined during adjudication - HELD : Confiscation and penalty order based only on retracted statements of accused persons were not sustainable - It was contrary to settled legal position, illegal, arbitrary and liable to be set aside - Sections 108, 111, 112 and 123 of Customs Act, 1962. [paras 22, 25, 26]

Evidence - Confessional statement of co-accused - It is not substantive evidence against another co-accused - It can at best be used for assurance to Court - In absence of any substantive evidence, it was inappropriate to base conviction of accused on statements of co-accused - Section 108 of Customs Act, 1962. [para 25]

31.2 The Tribunal in the cases of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking – other than statement of passenger no other proof produced by Revenue to substantiate the claim that jewellery were smuggled into India.

31.3 In view of the above discussion and relying upon the the decisions cited above, we hold that the gold bars/pieces cannot be confiscated based on the retracted statements alone. Accordingly answer to question no (iii) is negative.”

Relying on the decision of this Tribunal in the case of Shri Balwant Raj Soni (supra), we hold that the statement/retracted statements

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cannot be the basis to establish that the gold in question is smuggled one. Therefore, Issue No.(3) is also answered in favour of the appellants.

Issue No.(4)

Whether the facts and circumstances of the case, the penalties on the appellants can be imposed or not ?

13. We further take note of the fact that as the Revenue has failed to prove from the facts and circumstances of the case, we have come to the conclusion that in the absence of evidence on record, it cannot be held that the gold in question is of smuggled in nature, therefore, the same can be released to the appellants. Therefore, no penalty is imposable under Section 112 (a) & 112 (b) and 114AA of the Customs Act, 1962. Accordingly, penalties imposed on the appellants are also set aside.

14. In view of the above observations, we pass the following orders :

(a) The appellant has been able to show the source of procurement of gold and the Revenue has failed to come with positive evidence that the gold in question is smuggled one. Therefore, the gold in question is not liable for confiscation.

(b) No penalty is imposable on the appellant in the facts and circumstances of the case.

15. In the result, the appeals are allowed.

(Pronounced in the open court on **12.07.2023**)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)