IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75695 of 2024

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/37/2024 dated 12.01.2024 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Samadhan Ghadge **: Appellant**
S/o. Shri Yashwant Tatoba Ghadge,
Marathi Shale, Jawal, Kharat Wardi, Shivane Solepur,
Maharashtra – 413 307

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
3rd Floor, Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Nilotpal Chowdhury, Advocate, for the Appellant

Shri Subrata Debnath, Authorized Representative, for the Respondent

CORAM:

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

FINAL ORDER NO. 75833 / 2025

DATE OF HEARING: 01.04.2025

DATE OF DECISION: 03.04.2025

ORDER:

The present appeal has been filed against the Order-in-Appeal No. KOL/CUS/CCP/KS/37/2024 dated 12.01.2024 passed by the Ld. Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001 wherein the Ld. Commissioner (Appeals) has upheld the order passed vide Order-in-Original No. 157/ADC(P)/CUS/WB/2022-23 dated 28.12.2022.

2. The facts of the case are that the Officers of the P&I Branch of Customs conducted a search at the shop premises of M/s. New Pooja Jewellers, 24 Nalini Seth Road, Ground & 1st Floor, Sonapatti, Burabazar, and recovered two pieces of gold bars collectively weighing 156.350 grams from the possession of one Shri Amit Kumar Verma. In his statement, Shri Amit Kumar Verma has inter alia stated that the said two gold pieces were given to him by the appellant when he had gone to the shop of M/s. New Pooja Jewellers for exchanging assorted gold ornaments into gold bars.

3. On the basis of the said statement recorded from Shri Amit Kumar Verma, the Officers conducted a search at the shop premises of M/s. Shri Ganesh Assaying Centre, owned by Shri Samadhan Ghadge (the appellant herein) on 02.03.2022.The search led to the recovery of two pieces of gold bars weighing 50 grams each, both having inscriptions as "SUISSE 50 grams, Fine Gold 999.9" and Sl. Nos. 150664 and 150665 respectively, totally weighing 100 grams. The two gold bars, collectively weighing 100 grams and having an estimated value of Rs.5,29,750/- were finally seized on 02.03.2022.

4. On completion of the investigation, a Show Cause Notice dated 20.07.2022 was issued *inter alia* proposing confiscation of the two gold bars collectively weighing 100 grams seized from the appellant, as the appellant was not having any licit documents for legal procurement/possession of the said gold bars.

4.1. On adjudication, the Ld. Additional Commissioner of Customs (Preventive), Kolkata vide the Order-in-Original dated 28.12.2022 confiscated the two gold bars and imposed a penalty of Rs.50,000/- under Section 112(a) and 112(b) of the Customs Act, 1962.

4.2. On appeal, the Ld. Commissioner (Appeals) vide the impugned order dated 12.01.2024, upheld the order of confiscation and imposition of penalty on the appellant.

5. Aggrieved by the impugned order, the appellant has filed this appeal.

6. The Ld. Counsel appearing on behalf of the appellant submits that the appellant is a goldsmith by profession and has a small assaying centre under the name and style of “M/s. Shree Ganesh Assaying Centre”. He regularly purchases gold from various people and account the same in his books of account. It is submitted that, in the present case, the two cut pieces of gold bars have been purchased from one person by name Shri Saheb Santra, who had purchased the said gold bars from ICICI Bank. It is the appellant’s contention that the Department has not conducted any verification at the end of Shri Saheb Santra, from whom the appellant has legally procured the gold in question. In this regard, it is their submission that the said gold collectively weighing 100 grams has been recorded in the assets and liabilities of the appellant in the Balance Sheet for the Financial Year 2021-22. Thus, the appellant submitted that they have discharged the obligation cast upon them under Section 123 of the Customs Act, 1962 as legal ownership of the two gold bars seized.

6.1. It is also submitted by the Ld. Counsel for the appellant that they have not been provided with the statement recorded from Shri Amit Kumar Verma;

the adjudicating authority failed to follow the provisions of Section 138B of the Customs Act, 1962 and hence the said statement is not an inadmissible evidence; the adjudicating authority has relied upon the statement given by Shri Amit Kumar Verma but he has not allowed his cross-examination and therefore, the statement recorded from Shri Amit Kumar Verma cannot be relied upon in the instant case against the appellant. The Ld. Counsel for the appellant has further submitted that the Ld. Addl. Commissioner has not supplied the Relied Upon Documents (RUDs) to the appellant and thereby deprived his right to defend himself, which is in violation of the basic principles of natural justice; the Ld. Commissioner (Appeals) has also violated the principles of natural justice. Hence, the appellant contends that the impugned order is liable to be set aside on this ground alone.

6.2. The appellant submits that the entire allegation by the Department that the gold was procured illicitly is only on the basis of assumptions and presumptions and there is not a single piece of evidence available on record to corroborate the allegation that the gold was illegally imported into the country. It is pointed out in this regard that there was no testing conducted by the Department to ascertain the purity of the said gold and no test report from CRCL has been relied upon in the instant case to show that the gold seized is of 999.9 purity.

6.3. In view of the above submissions, the appellant prayed for setting aside the impugned order and allowing their appeal.

7. The Ld. Authorized Representative of the Revenue submits that the gold bars in question are bearing foreign markings and they are of 999.9 purity and hence, as per the provisions of Section 123 of the Customs Act, 1962, it is the responsibility of the person who claims ownership of the gold to produce evidence regarding legal procurement of the gold. As the appellant was not having any valid documents for its legal procurement, the Ld. Authorized Representative of the Revenue contends that the said gold pieces/bars have been rightly confiscated and penalties rightly imposed.

7.1. In view of the above, he supported the impugned order.

8. Heard both sides and perused the appeal records.

9. I find that the two gold bars collectively weighing 100 grams, were seized from the shop premises of the appellant. The said gold bars were having inscriptions as "SUISSE 50 grams, Fine Gold 999.9". Accordingly, the officers presumed that the gold bars were smuggled in nature, brought into the country without payment of applicable customs duties. The allegation of the Department is that the appellant was not having any valid documents evidencing legal procurement/possession of the said gold bars at the time of the search.

9.1. In this regard, the appellant has contended that at the time of seizure of the gold bars, the Department has no 'reasonable belief' that the goods were smuggled in nature. I find that Section 110 of the Customs Act,1962 clearly envisages that the proper officer of customs having 'reasonable belief' that any goods is liable to be confiscated, may seize such goods. In this case, I find that the Department has not brought in any corroborative evidence to substantiate the allegation that the gold bars in question were smuggled in nature. Failure to produce documents in respect of the goods available in the shop at the time of search does not *ipso facto* prove that the said goods are contraband in nature. The allegation of smuggling needs to be proved with cogent reasoning and corroborative evidence thereof. Subsequently, if the appellant could produce documents for its legal purchase, the same cannot be ignored to conclude that the gold is of smuggled in nature. Just because the gold bars in question bear foreign markings, it cannot be presumed that the gold bars were smuggled in nature. I find that this view is supported by the decision in the case of *Commissioner of Customs (Prev.), Shillong versus Sri Sangpuia, reported in 2005 (189) E.L.T. 321 (Tri. – Kolkata)* wherein it has been held as under: -

> *"3.(d) When interdiction of personal private property of a citizen by an officer is effected the law as in that case, it has to be strictly applied. If the Commissioner (Preventive) is of the opinion that large scale smuggling will be resorted to or is resorted in a particular commodity, he is free to move the concerned authorities to get such goods notified or specified under Chapter IVA or IVB of the Customs Act, 1962 and thereafter liabilities of vouchers, bills, acquisition records could be invoked and failure would be relevant and onus will be cast on people who want to or possess such goods. In the present case there is no such notification shown to us under these provisions of the Customs Act, 1962. The absence of documents, therefore, does not induce us to share the views of the Commissioner*

> *(Preventive) that the goods are of foreign origin and are of smuggled nature. The present appeal made on grounds as in para 2 above cannot be upheld. This Tribunal has to enforce liability as it is written and cannot go into the pleas as made in certain grounds taken by Commissioner (Preventive) in this appeal."*

9.2. I also observe that the ld. adjudicating authority has absolutely confiscated the gold without any concrete evidence to establish the smuggled nature of the gold bars. Having foreign markings on the gold bars alone not sufficient to conclude that the gold bars in question have been illegally imported into India without payment of applicable customs duties. This view is supported by the decision in the case of *Commissioner of Customs (prev.), Shillong versus Manisha Devi Jain reported in 2019 (370) E.L.T. 401 (Tri. Kolkata).*

9.3. In this case, I find that the appellant has claimed that he has purchased the said gold bars from one person, by name Shri Saheb Santra. However, I find that no verification was conducted by the Department at the end of Shri Saheb Santra to ascertain whether the appellant had procured the said two gold bars from him. I find that the appellant has recorded the possession of the said gold bars collectively weighing 100 grams in their balance sheet for the Financial Year 2021-22. For the sake of ready reference, the relevant page of the above balance sheet is reproduced below: -

SAMADHAN YASHAVANT GHADAGE 31
S/O. YASHAVANT GHADAGE
B-110, GARDEN REACH ROAD, BICHALI GHAT, KOLKATA

INCOME & EXPENDITURE ACCOUNT FOR THE YEAR ENDED 31ST MARCH, 2022

EXPENDITURE	AMOUNT	INCOME	AMOUNT
To Bank Charges	1243.72	By BUSINESS INCOME	
" GST on LICI	705.00	Profit from Proprietary Concern	
" Mediclaim	7930.00	M/s. Shree Ganesh Assay Centre	537840.00
" Interest on loan	0.00		
" Drawings for Expenses	213168.77	" INTEREST	
" Surplus transferred to capital account	315798.51	From Saving Bank Account	
		ICICI Bank Ltd	1006.00
	538846.00		538846.00

BALANCE SHEET AS AT 31ST MARCH, 2022

LIABILITIES		AMOUNT	ASSETS		AMOUNT
CAPITAL ACCOUNT			FIXED ASSETS		
Balance b/f (As per last year account)	3678310.62		Furniture & Fixture		67400.00
			Gold & Jewellery		238160.00
			Gold Biscuit-100grm		319000.00
Add:Surplus during the year	315798.51		Land at Tukdi, Solapur (MH)		
	3994109.13		Balance b/f		493350.00
			INVESTMENT		
Less:Gift issued to Amol Misal	25000.00	3969109.13	L.I.C.I.		
			Policy No.402663244 DOC:28.04.2018 (Yly)		
			Balance b/f	94035.00	
			Add:During the year	31345.00	125380.00
SECURED LOAN			LOANS & ADVANCES		
ICICI-LPHOG0044312		79373.00	Pandurang Appa Pawar		435000.00
ICICI-LPHOG0090675		76175.00	CAPITAL BALANCE WITH		
			M/s. Shree Ganesh Assay Centre (Proprietary Concern)		2411663.00
			CASH & BANK BALANCES		
			Cash on hand		50834.00
			Cash at ICICI Bank		
			S.B. A/c No.098201504651		16129.87
		4124657.13			4156916.87

(Emphasis supplied)

9.4. From the above, it is seen that the appellant has recorded the legal procurement and possession of the gold bars in question in their books of account. In these circumstances, I hold that the appellant has produced evidence as required under Section 123 of the Customs Act, 1962 for legal procurement/possession of the said two gold bars. Thus, I hold that the gold bars in question are not liable for confiscation and accordingly, I set aside the confiscation of gold bars ordered in the impugned order.

10. I find that the entire proceedings have been initiated on the basis of the statement recorded from Shri Amit Kumar Verma wherein he has informed the investigation officers that 156.350 grams of gold he was in possession was given by the appellant herein. I find that the said statement of Shri Amit Kumar Verma was not provided to the appellant. It is observed that the appellant had sought cross examination of Shri Amit Kumar Verma, on whose statement the Department has relied upon to implicate the appellant. A statement becomes admissible evidence under Section 138B of the Customs Act, 1962 only when the giver of the said statement is allowed to be cross-examined. Since in the instant case, cross examination of Shri Amit Kumar Verma was not allowed, I hold that the statement recorded from him does not have evidentiary value against the appellant and hence the same cannot be relied upon as evidence against the appellant.

10.1. I also take note of the submission of the appellant that he has not been provided with the relied upon document as sought by him. I find that the Ld. Addl. Commissioner has not supplied the Relied Upon Documents (RUDs) to the appellant and thereby deprived his right to defend himself, which is in violation of the basic principles of natural justice. I also find that the Ld. Commissioner (Appeals) has not followed the principles of natural justice and passed the impugned order without giving adequate opportunity to the appellant to put forth his defence effectively. Thus, I find that the impugned order is liable to be set aside on this ground alone.

10.2. As the confiscation of the two gold bars collectively weighing 100 grams, is not sustainable, no penalty is imposable on the appellant under Section 112(a) and 112(b) of the Customs Act, 1962. Accordingly, I set aside the penalty imposed on the appellant in the impugned order.

11. In the result, the impugned order is set aside and the appeal filed by the appellant is allowed, with consequential relief, if any, as per law.

(Order pronounced in the open court on **03.04.2025**)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd