

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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75804 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjay Kumar Mallick

: Appellant

S/o. Shri Prabhakar Mallick,
1, Seth Bagan Gulli,
Kolkata – 700 006

VERSUS

Commissioner of Customs (Preventive)

: Respondent

Custom House, 15/1, Strand Road,
Kolkata – 700 001

AND

Customs Appeal No. 75625 of 2024

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

Shri Sanjay Kumar Kotal

: Appellant

S/o. Shri Jayanta Kotal,
Director of M/s. Kanishk Jewellers and Bullion Pvt. Ltd.,
158/A, Bidhan Park,
Kolkata – 700 090

VERSUS

Commissioner of Customs (Preventive)

: Respondent

Custom House, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Nilotpal Chowdhury, Advocate, [Customs Appeal No. 75625 of 2024]
Shri Prithwijit Sharma, Advocate, [Customs Appeal No. 75804 of 2023]
for the Appellant(s)

Shri Ashwini Kr. Choudhary, Authorized Representative,
For the Respondent

CORAM:

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

FINAL ORDER NOs. 75912-75913 / 2025

DATE OF HEARING: 03.04.2025

DATE OF DECISION: 16.04.2025

ORDER:

Customs Appeal No. 75804 of 2023 has been filed by Shri Sanjay Kumar Mallick [hereinafter referred to as the "Appellant No. 1"] against the Order-in-Appeal No. KOL/CUS/CCP/KS/533-534/2023 dated 19.07.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001

1.1. **Customs Appeal No. 75625 of 2024** has been filed by Shri Sanjay Kumar Kotal [hereinafter referred to as the "Appellant No. 2"] against the same Order-in-Appeal.

2. The facts of the case are that on 15.09.2019, Officers of the Headquarters P&I Branch, C.C. (P), West Bengal, Kolkata intercepted Shri Sanjay Kumar Agarwal, the Appellant No. 1, at Shalimar Railway Station. On examination, he was found to be in possession of seven (07) pieces of gold collectively weighing 474.250 grams of gold valued at Rs.18,01,676/-. As the Appellant No. 1 was not having any document for licit procurement of the said gold, the said gold was detained vide Detention Memo No. 03/September/2019-2020 dated 15.09.2019 and later, converted to seizure under Section 110 of the Customs Act, 1962 vide Seizure Case No. 22/IMP/CL/GOLD/P&I/CCP/WB/2019-20 dated 12.10.2019. The gold in question was seized under the belief that the said gold hold had been illegally imported into India without payment of appropriate Customs duties.

2.1. In his statement recorded under Section 108 of the Customs Act, 1962, the Appellant No. 1 inter alia stated that he works under Shri Sanjay Kumar Kotal of M/s. Kanishk Jewellers and Bullin Private Limited, 158/A, Bidhan Park, Netaji Colony, Kolkata – 700 090 (the Appellant No. 2 herein), on whose direction he was proceeding to M/s. Shyam Narayan Jewellers of Bakhargang, Patna, on 13.09.2019 by Shalimar-Patna Duronto Express to deliver the said gold for making gold ornaments.

3. On completion of the investigation, a Show Cause Notice dated 26.02.2020 was issued to both the Appellants for their alleged involvement in the illegal importation of gold of foreign origin, proposing confiscation of the said gold, along with imposition of penalties.

4. The above Show Cause Notice was adjudicated vide the Order-in-Original No.149/ADC(P)/CUS/WB/2021-22 dated 30.03.2022 passed by the Commissioner of Customs (Preventive), Custom House, Kolkata wherein the Id. adjudicating authority has ordered as under: -

"[17.01] I order for absolute confiscation of 07 [seven] nos. of cut pieces of GOLD believed to be of foreign origin having 24 Carat [having purity between: 99.6% to 99.7% by wt. of gold], collectively weighing: 474.250 grams, valued at Rs.18,01,676/- [Rupees Eighteen Lakh One Thousand Six hundred and Seventy Six] only vide Seizure Case No.: 22/IMP/CL/GOLD/P&I/C.C.[PJ]/WB/2019-2020, Dated: 12.10.2019 in terms of Section 111(b) & Section 111(d) of the Customs Act, 1962.

[17.02] I order for confiscation of the seized brown coloured Adhesive Tapes used for wrapping the seized gold believed to be of foreign origin having no commercial value [N.C.V.] in terms of Section 118(a) of the Customs Act, 1962.

[17.03] I impose Personal Penalty of Rs. 5,00,000/- [Rupees Five Lakh] only upon the Noticee No. 2, i.e. Shri Sanjay Kumar Kotal, S/o: Shri Jayanta Kotal, Director of M/s Kanishk Jewellers & Bullion Pvt. Ltd, No. 158/A, Bidhan Park, Kolkata-700090 [Noticee No. 2/ Owner of gold].

[17.04] I impose Personal Penalty of Rs. 50,000/- [Rupees Fifty Thousand] only upon the Noticee No. 1 ie. Shri Sanjay Kumar Mallick, S/o: Shri Prabhakar Mallick, No. 1, Seth Bagan Gulli, Kolkata-700006 [Noticee No. 1/ Carrier of gold].

[17.05] In absence of any proven malafide or absence of proven submitting false / incorrect documents, Penalty is not liable to be imposed in terms of Section 114AA of the Customs Act, 1962. Accordingly, the charges framed against the Noticees No. 2 under Section 114AA of the Customs Act, 1962 as proposed in the impugned Show-Cause-Notice is hereby dropped.

[17.06] I order for disposal of the seized and absolute confiscated gold as mentioned in the Inventory List / Seizure Memo under Case No.: 22/IMP/CL/GOLD/ P&I/C.C.[P]/WB/2019-2020, Dated. 12.10.2019 by the S&D Unit, C.C.[P], W.B. as per instructions/procedure laid down in the Chapter-11 of the department's Disposal Manual-2019."

4.1. On appeal, the Ld. Commissioner (Appeals), vide the impugned Order-in-Appeal dated 19.07.2023, upheld the confiscation of gold and imposition of penalties imposed vide the above mentioned Order-in-Original dated 30.03.2022.

5. Aggrieved by the impugned order, both the Appellants have filed appeals before the Tribunal.

5.1. As both the appeals emanate from the same Order-in-Appeal, both are taken up together for decision by a common order.

6. The contentions raised by both the Appellants in these appeals are summarized as under: -

- i) As per Section 110(1) of the Customs Act, 1962, Officers can seize the goods only when there is a 'reasonable belief' that the said goods have been smuggled into the country without payment of applicable duties of Customs. However, in the present case, the Officers have not exercised any 'reasonable belief' that the gold in question was smuggled in nature. There is no foreign marking available on the said gold to indicate that the same had been illegally imported into the country.
- ii) The purity of the gold is not 99.9%, which is normally associated with 24 carat gold of foreign origin.
- iii) Further, Section 123 of the Customs Act, 1962 is applicable only when there is a 'reasonable belief' that the said gold is smuggled in nature. However, in the present case, the Appellants have submitted relevant documentary evidence to show that the gold had been procured domestically from indigenous sources. In this regard, they have submitted the Invoice No. KJ/WB/19-20/1042 dated 31.05.2019 wherein 700 grams was purchased by M/s. Kanishk Jewellers and Bullion Pvt. Ltd. (Appellant No. 2) from M/s. Kartikey Jewellers Pvt. Ltd. Out of this, 474.250 grams of gold was given to the Appellant No. 1 for the purpose of delivering the subject gold to M/s. Shyam

Narayan Jewellers, Bakargang, Patna for the purpose of making ornaments.

iv) The documentary evidence submitted by them have not been negated as false. Accordingly, it is their contention that they have produced sufficient evidence to show that the gold in question had been procured indigenously and hence, the provisions of Section 123 of the Act are not attracted in the instant case.

v) In support of their contentions, the Appellants have cited the following case-laws:

- *Nand Kishore Sumani v. Commissioner of Cus., C.Ex. & S.T., Siliguri* [2016 (333) E.L.T. 448 (Tri. – Kol.)]
- *Ram Naresh Chaurasiya v. Commissioner of Cus. (Prev.), Patna* [2019 (365) E.L.T. 940 (Tri. – Kol.)]
- *Sanjeeb Kumar @ Pappu Kumar vs Joint Commr. of Cus., Lucknow* [2019 (369) E.L.T. 1177 (Tri-All.)]
- *Balanagu NagaVenkata Raghavendra vs Commr. of Cus., Vijayawada* [2021 (378) E.L.T. 493 (Tri-Hyd.)]
- *Commissioner of Cus.(Prev.), Shillong v. Sri Sangpuia* [2005(189) E.L.T.321 (Tri. - Kolkata)]

vi) In support of their contention, the appellants also rely on the decision of the Tribunal, Kolkata in the case of *Ajit Bhosle* reported in 2020 (374) E.L.T. 814 (Tri. Kolkata); wherein it has been held that when there is no evidence regarding illegal import of the gold, the seized gold cannot be held to be smuggled in nature.

- vii) In the case of *Om Sai Trading* reported in *2020 (372) E.L.T. 542 (Pat.)*, the scope and meaning of the term 'reasonable belief' has been explained, wherein it has been held that "reason to believe" not the subjective satisfaction of the officer concerned but to be exercised in accordance with restraints imposed by law and such belief must be that of an honest and reasonable person based upon reasonable grounds. Reasons should either appear on the face of the notice or must be available on the materials which had been placed before him.

6.1. Regarding applicability of Section 123 of Customs Act, 1962, in this case, the Appellants submit that the key element under section 123 of the Customs Act, 1962 is 'reasonable belief'; that the seizure so made in the present case is clearly without 'reasonable belief'. It is thus argued that when there is clear absence of reasonable belief, the initial burden in terms of Section 123 of the Customs Act, 1962 automatically shifts to the Department.

6.2. The Appellants have also submitted that the documentary evidence submitted them clearly indicate that the gold in question was indigenously procured. It is further submitted by the Appellants that the Id. adjudicating authority has recorded the genuineness of the documents submitted them at paragraphs 15.17 and 16.05 of the Order-in-Original dated 30.03.2022; however, in spite of admitting the genuineness of the said documents submitted by them, the Id. adjudicating authority has finally concluded that the goods are liable for confiscation. In view of the above, the Appellants submit that

provisions of section 123 of the Customs act, 1962 are not applicable in this case and hence the confiscation of the gold in question is not sustainable in law.

6.3. As there is no evidence against them regarding illegal importation of the gold, the Appellants submit that the penalties imposed on them under Section 112 of the Customs Act, 1962 are also not sustainable.

6.4. In view of these submissions, the appellants have prayed for setting aside the impugned order and allowing their appeals.

7. On the other hand, the Ld. Authorized Representative of the Revenue submits that the gold has been confiscated as the Appellants were not having any valid document at the time of seizure to show that the gold had been legally purchased. Accordingly, he contends that the confiscation of the gold and imposition of penalties on the Appellants are sustainable. Thus, he supports the impugned order.

8. Heard both sides and perused the appeal records.

9. I find that the gold weighing 474.250 grams was seized from the possession of the Appellant No. 1 herein, viz. Shri Sanjay Kumar Mallick while he was at the Shalimar Railway Station. In his voluntary statement recorded on 15.09.2019, the Appellant No. 1 has inter alia informed that he works under Shri Sanjay Kumar Kotal, the Appellant No. 2, of M/s. Kanishk Jewellers and Bullion Pvt. Ltd., Kolkata, who had handed over the gold and directed him to deliver the same to M/s. Shyam Narayan Jewellers, Bakargang, Patna.

9.1. The Appellants have contended that Section 110 of the Customs Act is not applicable in this case as there was no 'reasonable belief' that the gold in question was smuggled in nature. In support of their contentions that the gold in question was procured from domestic sources, the Appellants have produced a copy of the Detention Memo No. 03/September/2019-2020 dated 15.09.2019. For the sake of ready reference, the Detention Memo dated 15.09.2019, showing details of the goods seized, is reproduced below: -

STATION: HQRS. P&I BRANCH, C.C.(P), WB, KOLKATA
DETENTION MEMO No. 03/September/2019-20

Name and Address of the owner[s]		DATED: 15.09.2019	
02	SRI SANJAY KUMAR MALLICK (M/H/39yrs), S/o Sri Prabhakar Mallick, 1, Seth Bagan Gulce, Kolkata-700006. Mob.no.8820036446	Date & Time of the Interception	Interception: 15.09.2019 at 05.45 Hours.
03	Place of the Interception/Recovery	On railway level crossing near Shalimar Railway Station, Howrah-711103	
04	Place & Time of the Detention	15.09.2019 at Custom House, 15/1 Strand Road, Kolkata-700001 at 12.30 Hrs.	
05	Modus operandi		
Illegal importation/possession/transportation/storage of yellow metal believed to be gold of foreign origin without any licit documents, travelled by Train no. 22214, Patna-Shalimar Duranto Express reached at Shalimar railway station on 15.09.2019			

7] Description of goods: - As stated below:-

Sl. No.	Marked As	Details of Yellow Metals believed to be gold recovered from Sri SANJAY KUMAR MALLICK	SHAPE	Total Weight (in grams)	Sample Weight	Remaining weight after sample
1.	SM-1	1(One) very small Cut piece Yellow Metal believed to be gold having inscription S.K	Uneven shape	39.300	2.080	37.220
2.	SM-2	1(One) Cut piece Yellow Metal believed to be gold having inscription SH3G	Uneven shape	121.070	2.440	118.630
3.	SM-3	1(One) very small Cut piece Yellow Metal believed to be gold having inscription FINE	Uneven Shape	40.030	1.720	38.310
4.	SM-4	1(One) Cut piece Yellow Metal believed to be gold having inscription 1	Uneven Shape	38.350	1.740	36.610
5.	SM-5	1(One) cut pieces of yellow metal believed to be gold having inscription FINE GOLD 99.5	Uneven Shape	100.990	1.860	99.130
6.	SM-6	1(One) cut pieces of yellow metal believed to be gold having inscription 995.0	Uneven Shape	114.650	1.560	113.090
7.	SM-7	1(One) very small Cut piece Yellow Metal believed to be gold having inscription S.B.R.T	Uneven Shape	19.860	1.980	17.880
8.		Brown Adhesive Tape used for wrapping the yellow metals believed to be gold	N/A			
TOTAL				474.250	13.380	460.870

Total value of detained gold (99.5 karat) Rs. 18,01,676/- (Rupees Eighteen lakh one thousand six hundred seventy six) only as per value @ Rs. 3799/-per gram as on 15.09.2019

Reason for detention: Shri Sanjay Kumar Mallick is not able to submit/produce any licit documents. He stated that he is not the actual owner of the above-mentioned gold, he is a carrier, works for his employer Shri Sanjay Kumar Kotal, Kolkata.

DATED SIGNATURE OF THE WITNESSES:

[1] *Radhakanta Maity* 15/09/19

[2] *Malay Raju* 15/09/19

DATED SIGNATURE OF THE OWNER/CUSTODIAN/AUTHORISED PERSON

Received the copy of the Inventory [Seizure Memo]

Malay Raju 15/09/19

[S.O./Inspector of Customs]
P&I Branch, C.C.(P) Kolkata
Inspector of Customs
HQ. P&I Branch, CC (P), W.B.

Malay Raju
SUPERINTENDENT OF CUSTOMS
Headquarter Preventive & Intelligence

From the Detention Memo reproduced above, I observe that the term 'reasonable belief' for seizure of the gold bars is not figuring in it. Further, it is seen that the gold is of uneven shape and not of standard weight. There are no foreign markings available on the said gold pieces.

9.2. I find that Board, vide its Circular No. 01/2017 dated 08.02.2017, has instructed to pass a specific order depicting the reasonable belief of the officer concerned while seizing the goods. Therefore, deviation thereof, clearly depicts that the seizure so made is illegal and hence, the goods are liable to be released and in corollary thereof, confiscation under Section 111 of the Customs Act 1962 is not at all warranted. Thus, when preliminary seizure of goods is in dispute, the SCN proceedings become vitiated in nature thereby making the impugned order liable to be quashed.

9.3. I also observe that Section 123 of the Customs Act clearly stipulates that a 'reasonable belief' that the gold is of smuggled in nature is mandatory for invocation of the said provision; However, in the present case no reasonable belief has been formed by the officers that the gold is of smuggled in nature and hence the provisions of Section 123 are not applicable in this case and the burden lies on the Department to prove that seized gold is of smuggled in nature. The Appellants contend that no evidence has been brought on record by the Revenue to substantiate the allegation that the gold is of foreign origin and smuggled in nature.

9.4. In the present case, I observe that no reasonable belief has been formed by the officers that the gold is of smuggled in nature. I also find that no evidence has been brought on record by the Revenue to substantiate the allegation that the gold is of foreign origin and smuggled in nature. I observe that the seizure of the gold without following the 'reasonable belief' that the gold is of smuggled in nature, is not sustainable.

10. The next ground raised by the Appellants is regarding 'Burden of Proof' as envisaged under Section 123 of Customs Act, 1962. The Appellants contend that Section 123 of the Act is not applicable to this case. As per this section, the burden of proving that the goods are not smuggled, lies on the person from whose possession the goods were seized. For the sake of easy reference, the said Section 123 is reproduced below:

"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;

(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."

10.1. I find that Section 123 applies inter-alia to gold bars 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 from whose possession the goods are seized. The contention of the Department is that in the instant case gold bars were not of smuggled in nature, lies on the Appellant No. 1, Shri Sanjay Kumar Mallick from whose possession the impugned goods were seized. The Department contended that the Appellant did not produce any document for the licit procurement of the gold bars.

10.2. I observe that Section 123 of the Customs Act clearly stipulates that a 'reasonable belief' that the gold is of smuggled in nature is mandatory for invocation of the said provision. However, in the present case no reasonable belief has been formed by the officers that the gold is of smuggled in nature and hence, the provisions of Section 123 are not applicable in this case. The burden in the instant case lies on the Revenue to prove that seized gold is of smuggled in nature. However, I find that no evidence has been brought on record by the Revenue to substantiate their allegation that the gold is of foreign origin and smuggled in nature.

10.3. I also observe that the provisions of Section 123 are not applicable to indigenously procured gold. Hence, I find merit in the argument of the appellant that the onus is on the Department to prove that the

gold is of smuggled in nature and the Department has failed to bring in any evidence to prove that the gold is smuggled in nature.

10.4. I observe that the appellants relied upon many decisions to support their contention. In the case of *Sanjeeb Kumar @ Pappu Kumar vs Joint Commr. of Cus., Lucknow [2019 (369) E.L.T. 1177 (Tri-All.)]*, it has been held as under:

"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 -

"19. The burden was, therefore, on the prosecution to prove that the goods were smuggled. For this the prosecution relied upon the evidence of Hebbbar 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. Therefore, we hold that the gold in question is not restricted item but being smuggled one liable for confiscation and the same can be redeemed on payment of redemption fine. We also take note of the fact that the value of gold is Rs. 1,26,22,800/- and margin of profit in the trade of gold is very less, therefore, considering the value of gold and margin of profit, we hold that the redemption fine of Rs. 5 lakhs is appropriate in the facts and circumstances of the case. Therefore, we impose redemption fine of Rs. 5 lakhs on the gold in question which can be redeemed on payment of the said redemption fine. Considering the fact, that appellants are involved in the activity of smuggling of gold, therefore, penalty of Rs. 1 lakh each is imposed on all the appellants."

10.5. The Appellants also relied upon the decision in the case of *Balanagu NagaVenkata Raghavendra vs Commr. of Cus., Vijayawada [2021 (378) E.L.T. 493 (Tri-Hyd.)]*, wherein it has been held that the burden under section 123 will not shift on the Appellants 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 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 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....."

10.6. I observe that the only ground in which the gold was seized by the officers was that the appellant was not having any document for licit purchase of the same at the time when they were intercepted. I observe that failure to produce documents in respect of the goods carried by a person does not ipso facto prove that the 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. In this regard, the appellant has relied on the case of *Commissioner of Cus.(Prev.), Shillong v. Sri Sangpuia* reported in 2005 (189) E.L.T. 321 (Tri. - Kolkata), whereby the following has been held:

"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."

10.7 Further, the purity of the gold in question is not 99.9, as seen from the Test Memo dated 17.09.2019 produced by the Appellant. For the sake of ready reference, the said Test Memo is extracted below: -

Lab no. 2014-2020/SZD (G)-188-194 dated 17.09.19

Detention Memo no: - 03/September/2019-20

Report: Received one sealed paper packet marked as SM-1, SM-2, SM-3, SM-4, SM-5, SM-6 and SM-7 respectively sealed with seven (07) red lac seals in intact condition with facsimile of seal "CUSTOM (PREV) KOLKATA, W.B. KOLKATA-2". On opening the sealed packet, seven (07) samples were found in seven different auto pressed plastic pouches.

Each of the seven samples is in the form of yellow metallic cut piece, composed of "Gold".

Sl no.	Marking	Net wt. Of sample drawn (in gm).	Wt. Of recovered gold (in gm.)	Wt. Of remnant gold in (gm.)	% of gold (w/w)
1	SM-1	2.06	0.28	1.75	99.7
2	SM-2	2.43	0.29	2.11	99.6
3	SM-3	1.72	0.24	1.45	99.6
4	SM-4	1.73	0.37	1.33	99.6
5	SM-5	1.90	0.30	1.57	99.6
6	SM-6	1.56	0.28	1.25	99.6
7	SM-7	1.97	0.37	1.57	99.6

Remnant samples and recovered gold of the above samples are kept in the respective pouch, packed in the same packet and sealed with "CHEMICAL EXAMINER CALCUS HOUSE NO.1" seal and returned.

1
PRAVEEN KUMAR RAI
Chemical Assistant

30/9/19
Rajesh Kumar Verma
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10.8. I find that the above Test Memo / Report indicates that the gold in question is not of 99.9% purity, which is usually associated with foreign origin gold. Also, the gold in question are not of standard weight. Further, I also take note of the fact that the Revenue has not brought in any evidence to prove that the gold was smuggled into India.

10.9. In view of the above discussions and the decisions cited above, I hold that the burden under Section 123 of Customs Act, to prove that the gold is not smuggled in nature, does not lie on the Appellants, in this case. The onus is on the Departmental officers that the gold is of smuggled in nature. However, I observe that the officers of the Department could not establish that the gold is of smuggled in nature.

10.10. I find that the Appellants have produced evidence in support of legal procurement of the gold, vide Invoice No. KJ/WB/19-20/1042 dated 31.05.2019 by which 700 grams of gold was purchased by the Appellant No. 2 (M/s. Kanishk Jewellers and Bullion Pvt. Ltd.) from M/s. Kartikey Jewellers Pvt. Ltd. It has been stated that out of this, 474.250 grams of gold was given to the Appellant No. 1 for the purpose of delivering the subject gold to M/s. Shyam Narayan Jewellers, Bakargang, Patna for the purpose of making ornaments. For the sake of ready reference, scanned copy of the said invoice is reproduced below: -

(ORIGINAL FOR RECIPIENT)

"No E-way Bill is required to be generated as the Goods covered under this Invoice are exempted as per Serial No. 4/5 to the annexure to Rule 138(1A) of the CGST Act, 2017."

10.11. In this regard, I observe that the Id. adjudicating authority has given a finding regarding validity of these documents at paragraphs 15.17 and 16.05, which are reproduced below for the sake of ready reference: -

"[15.17] I hold that, submitted documents by Shri Sanjay Kumar Kotal [Claimant of gold] i.e. [i] JOBWORK-KJB-KIV-164/2019-2020, dated: 13.09.2019 has not been proven falls (sic) by the investigating authority [but it was not accompanied by the Carrier of the gold at the time of carrying possessing the gold] and [ii] Purchase GST Tax Invoice for gold bullion weighing: 700.000 grams issued by from M/s Kartikey Jewellers Pvt. Ltd. Kolkata, dated: 31.05.2019 has not been proven falls (sic) by the investigating authority rather Director of M/s Kartikey Jewellers Pvt. Ltd. Kolkata has confirmed/certified about its genuinity.

.....

[16.05] I hold that, considering the fact that no corroborative evidence has been placed on record regarding submission of falls / fake documents in respect of claims of gold under seizure by the Noticee No. 2. Accordingly, charges framed against the Noticee No. 2 for imposing penalty under Section 114AA of the Customs Act, 1962 cannot be proper as Section 114AA of the Customs Act, 1962 is held for imposing penalty for extreme fraud / evasion cases under the Customs Act, 1962, 11 was found that no such act has been committed / done by the Noticee No. 2. Although the investigating authority has failed to ascertain that who was the actual supplier of that gold under seizure or from whom the gold was procured by the Noticee No.1, the gold under seizure were liable to confiscation under Section 111(b) & (d) of the Customs Act, 1962 as none of the Noticees were able to submit/produce any proper / related documents in respect of actual procurement of d under seizure while coming from Patna to Shalimar by Patna-Shalimar Duronto Express which was mandatory under Section 123 of the Customs Act, 1962."

10.12. From the above, I find that the documents submitted by the Appellant have not been proved to be false. However, despite having found that the documentary evidence submitted by the Appellants was genuine, the Id. adjudicating authority has held that the goods are liable for confiscation vide the Order-in-Original dated 30.03.2022. Considering the documentary evidence submitted by the appellants, I do not find any reason to reject the evidence of legal procurement of the gold produced by the Appellants. Consequently, I hold that the provisions of Section 123 of the Customs Act, 1962 are not applicable to this case.

10.13. As the Appellants have submitted enough evidence for legal purchase of the gold domestically, I hold that the confiscation of the gold under Section 111 of the Customs Act, 1962 is not sustainable and hence, I set aside the same.

11. Regarding the penalties imposed on the Appellants, I find that the Id. adjudicating authority has imposed the penalties under Section 112 of the Customs Act, 1962. As the gold is not liable for confiscation, there is no offence committed by the Appellants warranting imposition of penalty under Section 112 *ibid*. Accordingly, the penalties imposed on the Appellants under Section 112 of the Customs Act are set aside.

12. In the result, I set aside the impugned order and allow the appeals filed by the Appellants.

(Order pronounced in the open court on **16.04.2025**)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd