

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

REGIONAL BENCH - COURT NO.2

Customs Appeal Nos.75688 of 2024

(Arising out of Order-in-Appeal No.KOL/CUS/CCP/KS/31-36/2024 dated 12.01.2024 passed by Commissioner of Customs (Appeals), Kolkata.)

Shri Santosh Kumar

(Ward 14, Village – Hakeyari, Post-Vishnupur Titra, Vaishali, Bihar-844502.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

WITH

(i) Customs Appeal No.75689 of 2024 (Shri Amit Jaiswal vs. Commissioner of Customs (Preventive), Kolkata); (ii) Customs Appeal No.75702 of 2024 (Shri Nabin Khandelwal vs. Commissioner of Customs (Preventive), Kolkata); (iii) Customs Appeal No.75703 of 2024 (Shri Vivek Kanodia vs. Commissioner of Customs (Preventive), Kolkata); (iv) Customs Appeal No.75705 of 2024 (Shri Naresh Khandelwal vs. Commissioner of Customs (Preventive), Kolkata); (v) Customs Appeal No.76509 of 2024 (Shri Sanjay Giri vs. Commissioner of Customs (Preventive), Kolkata);

(Arising out of Order-in-Appeal No.KOL/CUS/CCP/KS/31-36/2024 dated 12.01.2024 passed by Commissioner of Customs (Appeals), Kolkata.)

APPEARANCE

Shri Swarbhanu Bhattacharjee & Ms. Sweety Jha, both Advocates for the Appellant (s)

Shri S.Debnath, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)

FINAL ORDER NO. 76344-76349/2025

DATE OF HEARING : 05.03.2025
DATE OF DECISION : 19.05.2025

R. MURALIDHAR :

In this case several types of firecrackers believed to be of foreign origin were found stored in one godown and after detailed investigation and verification, proceedings were initiated against the above six Appellants.

2. The value of the seized fire crackers was Rs.5,82,12,560/-. After due process the Adjudicating authority ordered for absolute confiscation of the seized fire crackers valued at Rs.5,82,12,560/-. He also imposed penalties on the Appellants. Being aggrieved, the Appellants are before the Tribunal.

3. The penalties imposed on the appellants is as per the following Table :

Name of the Appellant	Role Played	Penalty imposed Rs.
Shri Vivek Kanodia	Main person	10,00,000/-
Shri Nabin Khandelwal	Company	5,00,000/-
Shri Naresh Khandelwal	Company providing IEC Code	5,00,000/-
Shri Amit Jaiswal	Godown owner	50,000/-
Shri Sanjay Giri	Misc.	50,000/-
Shri Santosh Kumar	Driver	50,000/-

4. The Ld.Counsel appearing on behalf of the above Appellants provides the chronological details of the case, which is reproduced below :

Dates	Events
07-08-21	Officers of Directorate of Revenue Intelligence (FRI) searched Godown No.1-D, Vidya Complex-1, Khariar, Dankuni 712370, when a Panchnama was drawn.

08-08-21	DRI inventorised the goods and sealed the godown.
08-08-21	Seizure Case being No. DRI/KZU/CF/ENQ-06(INT-03)/2021 was registered.
08-08-21, 16-11-21 & 21-01-22	Statement of Sri Rakesh Gupta, owner of Godown was recorded.
27-08-21	Statement of Sri Amit Jaiswal was recorded.
31-08-21	Statement of Sri Vivek Kanodia was recorded.
24-01-22	Sri Sashikant Das, a new employee of M/s JN Khandelwal & Sons, joined from his native place.
28-01-22 & 24-02-22	Statement of Sri Navin Khandelwal was recorded.
14-03-22	Further statement of Sri Amit Jaiswal recorded.
19-04-22	Follow up inquiry was conducted by the officers of DRI at the residential premises of Sri Sanjay Giri.
31-05-22	Show Cause Notice issued by the office of the Directorate of Revenue Intelligence.
14-03-22	Order-In-Original being No.186/ADC(C)/CUS/WB/2022-23 passed by the Office of Commissioner of Customs (Preventive).
12-01-24	Order-in-Appeal No. KOL/CUS//KS/31-36/2024 passed by the Office Commissioner of Customs (Appeal),
	Hence this present Appeal challenging the Order in Appeal.

5. He makes the following further submissions :

5.1 Burden of Proof – Latches on the part of the Deaprtment to prove

- There is no shred of evidence to prove that the Appellant [Vivek Kanoria] is anyway involved in the commission of the said offence. The said allegation of him being the master-mind is completely based upon the statement without any independent corroboration thereof. Thus, although the Appellant knew that smuggling is an offence, yet the fact that the said alleged importation of the said alleged confiscated

goods was perpetrated by the Appellant is a brazen, false and concocted fact which the Appellant strongly objects to. There is nowhere in the statement recorded by the other Appellants to show that the Appellant is the alleged mastermind to the said importation. On the basis of mere surmise and conjectures, the Authority concerned had arraigned the present Appellant to the said proceedings.

- There is no shred of evidence to prove that the said godown was rented by the Appellant(namely Shri Nabin Khandelwal) or that the Appellant had any role to play in the booking of the said Godown by the said Appellant was known fully perpetrated by the said Appellant, but the same is not the case herein. The said allegation is completely based upon the statement without any independent corroboration thereof. It is also imperative to state herein that the dealings pertaining to booking the said godown space was conducted between one Mr. Rakesh Gupta(being the owner) and one Mr. Shashikant Dash. Nowhere has it been specified that the said Appellants had facilitated to the said alleged commission of the said offence. It is extremely shocking to note herein that the said 2 persons, named above, had been expunged from the said proceedings, thereby releasing them from the shackles of the judiciary. But what is strange to note herein is that the said Rakesh Gupta was the main person behind the perpetration of the said offence, and instead of arraigning him, and knowing fully well that the owner of the said Godown is a key suspect in the said offence, the Department miserably failed and went beyond the four corners of the law and expunged them from the said proceedings. Moreover, no statement has been recorded from the said Appellant and thus, the allegations are completely brazen, vague and improper. Moreover, on the basis of mere surmise and conjectures, and without any

specific evidence, the Authority had illegally imposed the penalty on the Appellants. Moreover, there is no specific admission of the part of the Appellant (namely Mr. Nabin Khandelwal) wherein it would be established that the Appellant had paid the amount to the godown owner for alleged renting of the said godown). Not only this, there is no specific admission or evidence to establish that the other Appellant (namely Naresh Khandelwal) had knowledge of the said alleged commission of the offence, nor was part of the said alleged offence. Thus, although the Appellants knew that smuggling is an offence, yet the fact that the Authority had miserably failed to establish any shred of evidence to prove their involvement, is a question that this Hon'ble Court should strongly consider.

- There is no shred of evidence to prove that the said godown was booked by the said Appellant [Amit Jaiswal] or that by allegedly booking the said godown, the Appellant had knowingly perpetrated by the said Appellant, but the same is not the case herein. The said allegation is completely based upon the statement without any independent corroboration thereof. Moreover, no statement has been recorded from the said Appellant and thus, the allegations are completely vague and improper. Thus, although the Appellant knew that smuggling is an offence, yet the fact that the truck was being booked for the purpose of the alleged smuggling, was not known to the Appellant. Moreover, basis of a Whatsapp Chat Transcript, and considering the said Whatsapp Transcript without authenticating the same by obtaining a Certificate under Section 65B of the Evidence Act, the Appellant could not have been arraigned in the present proceedings.

- There is no shred of evidence to prove that the Appellant [Sanjay Giri] was in anyway involved in the said alleged commission of the said offence. The said allegation is completely based upon the statement without any independent corroboration thereof. Moreover, no statement has been recorded from the said Appellant and thus, the allegations are completely vague and improper. Moreover, the said Appellant has never committed any offence of like nature ever in his life. Moreover, the Appellant earns a moderate income from his professional engagements which barely covers his household expenses, and thus, he had no intention nor motive to commit the alleged offence. Not only this, nowhere has this fact been established that the said Appellant had rented the said godown, and/or was involved in the alleged commission of the said offence. Thus, although the Appellant knew that smuggling is an offence, yet the fact that the said goods were smuggled, was not known to the Appellant.

- There is no shred of evidence to prove that the Appellant [Santosh Kumar] herein has, at any point of time, made any payment in favour of Mr Vivek Kanoria nor has he ever indulged in commission of any offence whatsoever. The said allegation is completely based upon the statement without any independent corroboration thereof. Moreover, no statement has been recorded from the said Appellant and thus, the allegations are completely vague and improper. Thus, although the Appellant knew that smuggling is an offence, yet the fact that the said alleged goods were allegedly imported and stored was not known to the Appellant. As the Appellant being an honest employee, and earning barely to sustain his and his family's daily needs, the said Appellant had never

committed any offence of like nature, nor ever wishes to commit.

- Moreover, the alleged smuggled goods is not notified under Section 123 of the CA,'62, therefore the burden is on the department to prove that seized goods is illegally imported into the country and is of foreign origin. Hence, it is abundantly clear that the Department has squarely failed to prove that the seized goods is of foreign origin and is illegally imported into the country and any allegation pertaining involvement of the present Appellant falls flat.
- Reference is placed on **"Akash Enterprise** reported in **2014(304) ELT 73 (KAR).**
- Moreover, opinions on visual examinations, without any test to prove has no legal force to sustain the allegation of smuggling, as referred to in **Maqsood Alam,** reported in **2015 (324) ELT 162 (Tri-Del).**
- Reliance is also heavily placed on **Krishna Das -vs- Commissioner of Customs, Lucknow, 2014 (303) E.L.T. 548 (Tri-Del) and Commissioner of Customs (P), Lucknow -vs- Pinki Agarwal 2020 (372) E.L.T. 277 (Tri-All).**

5.2 Failure to prove that the goods were illegally smuggled and/or of foreign origin

It is imperative to state herein that it is a clear case of **town seizure**, where only based upon packing materials, **and without any authentic test report**, the said goods were termed as goods of foreign origin. Reliance is again placed on

Maqsood Alam(supra). The Ld. Adjudicating Authority failed to consider that in the judgment of **D. Bhoramall [1983(130 ELT 1546 (SC))]** the following had been held-

It cannot be disputed that in proceedings for imposing penalties under Clause (8) of Section 167 of the Sea Customs Act, to which Section 178A does not apply. the burden of proving that the goods are smuggled goods is on the Department. But in order to appreciate the scope and nature of the onus cast by it, due regard must be paid to other kindred principles, no less fundamental of universal application. One of them being that the prosecution or the Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue.

Penalty — Illicit importation/exportation — How to prove by the Department (Section 112 of the Customs Act, 1962).

Since the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personal which is enforced against the person concerned in the smuggling of goods, therefore, in the case of the former it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling. [para 33].

5.3 Nowhere in the said investigation have the Appellants been directly implicated

The authority concerned had also failed to appreciate that nowhere in the statement of any of the said accused, has this fact come to light with regards to the ownership of the said smuggled goods. It is also pertinent to mention herein that none of the accused have come forward to claim the said goods while being served with notice under

Section 150 of the Customs Act. All this clearly establish the fact that the persons did not realise which were the goods so seized and, hence, the allegations framed by the authority concerned are baseless and have no locus to stand on. He cannot be accused for which had has not committed any offence.

The authority thereafter has also failed to appreciate that the appellant have in no way committed the said offence. Moreover, the only alleged conversation the Appellant had, was the prime evidence basis which the Appellant was arraigned by the Department. Thus, basing entirely on the said non-corroborative evidence and presuming the Appellant to be an offender, the Department had caused a grave miscarriage of justice when imposing penalties solely on the same, without any further investigation into the same, thus making the entire investigation process illegal and violative of the principles of natural justice. It is repeated and reiterated that prejudice has been caused to the Appellant and have subsequently lead to grave miscarriage of justice. Reliance is placed on a judgment of **Union of India -vs- Kisan Ratan Singh and Ors** reported in **2020 SCC Online Bom 39 (Para 9)**

Reliance is further placed on (a) **Sampad Narayan Mukherjee** (Supra); (b) **Samaresh Agarwal** (Supra) and (c) and **Shakil Ahmed Khan** (Supra).

5.4 THE OWNER OF THE GODOWN WAS EXPUNGED FROM THE CASE, SCOT FREE

The Authority miserably failed to understand and appreciate that the owner of the said Godown, in whose possession the said goods were present, was expunged from the present case, scot free. It could very well be the case that the said owner of the godown had made the Appellant a scapegoat to escape from the clutches of the judiciary, which the Authorities miserably failed to appreciate, and thus, imposing the unjustified penalty on the Appellants had caused irreparable injury to the Appellant. Instead of arraigning the owner and

possessor of the said confiscated goods, who is running around scot-free, the Appellant, being innocent, was made to suffer the harsh, illegal and unjustified imposition, when both parties knew fully well that the Appellant was neither the owner or possessor of the said alleged confiscated goods.

The authority concerned has further failed to appreciate that placing sole reliance on the CDR of the accused persons and implicating and/or penalizing the Appellants on the sole basis of the said CDR is patently illegal and puts a black mark on the judiciary and judicial process. What is surprising to note is that the CDR can never be admitted as evidence, as the said CDR Records are not credible source of evidence as the same is required to be examined terms of Section 138 C of the Customs Act, 1962.

5.5 Absence of Preponderance of Probabilities

The present case has been designed by the Authorities, on an opinion derived at by simply barely looking at the packing of the materials, and no test conducted, thereby proving that the said case has no merit whatsoever. Barely on the basis of the packing materials, the Authorities had established that the said goods were smuggled nature, and without any shred of evidence, which clearly proves that there lies no preponderance of probability.

5.6 No Knowledge, No Mens-Rea – No Penalty

The Appellant has no knowledge of any smuggled goods and/or foreign origin goods, and thus, the vires of Section 112 of the CA,'62 does not meet and thus the said Penalty should not have been imposed on the Appellants. Moreover, the Appellant was in no way involved in the alleged commission of the said offence. The Appellant was made a scape-goat by the owner/possessor of the said imported goods, who had not be arraigned into the said proceedings. Reference is placed on a decision of the Hon'ble High Court at Bombay in the case of **SHYAM SWAROOP MUNDRA Vs UNION OF INDIA [2005 (185) E.L.T. 16**

(Bom.)]. From, the present scenario it is clear that there is nothing on record to prove the alleged act of smuggling on the part of your appellant, and to substantiate the stands, a case being **Shankeshwar Metal Corporation –vs- Commissioner of Customs (Imports), Mumbai, 2014 (312), ELT 344(TRI)-(Mumbai)** can be cited, wherein it was held that *'mens rea is an important ingredient for imposing a penalty under Section 112(b) of the Customs Act, '62. Goods may be liable for confiscation for contravention of provision of Customs Act, but the person who is in possession of goods need not necessarily have anything to do either with smuggling or dealing with them knowingly.'*

5.7 Incorrect Allegation

What is surprising to note is that the CDR can never be admitted as evidence, as the said CDR Records are not credible source of evidence as the same is required to be examined terms of Section 138 C of the Customs Act, 1962.

Reliance is placed on **Akash Enterprises** (Supra), **Masood Alam** (Supra) and **Sudhir Saha** (Sura).

Reliance is placed on (a) **Harchand** reported in **1981 (h) ELT 699 (Cal)**; (b) **Santosh Kumar Poddar –vs- Commr of Customs (Prev.), Kolkata** reported in **2020 (372) TLC 606 (Tri.Kol)**; (c) **Sri Dilip Jain –vs- Commr of Customs, Kolkata**, reported in **2002 (149) ELT 1423 (Kol)**; (d) **Laxmi Narayan Swami –vs- Commr of Customs (Patna)** reported in **2003 (156) ELT 131 (Tri.Kol)**; (e) **Shankal Metal Shwar –vs- Comm of Customs (Import)** reported in **2014 (312) ELT 344 (Tri.Mum)**.

5.8 Conclusion

Thus, in light of the above, it can clearly be construed that there is no shred of evidence which can clearly evince that the said Appellant was the mastermind behind the said alleged confiscation. Moreover, the

alleged seizure being the nature of town seizure, proper test reports were necessary to prove that the said alleged smuggled goods were of foreign origin or not. Just by visual opinion, the Department had allegedly evinced that the said smuggled goods were of foreign origin. Ergo, the Department has miserably failed to establish a role of the Appellant in the said proceedings. It is imperative to state herein that the owner and possessor of the said confiscated goods had not been arraigned as a noticee, moreover the said Appellant was made a scapegoat in the entire process, and an innocent, being the Appellant herein, had been arraigned, whereas the main perpetrators were roaming around scot-free. The acts and/or actions of the Department have clearly vitiated the principle of law that "It is better that ten guilty persons escape than that one innocent suffer". Thus, arraigning the Appellant to this present proceedings, whereas the main perpetrators remain scot-free, smears a black mark on the chastity of the judiciary and is bad in law and should be nipped in the bud. Moreover, it is a known principle of law that if a person has no knowledge of the alleged commission of the offence, Mens-Rea cannot be established and thus penalty cannot be imposed. Moreover, it is a thumb-rule theory and/or principle of law that a person who doesn't have knowledge of the alleged omission of the said offence cannot be penalized as no knowledge clearly evinces no Mens Rea, and if there is no mens rea on the Appellant, then, as per law, the said Appellant cannot be penalized.

4. The Ld.AR for the Revenue submits that on a specific intelligence gathered by DRI, the officers have searched the godown No.1D, Vidya Complex-1, Kharial, Dankuni-712310 on 07.08.2021. They found large amount of firecrackers having China origin were stored in 2000 to 2515 gunny sacks. The total value of the goods was Rs.5,82,12,560/-. Thereafter detailed investigation was taken up right from the owner of the godown to all the concerned persons. The statements have been recorded and corroborative evidence by way of the mobile conversation details etc. have been gathered by the Department. The Bank accounts have been verified and finally a Show Cause Notice has been issued to

the Appellant. It has come to light that the IEC Code was being misused. They have not only contravened the provisions of the Customs Act, 1962, but also have contravened the provisions of The Explosive Rules, 2008. For storing these imported firecrackers illegally they have also endangered the lives of the people came around the godown. Therefore, he justifies the absolute confiscation of the firecrackers and the penalties imposed on the Appellants.

5. Heard both sides and perused the Appeal papers and further submissions made by both the sides.

6. Admittedly, the seizure was effected after visiting the premises located at Dankuni, West Bengal, which is about 300 kms away from the Bangla Desh border. Also there is nothing to suggest that the goods were intercepted when they were being cleared from any port in transit to the godown. Therefore, it is a town seizure, within the state of West Bengal

7. The statutory provision enabling the Customs Officials to intercept, check, verify, detain, seize are all guided by Section 123 of the Customs Act 1962. It would be important to go through the relevant provisions, which are extracted below :

Section 123 in The Customs Act, 1962

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 by notification in the Official Gazette specify.

8. A careful reading of the above provisions clarifies that the goods in question pertain to,

- (a) Gold
- (b) Watches
- (c) Any other class of goods which the Central Govt may notify

the officials, can have a reasonable belief and take up the further proceedings. In these cases, the burden to prove the non-foreign nature of the goods is on the person from whose possession the goods are recovered.

9. On the other hand, if the goods in question are not notified by the Central Govt., then the burden entirely shifts to the Customs Officials so as to prove that the goods are of foreign origin.

10. In order to attract the provisions of Section 123, to fasten the burden on the person possessing the goods, the items in question, i.e fire-crackers, should be Notified by the Government, which does not seem to be the case here.

11. Coming to the Revenue's belief about the Chinese Origin of the goods, I have gone through the Panchanama. The relevant portion of the Panchanama reads as under :

(3)

Panchanama Dated 07.08.2021

<u>Pancha:</u> Subrata Maity [Aged abt 42 yrs] S/o. Ashutosh Maity, Par Dankuni, Khurijol, WB-712310	<u>Pancha:</u> Arindam Halder [Aged - S/o Sasanka Halder, Aged 26 yrs Bal Baba Road, Mahoharpur, Hooghly - 712310
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On being called by some plain clothed persons, who disclosed their identity as officers at Directorate of Revenue Intelligence, Kolkata Zonal unit (Here in after referred as DRI officers) by showing their identity Card, presented ourselves at Par-Dankuni Main & C.T. Road, Dankuni, at about 19:00 hrs on 07.08.2021. Then DRI officers informed us that they have specific intelligence that huge quantity of Chinese origin banned fire crackers have been store in a near by godown, they also explained us, the above mentioned persons, that they intend to search the said godown & detain the said ^{illegal} consignments of imported Chinese origin banned fire crackers.

P1 Smaity
07.08.21

P2 P. Halder
7.8.21

Bulhu Maity
7/8/2021
Shri Bulhu Maity


 7/8/21
 DRI Officer.
 राहुल रॉय / RAHUL ROY
 असुचना अधिकारी / Intelligence Officer
 राज्य आपूर्ति विभाग, Directorate of Revenue Intelligence
 कोलकाता और क्षेत्रीय कार्यालय, Kolkata Zonal Unit
 कोलकाता - 700071

4)

Then DRI officers requested us to witness the entire proceedings of search & detain the said goods, i.e. the smuggled Chinese origin firecrackers. On realizing the gravity of the situation we the above mentioned persons agreed to their proposal. Accordingly then they, the DRI officers disclosed that the said goods are stored in Godown No. 01D, Vidya Complex 1, Ground Floor, Khair, Danku. Pin 712310 and they also showed us a Search Authorization issued by the competent Authority of DRI Kolkata.

Then we, the above mentioned persons along with the team of DRI officers entered in the Vidya Complex 1 at about 19:20 hrs on 07.08.2021. On entering the said premises one person came forward and asked about our identities. Then DRI officers showed their official identity cards & search authorization and also explain their purpose of visit and

P1 Smaity
07.08.21

P2 Sheldar
7.8.21

Bullu Maity
7/8/21
Shri. Bullu Maity

RAHUL ROY / RAHUL ROY
Intelligence Officer
Directorate of Revenue Intelligence
Kolkata Zonal Unit
Kolkata - 700071

(5)

introduced us as independent witnesses for the said purpose of visit of DR1 officers. Then the said person disclosed his identity as the caretaker of Vidya Complex I, Shri Bulhu Maity and he handed the Search Authorisation, issued by the competent Authority of DR1, Kolkata by putting his dated signature.

On questioning he showed the Godown NO. 4D and informed us that last night some vehicles arrived with cartons & loaded/stored the goods in the said godown, and further he informed that his Employer Shri Ritesh Gupta may know details about the said goods. The godown found to be locked & DR1 officer asked Shri Bulhu Maity to open the same. On his request DR1 officers called Shri Ritesh Gupta and found that another person Shri Amit Jaiswal of M/s. Sumangda Enterprise contacted him to store the goods. ~~Thereafter~~. On asking Shri Amit Jaiswal informed the said goods

P. Smaity
07.08.21
P2 ~~Shal~~
7.8.21

Bulhu Maity
7/8/21
Shri Bulhu Maity

DR1 Officer
RAHUL ROY
आयुक्त अन्वेषक/Intelligence Officer
राज्य आयुक्त निरन्तर निरीक्षण/Regional Revenue Intelligence
कोलकाता आयुक्त एकाई/Kolkata Zonal Unit
कोलकाता/Kolkata - 700071

(6)

actually belongs to Shri. Vinek Manodia. On calling Shri. Vinek Manodia, he informed that he will be present during opening of the said godown. But after waiting for more than one hour, his i.e. Shri. Vinek Manodia's phone number found to be switched off, so he never arrived. Then with the help of Shri. Bulu Maiti, Case taker opened the Godown 10 at Vidya Complex 1, with the key available with him.

On entering the said godown, several cartons found inside which are properly piled up & stacked and each of them are covered with plastic sacks. Then DRI officers randomly opened some of the cartons in presence of us, the above mentioned parties & Shri. Bulu Maiti. On opening such cartons various firecrackers of foreign origin in various size & colors were found.

P. S. Maity
07.08.21

P. S. Maity
7.8.21

Bulu Maiti
7/8/21
Shri. Bulu Maiti


DRI Officer
राहुल रॉय / RAHUL ROY
आवृत्ति अधिकारी / Intelligence Officer
एकलव्य आरक्षणा विभाग / Directorate of Revenue Intelligence
कोलकाता क्षेत्रीय इकाई / Kolkata Zonal Unit
कोलकाता / Kolkata - 700071

(7)

As the cartons were many in number, many labours were required for opening each and every cartons & examining the same. The DRI officers decided to seal the godown No. 01 D, & examine later, on the following Days. Shri. Bullu Maity also informed that labours were not available with him at that time. Accordingly they, the DRI officers sealed the Godown ID in presence of Shri Bullu Maity & us, the above mentioned Panchas.

~~our~~ Panchana proceedings ended at 23:00 hrs on 07.08.21.

As we were not accustomed with the draught of Panchana, on our request one DRI officer drawn the same, and read out in our own vernacular. On being fully satisfied we, the above mentioned Panchas & Shri Bullu Maity & DRI officer put our dated signature on each page.

The entire proceeding completed without having any person or damaging any property.

P₁ S Maity

07.08.21

P₂ A. S. Sarker

Bullu Maity

7/8/2021

Shri Bullu Maity

Director of Revenue Intelligence
आपूर्तिकर्ता अधिकारी/Inspector of Revenue Intelligence
राजस्व आयुक्तों निदेशालय/ Directorate of Revenue Intelligence
कोलकाता क्षेत्रीय इकाई/Kolkata Zonal Unit
कोलकाता-700071

10

PANCHANAMA DATED 08-08-2021	
Pancha 1. Shri Goutam Das, aged about 28 years, S/O - Shri Paran Das, Address - Kharial, Muslim Para, Dankuni, Pin- 712310	Pancha-2. Sk. Dilshad Alam, aged about 28 years, S/O - Sk Munna, Address - Dankuni Munnarpur Mallick Para, Pin-712314

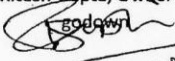
We, the above named Panchas, on being called upon by the officers of Directorate of Revenue Intelligence (henceforth referred as DRI officer), Kolkata Zonal Unit presented ourselves today i.e. on 08-08-2021 in front of Vidya Complex 1, Opposite Coal India Township, Kharial, Dankuni, Pin - 712310 at about 11:30 Hrs. The DRI officers explained to us that huge quantity of smuggled firecrackers of Chinese origin is stored inside Godown No. 1D, Ground floor of the aforementioned Vidya Complex 1. The DRI officers further explained to us that yesterday, i.e. on 07-08-2021, a team of DRI Officers searched the Godown based on specific intelligence and found the Chinese origin smuggled firecrackers. However, due to late hours and unavailability of labours and other logistic support, detailed examination of the goods could not be done. Then on that day i.e. 07-08-2021 the godown containing the smuggled goods was duly sealed by DRI officers under panchnama proceedings in presence of the representative of the godown and two independent witnesses. The fact of search and sealing of the godown was intimated to the local police station in writing.

The DRI officers further informed us that their purpose of visit today was to examine the goods in detail and for that purpose they requested us to witness the entire examination proceedings. Realizing the gravity of the situation, we agreed to their proposal. They further informed us that they have already informed the local Police Station about today's proceedings in writing. The Officers also informed us that they have already intimated Shri Ritesh Gupta, owner of Vidya Godown Complex-1 to come over and to witness the proceedings.

Pancha-1

Goutam Das
8/8/2021

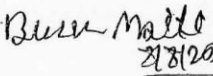
Shri Ritesh Gupta, Owner of the Godown


RITESH GUPTA
08/08/2021

Pancha-2

Dilshad Alam
8/8/21

Shri Amal Maiti alias Bullu


Bullu Maiti
8/8/2021

Mr. Dilip Ghosh
08-08-2021
DRI Officer
মুদুল ঘোষ
MRIDUL GHOSH
आसूचना अधिकारी/Intelligence Officer
डी.आर.आई, कोलकाता
DRI, KOLKATA

(11)

Thereafter, DRI Officers then checked the seal of the Godown No. 1D which was put on yesterday and found intact. The godown was opened in presence of us, Shri Amal Maiti alias Bullu and we entered the godown. On entering the godown, two stacks of sacks containing cartons found in the front side of the godown and in the backside, another stack of sacks containing cartons was found. Then DRI officers started examination of the goods systematically with the help of labourers called by them in presence of us and Shri Amal Maiti alias Bullu, Representative of Vidya Complex. In course of examination, Shri Ritesh Gupta, owner of Vidya Complex 1, reached the godown complex and he continued witnessing the proceedings. In the meantime, a team of local police officers led by Shri Sanjay Chatterjee, Sub-Inspector, Dankuni Police Station reached the godown and witnessed the examination proceedings for sometime and then left.

Each and every sacks was opened, some sacks found to contain one carton and some contained two or three cartons. In some cartons found marking 'Made in China'. Almost all the cartons found containing various types of fireworks, namely, Cold, Fountain Firecrackers, Skyshot Fireworks, Brocade Crown Flower - Bouquet with Comet Red etc. A total of 2515 Sacks were found inside Godown Complex No. 1D and detailed inventory of the goods and the quantity and estimated price is detailed in the attached Annexure-A. The officers ascertained the value of the goods on the basis of open source information and the total value of the goods was found to be Rs. 5,82,12,560/- [Rupees Five Crores Eighty Two Lakhs Twelve Thousand Five Hundred and Sixty only].

Representative samples were drawn from similar types of sacks and kept in two PVC bags and sealed under the signature of us, DRI officer, Shri Ritesh Gupta, owner of the Vidya Complex 1 and Shri Amal Maiti alias Bullu, Representative of Vidya Godown Complex.

After completion of examination, the labourers were instructed to put adhesive tapes at every cut marks on the sacks to minimize the wastage. Then the officer of DRI seized the goods under Section 110(1) of the Customs Act, 1962 on reasons to believe that those goods are liable to confiscation under the Customs Act, 1962 and a Supradnama was issued to Shri Ritesh Gupta, the owner of the godown for safe custody of goods seized. The Godown No.

Pancha-1

Boutam Das
8/8/21

Shri Ritesh Gupta, Owner of the

godown
8/8/21Mridul Ghosh
08-08-2021
DRI Officer

মুন্ডুল ঘোষ

MRIDUL GHOSH

आपूर्ना अधिकारी/Intelligence Officer
डी. आर. आई, कोलकाता
DRI, KOLKATA

Pancha-2

Dilshad AK
8/8/21

Shri Amal Maiti alias Bullu

Bullu Maiti
8/8/21

(12)

1 of Vidya Complex was then again sealed in presence of us, Shri Ritesh Gupta, owner of the Vidya Complex 1 and Shri Amal Maiti alias Bullu, Representative of Vidya Godown Complex.

The entire proceedings was completed peacefully in presence of us and said Shri Ritesh Gupta and Shri Amal Maiti alias Bullu without any damage to any property of the said godown complex and without causing harm to any person.

As we are not accustomed with the Panchanama proceedings on our request one of the DRI officers has typed this panchanama in the laptop carried by DRI officers and they read out this panchanama to us and explained it in our vernacular. On being satisfied with the facts and events recorded here and in the inventory, we put our dated signature on it and also on the inventory. The entire proceedings ended at about 18:00 hrs on 08.08.2021.

Gouram Das
Pancha-1 8/8/2021

Shri Ritesh Gupta, Owner of the

godown
Ritesh Gupta
08/08/2021

Mr. Ritesh Ghosh
DRI Officer 08.08.2021

মুদ্রিত স্বাক্ষর

MRIDUL GHOSH
আসূচনা অফিসার/Intelligence Officer
ডী.আর.আই, কোলকাতা
DRI, KOLKATA

Pancha-2

Dilshad Ali
8/8/21

Shri Amal Maiti alias Bullu

Bullu Maiti
8/8/2021

ANNEX - A

Inventory of goods found in the Godown No. 10, Vidya Complex 1, Kharihal, Bunkun, Pin - 712310 on 08-08-2021

Sl. No.	Description of goods	Country of Origin (if applicable)	Number of Sacks	Number of Cartons (if in each sack)	No. of Cartons	No. of boxes in each Carton	Quantity in each box/Carton (in Pcs)	Total Quantity in each Sack (in Pcs)	Total Quantity in Pcs	Estimated Market Value (in INR)	Total Estimated Market Value of Goods (in INR)
1	Cold Fountain Firecrackers - 3M 15 (Height - 3Mtrs & Duration - 15 Seconds)	CHINA	2	2	4	12	10	240	480	12	5760
2	Cold Fountain Firecrackers - 3M35 (Height - 3Mtrs & Duration - 35 Seconds)	CHINA	935	1	935	30	6	180	168300	120	20196000
3	Cold Fountain Firecrackers - 3M35 (Height - 3Mtrs & Duration - 35 Seconds)	CHINA	81	3	243	12	10	360	29160	120	3499200
4	Cold Fountain Firecrackers - 3M35 (Height - 3Mtrs & Duration - 35 Seconds)	CHINA	1345	2	2690	20	6	240	322800	100	32280000
5	Cold Fountain Firecrackers - 3M35 (Height - 3Mtrs & Duration - 30 Seconds)	CHINA	10	4	40	12	10	480	4800	100	480000
6	Cold Fountain Firecrackers - 3M 15 (Height - 3Mtrs & Duration - 15 Seconds)	CHINA	1	2	2	12	10	240	240	15	3600
7	Fireworks - Shyshot 1.2"	CHINA	53	2	106	Not Applicable	100	200	10600	100	1060000
8	Fireworks - Shyshot 1.5"	CHINA	7	2	14	Not Applicable	50	100	700	150	105000
9	Fireworks - Shyshot 2"	CHINA	3	2	6	Not Applicable	50	100	300	200	60000
10	Brocade Crown Flower - Bouquet with Comet Red (1.2") (7 pieces in a packed chain)	CHINA	17	1	17	Not Applicable	10	10	170	600	102000
11	Brocade Crown Flower - Bouquet with Comet Red (1.2") (50 pieces in a packed chain)	CHINA	57	1	57	Not Applicable	2	2	114	3500	399000
12	Brocade Crown Flower - Bouquet with Comet Red (1.2") (100 pieces in a packed chain)	CHINA	2	1	2	Not Applicable	1	2	2	7000	14000
13	Chainaw without blade	CHINA	2	1	2	Not Applicable	1	1	2	4000	8000
Grand Total			2515 Sacks						537568	GRAND TOTAL	58212500



P1- Godown Dns
8/8/2021
P2- Disposal Alert
8/8/21
Smt Rakesh Gupta, Owner of
the godown
Buen Markt - 8/8/2021
Shr Anand Mehta alias Bulda
8/8/2021

DRI Officer
8/8/21

12. It is seen from the Written Panchanama that there is general assertion that the goods are of Chinese Origin. In the second Panchanama, which is typed, the words used are "*In some cartons found marking " Made in China"*". Under Annexure A wherein the value has been quantified, in respect of 13 different types of Fire-crackers, the column 3 shows the Country of Origin as China. While the Panchanamas have been prepared on 07.08.2021 and 08.08.2021, no photographs of the cartons showing 'Made in China' have been taken, nor have been placed as an evidence. Further the words used 'in some cartons' makes it even more difficult to decipher whether all the cartons were containing the marking '*made in China*' or not. The very fact that the words '*in some cartons*' have been used, shows that not all of the cartons carried such markings. Even in respect of '*in some cartons*', there is no clinching evidence by way of photographs of such cartons. In these days of camera being available in all the mobile devices, it is not understood, as to why no such photographs were taken in order to fortify the Revenue's claim that the goods are of foreign origin.

13. I have gone through some of the case laws on the issue of the onus of the Revenue in such cases. Two of them are discussed below :

Commissioner of Customs (Port), Patna

VERSUS Shri Pankaj Kumar Sharma

FINAL ORDER NO.76402-76403/2023 Dated : 03 .08.2023

CESTAT Kolkata

8. It is case booked by the revenue against the respondents that they have smuggled betel nut through truck which was intercepted and was found parked adjacent to a petrol pump, namely, Akharaghat Service Station, Kolhan Dadar, before Zero Mile on Muzaffarpur Sitamarhi Road and the same is smuggled one, but we find that the betel nut in question is neither notified items under Section 123 of the Customs Act, 1962. Therefore, the onus lies on the Revenue to prove that the impugned goods are smuggled one from where and which is the country

of origin and how they were transported into India. The Revenue has failed to produce any evidence to that effect and in this regard.

9. The Id.Commissioner (Appeals) has recorded his findings, which are as under :

8. I find that there is not a iota of evidence to prove the third country origin of the impugned goods i.e. Betel Nuts. The whole proceedings started on the presumption that the impugned goods were of third county origin and have been smuggled into India. This is despite the fact that these are neither notified, prohibited nor specified goods. The burden of proof in such situation is on the department and cannot be shifted. Further appellant did produce the documents including market regulatory fees at, jalpaiguri, which was never rejected or investigated by the deptt. Ld. Adjudicator has completely disregarded the legal and factual position of the case and went on confiscating the goods & trucks and penalizing the appellants. Since there is no evidence of doing so, the impugned order is set aside completely.”

10. We do agree with the fact that the Revenue has failed to discharge their obligation to prove that the impugned goods are of smuggled in nature with any cogent evidence.

11. In that circumstances, we do not find any infirmity in the impugned order and the same is upheld and the appeals filed by the Revenue are dismissed. (Operative part of the order was pronounced in the open court

2022 (382) E.L.T. 716 (Tri. - Kolkata)

LALTANPUII Versus

COMMISSIONER OF CUS. (PREVENTIVE), NER, SHILLONG

12. In view of the above, we find the betel nut being non notified goods; burden to prove the fact of smuggling lies on the department and the same has not been discharged; the report of ADRF, Mangalore cannot be relied upon. On the issue of goods being held to be unfit for human consumption, we hold that as the goods are neither imported nor proved to be smuggled, no action by Customs is warranted. 13. In view of the above discussions, seizure of impugned betel nut is not justified and needs to be set aside. Therefore, nothing survives in the case and appeal is liable to be allowed. We allow the same with consequential relief, if any, as per law.

Affirmed by the High Court of Meghalaya

2022 (382) E.L.T. 592 (Meghalaya)

C.C. (PREVENTIVE), NER REGION, SHILLONG

Versus LALTANPUII

4. The Division Bench of the Tribunal recorded the finding that the confiscated betel nut is non-notified goods and therefore, burden to prove the fact of smuggling lies on the department and same has not been discharged. In this regard, the department relied upon the certificate issued by the Arecanut Research and Development Foundation, Mangalore to show that the confiscated goods/betel nuts are of foreign origin. However, the Tribunal refused to consider this certificate on the ground that the said Institution is not accredited and hence the report was not relied on. The Tribunal in this regard relied on the decision of the Patna High Court reported in 2020 (371) E.L.T. 353 (Patna).

5. After hearing the Learned Counsel appearing for the respective parties and after going through the impugned judgment and order, we find no error in the findings given by the Tribunal. The said findings, in our opinion are supported by reasons and therefore, we are not inclined to interfere in this appeal. Appeal has no merit and is accordingly dismissed.

Shanti Biswas Vs Commissioner of Customs (Preventive) Lucknow

FINAL ORDER NO.70177/2023 Dated 20 October, 2023 – CESTAT Allahabad

4.2 At the outset it is observed that the impugned goods i.e. Betel Nuts and Black Pepper are not the goods specified or notified under Section 123 of the Customs Act, 1962. Thus the burden to prove the smuggled nature of these goods lies on the Custom Authorities as held by the Tribunal in the case of Baboo Banik [2004 (174) E.L.T. 205 (Tri.- Kolkata)]. Tribunal in the case of Bijoy Kumar Lohia [2006 (196) E.L.T. 215 (Tri.-Kolkata)] has held that the local trade opinion cannot take the place of the legal evidence.. No case has been made out for the seizure and confiscation of the Black Pepper or Betel Nuts is made out as no evidence has been placed on record to establish the foreign origin of these goods, or of illegal importation of the same. These goods were seized when they were being transported within the country via SLR No. 05853 of Train No. 15909 (Awadh

Assam Express) which do not cross any international border from the place of origin to destination.

4.11 I do not find any merits in the impugned order of Commissioner (Appeals).

13. In the present case, the goods are not notified in terms of Section 123. The Revenue has not brought in any cogent evidence towards the foreign origin of the goods. No documentary evidence with the photographs of the seized goods have been brought in to show that the goods are of Chinese origin. The goods have been seized within the territory of India in Dankuni and is not a seizure in the border. No follow-up investigation has been conducted as to how the restricted items by DGFT under the Foreign Trade Policy could have crossed the Customs barrier in the sea / land so as to land at the godown wherein the goods have been seized. All these factual details would lead to conclusion that the ratio of the case laws cited above would be squarely applicable to the present case also wherein the Revenue has not discharged the onus of proving the foreign origin of the fire-crackers in question.

14. The second point to be considered is that the quantity of sacks is 2515, which is huge. Though reference to the misuse of IEC has been brought in randomly, there is nothing to suggest as to what kind of follow up action was taken to up to verify as to how the alleged smuggled fire-crackers, which are restricted goods, could have reached the Indian shores either by road or by sea from any other country.

15. The goods have been seized from the godown and none of the persons who have been questioned have come forward to claim the ownership. Even under Section 123 (1) (a) (i), the person under whose possession the goods are seized, is an important link to

establish the origin of the goods. In the present case, the owner of the godown has not been made a noticee by the Revenue.

16. Even in the recorded statements, I do not find that any of the appellants have implicated themselves by confessing that they have been dealing in the goods of foreign origin. While the statements have been recorded in terms of Section 108 of the Customs Act 1962, it is observed that the cross-examination sought by the appellants have not been granted.

17. The Hon'ble Punjab and Haryana High Court in the case of **G-TECH INDUSTRIES Vs UNION OF INDIA – 2016(339) ELT 209 (P&H)**, has dealt this issue and held as under :

8. As already noticed herein above, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a Gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

9. The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied

on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

18. Therefore, apart from not fulfilling the onus of proving the foreign origin of the goods, it is seen that the investigation and proceedings have been conducted in a casual manner, giving a go by to the principles of natural justice. It is an admitted fact that the restricted goods, i.e. fire-crackers have been found in the godown. The storage of these goods not only violates the Customs Act provisions if smuggled, but also violates several other laws of the country. Therefore, no doubt, the goods in question could not have been legally stored without fulfilling several other statutory provisions under different laws. The appellants herein may have violated the provisions of other statutes, but we are not concerned about the same in the present proceedings, which is only confined to Customs provisions..

19. So far as Revenue is concerned, as discussed above, there are several missing links in the proceedings, including non-proving with cogent evidence about the foreign origin of goods. Added to this non-adding of the owner of the godown as a noticee, non-allowing of the cross-examination of the persons recording the statements have resulted in non-following of principles of natural justice.

20. The present appeals have been filed only against the penalties imposed on various appellants herein. The Confiscation is not being questioned, since none of them have claimed the ownership, nor has the Dept has come out with proper cogent evidence towards ownership by anyone of the appellants in question.

21. Therefore, in view of the above detailed discussions, I do not find any merits in the proceedings initiated by the Revenue. I set aside the impugned order so far as it imposes the penalties against all the appellants herein.

22. The appellants herein succeed in their appeals, with consequential relief, if any, as per law.

(Order pronounced in the open court on 19.05.2025.)

Sd/
(R. MURALIDHAR)
MEMBER (JUDICIAL)

sm