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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75073 of 2020

(Arising out of Order-in-Adjudication Order No. 12/Cus/CC(P)/WB/2019-20 dated 19.07.2019 passed by the Commissioner of Customs (Preventive) Kolkata Custom House, 3rd Floor, 15/1, Strand Road, Kolkata-700 001)

M/s. Basant Kumar Soni @ Bablu Soni **: Appellant**
S/o- Late Jagdish Prasasd Soni,
351, Lake Town, Block-a, 3rd Floor,
Kolkata-700 089

VERSUS

Commissioner of Customs (Prev.) **: Respondent**
West Bengal, Kolkata,
Customs House, 3rd Floor,
15/1, Strand Road, Kolkata-700 001

APPEARANCE:

Shri Amit Kumar, Advocate for the Appellant
Shri F. Ahmed, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO.76533/ 2025

DATE OF HEARING: 11.06.2025
DATE OF PRONOUNCEMENT: 17.06.2025

ORDER: [PER SHRI ASHOK JINDAL]

The appellant is in appeal against the impugned order, absolutely confiscating the gold bars recovered from the appellant, along with US$ 3400/- and Indian currency of Rs.41,900/-, a Hyundai i10 Car bearing Vehicle No. WB-06/8713, besides imposition of various penalties on the appellant under Section 112(b) of the Customs Act, 1962.

2. The facts of the case are that the appellant was apprehended on 29th March, 2017 by the Officers of the Directorate of Revenue Intelligence (DRI), Kolkata, along with the driver of the said vehicle, near Md. Ali Park at about 05:00 p.m., while he was approaching his business premises. The appellant was taken over to the Office of the DRI, along with the vehicle. During the course of search, 56 pieces of yellow coloured metallic bars, which were alleged to be of foreign origin, were recovered from the bag of the appellant. Apart from this, there was recovery of 34 pieces of US currency notes of face value of USD 100/- each, 4 pieces of Indian currency notes having denomination of Rs.2000/-, 61 pieces of new Indian currency notes of Rs.500/-, 34 pieces of Rs.100/-, and the same were seized on the same day.

2.1. Thereafter, the statement of the appellant was recorded on 29th March, 2017 and the appellant was subsequently arrested by the DRI Officers on 30th March, 2017, on the allegation that the appellant was having smuggled gold. The appellant was thereafter presented before the Ld. Chief Metropolitan Magistrate, Kolkata on 30th March, 2019. The appellant was sent to judicial custody on the said date. While the appellant was in judicial custody, his statement was recorded on 05.04.2017. On 07.04.2017, the appellant was granted bail.

3. On completion of the enquiry, a Show Cause Notice was issued on 27.09.2017 to the appellant, for absolute confiscation of the seized gold along with the foreign currency, Indian currency and the

said vehicle in which the appellant was found to be travelling, and proposing to impose various penalties under the Customs Act, 1962. The appellant contested the above Show Cause Notice.

4. Finally, by way of the impugned order, the gold in question was absolutely confiscated under Section 111(b) and Section 111(d) of the Customs Act, 1962; Along with the foreign currency, Indian currency and the vehicle in question; penalties under Section 112(b) of the Act were also imposed.

5. Aggrieved from the said order, the appellant is before us.

6. The Ld. Counsel appearing on behalf of the appellant submits that the seized gold belongs to his mother and the same have been obtained by melting his mother’s ornaments; that his mother was having jewellery weighing 8054 grams and on removal of stones, the quantity of jewellery was 7950.70 grams; and on melting and purification, the total quantity of gold came down to 7001.100 grams, which was recovered from the appellant on 29.03.2017. In support of his claim, the appellant has produced an Affidavit filed by his mother along with Wasiyatnama dated 28.02.2006. In this regard, the appellant has also produced the details of the jewellery which were owned by his mother and ultimately given to him and the Shri Panchayeti Electronic Dharam Kata receipt.

6.1. The Ld. Counsel for the appellant further submitted that the statement recorded by the DRI on 29th March, 2017 was under coercion and threat; that the character “Lamthum” is the creation of mind of the Officer of the DRI, with a view to convert the lawfully acquired gold bars into smuggled ones, allegedly from Myanmar. He pointed out that seized foreign currency of USD 3400/- belongs to the nephew of the appellant, who is a permanent resident of USA, who had come to Kolkata in March, 2017; the seized foreign currency was left by his nephew. It is also stated that the seized Indian currency belongs to the appellant himself, which are not the sale proceeds of any smuggled goods.

6.2. It is also his submission that the gold recovered from the appellant is not having any foreign marking and therefore, there was no reason to believe that the said gold was smuggled, to fulfil the criteria, so as to seize the said gold under Section 110 of the Customs Act, 1962. To support this proposition, the appellant relies on the decision of this Tribunal in the case of *Ajit Bhosle reported in 2020 (374) E.L.T. 814 (Tri. – Kolkata)*

6.3. He also relied on the decision of this Tribunal in the case of *R.K. Swami Singh reported in 2024 (18) Centax 459 (Tri. – Kol.),* wherein, in respect of gold biscuits which were not having foreign marking and tested to have a purity of 995 mille, intercepted at the outskirts of Imphal from a person travelling in a van, who was not having any document for licit importation, and where the seizure was under "reasonable belief" that the foreign origin gold was smuggled into India without Customs duty payment, it was held that the said gold was not standard foreign origin gold, which normally bears a purity of 999.9 mille and that the Seizure was at Imphal, far away from Indo-Myanmar international border; it was also observed therein that there was no document on record to establish that the gold bars/pieces were smuggled into India without Customs duty payment and there was no evidence to counter the intercepted person's claim that the gold was domestically purchased by his father and thus inherited to him; therefore, it was held that there was no "reasonable belief" on which it was presumed that the gold bars/pieces were smuggled in nature.

6.4. Reliance has also been placed on the decision in the case of *Suresh Chand Garg [2023 (10) 2409 (Tri. – Kol).]* to say that when seizure is not based on any information against an appellant, the detained / seized gold has no foreign marking and nothing incriminating against the appellant is recovered from the car, mere fact of the gold having a purity of 99.8 per cent as good as that of foreign gold is highly insufficient to form such "reasonable belief" as is required for invoking Section 123 of the Customs Act, 1962.

6.5. Further, the appellant has also relied on the decision in the case of *Ramchandra v. Collector of Customs [1992 (6) E.L.T. 277 (Tribunal)]* to say that: -

> *"(1) There must be a sale*
>
> *2) The sale must be smuggled goods.*
>
> *(3) These sales must be by a person having knowledge or reason to believe that the goods were of foreign origin.*
>
> *(4) The seller and purchaser and the quantity of gold must be established by the Customs Authorities.*
>
> *That none of the above ingredients is satisfied by the investigating authority in the instant case.*

Therefore, the said foreign currency and Indian currency can not be held as sale proceeds of smuggled goods and the confiscation of the same is liable to be set aside."

6.6. It has also been submitted that the case of the Revenue is that the smuggled nature of the recovered gold has been established on the basis of a few SMS and WhatsApp messages recovered from the seized mobile phones. He also contends in this regard that electronic evidence, without certificate under Section 65B of the Indian Evidence Act, are not admissible, as held by this Tribunal in the case of *J.P. ISCON Pvt. Ltd. v. Commissioner of Central Excise [2022 (63) G.S.T.L. 64 (Tri. – Ahmd.)].*

6.7. The appellant also stated that since the smuggled nature of the seized gold could not be established in this case by the Revenue, and the seized vehicle was never used as a means of transportation of smuggled goods, therefore, absolute confiscation is not tenable.

6.8. With regard to the seizure of foreign currency, the appellant has relied on the decision of the Tribunal, Allahabad in the case of *Commissioner of Customs (Preventive), Lucknow v. Abu Zaid [2019 (370) E.L.T. 1254 (Tri. – All.)]* to say that mere possession of foreign currency cannot lead to the fact that the foreign currency is a smuggled one and therefore, absolute confiscation of the same is bad.

6.9. The appellant also relied on the decision in the case of *Gurumukh Singh v. Union of India & ors. [1984 (18) E.L.T. 274 (P&H)]* to argue that there should be a reasonable belief and not a 'suspicion' to seize Indian currency. Accordingly, the appellant contends the seizure of the currency during the course of investigation is illegal.

6.10. In view of these submissions, the Ld. Counsel for the appellant submitted that the gold in question, the Hyundai i10 Car. along with the said Foreign and Indian currency are not liable for confiscation and are to be released to the appellant. Accordingly, he prays that no penalties be imposed on the appellant.

7. On the other hand, the Ld. Authorized Representative of the Revenue submitted that at the time of interception, the appellant was not having any licit document for procurement of the gold in question. Moreover, he submits that the purity of the gold as per M/s. G.N. Hallmarking & Refinery Pvt. Ltd., Kolkata is '24 carat gold of foreign origin'. Further, contending that the appellant has not produced any document indicating licit procurement of the gold in question, the Ld. Authorized Representative of the Revenue relied on the decision of the Hon'ble High Court at Calcutta in the case of *Commissioner of Customs (Preventive) v. Shri Rajendra Kumar Damani @Raju Damani [2024 (5) TMI 730 – Calcutta High Court].* He therefore prayed that the impugned order be upheld.

8. Heard the parties and considered their submissions.

9. We find that in this case, the appellant was intercepted on 29th March, 2017 at Md. Ali Park, Central Avenue, Kolkata, while he was travelling in a car bearing Registration No. WB-06/8713 Which was being driven by his driver, namely, Shri Manoj Kumar Bhagat. During the course of search, the gold in question was recovered and no documents of licit

procurement of the gold were found in the possession of the appellant. It is also a fact on record that the appellant was having foreign currency of USD 3400/-; some Indian currency was also seized from the person of the appellant. It is also a fact that the appellant was engaged in the sale and purchase of jewellery. The allegation of the Revenue is that the appellant has brought the said gold from Myanmar, which is a smuggled one.

10. In this case, it is a fact on record that the gold has been seized in town and not at any international border / port. Moreover, we observe that the purity of the said gold as per the CRCL Laboratory is "99.5" as recorded by the ld. adjudicating authority in the impugned order.

10.1. For better appreciation of the facts, the relevant portion of the said order is reproduced below: -

> *"39.23 I find the samples of the recovered gold were forwarded to Chemical Examiner. Chemical Laboratory, Custom House, Kolkata for testing and it was reported that the samples were gold and the percentage of gold by weight is 99.5. The ascertained purity of gold also clearly confirmed its foreign origin. In respect of seized Hyundai i10 car, it has been gathered from 'Vahan' (National Portal for registration vehicle details) that the owner of the vehicle No. WB 06 8713 is Ketan Jewellers(P) Ltd of 29A, Sir Hari Ram Goenka Street, Kolkata 700007. Although no existence of any Ketan Jewellers could be ascertained on enquiry around the said address, it had been submitted by Sri Basant Kumar Soni that he used to buy and sell gold and silver in the name of M/s. Ketan Jewellers. In view of the above,*

> *coupled with his own admissions, it is indisputable that the ownership of the said vehicle was held by Sri Basant Kumar Soni."*

10.2. It is also an admitted fact that there is no foreign marking on the gold in question.

11. Therefore, the question that arises is whether, in such circumstances, there is reasonable belief to seize the said gold or not.

12. We find that the said issue has been examined by this Tribunal in the case of *Ajit Bhosle (supra)* wherein it has been held in respect of seizure of gold in cut pieces, having no marking and of different purity, from melting house, that since gold is freely imported in country and abundantly available in the market, it cannot be held that the seized gold is a smuggled one, which creates doubt and suspicion on the investigating authority.

12.1. Further, in the case of *R.K. Swami Singh (supra),* the appellant had been intercepted at the outskirts of Imphal, testing showed purity of gold as 995.2 mille, which had no foreign marking; the appellant therein was not having any documents for licit importation, and confiscation of gold was ordered under "reasonable belief" that foreign origin gold was smuggled into India without Customs duty. In the said case, the intercepted person in initial statements, in his own handwriting, in the presence of two independent witnesses had stated that the gold had been handed to him by another person for transporting based on financial consideration, but the same was retracted later on, saying that it was not voluntary. The orders of authorities below confiscated the gold mainly on the basis of statements of intercepted persons, without independent and corroborative evidence. In this case, it was observed by this Tribunal that the said gold was not standard foreign origin gold, which normally bears a purity of 999.9 mille and that the seizure was at Imphal, far away from Indo-Myanmar international border. It was also observed therein that there was no document on record to establish that the gold bars/pieces were smuggled into India without Customs duty payment and there was no evidence to counter the intercepted person’s claim that the gold was domestically purchased by his father and thus inherited; therefore, confiscation of gold under the presumption of the Customs Officer that the same was smuggled one, was set aside.

12.2. We also find that in the case of *Gurumukh Singh (supra),* the Hon’ble High Court has observed that the “the words 'reason to believe suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. He will be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court.”; the Court was also of the view that if there is no record wherein it could be shown that the petitioner had at any stage imported any goods in pursuance of the import licence, it cannot be the case of the authorities that the seized currency is the sale proceeds of the smuggled goods.

12.2.1. In this case, it is an admitted fact that the gold has been seized in Kolkata, which is far away from the International borders, and is having a purity of 99.5 per cent.

12.3. It is also seen that the gold in question is not having any foreign marking. The appellant has produced evidence of procurement of the said gold in question by way of an Affidavit executed by the mother of the appellant and the Wasiyatnama dated 28.02.2006. In view of these facts, we find that the appellant has been able to explain the source of procurement of the gold in question, which has been inherited from the appellant's mother through Wasiyatnama, and who, in turn, has given the said gold to the appellant after converting her jewellery into gold.

13. In these circumstances, we hold that the gold in question cannot be absolutely confiscated.

13.1. The Ld. Authorized Representative of the Revenue has heavily relied on the decision of the Hon'ble High Court in the case of *Shri Rajendra Kumar Damani (supra)* wherein the Hon'ble High Court had consciously recorded the fact that the respondent in that case had taken the plea that the gold bar was made of old gold jewellery purchased in cash, which was found to be a very faint plea raised by the respondent thereon and other co-noticees. Admittedly, no such plea has been taken by the appellant herein in this case. We observe that in support of his claim of legal procurement of the gold in question, the appellant has in fact produced documents in the form of Wasiyatnama and Affidavit executed by his mother.

14. Moreover, it is also seen that during the course of criminal proceedings initiated against the appellant, the Hon'ble Chief Metropolitan Magistrate, Kolkata, on the basis of the statement recorded on 29th March, 2017 after interception by the authorities, came to the conclusion that the Department has no basis for its allegation that the seized gold is a smuggled one.

14.1. For better appreciation of the facts of the case, the said order is extracted below: -

> *"I have heard the Ld. Advocate for the accused and the Ld. Prosecutor for the Customs Department and against the prayer for bail.*
>
> *I have gone through the case record and the CD.*
>
> *On the last occasion the accused was sent for medical examination to allay his fear of immediate hospitalization. The nephrologist has examined the accused, has prescribed a few diagnostics tests but has not directed admission.*
>
> *Be that as it may, the medical documents do suggest that the accused is a patient with nephrological problems.*
>
> *In support of todays for bail it is urged, in addition to the medical ground, that there is nothing on record to show that the seized gold is of foreign origin. It has also been pointed out that the Department's prayer for remand made today is silent regarding seizure of foreign currency.*
>
> *The Ld. Prosecutor would submit per contra that Section 123 of the Customs Act creates a presumption that the gold is smuggled.*

The Defence is right in contending that the seized gold has nothing on its face to nurture the idea that it has been brougnt from a foreign land. The report by GN Hallmarkings Pvt. Ltd is also silent on this issue. It does not state the purity of the gold which it is said is a pointer to its source.

At the end, the position comes down to this: <u>the Department presently has no basis for its allegation that the seized gold is smuggled.</u> Ordinarily, this should have led to an order of bail but the one factor which weighs against the accused is the clandestine manner in which the gold was being moved (as alleged). If the possession of the gold was lawful, there would have been no necessity to wrap the transaction under cover of obfuscation.

The Department, it seems, has given up the story of foreign currency.

As there was no effective interrogation till now, the accused is sent to J/C till 07-04-2017 with liberty to the Department to interrogate him there and to record any statement which he may make.

The Superintendent of Correctional Home is requested to keep a check on the heath and diet of the accused on day to day basis. It is made clear that if Professor Doctor Pahari deems it fit to examine the accused the I.O shall cause the latter to be produced before him.

It is stated by the Ld. Prosecutor that no statement from the mother of the accused has been recorded till this date.

A copy of this order be supplied to the Ld. Prosecutor."

14.2. It is also observed that further investigation has failed to establish or reveal that the gold in question is of foreign origin or smuggled in nature.

15. Therefore, in these circumstances, we hold that the gold in question cannot be confiscated.

16. We further take note of the fact that in this case, foreign currency recovered from the possession of the appellant has been seized on the allegation that the same was also smuggled into India.

16.1. We find that for the said foreign currency, the appellant has explained the source of procurement. We are of the opinion that mere possession of foreign currency cannot lead the Department to allege that the said foreign currency was smuggled into India by the appellant. In fact, the onus was on the Department to prove that the said smuggled gold was indeed smuggled into the country, which the Department has failed to do. Therefore, we hold that the foreign currency seized during the course of investigation is also not liable for confiscation.

16.2. The Indian currency recovered during the course of investigation has not been proved by the Revenue to be the sale proceeds of smuggled goods. Consequently, the Indian currency recovered during the course of investigation is also not liable for confiscation.

16.3. Moreover, the vehicle seized during the course of investigation, is also not liable for confiscation as the same was not involved in any activity of smuggling by the appellant.

17. In view of this, we hold that the gold in question, the vehicle in question, foreign currency

and Indian currency recovered from the appellant are not liable for confiscation and therefore, the same are to be released to the appellant.

17.1. We also hold that no penalties are imposable on the appellant.

18. In these terms, we set aside the impugned order and allow the appeal, with consequential relief, if any.

(Order Pronounced in Open court on 17.06.2025)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP