

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

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 75721 of 2022

(Arising out of Order-in-Appeal No. Kol/Cus/CCP/AKR/298-299/2022 dated 11.07.2022 passed by the Commissioner of Customs(Appeals) 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001)

Sri Birendra Nath Ghosh,
S/o- Ranjit Kumar Ghosh,
14A, Birpara Lane, Kolkata-700 030

: Appellant

VERSUS

Commissioner of Customs(Preventive),
3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001

: Respondent

WITH

Customs Appeal No. 75722 of 2022

(Arising out of Order-in-Appeal No. Kol/Cus/CCP/AKR/298-299/2022 dated 11.07.2022 passed by the Commissioner of Customs(Appeals) 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001)

Sri Dilip Kumar Ghosh,
S/o- Shri Dulal Chandra Ghosh, 4th Floor,
Flat No. 16,25, Motilal Mullick Lane,
Banhooghly Kolkata-700 035

: Appellant

VERSUS

Commissioner of Customs(Preventive),
3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001

: Respondent

AND

Customs Appeal No. 75723 of 2022

(Arising out of Order-in-Appeal No. Kol/Cus/CCP/AKR/300/2022 dated 11.07.2022 passed by the Commissioner of Customs(Appeals) 3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001)

Sri Dilip Kumar Ghosh,
S/o- Shri Dulal Chandra Ghosh, 4th Floor,
Flat No. 16,25, Motilal Mullick Lane,
Banhooghly Kolkata-700 035

: Appellant

VERSUS

Commissioner of Customs(Preventive),
3rd Floor, Custom House, 15/1, Strand Road, Kolkata-700001

: Respondent

APPEARANCE:

Shri Nilotpal Chowdhury, Advocate for the Appellant
Shri F. Ahmed, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NOS. 77839-77841/ 2025

DATE OF HEARING: 28.11.2025
DATE OF PRONOUNCEMENT: 02.12.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

Customs appeal No.C/75721 of 2022 has been filed by Birendra Nath Ghosh (herein after referred as the Appellant No.1).

Customs appeal No.C/75722 of 2022 has been filed by Dilip Kumar Ghosh. Customs appeal No.C/75722 of 2022 has also been filed by Dilip Kumar Ghosh (herein after referred as the Appellant Nos. 2 and3).

As all the three appeals have the common issue, they are all taken up together for decision by a common order.

1.1. The appellant No. 1 and 2 are assailing the Order in Appeal No. KOL/CUS/CCP/AKR/298-299/2022 dated 11.07.2022 and appellant No. 3 is assailing Order in Appeal No. KOL/CUS/CCP/AKR/300/2022 dated 11.07.2022 both passed by the Ld. Commissioner of Customs (Appeals), Kolkata. Order in Appeal No. KOL/CUS/CCP/AKR/298-299/2022 dated 11.07.2022 is arising out of Order-in-Original No. 63/ADC(P)/CUS/WB/2021-22 dated 25.11.2021 passed by the Ld. Joint Commissioner of Customs (Prev) Kolkata dated arising out of Seizure Case no. 03/IMP/CL/Gold/Cus/BCD/DPU/2017-18 dated

01.11.2017 in relation to seizure of 2 pieces (1 kg. each) of Gold allegedly recovered from the possession of the appellant no. Further, amount of Rs. 2,00,000/- Cash (Indian Currency) was also recovered which was alleged to be the Sale proceeds of smuggled gold.

1.2. Order in Appeal No. KOL/ CUS/ CCP/ AKR/ 300/ 2022 dated 11.07.2022 is arising out of Order-in-Original No. 67/ ADC(P)/ CUS/ WB/ 2021-22 dated 29.11.2021 passed by the Ld. Joint Commissioner of Customs (Prev) Kolkata dated arising out of Seizure Case no. 04/IMP/CL/Gold/ Cus/BCD/ DPU/2017-18 dated 01.11.2017 in relation to seizure of 2 pieces (1 kg. each) of Gold allegedly recovered from the possession of the one Siddhartha Sarkar.

2. It is alleged that Appellant No.1 was intercepted in front of 1, Baikuntha Nath Sen Lane, Kolkata. He was found to be in possession of 2 kgs. gold. The said 2 Kgs gold along with Indian currency of Rs.2,00,000/-, which was alleged to be sale proceeds of smuggled gold, was seized under the reasonable belief that the said gold was smuggled in nature and the Appellant was not having any document in his possession for the legal purchase of the same. The Indian currency of Rs.2,00,000/-, was also seized on the allegation that the said currency was the sale proceeds of smuggled gold.

2.1 It is alleged that Appellant No. 2 and 3 knew the intercepted persons. This allegation is solely based on the statement of Girish Bhosale, who implicated the Appellant 2 and 3. On the basis of the above said allegations, Show cause notices were issued to the appellants amongst others.

2.2. The show cause notices issued were adjudicated and the following orders were passed:

(a) Order-in-Original No. 63/ADC(P)/CUS/WB/2021-22 dated 25.11.2021 was passed, imposing penalty on Appellant no. 1 to the tune of Rs. 1,50,000 under Section 112(b) and Indian Currency notes of Rs. 2,00,000/- were ordered for absolute confiscation and disposal. Penalty under Section 112(b) was imposed on the Appellant No. 2 to the tune of Rs. 50,000/-, amongst others.

(b) Order-in-Original No. 67/ ADC(P)/ CUS/ WB/ 2021-22 dated 29.11.2021 was passed imposing penalty under Section 112(b) on the Appellant no. 3 to the tune of Rs. 50,000/-, amongst others.

2.3. Vide the impugned Orders in Appeal, the Ld. Commissioner of Customs (Appeals), upheld both the adjudication orders. Aggrieved against the penalties imposed on them in these impugned orders, the Appellants have filed these appeals.

3. The appellants have preferred the present Appeal separately against the Order-in-Appeal dated 17.02.2023 more particularly challenging the confiscation of the goods, imposition of redemption fine and imposition of penalty and reiterates the grounds of appeal.

3.1. As regards the Appellant No. 1. (Appeal No. C/75721 of 2022), the appellant submits that he was intercepted on 01.11.2017 at around 16:00 hrs, near Kalakar Street Post Office, Kolkata and after overnight detention two statements were recorded from him on 01.11.2017 and 02.11.2017. Later, he was put to arrest and subsequently was enlarged on bail by Ld. CMM, Calcutta.

3.2. The Appellant submits that from the very beginning, he dis-owned any link or ownership on

the gold. In the reply dated 29.12.2020, he contested that the seized Indian currency of Rs.2,00,000/- was not the sale proceeds of alleged smuggled goods. In course of adjudication, he also submitted photocopy of ITR-V for Assessment Year: 2017-18 evidencing that he had at his possession more than 2,00,000/- rupees at his 'cash and bank'. The seizure altogether was disputed.

3.3. The Appellant submits that the department had no other evidence on-record apart from the statements of the appellant that the same was recovered from his possession. At the time of adjudication, the appellant had asked for cross-examination of the panch witnesses and the seizing officer, which was not granted. The Appellant submits that he has disputed the voluntariness of the statements and it's admissibility in the proceedings. The Appellant submits that the provisions of Section 138B of the Customs Act, 1962, has not been complied with in this case and hence such statements are not admissible evidences.

3.4. The Appellant submits that even if it is assumed that the gold was recovered from his possession, it is a case of town seizure where in absence of evidence of any foreign marking, and the purity below 99.5%, the onus is on the department to first establish the foreign origination or smuggled nature of the gold, which remained unestablished and therefore the reasonable belief of the department in causing the seizure itself to be of smuggled nature was void *ab-initio*. The place of interception is also not a customs notified area in terms of Section 11B of the Customs Act, 1962 and therefore, in the absence of any notification issued under the said provision, the exercise of power to seize the goods at

a non-notified customs area for goods, which are also not expressly notified to be restricted from use, the customs authority has no jurisdiction to even cause the seizure and shift the burden upon any person from whom such goods are recovered. The question of confiscation thereof is wholly unwarranted. As a result, imposition of penalty, which is the consequence of illegal confiscation, is also not warranted. Thus, the Appellant No.1 submits that no penalty can be imposed upon him.

3.5. In so far as seizure of Indian currency is concerned, the appellant submits that he has placed enough evidence to substantiate the licit possession thereof which has not been considered by the Ld. Adjudicating Authority. Moreover, the department had also failed to prove that the said Indian currency was sale proceeds of goods of third country origin and hence, the appellant is entitled for return of the seized Indian currency along with appropriate interest since the appellant has been deprived of the licit property owned by him.

3.6. Reliance is placed on the decision in the case of –

- i. CC (Prev.), Kol. V. Bajrang Ingole – 2024 (387) ELT 437 (Tri.-Kol.)*
- ii. Ajit Bhosle v. CC(Prev.), Kol. – 2023 (386) ELT 283 (Tri.-Kol.)*
- iii. CC, Patna v. Lalit Krishna Agarwal – 2024 (387) ELT 424 (Tri.-Kol.)*

4. Regarding the penalty imposed on him (Appeal No. C/75722 of 2022), the Appellant No. 2.submits that he was no way connected with the gold. He was not available at the place of interception of the gold; no gold was recovered from his possession. The

entire case against him is based upon the purported statement of one Girish Bhosale, who runs a gold melting shop. Relying on his such statement, the department has alleged that the seized gold belonged to him. Even the person from whose possession the gold was recovered, did not indicate or allege anything about the involvement of the appellant as the owner of the recovered gold.

4.1. During the course of adjudication, prayer was made for granting opportunity for cross-examination of the said Girish Bhosale in terms of Section 138B, which was not granted. Apart from the said statements of the said Girish Bhosale, there is no other evidence on-record against the appellant. Thus, the Appellant submits that the penalty imposed by the Ld. Adjudicating Authority and upheld by the Ld. Appellate Authority against him is wholly misdirected. No case, even of indirect involvement in relation to the alleged smuggled goods, which is also disputed, is made out against the appellant. Thus, the Appellant No.2 submits that penalty under Section 112(b) is not imposable on him.

5. Regarding the penalty imposed(Appeal No. C/75723 of 2022), the Appellant No. 3. submits that he was neither present at the place of interception nor any gold was recovered from his possession. The entire case against the appellant is based upon purported statement of one Girish Bhosale, who purportedly runs a gold melting shop. The Appellant No.3 reiterated the same submissions as recorded in para 4.1. supra.

5.1. In view of the above submissions, the Appellants prayed for setting aside the penalties

imposed on them and allow the appeals filed by them.

6. The Ld. A.R. reiterated the findings in the impugned order.

7. Heard both sides and perused the appeal documents.

8. We observe that the appellant No.1 was intercepted on 01.11.2017 at around 16:00 hrs. near Kalakar Street Post Office, Kolkata and 2 pieces (1 kg. each) of Gold was recovered from him as he was not having any valid documents for the licit purchase of the same. An amount of Rs. 2,00,000/- Cash (Indian Currency) was also recovered on the allegation that the said currency was sale proceeds of smuggled gold. The submission of the Appellant is that it is a case of town seizure where in absence of evidence of any foreign marking, and the purity of the gold is below 99.5%, the onus is on the department to first establish the foreign origin and smuggled nature of the gold.

8.1. Regarding the confiscation of the gold, we find that the gold in question was seized in the midst of the town of Kolkata, where gold with foreign markings is freely available in the market. The seizure was effected not at the airport or sea port and the person in possession of the gold was not intercepted in any port while arriving from abroad. Further, we observe that the root of import of the gold i.e. who imported the gold, when it was imported, who handed it over to the Appellant etc. are not made known before or even after seizure. There is no evidence available on record to prove

that the gold was imported from a foreign country in contravention of the provisions violating the conditions prescribed for importation of gold. In this regard, we agree with the submission of the appellant that mere absence of documents cannot make the gold in question as smuggled gold. We also find that the purity of the gold is below 99.5%. Under such circumstances, we agree with the argument of the appellant that the onus is on the department to first establish the foreign origin and smuggled nature of the gold. In the present case, we find that the department has not brought in any evidence to establish the smuggled nature of the gold.

8.2. We observe that the gold was not seized under the 'reasonable belief' that it was smuggled. Thus, we hold that the seizure of the gold in this case under Section 110 of the Customs Act, 1962 is legally not sustainable.

8.3. Section 123 of Customs Act, 1962, prescribes that the burden of proving that goods which have been seized under the Act are not smuggled in nature is on the person who claims the ownership of the goods, when seizure was affected under the reasonable belief that the said goods are smuggled. In this regard, we observe that for shifting the onus on the person who claims the ownership of gold, it is required to be proven first that the gold under seizure were of foreign origin and secondly once foreign character is proved, then the seizure must have been affected under reasonable that the gold is smuggled, only then the onus is shifted on the person who claims the ownership, to show that the same were not smuggled. Further, we find that the

Appellant have not claimed the ownership of the gold in question.

8.4. In this regard, it is relevant to cite the judgement of the Hon'ble Supreme Court in *Ganesh Das v. Collector of Central Excise [1994 (70) ELT 441 (SC)]* wherein it was held that before the burden shifts to the person from whom the goods were seized, it must first be established that the goods were of foreign origin and mere suspicion or presence of certain disputed markings is not sufficient. Further, the Hon'ble Supreme Court in *Commissioner of Customs v. Abdul Gani [2012 (278) ELT 474 (SC)]* has reiterated that reasonable belief must be backed by sufficient evidence of foreign origin. If there are no foreign markings or documentation, the Customs authorities cannot simply assume that the gold in question were of smuggled in nature.

8.5. It is a fact that in the present case, the investigation has not brought in any evidence to prove foreign origin of the gold or smuggled nature of the gold. Hence, in the facts and circumstances of the case, we observe that the burden of proof under Section 123 of the Customs Act does not shift to the Appellants. The Customs authorities must first establish the foreign origin of the gold before invoking the presumption of smuggling. So, we find that the responsibility was on the Department to show that the gold in question was smuggled into the country without payment of appropriate duties of Customs thereon, which the Department has failed to discharge in this case.

8.6. We find that the issue has been examined by this Tribunal at Hyderabad in the case of *Balanagu*

Naga Venkata Raghavendra vs CC Vijayawada [2021 (378) ELT 493 (Tri-Hyd)], wherein it has been held that the burden under Section 123 *ibid.* will not shift on the appellants when the seizure of gold without foreign markings are seized from city.

8.7. In this regard, we also find that a similar view has been expressed in the case of *Sarvendra Kumar Mishra &Anr. v. Commissioner of Customs [2021 (9) TMI 405 – CESTAT, Allahabad]*.

8.8. Thus, we hold that the burden of proof under Section 123 of the Customs Act does not shift to the appellant in this case.

9. Regarding the penalties imposed on the Appellant No. 2 and 3, we find that he was no way connected with the gold. He was not available at the place of interception of the gold and no gold was recovered from his possession. We find that the entire case against him is based on the statement of one Girish Bhosale, who purportedly runs a gold melting shop. Relying on his statement, the department has alleged that the seized gold belonged to him. We find that even the person from whose possession the gold was recovered, did not indicate or allege anything about the involvement of the appellant as the owner of the recovered gold.

9.1. Further, we find that during the course of adjudication, the Appellant prayed for granting opportunity for cross-examination of the said Girish Bhosale in terms of Section 138B, which was not granted. Since, the entire evidence against the Appellant No.2 and 3 is only the statement, we are of the view that the adjudicating authority should have given an opportunity to cross examine him. As

the opportunity to cross examine Girish Bhosale was not given, we hold the view that the said statements of Girish Bhosale, cannot be relied upon in this proceedings against the appellant. As there is no other evidence other than the statement available on record to implicate the Appellant in the alleged offence, we hold that the allegation against the Appellants are not sustainable.

10. Regarding the imposition of penalties on the appellants under Section 112(b) of the Customs Act, we take note of the fact that in view of the discussions in the preceding paras, it has been held that the gold in question is not liable for confiscation. In the absence of any cogent evidence establishing the smuggled character of the gold, the appellants cannot be held liable for abetting any offence under the Customs act, 1962. In these circumstances, we find that the ingredients enshrined in Section 112(b) of the Customs Act, 1962 are not applicable to the present case for imposition of penalties on the appellants. Accordingly, we hold that the penalties imposed on the appellants are not sustainable and hence we set aside the penalties imposed on all the appellants herein.

11. We find that an amount of Rs. 2,00,000/- Indian Currency was also recovered from Appellant no.1, on the allegation that the said currency was sale proceeds of smuggled gold. We find that the department has failed to prove that the said Indian currency was sale proceeds of gold of foreign country origin. On the contrary, the Appellant submitted photocopy of ITR-V for Assessment Year: 2017-18 evidencing that he had at his possession more than 2,00,000/- rupees at 'cash and bank'. Thus, we

observe that the Appellant has placed enough evidence to substantiate the licit possession of the Indian currency. Accordingly, we hold that the Indian currency was not liable for confiscation and hence we set aside the confiscation of Indian currency and order for returning the Indian Currency to the Appellant No.1., from whose possession it was seized.

11.1. Regarding the claim of interest made by the Appellant No.1 for illegal seizure and subsequent confiscation of the Indian currency, we observe that in view of the discussions in para 11 supra, it has been established that the Indian currency was not liable for confiscation and the confiscation has been set aside. As the appellant has been deprived of the licit property owned by him, we agree with the claim of interest made by the Appellant. Accordingly, we hold that the appellant is liable for payment of interest at the applicable rate from the date of seizure of the Indian currency till the date of its return.

12. In view of the above findings, we pass the following order:

(i) We hold that the penalties imposed on the appellants are not sustainable and hence we set aside the penalties imposed on all the appellants herein.

(ii) We hold that the Indian currency was not liable for confiscation and hence we set aside the confiscation of Indian currency and order for returning the Indian Currency to the Appellant No.1., from whose possession it was seized.

(iii) We hold that the appellant is liable for interest at the applicable rate from the date of seizure of the Indian currency till the date of its return to Appellant No.1.

(Order Pronounced in Open court on 02.12.2025)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP