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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75587 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1 Strand Road, Kolkata – 700 001)

Himanshu Khandelwal **: Appellant**
29/2, Mankandurganj, Begam Ward,
Shyam Bihari Gali, Paratpgarh,
Uttar Pradesh – 230 001

VERSUS

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

WITH

Customs Appeal No. 75588 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1 Strand Road, Kolkata – 700 001)

Shiv Dular Soni **: Appellant**
S/o. Sh. Gaya Prasad,
R/o. House No. 51, Ajeet Nagar, Pratapgarh,
Uttar Pradesh

VERSUS

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

WITH

Customs Appeal No. 75589 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1 Strand Road, Kolkata – 700 001)

Jagdish Soni **: Appellant**
S/o. Sh. Ayodhya Prasad,
R/o. Sadar Bazar, Azad Nagar, Pratapgarh,
Uttar Pradesh

VERSUS

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

WITH

Customs Appeal No. 75590 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1 Strand Road, Kolkata – 700 001)

Lavkush **: Appellant**
S/o. Sh. Jiyalal,
R/o. 263, Post Sudanipur, Jaunpur,
Uttar Pradesh – 222 161

VERSUS

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

AND

Customs Appeal No. 75591 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1 Strand Road, Kolkata – 700 001)

Shiv Kumar Soni **: Appellant**
S/o. Sh. Ram Sujan Soni,
Vill: Antpur, Post Balikaranganj, Mandhata, Pratapgarh,
Uttar Pradesh

VERSUS

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

APPEARANCE:

Shri Sambhav Jain, Advocate,
For the Appellant(s)

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

CORAM:

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

FINAL ORDER NOs. 76121-76125 / 2026

DATE OF HEARING: 05.08.2026

DATE OF DECISION: 21.08.2026

ORDER: [PER SHRI ASHOK JINDAL]

These appeals have been filed by Shri Himanshu Khandelwal (appellant No. 1), Shri Shiv Dular Soni (appellant No. 2), Shri Jagdish Soni (appellant No. 3), Shri Lavkush (appellant No. 4) and Shri Shiv Kumar Soni (appellant No. 5), against the common Order-in-Appeal No. KOL/CUS/CCP/KS/321-325/2023 dated 01.05.2023, whereby their respective appeals against Order-in-Original No. 116/ADC(P)/CUS/WB/2021-22 dated 28.02.2022 came to be dismissed.

1.1. As all these appeals involve a common issue arising out of the same set of facts and proceedings, they were heard together and are being disposed of by way of this common order. The particulars of the present appeals are provided in the table given below:-

Sl. No.	Appeal No.	Appellant	Recovery attributed	Penalty u/s 112(b)
1.	C/75587/2023	Shri Himanshu Khandelwal	Nil	Rs. 2,25,000/-
2.	C/75588/2023	Shri Shiv Dular Soni	01 bar (1000 gms); Rs. 6,900/-	Rs. 25,000/-
3.	C/75589/2023	Shri Jagdish Soni	02 bars (2000 gms); Rs. 6,000/-	Rs. 25,000/-
4.	C/75590/2023	Shri Lavkush	01 bar (1000 gms); Rs. 8,000/-	Rs. 25,000/-
5.	C/75591/2023	Shri Shiv Kumar Soni	02 bars (2000 gms); Rs. 5,000/-	Rs. 25,000/-

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2. The facts of the case are that on 12.06.2019, officers of the Directorate of Revenue Intelligence (DRI), Kolkata Zonal Unit, reached Hotel Samrat, 144, M.G. Road, Kolkata – 700007, at about 19:50 hours. Search of Room No. 10 of the said hotel did not result in recovery of any incriminating material. Thereafter, the appellant nos. 2 to 5 were taken to the DRI office at 8, Ho Chi Minh Sarani, Kolkata, where their persons and baggage were searched. During such search, six yellow-coloured metallic bars, each weighing approximately one kilogram, were recovered. A Panchnama was drawn in respect thereof and the Government-approved valuer certified the bars to be of 24-karat purity, collectively weighing 6000.00 grams and having a value of Rs. 2,01,60,000/-, calculated at Rs. 3,360/- per gram. At the time of seizure, none of the apprehended persons could produce any licit document in support of possession / transportation of the said gold. The said gold was therefore seized under Section 110 of the Customs Act, 1962 under the reasonable belief that the same was of foreign origin and attempted to be smuggled through unauthorized routes to evade payment of applicable duty. Alongside, Indian currency aggregating to Rs. 25,900/-, comprising Rs. 8,000/- from Shri Lavkush, Rs. 5,000/- from Shri Shiv Kumar Soni, Rs. 6,000/- from Shri Jagdish Soni and Rs. 6,900/- from Shri Shiv Dular Soni, besides four pairs of shoes and certain wrapping material, were also seized.

3. The statements of appellant nos. 2 to 5 were recorded under Section 108 of the Customs Act, 1962 on 13.06.2019, followed by further statements on subsequent dates. All the said persons had stated that they had been carrying the impugned gold bars of

foreign origin at the behest of Shri Himanshu Khandelwal (the appellant no. 1 herein). In their statements, reference was also made to one person known as "Johnny", stated to be associated with premises at 4, Adi Banstalla Lane, Kolkata. Pursuant thereto, the said premises were searched by the DRI on 19.11.2019; however, no such shop was located and no person identifying such individual was found.

4. The seized gold was subjected to chemical examination pursuant to Test Memo dated 17.07.2019. The report of the Custom House Chemical Laboratory, bearing Lab Nos. 1076-1079/SZD(G)-119-122, signed on 26.07.2019, reported the purity of the samples to be 99.5% and 99.7%.

4.1. Subsequently, verification of the CAF and CDR records in relation to incoming and outgoing calls to and from the mobile number of Shri Himanshu Khandelwal (appellant no. 1) and other co-appellants was conducted, from which it was found that there were substantial calls made during the concerned period.

5. In the meantime, the jewellery premises of appellant No. 1 at Pratapgarh were searched by the DRI, Lucknow Zonal Unit on 08.11.2019, in the presence of his father. The statement of appellant No. 1 was thereafter recorded under Section 108 of the Customs Act on 22.11.2019, wherein he denied any involvement in the alleged smuggling activity, but admitted that he was familiar with the appellant nos. 2 to 5 who have been apprehended in this case.

6. Thereafter, multiple summonses were issued to the appellant no. 1, but he did not cooperate with the investigation. It was also gathered that Shri Himanshu Khandelwal had deliberately stated false facts in order to derail the investigation.

7. The investigation culminated in issuance of a Show Cause Notice dated 28.05.2020 under Section 124 of the Customs Act, 1962, proposing, inter alia, confiscation of the seized gold under Sections 111(b) and 111(d) of the said Act, confiscation of the shoes and wrapping material under Section 119 and of the Indian currency under Section 121, besides imposition of penalties upon the noticees under Section 112(a) and/or 112(b) of the Act.

8. The appellants submitted a consolidated reply dated 06.09.2021 to the notice, inter alia placing on record certain documents in support of the contention that the seized gold represented gold obtained from old jewellery received from customers in the ordinary course of business.

9. The matter was adjudicated vide Order-in-Original No. 116/ADC(P)/CUS/WB/2021-22 dated 28.02.2022, whereby the seized gold was ordered to be absolutely confiscated. The shoes and wrapping material were confiscated under Section 119 and the currency under Section 121 of the Customs Act, 1962. Penalties of Rs. 25,000/- each were imposed upon appellant nos. 2 to 5 and a penalty of Rs. 2,25,000/- was imposed upon appellant No. 1 under Section 112(b) of the Act. The ld. adjudicating authority held that the burden under Section 123 was not discharged by the appellants, that the documents filed with the reply were an afterthought created after the seizure and that the same did not relate to the seized gold.

The ld. adjudicating authority placed considerable reliance on the statements recorded under Section 108 holding that the same were admissible and binding.

9.1. Aggrieved by the said adjudication order, the appellants preferred their respective appeals before the Ld. Commissioner (Appeals). The Ld. Commissioner (Appeals), vide the impugned order dated 01.05.2023, rejected their appeals and upheld the Order-in-Original passed by the ld. adjudicating authority.

9.2. Against the said order, the appellants are before us.

10. The Ld. Counsel appearing on behalf of the appellants made various submissions in support of his contentions, which can inter alia be summarized as under: -

<u>A. The Department's own case places the acquisition of the gold within India</u>

(i) Section 111(d) applies to goods imported contrary to a prohibition, and Section 111(b) to goods imported by land or inland water through a route other than one specified under Section 7(c). Each therefore requires proof of importation. The case pleaded in the show cause notice and adjudicated below is that the gold was taken delivery of at Kolkata from one 'Johnny' against cash carried from Pratapgarh. A hand-over at Burrabazar is not an importation. There is no seizure at or near any border, no evidence of any cross-border movement, no consignment traced, and no person upstream of the alleged supplier identified. Taken at its highest, the Department's case establishes possession at Kolkata and establishes nothing whatsoever as to how the gold entered India.

(ii) It is submitted that this is a town seizure, and that in such cases the burden of establishing unauthorised importation rests upon the Department. Reference is invited to Circular No. 4/149/65-Cus-III dated 14.12.1965 issued by the Central Board of Excise and Customs, which sets out the principles governing the onus of proof in town seizures and is binding upon the Department, and to *Boddu Ramaiah, 1987 (32) E.L.T. 355 (A.P.),* where confiscation of goods seized in the town was quashed in the absence of evidence of import in contravention of the Act.

B. The only source named by the Department does not exist on its own verification

(i) The sole supplier named anywhere on the record is 'Johnny'. On 19.11.2019, on the strength of two search authorisations, the officers of the DRI searched the 4th and 6th floors of 4, Adi Banstalla Lane, Kolkata and recorded that no such shop could be located and that no person could identify any such individual. That search was moreover conducted five months after the seizure. It follows that either the statements upon which the entire case rests are unreliable in a material particular, or the chain leading from any foreign origin to these Appellants was never established at all. Neither authority below addressed this.

C. The Department's own record is internally inconsistent

(i) The Government Approved Valuer valued the gold at Rs. 3,360/- per gram on the date of seizure, that is Rs. 33.60 lakh per kilogram, and the show cause notice adopts that valuation. The same notice relies upon statements recording the purchase of one kilogram for Rs. 15 lakh and of two kilograms for Rs. 50 lakh. No person parts with bullion at less than half its prevailing market value. The contradiction appears on the face of the Department's own record and bears directly upon whether the statements were voluntarily made or otherwise.

D. The burden under Section 123, if attracted, stands discharged

(i) The following material was placed before the Adjudicating Authority with the reply dated 06.09.2021 and was reiterated before the Commissioner (Appeals). It is not disputed that all of it was on record before the orders under challenge were passed.

Link in the chain	**Material on record**
Receipt from customers	Stock Register recording, for each customer, the date of receipt, name and address, weight of jewellery received, purity, jobwork charges, date of return of the new jewellery and the customer's signature; Income Tax Return, Balance Sheet and Computation of Income reflecting jobwork charges of Rs. 30,871/- received from 25 customers between 01.04.2019 and 12.05.2019.
Assay	35 original Tunch Forms issued by New Bombay Bullion Tunch House, Shri Mauhli Silver Tunch

Link in the chain	Material on record
	and KK Gold Testing Lab, recording customer-wise the weight of old jewellery, the purity percentage on assay and the weight of pure gold retrieved. The aggregate of pure gold so retrieved is 6003.26 gms.
Melting and conversion	Notarised affidavits of M/s New Bombay Bullion and M/s Shri Mauhli Silver Tunch, both of Shyam Bihari Gali, Pratapgarh, deposing that they melted the gold rawa and converted it into bars of one kilogram each - three bars by each firm - against conversion and melting charges of Rs. 500/- per kilogram.
Confirmation by customers	Notarised affidavits of 35 customers, on stamp paper, with attested identity proof, confirming that they entrusted their old jewellery to Appellant No. 1 for remaking.
Movement	Delivery Challan Vouchers Nos. 12, 13, 14 and 15, all dated 11.06.2019, covering the movement of the six bars from Pratapgarh to Kolkata in the hands of Appellants 2 to 5.

(ii) The documentary chain set out above traces the gold from the customers to the seizure. The 35 Tunch Forms aggregate 6003.26 gms of pure gold retrieved, against 6000.00 gms seized; six bars of one kilogram each correspond exactly to three bars melted by each of the two named firms; and the Delivery Challan Vouchers of 11.06.2019 cover the movement of that very gold on the day before interception. A reconciliation of this order is not the mark of an afterthought.

(iii) The finding that these documents were created after the seizure was recorded without testing them. Not one of the 35 Tunch Forms was verified with the issuing tunch house; not one of the 35 customers was examined, though their names, addresses and identity documents were on record; and neither of the two melting houses was summoned, though both are located in the same lane as the Appellant's own shop. It is respectfully submitted that documentary evidence on record cannot be rejected as fabricated without any enquiry whatsoever. Reference is invited to *Rajesh Verma v. Commissioner of Customs, 2021 (378) E.L.T. 502 (T); S.K. Chains v. Commissioner of Customs, 2001 (127) E.L.T. 415 (T); and Dhanistha Gold v. Commissioner of Customs, 2019 (369) E.L.T. 688 (T).*

(iv) So far as the reported purity of 99.5% and 99.7% is concerned, the Tunch Forms record customer-wise assay of old jewellery ranging between approximately 74% and 83% purity, and the melting-house affidavits record its conversion into pure bars. The fineness of the seized bars is therefore accounted for by the very process documented on the record. Purity is at highest an indicium; it cannot be treated as proof of foreign origin where the process which produced it stands proved. It is further submitted that the bars bear no foreign marking of any kind, and that Indian-origin remolten gold cannot be confiscated on a suspicion of foreign origin: *Commissioner of Customs v. Manisha Devi Jain, 2019 (370) E.L.T. 401 (T).*

E. The manner of carriage does not prove importation

(i) It is respectfully submitted that the manner in which goods are carried is a circumstance relevant to the formation of a reasonable belief for the purpose of seizure under Section 110. It is not, and cannot be, proof of illegal importation, which alone attracts Sections 111(b) and 111(d). Bullion of very high value being carried by four artisans travelling by rail was secured in the manner explained on record from the outset. Where the source, the assay, the melting, the conversion and the movement all stand documented, the mode of carriage cannot supply the link which the Department has otherwise failed to establish.

F. The statements were relied upon without compliance with Section 138B

(i) Section 138B(1)(b) of the Customs Act, 1962 provides that a statement made and signed before a gazetted officer of customs during the course of an inquiry shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made it is examined as a witness and the authority is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. Sub-section (2) provides that the provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under the Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court. The provision therefore governs adjudication proceedings, and the procedure it prescribes is mandatory.

(ii) In the present case the statements of Appellants 2 to 5 were relied upon against Appellant No. 1, and the statement of Appellant No. 1 was relied upon against Appellants 2 to 5, without any of them being examined and without any opinion being formed as required by the section. The request for such examination was made expressly and was refused.

(iii) The refusal proceeds upon *Kanungo & Co. v. Collector of Customs, Calcutta, Civil Appeal No. 468 of 1970, decided on 07.02.1972, reported in AIR 1972 SC 2136 and 1983 (13) E.L.T. 1486 (S.C.)*. It is submitted that the decision does not govern the question at all, for three reasons.

(iv) First, the question decided there was whether the principles of natural justice require that persons who have furnished information be produced for cross-examination. It was answered in the negative. The ground urged here is not a plea of natural justice at large; it is a plea of statutory inadmissibility. The question is not whether the Appellants had a right to cross-examine, but whether the adjudicating authority could admit and act upon a statement recorded under Section 108 without first taking the step which Section 138B(1)(b) requires. Kanungo & Co. does not answer that question, and could not have done so.

(v) Secondly, *Kanungo & Co.* arose under the Sea Customs Act, 1878. The premises there were searched in October 1959, the show cause notice was issued in August 1961 and the order of confiscation was passed on 15.06.1963 under Section 167(8) of that Act read with the Imports and Exports (Control) Act, 1947. The decision therefore predates not merely Section 138B but the Customs Act, 1962 itself so far as the proceedings before the Hon'ble Supreme Court were concerned.

(vi) Thirdly, and in any event, Section 138B was inserted into the Customs Act, 1962 by Section 9 of the Customs (Amendment) Act, 1973 (Act 36 of 1973) with effect from 01.09.1973, that is more than eighteen months after *Kanungo & Co.* was decided. A decision rendered before a provision is enacted cannot be an authority upon the construction or the operation of that provision. Where the legislature has prescribed a specific procedure governing the admissibility of a class of evidence, that procedure must be followed, and a general observation upon the requirements of natural justice made before its enactment cannot dispense with it.

(vii) The observation of the Commissioner (Appeals) that cross-examination was very unlikely to bring out new facts is, with respect, a conclusion upon the merits reached before the evidence was tested, and assumes the very reliability which examination under Section 138B is designed to test. Reference is invited to *Paramount Cargo & Logistics Solutions v. Commissioner of Customs (A&G), 2021 (375) E.L.T. 674 (T); ITS My Name Pvt. Ltd. v. Addl. Director General (Adjn.), 2021 (375) E.L.T. 545 (Del.), paras 76 and 77; Mridul Agarwal v.*

Commissioner of Customs, 2018 (362) E.L.T. 847 (T); and the decision of the Principal Bench of this Tribunal in *Bharat Shantilal Shah, Final Order No. 51837/2025 dated 08.12.2025.*

G. The statements of co-noticees are without independent corroboration

(i) Once the statements are put through the filter of Section 138B, what remains against appellant No. 1 is the statements of Appellants 2 to 5, and what remains against each of Appellants 2 to 5 is the statements of the others. It is settled that the statement of a co-noticee, uncorroborated by independent evidence, cannot form the basis of a finding of involvement in smuggling: *Jaswinder Singh v. Collector of Customs, 1996 (83) E.L.T. 175 (T); Punam Chand Bhotra v. Collector of Customs, 1993 (63) E.L.T. 237 (T); Commissioner of C. Ex. v. Tokyo Electronics, 2007 (212) E.L.T. 86 (T); and Gopal Prasad v. Commissioner of C. Ex., Cus. & S.T., 2018 (362) E.L.T. 309 (T).*

(ii) The call detail records relied upon establish telephonic contact between Appellant No. 1 and his own karigars, who were travelling on his instructions with his stock under his delivery challans. That contact was never in dispute. Call records establish connection; they do not establish the content of any conversation, and they are equally consistent with the case of either side. Similarly, the entries in the hotel register establish frequency of travel to Kolkata, which is the Appellants' own case, Kolkata being the centre to which karigars travel for jobwork and for current designs.

(iii) It is further submitted that no enquiry was made from Shri Aditya Soni and Shri Dheeraj Soni, who are recorded in the statements as having been present in the hotel rooms only hours before the search, and that the search of the business premises of Appellant No. 1 at Pratapgarh on 08.11.2019 yielded nothing incriminating - no unaccounted stock, no parallel records and no cash. For a case pleaded as a systematic and organised smuggling operation, the absence of any recovery at the alleged apex is significant.

H. The burden of proof lies upon the Department

(i) It is further submitted that the fundamental burden of establishing that the goods were smuggled lies upon the Department, and that suspicion, however grave, cannot take the place of proof. Reference is invited to *Amba Lal v. Union of India, 1983 (13) E.L.T. 1321 (S.C.),* where the Hon'ble Supreme Court held that Section 106 of the Evidence Act cannot be used to undermine the well established rule that the burden is upon the prosecution and never shifts, and to *Commissioner of Customs (P) v. Dinesh Rayasoni, 2005 (192) E.L.T. 565*, where it was held that the Department must prove the case and establish at the least the link of a chain.

I. Confiscation of the currency under Section 121 is not made out

(i) Section 121 permits confiscation of the sale proceeds of smuggled goods sold by a person having knowledge or reason to believe that the goods are smuggled. The sums involved are Rs.

8,000/-, Rs. 6,900/-, Rs. 6,000/- and Rs. 5,000/-, carried by four artisans travelling between Pratapgarh and Kolkata. On the Department's own theory these sums represented the remuneration and travelling expenses paid to them. Remuneration is not the proceeds of a sale. No sale, no purchaser, no seller and no transaction has been identified. The confiscation of Rs. 25,900/- cannot stand on the plain terms of the section.

J. Absolute confiscation without an option to redeem

(i) Gold is not a prohibited good simpliciter; it is a restricted good importable upon conditions. The discretion conferred by Section 125 was not adverted to at all and no reason was recorded for declining redemption. Even if confiscation were to be sustained, the Appellants are entitled to have that discretion exercised judicially.

K. Penalty under Section 112(b)

(i) Section 112(b) is attracted only against a person who acquires possession of, or is concerned in carrying, keeping, concealing or otherwise dealing with, goods which he knows or has reason to believe are liable to confiscation. Knowledge is a necessary ingredient and must be established. Against Appellants 2 to 5 there is no material independent of their own statements and those of one another. They are artisans of modest means who carried one or two bars entrusted to them by their employer under his delivery challans. No independent finding of knowledge was recorded against any of them. Against appellant no. 1, the penalty rests upon the same statements and upon call records which establish nothing beyond contact.

10.1. Without prejudice to the above submissions, the Ld. Counsel for the appellants, on their own motion, drew attention to two judgments of the Hon'ble jurisdictional High Court, namely *Commissioner of Customs (Prev.), Kolkata v. Shri Anil Kumar Soni & Anr., CUSTA 30 and 31 of 2025, decided on 31.03.2026*, and *Rajendra Kumar Damani v. Union of India, decided on 15.05.2024,* submitting that the ratio of the said cases is inapplicable to the facts of the present case. It is submitted that both turn upon a factual matrix wholly different from the present, and that upon the questions on which these appeals are pressed neither decision speaks at all. He submitted that it is well settled that a judgment is an authority for what it actually decides upon its own facts and not for what may logically be deduced from it; that judgments are not to be construed as statutes; and that a slight difference in the factual foundation can make a world of difference in the applicability of a precedent. In this regard, reference is invited to the decisions in *Padma Sundara Rao (Dead) v. State of Tamil Nadu, (2002) 3 SCC 533 (Constitution Bench); Bharat Petroleum Corporation Ltd. v. N.R. Vairamani, (2004) 8 SCC 579; and Ambica Quarry Works v. State of Gujarat, (1987) 1 SCC 213.* The submissions made in respect of each of these judgements are as under:-

- <u>Anil Kumar Soni and Anil Kumar Gaur, judgment dated 31.03.2026</u>

(i) In that case the Hon'ble Division Bench restored absolute confiscation of 1,999.90 gms of gold seized at Howrah Railway Station, holding in substance that a reasonable belief under Section 123 is not confined to seizures at the border, and that the combination of transportation of bullion secreted in a specially stitched waist belt, fineness answering to international bullion standards, the absence of any refinery or melting record and the absence of payment records established that the claimant had failed to discharge the statutory burden. The distinctions are set out below.

Point of comparison	**Anil Kumar Soni and Gaur**	**The present appeals**
Who bore, and who discharged, the burden	The claimant was the proprietor of A.R.P. Ornaments, who asserted licit acquisition and produced only GST records in support.	The claimant is Appellant No. 1, who has produced a complete documentary chain going to source, assay, melting, conversion and movement. Appellants 2 to 5 are his karigars and assert no ownership.
Refinery and melting record	There was no refinery record and no melting certificate at all, and that absence was held to be decisive.	The melting is proved by the notarised affidavits of M/s New Bombay Bullion and M/s Shri Mauhli Silver Tunch, by 35 original Tunch Forms and by the Stock Register. This is precisely the class of material whose absence was decisive there.
Purity	Fineness of 99.5% to 99.6% was held to answer to international bullion standards and, being wholly unexplained, supported the inference of smuggling.	The fineness reported here is explained on the record: the Tunch Forms show customer-wise assay of old jewellery of approximately 74% to 83% purity and the melting-house affidavits show its conversion into

Point of comparison	Anil Kumar Soni and Gaur	The present appeals
		pure bars. Where the process is documented, the inference does not arise.
Reconciliation of quantity	No reconciliation was possible, no source records existing.	The 35 Tunch Forms aggregate 6003.26 gms of pure gold retrieved, against 6000.00 gms seized, and six bars of one kilogram each correspond exactly to three bars melted by each of the two named firms.
Payment and customer trail	There were no payment records whatsoever.	Delivery Challan Vouchers Nos. 12 to 15 dated 11.06.2019; the Stock Register recording receipt, purity, jobwork charges and return; jobwork charges reflected in the Income Tax Return and Balance Sheet; and notarised affidavits of 35 customers with attested identity proof.
The Department's case as to source	The carrier's initial version was that the gold was of foreign origin and no domestic source was identified.	The Department's own case, drawn from the statements it relies upon, is that delivery was taken at Kolkata from one 'Johnny'. The source pleaded by the Revenue is itself within India.
Verification of the alleged source	Not in issue.	On 19.11.2019 the DRI searched the premises of 'Johnny' and found no such shop and no person who could identify him.

Point of comparison	**Anil Kumar Soni and Gaur**	**The present appeals**
Internal consistency of the record	Not in issue.	The Department valued the gold at Rs. 33.60 lakh per kilogram, yet relies upon statements recording purchase at Rs. 15 lakh per kilogram.
Section 138B	Neither raised nor considered.	Cross-examination was sought and refused upon a decision predating the insertion of Section 138B, and the statements were used against one another without the mandatory procedure. This is a principal ground pressed here.

(ii) As regards the observation upon the manner of carriage, it is respectfully submitted that it was made in a documentary vacuum, where nothing existed to explain how a trader had come by bullion of that fineness. Here the source, assay, melting, conversion and movement all stand documented and untested.

- Rajendra Kumar Damani, judgment dated 15.05.2024

  (i) That case arose from a wholly different order of facts, as set out below.

Point of comparison	**Rajendra Kumar Damani**	**The present appeals**
Scale and scene	Search of business premises and a godown, yielding about 10.5 kilograms of gold in bars, gold coins and silver granules, together with cash of about Rs. 1.74 crore kept in a wall-mounted vault.	Four artisans in a hotel room and six bars aggregating 6000 gms - one bar each attributable to Appellants 2 and 4 and two each to Appellants 3 and 5; personal currency aggregating Rs. 25,900/-.
Content of the statement	A detailed account of a running smuggling business over about two years, with suppliers named along with their mobile numbers, monthly volumes, the practice of melting to remove markings, hawala payments and an express admission that the cash was the sale proceeds of smuggled gold.	Bare admissions unsupported by any traceable supplier, any volume, any network, any hawala trail and any recovery of unaccounted cash, and untested under Section 138B. The only supplier named was not found to exist on the Department's own search.
Course of conduct thereafter	A third statement recorded almost a year later reiterated the earlier statements.	The allegations were disputed at the first available opportunity in the reply to the show cause notice and have been disputed consistently since.
Documentary defence	No contemporaneous documentary trail of licit acquisition was produced.	A complete contemporaneous trail was produced before the Adjudicating Authority and remains untested and unrebutted.
Position at the receiving end	The premises searched yielded gold, coins, granules and cash.	The business premises of Appellant No. 1 were searched on 08.11.2019 and nothing incriminating was recovered.

Point of comparison	**Rajendra Kumar Damani**	**The present appeals**
Currency under Section 121	Rs. 1.74 crore, admitted on oath to be the sale proceeds of smuggled gold.	Rs. 25,900/- in aggregate, which on the Department's own theory represented remuneration and travelling expenses, and not the proceeds of any sale.

(ii) In *Rajendra Kumar Damani* the confession was the case, and it was a confession to a smuggling enterprise corroborated by scale, by concealment infrastructure and by an admitted cash trail. Here there is no enterprise, no cash trail, no traceable supplier and no corroboration.

10.2. It is therefore submitted that neither judgment considered the mandatory procedure under Section 138B(1)(b); the refusal of cross-examination upon a decision predating that provision; the sufficiency of an uncorroborated statement of a co-noticee to fasten penalty under Section 112(b); or the sustainability of confiscation under Sections 111(b) and 111(d) where the Revenue's own case locates the acquisition of the goods within India; that a decision is not an authority upon a question neither raised nor decided.

10.3. In view of these submissions, the Ld. Counsel for the appellants, therefore, prayed for setting aside the impugned order thereby granting the consequential reliefs, including, inter alia, release of the bars in question.

11. On the other hand, the Ld. Authorized Representative of the Revenue appearing before us reiterated the findings recorded in the impugned order. He submitted, inter alia, as under: -

(i) The appellants have failed to produce any contemporaneous and reliable documentary evidence establishing the licit importation, lawful acquisition or legitimate possession of the six gold bars weighing 6000.00 grams. The gold was intercepted in the possession of appellant nos. 2 to 5, and no valid purchase documents, import documents, invoices or other statutory records evidencing lawful procurement or movement of the said gold were available at the time of interception.

(ii) It was submitted that, the goods being gold, the provisions of Section 123 of the Customs Act, 1962 are attracted and the burden of proving that the seized gold was not smuggled goods lies upon the person from whose possession the same was recovered and, consequently, upon the persons claiming lawful ownership or acquisition thereof. Such statutory burden cannot be discharged by mere assertions or by producing documents subsequently prepared or collected during the course of adjudication.

(iii) The documents relied upon by the appellants, including the alleged Tunch Forms, delivery challans, affidavits of customers and documents relating to melting of gold, were produced only during the subsequent stages of the proceedings and were not found in the possession of the carriers at the time of interception. There was, therefore, no contemporaneous documentary trail connecting those documents with the very gold which was seized. The mere existence of documents pertaining to transactions or quantities of gold cannot, in the absence of a satisfactory nexus, establish that the particular gold bars under seizure were covered by those documents.

(iv) It was further submitted that the adjudicating authority had, upon examination of the material on record, rightly found that the documents produced by appellant No. 1 were an afterthought and had been brought into existence subsequent to the seizure with a view to provide a colour of legitimacy to the seized gold. The alleged Tunch Forms and connected documents did not constitute reliable evidence of the lawful source of the specific six gold bars seized in the present proceedings.

(v) The statements of Appellants 2 to 5 recorded under Section 108 of the Customs Act, 1962 contain material disclosures regarding the manner in which the gold had been received and was being transported. The statements, recorded in the course of a statutory investigation, referred to the role of Appellant No. 1 and the circumstances in which the gold was allegedly handed over to Appellants 2 to 5. Such statements, having evidentiary value in customs proceedings, could not be brushed aside merely because the appellants subsequently sought to dispute their contents.

(vi) That the explanation subsequently furnished by the appellants regarding the gold having been obtained from old jewellery belonging to 35 customers was not satisfactorily established. The alleged customer affidavits and Tunch Forms were insufficient to establish that the very gold seized from appellant nos. 2 to 5 represented the gold allegedly obtained from those customers. The appellants had thus failed to establish an unbroken and credible chain connecting the seized gold with the alleged legitimate business transactions.

(vii) It was specifically submitted that the aggregate quantity reflected in the documents relied upon by the appellants, by itself, could not establish identity of the seized gold. In the absence of any unique identification, contemporaneous movement record or other reliable evidence correlating the six seized bars with the 35 Tunch Forms and the alleged customer transactions, the documents could not displace the statutory presumption arising under Section 123.

(viii) That the circumstances surrounding the recovery, coupled with the statements recorded during investigation and the absence of contemporaneous licit documents, were sufficient to sustain the finding that the goods were liable to confiscation under the relevant provisions of Section 111 of the Customs Act. The subsequent production of documents, which were neither found with the carriers nor satisfactorily linked to the seized gold, could not retrospectively legitimise the possession.

(ix) The adjudicating authority had correctly appreciated the evidentiary material and had rightly ordered absolute confiscation of the six gold bars and confiscation of the other seized articles under the applicable provisions of the Customs Act. The penalties imposed upon the appellants under Section 112(b) were also justified in view of their respective roles and the circumstances emerging from the investigation. The impugned Order-in-Appeal, having correctly upheld the adjudication order, calls for no interference and the appeals are liable to be dismissed.

11.1. Accordingly, he prayed that the appeals be rejected.

12. Heard the parties and considered their submissions.

13. The facts which are not in dispute are that on 12.06.2019, the appellant nos. 2 to 5 were intercepted, at about 07:50 p.m., by the Offices of the DRI at Hotel Samrat, 144, M.G. Road, Kolkata – 700 007 when the six (06) pieces of gold bars in question were recovered from their possession, along with certain amounts of Indian currency. The statements of the appellant nos. 2 to 5 were recorded on 13.06.2019, 25.06.2019 and 17.12.2019. They were also arrested and sent to judicial custody. The Test Memo / Report proved that the purity of the gold in question was between 99.5% to 99.7%.

13.1. A search was also conducted at the jewellery shop of the appellant no. 1 where he was not available; only his father was available.

13.2. The statement of the appellant no. 1 was recorded, for the first time, on 22.11.2019. When his statement was recorded, the appellant no. 1 inter alia stated that he is in the business of jewellery since 2017; he also admitted that he was familiar with the appellant nos. 2 to 5 who were apprehended in this case, but did not know their residential addresses and could not recollect their phone numbers. He denied his role in the gold smuggling.

14. Thereafter, the appellant no. 1 had been issued various summons for appearance on 22.11.2019, 25.11.2019, 28.11.2019, 14.01.2020, 03.02.2020, 14.02.2020 and 09.03.2020, but on all these occasions, the appellant did not join the investigation.

15. It is also a fact that the mobile numbers 9305778774 and 9871716766, which the appellant no. 1 claimed to be his mobile numbers, were found to be in the name of "Asif Khan" and "Devender" respectively.

16. The mobile number 7617066750, which was in his name, was found to have been used by the appellant no. 1 for having conversations with the appellant nos. 2 to 5 on multiple occasions.

17. Admittedly, during investigation and till issuance of the Show Cause Notice, the appellant no. 1 did not claim ownership of the gold in question, whereas the statements of the appellant nos. 2 to 5 revealed that the appellant no. 1 had sent them to collect smuggled gold from Kolkata from one "Johnny", against payment, which was handed over by the appellant no. 1 to the appellant nos. 2 to 5.

17.1. Further, we find that in their statements, apart from stating that they had received the said smuggled gold from one Johnny, admittedly, the appellant nos. 2 to 5 had also informed that they were not in possession of any licit document for possession or transportation of the gold in question. In terms of Section 123 of the Customs Act, 1962, gold is a notified item and the person who is having such gold is duty bound to show the source of procurement of the said gold. It is evident that the appellant nos. 2 to 5 were not having any document or evidence to prove that the said gold had been procured by them through licit means. It is under such circumstances that the gold in question has been ordered to be confiscated, which we find to be correct.

17.2. We take note of the fact that the claim of the appellant no. 1 towards ownership of the gold was only at the time of filing the reply to the Show Cause Notice. This shows that at the time of filing his reply, the appellant no. 1 had thought that he could claim the gold by producing various documents. The same cannot be taken on record as it is only an afterthought. In fact, if the appellant no. 1 was the owner of the gold in question, he should have come forward on 22.11.2019 itself to say that he is the owner of the gold which was recovered from the possession of the appellant nos. 2 to 5, which was not done in this case. In the circumstances, we find that all the documents produced by the appellants in the reply to the Show Cause Notice are not admissible at this stage. Accordingly, the appellant no. 1 cannot claim ownership of the gold in question.

18. In view of the above, we hold that the gold in question has been rightly absolutely confiscated by the authorities below.

19. We further take note of the fact that various penalties have been imposed on the appellants herein under Section 112(b) of the Customs Act, 1962. While a penalty of Rs.2,25,000/- has been imposed on the appellant no. 1, penalties of Rs.25,000/- each have been imposed on the appellant nos. 2 to 5.

19.1. Considering the fact that the appellant nos. 2 to 5 were engaged in carrying gold of foreign origin without any licit document for the same, we find that the penalties of Rs.25,000/- imposed on each of them do not require any intervention by this Tribunal. Accordingly, the same are affirmed.

19.2. With regard to the penalty of Rs.2,25,000/- imposed on the appellant no. 1, we find that it has been alleged that the appellant no. 1 has tried to mislead the investigating agencies. The claim of the appellant no. 1 towards the gold in question has also not been accepted since he had not claimed ownership of the gold during the investigation. In such circumstances, we find the penalty imposed on the appellant no. 1 to be highly excessive. Therefore, the same is reduced to Rs.1,00,000/- (Rupees One Lakh only).

20. The appellants have also relied on various case-law in support of their case. We have examined the said case-law relied upon by the appellants, but the same are found to be inapplicable to the facts and circumstances of the present case, especially since in this case, during the course of investigation, the appellant no. 1 never claimed ownership of the gold.

21. In view of the above, we pass the following order: -

(i) We affirm the order of absolute confiscation of the gold in question;

(ii) We affirm the order of imposition of penalties on the appellant nos. 2 to 5 under Section 112(b) of the Customs Act, 1962; and

(iii) We reduce the penalty imposed on the appellant no. 1 under Section 112(b) of the Customs Act, 1962 to Rs.1,00,000/-.

22. In these terms, the appeals are disposed of.

(Order pronounced in the open court on **21.08.2026**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd