

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH - COURT NO. IV

Custom Appeal No. 51057 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s DI GOLD DESIGNER JEWELLERYAppellant
RAMBHAJ, 210, Deepali Enclave,
Pitampura, New Delhi,
110034

VERSUS

Commissioner of CustomsRespondent
(Preventive) Delhi
New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

WITH

Custom Appeal No. 51058 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s RIDHI SIDHI JEWELLERSAppellant
Main Market,, Gandhi Chowk Nohar,
Hanumangarh, Rajasthan
335523

VERSUS

Commissioner of CustomsRespondent
(Preventive) Delhi
New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

AND

Custom Appeal No. 51059 of 2020 (SM)

(Arising out of Order-in-Appeal No. CC(A)CUS/D-II/Prev/nch/1038-1039-1040/2019-2020 dated 24.01.2020 passed by the Commissioner of Customs (Appeals), New Delhi.)

M/s PRADEEP RATUSARIAAppellant

(HUF) M/S Ratusaria Jewellers,
Gali Bombay Wali,
Sirsa, Haryana-125055

VERSUS

Commissioner of CustomsRespondent
(Preventive) Delhi

New Customs House,
Near I.G.I, AIRPORT, New Delhi
110037

APPEARANCE:

Shri B. Bhushan, Advocate for the Appellant
Shri Mahesh Bhardwaj, Authorised Representative for the Respondent

CORAM:

HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 52094-52096 / 2021

Date of Hearing: **02.12.2021**
Date of Decision: **22.12.2021**

RACHNA GUPTA:

Present Appeal has been filed to assail the Order-in-Appeal bearing no. 1038-1039-1040/2019-2020 dated 24th January 2020. The relevant factual matrix for adjudicating the impugned appeal, in brief, is as follows:

The Appellants herein are engaged in jewellery business. They used to send parcels of gold for job work of jewellery through the known trade practice called 'Angarias' and also used to receive the gold/jewellery through the same mode. Department got an information about a consignment booked by Airway Bill No. 589-

56652551 of Jet Airways destined to Bombay to might have contained gold bullion of foreign origin which might have been smuggled into India. The said consignment was put on hold on 21/10/2014 and CELEBI, the custodian of warehouse, was instructed to not to clear the shipment without the permission of Custom Department. The said consignment was booked in the name of Shri Onkar Nath Singh. The Custom Officers, in the presence of Shri Onkar Nath Singh brought the consignment from CELEBI warehouse to new Custom House on 11/11/2014 and examined the same in presence of Shri Onkar Nath Singh and two more independent witnesses.

1.1 The consignment was found containing two tin boxes collectively weighing 11.8 kgs containing 22 & 18 small parcels respectively. All these parcels were detained for further investigation vide Panchanama dated 11.11.2014. To verify the yellow metal to be gold that the parcels were also got examined by jewellery appraisal on 27/11/2014 who vide the report of the even date verified that the yellow metal and yellow metal jewellery is gold. All 22 parcels since were having yellow metal jewellery or rough diamonds and 18 parcels since were found to contain yellow metal, yellow metal jewellery, and rough diamonds and the metal was verified to be gold, that the consignment was seized under Section 110 of Customs Act 1962, vide Panchnama dated 27/11/2014. It was also observed that 22 parcels were containing Indian made gold or jewellery out of Indian made gold and accordingly were released on 18/10/2014.

1.2 Based upon the statement of Shri Omakarnath Singh, statement of Shri Pradeep Ratusaria of M/s Ratusaria Jewellers summons also issued to M/s DI Gold Jewellery at M/s Ridhi Sidhi Jewellery who though not appeared but a letter dated 14/09/2015 was received from Shri Rajesh Agarwal proprietor of M/s DI Gold Jewellery based thereupon department formed an opinion that three of these jewellery merchants were in possession of foreign marked gold. Since they did not produce any document of acquiring the possession, they were alleged to have illegally imported the same and were alleged to have intentionally withheld the complete information and the identities of the person from whom they acquired the said gold knowing that the gold in their possession to be smuggled gold that show cause notice bearing no. 229/14 dated 5/11/2015 was served upon three of the appellants proposing the confiscation of the gold weighing 351.54 Gms. & 163.8 Gms. valued at Rs. 831747/- and Rs. 387597/- respectively seized from parcel no. 4 & 16 among 18 parcels of one of the tin box in Airway Bill No. 58956652551 under Panchnama dated 11/11/2014. Penalty upon the appellants under Section 112 (b) of Customs Act, 1962 was also proposed. The said proposal has initially been confirmed by the original adjudicating authority vide Order-in-Original No. 148/2017 dated 13/03/2017, the appeal thereof has been rejected vide the order under challenge.

2. Being aggrieved that appellant is before this Tribunal. I have heard Shri B Bhushan for the Appellant & Shri Mahesh Bhardwaj for the Respondent.

3. It is foremost submitted on behalf of the appellants that though 22 & 18 no. of parcels were recovered from two tin boxes in the consignment in question but only two parcels thereof bearing no. 4 & 6 containing gold bar weighing 351.54 Gms. and 163.8 Gms respectively were found engraved with foreign marked that is 'Valcambi Suisse' and 'Esayeur Founder' respectively. All total number of parcel were put on hold on 21/10/2014 and were seized on 27/11/2014. All other parcels except the above said 4 & 6 were released on 18/12/2014. Since, the seizure of the said two packets was under Section 110 of Customs Act dated 27/11/2014, the Show Cause Notice under Section 124 of the Customs Act, 1962 was required to be served upon the appellants within six months thereof, else the goods should have been returned to the person from whose possession they were seized. In the present case, the period of six months expired on 27/05/2015 but the show cause notice was issued on 05/11/2015 that is almost after one year of the seizure. Hence, Show Cause Notice itself is alleged to be barred by time.

3.1 On behalf of M/s DI Gold & M/s Ridhi Sidhi Jeweller, in addition, it is submitted that the show cause notice was not properly served upon them nor at the correct address. Also too short a time was given to them to mark their presence before the investigating officer which was not possible. The time and date chart as mentioned in para 12 of the appeal is impressed upon to explain the same & the absence. However, a letter dated 14/09/2015 was given by the

proprietor M/s DI Gold Designer Jeweller, Shri Rakesh Agarwal. The appellants further submitted that it is a settled practice that the gold is imported from foreign countries as duty paid gold and thus much of the gold available in the market is of foreign origin. Hence, with respect to the foreign origin gold found in parcel no. 4 & 6 it was the duty of the department to show that the said foreign origin gold is received by any of the appellants without payment of duty. But apparently department failed to conduct any investigation with respect to the origin of the gold and its mode of coming into India. Sufficient document have been submitted by the appellant to the department in the form of tax-invoice for the purchase of the above gold from Shreenath Corporation alongwith the document about sending gold weighing 351.54 gms. to M/s Ratusaria Jewellers for job work in the form of work order dated 15/10/2014. Delivery challan dated 16/10/2014 was submitted as the document to the fact that said M/s Ratursaria jewellers could not prepare the jewellery as per the job work assigned and thus it returned the same gold quantity to M/s DI Gold vide delivery note dated 30/10/2014. It is further submitted that since it is the quantity of gold as received is relevant while returning the same irrespective of marked thereof, M/s Ratusaria Jewellers was not required to return the same piece of gold which otherwise was already seized by the Customs by that time. It is submitted that the allegation against M/s Ratursaria Jewellers was absolutely false and are based on mere presumption basis.

3.2 Ld. Counsel also mentioned that defence as taken by the appellants about the Angariya as known trade practice among the jewellers for receiving gold or sending the same as jobwork and

receiving back stands fully corroborated not only from the statement of Shri Omkarnath but also from the contents of letter of Shri Rakesh Agarwal on behalf of the M/s DI Gold & M/s Ridhi Sidhi Jewellers, violation of principle of natural justice has also been alleged against the adjudicating authority vide confirming the allegations of presumptive smuggling against them and while imposing the penalty. It is submitted that serving notices on the wrong addresses and giving a short notice just 5 to 7 days not providing the opportunity of hearing any remand confirmed and penalty imposed in the giving circumstances is liable to be set aside on this score, it is based upon on behalf of all the appellants that the recovered gold was sent through Angariya which is a normal trade practice among the jewellers in the country. The quantity recovered is too small from a jeweller's perspective to be alleged as the case of smuggling. The evidence collected through the investigation is sufficient to prove that the gold was being transferred in the aforesaid normal course of trade. No evidence has been brought on record about the gold to have been smuggled one. The findings of the Adjudicating Authorities are alleged to be merely presumptive in nature, accordingly, are prayed to be set aside and the appeal is prayed to be allowed.

4. To rebut these submissions, learned DR has mentioned that the requisite documents were never produced by the appellants herein. In fact M/s. DI Gold and M/s. Ridhi Sidhi never co-operated the Department. Despite the issuance of several notices, they failed to make them appear before the investigating authority. Lack of documents is sufficient to hold that the goods were smuggled one,

otherwise also, the onus to prove that the seized gold was not received by illicit importation and was not smuggled one was upon the appellants in terms of Section 123 of Customs Act, 1962. The statement of Mr. Pradeep for M/s. Ratusaria Jewellers is highly insufficient to discharge the said onus. Remaining appellants failed to join the investigation. The gold in question is admittedly of foreign origin hence, no infirmity has been committed by Commissioner (Appeals) by ordering confiscation of the gold on the ground of it being smuggled one. The consequent penalty is also accordingly justified. The appeal accordingly, is prayed to be dismissed.

5. After hearing the rival contention, perusing the record of three of these appeals, my observance and findings are as follows:

5.1 The findings of the Adjudicating Authorities below are that seized gold was engraved with foreign markings i.e. Valcambi Suisse and Esayeur Founder recovered from the packet no. 4 and 6 of Airway Bill No. 58956652551 dated 20.10.2014 of Jet Airways being illegally and illicitly imported into the country in contravention of provisions/conditions of notification no. 12/2012 dated 17.03.2012 read with section 3 of Foreign Trade (Development & Regulation) Act, 1992. These findings are mainly based upon the fact that the documents submitted by Mr. Pradeep Ratusaria had no description of making and serial no. of gold bars and that the remaining appellants have failed to submit any document to falsify these findings.

5.2 I have perused the statements recorded during the investigation and the documents tendered. It is observed that Shri Onkar Nath Singh in whose name the seized gold was booked has

mentioned that he works for a company M/s BBS Parcels Services, Paharganj, New Delhi, who used to send parcels of jewellers from Chandani Chowk to Mumbai. The impugned two boxes of 22 & 18 parcels were booked by him on 20/10/2014 vide the impugned Airway Bill to be received by Suchit Kumar Yadav of Mumbai. One of the two parcels of 22 parcels belongs to his firm, another parcel of 18 parcels belongs to Mr. Shravan Kumar Chawat of M/s Jai Mata Di. He submitted the document with respect to 18 parcels including the name of the address of the senders and the receivers of the parcels. Shri Shravan Kumar also corroborated the transaction as deposed by Shri Onkar Nath Singh. Shri Pradeep Ratusaria of M/s Ratusaria Jewellers vide his statement accepted the same in addition informed vide his letter dated 01/04/2015 to have received said gold of M/s DI Gold & M/s Ridhi Sidhi Jeweller for manufacture of jewellery. The job work whereof was to be got done from M/s J.K. Jewells, M/s Classic Ornament & M/s Anil Jewells. All situated in Mumbai and accordingly, both the impugned gold pieces and alongwith the third one weighing 138.38 gms. were booked with Mr. Shravan Kumar of M/s Jai Mata Di to be delivered at Mumbai.

5.3 I further observe that though M/s DI Gold designer jewellery and M/s Ridhi Sidhi did not make them available before the investigating officer in furtherance of summon issued to them but from the time & date chart as mentioned in the appeal, it is abundantly clear that the notices were served for just five to seven days time for both these appellants to appear and in fact, most of them were received by these appellant after the date of hearing

mentioned therein use to expire. In such circumstances, the findings of the adjudicating authority below that both these appellants failed to co-operate the investigating agency are held to be false on the face of it. These findings are observed to be false also for the reason that M/s DI Gold Designee Jewellery respondent had replied to the impugned show cause notice vide their letter dated 16/03/20107 and M/s Ridhi Sidhi vide their letter dated 15/08/2016. Both of them have objected the issuance of show cause notice after the expiry of period of six months, in addition, have clarified about acquiring the licit/ legal possession of the impugned gold pieces. It is mentioned in the letter that the gold was purchased from Shreenath Corporation, Telipada, Jaipur. A copy of Tax/VAT invoice for the purchase of said gold was duly annexed alongwith said letter. The purchase was made on the basis of bills issued by Shreenath Corporation to M/s DI Gold Designer. Those bills were also got annexed with the letter. Further perusal shows that out of the gold weighing 1255.3 gms as purchased from said Shreenath Corporation, the gold weighing 351.54 gms was mentioned to have been sent to M/s Ratuarria Jewellers for making jewellery. Accordingly, the work order dated 15/10/2014 stands corroborated in view of this letter of M/s. DI Gold Designee Jewellery. It was also corroborated that Ratusaria since could not get the jewellery made, hence, returned the said gold quantity of 351.54 gms. vide delivery note of 30/10/2014. It has been found clarified that it was not necessary to return the gold of same marking.

5.4 Similarly, M/s Ridhi Sidhi Jewellers in their letter 15/08/2016 has stated about receiving 163.8 grms of gold from Smt. Krishna Devi, wife of Shri Anil Kumar, village Kumedpura, for making gold jewellery as per the design approved. It is deposed that the said piece of gold was sent to M/s Ratusari Jeweller. Both these appellants have clearly specified that the gold retained by the officers of Customs on 21/10/2014 and finally seized on 27/11/2014 was actually the licit purchase of the appellants and was on the way for getting a job work of jewellery out of the said gold send through the prevalent mode of 'Angariya' prevalent among jewellers.

6. As relied upon learned DR that it was not the department to prove the alleged smuggling but the onus was upon the appellants in terms of Section 123 of the Customs Act, I am of the opinion that above statement and the documents annexed therein are absolutely sufficient for discharging the burden as stands rest upon the appellants in view of Section 123 of the Customs Act. I also observe that the allegation of smuggling are based on the mere fact that the impugned parcels were containing gold of foreign origin but there is no denial to the fact that much of the gold in Indian market is of foreign origin. It was accordingly for the department to investigate that no requisite duty has been paid on the impugned gold. Apparently and admittedly, there is no such evidence on record, I am therefore of the opinion that since the appellant have already disclosed the source of acquisition of gold in question, the initial burden of showing the licit possession of the impugned gold stands discharged by the appellant. The burden stands shifted upon the

Revenue to show that the goods proposed to be confiscated were smuggled one.

6.1 I rely upon the decision of this Tribunal in the case of **Krishna Kumar Dhandia vs. Commission of Customs, Calcutta 2007 (2019) E.L.T (736)**, I also draw support from the decision of Hon'ble High Court of Mumbai in the case of **Union of India vs Imtiyaz Iqwal Pothiawala reported in 2019 (365) E.L.T. (167)** wherein it has been held that burden of proof in case of notified goods is though upon the person from whose possession or the person who claims ownership of such goods to prove that the seized goods are not the smuggled goods. However, it has still for the Revenue to establish the reasonable belief that the goods seized under Section 110 of Customs Act were the smuggled goods. It has been held that when such reasonable belief is challenged, Section 123 come into picture only when such challenge to seizure is negated. In the present case, from the above discussion, it is clear that the appellants since beginning have been challenging the said belief of the Revenue emphasizing that they are jewellers and getting gold from licit means and sending it for being converted into jewellery to and fro by the known trade of 'Angarias'. The onus was definitely upon the department to prove that the gold recovered was not possessed by the appellant through licit means and it was smuggled. The mere fact of the gold being of foreign origin is highly insufficient to prove alleged smuggling. Resultantly, ordering confiscation on the ground of seized gold to be smuggled one is held to be nothing but merely presumptive finding. Rather, I opine that

there is no basis for the belief to be reasonable while alleging smuggling. Hon'ble Apex Court in the case of **Tata Chemicals Ltd vs. Commissioner of Customs (Preventive), Jamnagar reported as 2015 (320) E.L.T. 45 (S.C)** as explained the meaning of 'reason to believe' by opining it to be not the subjective satisfaction of the officer concerned, for such power given to the officer concern is not arbitrary power and has to be exercised in accordance with the restraints imposed by law and that such belief must be that of an honest and reasonable person based upon reasonable grounds. It was held that confiscatory power based on imports 'reason to believe' has to be exercised only on the satisfaction based on certain objective material. Earlier decision of Apex Court in the case of **Hukma vs. State of Rajasthan 2008 (228) E.L.T. 8 (S.C.)** was relied upon wherein it was clearly opined that the burden of proof upon the private party is based on the existence of satisfaction of reason to believe. In the present case, there is nothing to explain as to why the VAT/Tax, the purchase orders, the job orders, the delivery challans etc. have not been considered by the Revenue. There is no apparent denial that the foreign origin gold can licitly also be available in the market. Hence the mere fact that gold was having foreign engravings is opined to be highly insufficient a reason to believe the gold to be smuggled one.

6.2 Hence, I opine that Section 123 of Customs Act cannot be resorted to otherwise also as already discussed above, there is ample evidence for discharging the said burden by the appellants in terms of said Section 123. The present, therefore becomes a clear case

where department has failed to established that the seized foreign marked gold was smuggled one. Merely because the foreign marked gold is involved, the same is wrongly held to be smuggled one. I draw my support from the decision of the Tribunal in the case of **Nitya Gopal Vishwas vs. Commissioner of Customs(Prev), Kolkata reported as 2016 (344) E.L.T. (209) Tri. Kolkata.** Otherwise also, in the light of liberalized policy of Central Government, it cannot be held that all foreign marked goods being bought and sold in India are of smuggled nature. I also rely upon the decision in case of **Giridhari Dubey vs. Commissioner of Customs (Preventive), Kolkata reported as 2002 (149) E.L.T. (427) Tri. Calcutta.**

7. In the present case, when apparently, the show cause notice proposing confiscation of goods seized under Section 110 of Customs Act was issued after one year from the date of seizure. The show cause notice itself gets hit by limitation as the show cause notice was mandatorily to be issued within the six months time of the seizure. The show cause notice has been objected since beginning to have been hit by time still the adjudicating authority failed to take cognisance thereof. Accordingly, the show cause notice itself is held to be barred by time and as such being void ab initio. I draw my support from the decision of the Hon'ble Apex Court in the case of **Rakesh Kumar Bhagat vs. Commissioner of Customs, New Delhi reported as 2008 (231) E.L.T. (204) (S.C).**

8. Above all, as far as DI Gold Designee Jewellery & M/s. Ridhi Sidhi are concerned, the order against them has been passed to

holding them to fail to appear and respond but from the date chart as relied upon by the appellants with respect to the date of issue of summons the date of receipt thereof and the date of hearing mentioned in summons it is abundantly clear that the absence of these appellant was not at all intentional but because of too short time as was given to them to make themselves available before the investigating officer. Absence of reasonable time for seeking presence amounts to absence of reasonable opportunity and is definite violation of Principles of Natural Justice. I draw my support from the decision of Hon'ble High Court of Delhi in the case of **Directorate General of Central Excise Intelligence vs State reported as 2015 (326) E.L.T. (282).**

9. In view of entire above discussion I summarize as follows:

- i) Show cause notice under Section 124 of Customs act confirming confiscation of seized gold being issued beyond six months of the date of seizure is held to be barred by limitation.
- ii) Lack of appropriate and reasonable opportunity of hearing to the appellant amounts to violation of natural justice, the findings against them are liable to be set aside on this score as well.
- iii) The appellants have sufficiently discharged their burden of proof in terms of Section 123 of Custom Act by proving the licit possession of the impugned gold which was delivered for job work through approved mode of the Trade for transfer of Gold and Jewellery. Lastly, the department has failed to show any cogent reason to believe that the goods were the smuggled one.

10. Resultantly, the Order-in-Appeal is nothing but the outcome of presumption on part of the authority. Accordingly, the impugned Order-in-Appeal is hereby set aside. Consequent thereto, three of the appeals herein, stand allowed.

[Order pronounced in the open court on 22.12.2021)

**(Rachna Gupta)
Member (Judicial)**

*SB