

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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75024 of 2016

(Arising out of Order-in-Appeal No.109-114/Pat/Cus/Appeal/2015 dated 15.10.2015 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Patna.)

M/s. Hari Manthan Jewellery House Private Limited

(1256, 2nd Floor, Main Market, Rani Bagh, Delhi-110034.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Patna

.....Respondent

(5th Floor, Central Revenue Building, Birchand Patel Path, Patna-800001.)

WITH

(i) Customs Appeal No.75025 of 2016 (Shri Devender Kumar, Director of M/s. Hari Manthan Jewellery House Private Limited); (ii) Customs Appeal No.75026 of 2016 (Shri Vikash Agarwal, Proprietor of M/s. Agarwal Gold House); (iii) Customs Appeal No.75027 of 2016 (Shri Premnath Gupta, Proprietor of M/s. Ambika Jewellers); (iv) Customs Appeal No.75028 of 2016 (Shri Mohan Lal @ Ram);

(Arising out of Order-in-Appeal No.109-114/Pat/Cus/Appeal/2015 dated 15.10.2015 passed by Commissioner(Appeals), Customs, Central Excise & Service Tax, Patna.)

APPEARANCE

Shri Arijit Chakraborty, Advocate for the Appellant (s)

Shri A.K.Singh, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75480-75484/2022

DATE OF HEARING : 28 March 2022
DATE OF DECISION : 17 August 2022

P.K. CHOUDHARY :

The Appellants are in appeal against Order-in-Appeal No. 109-114/ Pat/ Cus/ Appeal/2015 dated 15.10.2015 passed by the

Ld.Commissioner (Appeals), Customs, Central Excise, Patna. Since all the Appeals are arising out of common Order-in-Appeal, they are taken up together for consideration on merit.

2. By the impugned common Order-in-Appeal, the Appellate Commissioner has rejected six appeals and upheld the Adjudication Order No. 06-CUS/ADC/DRI/2014 dated 22.05.2014 passed by the Joint Commissioner (Adjn), Customs, (P) Hqrs., Patna wherein the adjudicating authority had confiscated seized goods i.e. 3 pieces of gold bars weighing in total 1958.240 gms. valuing Rs. 60,70,540/- under Section 111(d) of the Customs Act, 1962 and imposed following respective penalties upon the appellants/ noticees:

Sri Vikash Agarwal (Noticee No.1) – Rs. 15,00,000/-

M/s. Agarwal Gold House (Noticee No.2) – Rs. 1,00,000/-

Sri Mohanlal @ Ram (Noticee No.3) – Rs. 50,000/-

M/s. Ambika Jewellers (Noticee No.4) – Rs. 1,00,000/-

M/s. Harimanthan Jewellery House (Noticee No.5) – Rs. 1,00,000/-

Sri Davender Kumar (Noticee No.6) – Rs. 1,00,000/-

3. Sri Vikash Agarwal, being proprietor of M/s. Agarwal Gold house has preferred conjoint appeal for himself as well as for his proprietorship firm challenging the order of confiscation of seized gold and imposition of penalties. Other Appellants in appeal are precisely against the imposition of respective penalty upon them.

4. Ld. Advocate appearing on behalf of the Appellants submitted that the only finding recorded at para 27 of the impugned Order-in-Appeal dated 15.10.2015 is perverse and far away from facts on-record. He drew reference to Invoice No. Pat/13-14/5 dated 22.04.2013 issued by M/s. Ambika Jewellers in favour M/s. Agarwal Gold House towards purchase of 0.7746 Kgs. of gold by the Appellant Sri Vikash Agarwal. He also referred to Tax/ Vat Invoice under Delivery Reference: G95/PAT/13-14/31 dated 22.04.2013 issued by HDFC Bank Limited in favour of M/s. Ambika Jewellers recognizing their sale of 3 Kgs. of gold to M/s. Ambika Jewellers. Disputing the letter dated 12.06.2014 issued by the HDFC Bank, Patna to the Intelligence Officer,

DRI, the Ld. Advocate on behalf of the Appellants referred to the letter dated 21.10.2014 under Ref. No. HDFC/BO/MISC/2014-15/11 issued by the HDFC Bank, Bullion Operation, Mumbai to contend that sale of 3 Kgs gold by HDFC Bank to Ambika Jewellers under Invoice dated 22.04.2013 has been confirmed by the HDFC Bank. He further referred to the statement dated 07.4.2014 of Shri Premnath Gupta, Proprietor of Ambika Jewellers as recorded by the Deputy Director, DRI, Patna wherein u/s. 108 of the Customs Act, 1962, said proprietor of Ambika Jewellers had confirmed the sale of 0.7746 kgs of gold in favour of Agarwal Gold House.

5. It is also submitted that Agarwal Gold House had a further purchase of 1000 gms. of pure gold from M/s. Harimanthan Jewellery House Pvt. Ltd. under purchase Invoice No. 057 dated 15.02.2014. On inquiry by DRI, Sri Davender Kumar, Director of M/s. Harimanthan Jewellery House Pvt. Ltd., Rani Bagh, Delhi vide statement dated 21.05.2014 u/s. 108 of the Customs Act, 1962 confirmed the sale of such quantity of gold in favour of Agarwal Gold House under the said Invoice.

6. Ld. Advocate on behalf of Appellants referred to the relied upon documents to show cause notice to show that M/s. Agarwal Gold House had an opening stock of 1873.295 gms. of gold on 01.04.2013 and during the F.Y.: 2013-14 had purchased 774.600 gms. of gold from Ambika Jewellers, Patna and 1000 gms. of gold from Harimanthan Jewellery House Pvt. Ltd., Delhi. On 27.02.2014, when 3 pcs. of gold weighing 1958.240 gms. therefrom was being sent to M/s. Dwarika Ornaments of Chandni Chowk, Delhi for job-work through Sri Mohanlal, employee of M/s. Agarwal Gold House, the same was seized arbitrarily by DRI, Patna. During search at Agarwal Gold House on 28.02.2014, original Ledger Books and Books of Account were seized by DRI as is evident from Panchnama prepared thereat and referred at para 4 of show cause notice. As such, there was no question of fabrication of any document on the part of Vikash Agarwal, Proprietor of M/s. Agarwal Gold House. The investigation of the DRI has revealed

that sellers of the gold had admitted the fact of sale of respective gold under their respective invoices in favour of Agarwal Gold House. Such sellers had also disclosed their respective purchase, which actually could not be disputed by DRI.

7. He also submitted that the allegation of DRI that since an account payee cheque was issued by Agarwal Gold House to Harimanthan Jewellery House Pvt. Ltd., but later the payment for purchase under Invoice no. 057 dated 15.02.2014 was made on 13.03.2014 through RTGS, the transaction was not genuine, has no leg to stand in law inasmuch as the transaction has been admitted upon corroborative documents and there is nothing contrary on-record to negate the same. Moreover, M/s. Harimanthan Jewellery House Pvt. Ltd, during investigation, submitted their purchase invoice also, which could not be disputed by the investigating authority. The allegation of DRI on the basis of letter dated 12.06.2014 issued by the HDFC Bank, Patna that there was no purchase of gold by Ambika Jewellers and hence their sale in turn in favour of the Agarwal Gold House is fake, is ill founded in view of the letter dated 21.10.2014 under Ref. No. HDFC/BO/MISC/2014-15/11 issued by the HDFC Bank, Bullion Operation, Mumbai admitting sale of gold by bank in favour of Ambika Jewellers. It is submitted that since the burden u/s. 123 of the Customs Act, 1962 has been wholly discharged and the department has failed to contradict the same upon evidence, the order of confiscation of seized gold and imposition of penalties upon the appellants should be quashed.

8. Per contra, Ld. Authorized Representative appearing on behalf of the respondents submitted that Sri Mohanlal @ Ram in his statement dated 27.02.2014 after apprehension by DRI, Patna had admitted that the seized gold was smuggled from Nepal and Vikash Agarwal had handed him over the same and directed to go to Kanpur. Further, Sri Vikash Agarwal in his statement dated 28.02.2014 had stated that the seized gold was purchased from Ambika Jewellers of Patna and Jalan & Co. of Kolkata, but on investigation, it was found that there was no

such sale by Jalan & Co. of Kolkata in favour of Vikash Agarwal. Later, he came up with the Invoice of Harimanthan Jewellery House Pvt. Ltd. of Delhi which DRI disbelieved since payment was made through RTGS after the date of seizure though the purchase invoice was carrying details of an account payee cheque as the mode of transaction. The purchase from Ambika Jewellers was also negated by DRI since HDFC, Patna informed that there was no such sale in favour of Agarwal Gold House. In all fairness, Ld. AR for respondents submits that the letter of HDFC, Mumbai was before the adjudicating authority, but no cognizance of the same was taken and Mohanlal @ Ram though retracted from his initial statement dated 27.02.2014 by way of Affidavit, no subsequent investigation was caused with him. Ld. AR for respondents submitted that lower authorities have passed the order of confiscation of seized gold and imposed penalties upon the Appellants upon correct appreciation of evidence on-record and hence, the same should be upheld.

9. In reply, Ld. Advocate for the Appellants submitted that the Appellate Commissioner at para 27 of the impugned Order-in-Appeal has though in connection to purchase of M/s. Ambika Jewellers referred to the Letter of HDFC, Mumbai, no findings thereof have been given. Further, in connection to transaction between Agarwal Gold House and Harimanthan Jewellery House Pvt. Ltd., the Appellate Commissioner has mechanically recorded and followed the objections of the Department on flimsy grounds without any finding of his own. He also submitted that Vikash Agarwal under his letter dated 26.03.2014 before DRI submitted documents and prayed for release of seized gold and his subsequent statements dated 05.06.2014 and 06.06.2014 were recorded u/s. 108 of the Customs Act, 1962 by DRI when he stated that being regular purchaser from Jalan & Co. of Kolkata, on 28.02.2014 he had inadvertently stated that part of seized gold was also purchased therefrom which was not a fact. Such letter and statements are part of relied upon documents to show cause notice and hence, cannot be ignored while adjudicating the matter.

10. We have gone through the records and documents placed before us and considered the rival contentions of both the parties at length.

11. We find that the issue in the present case is whether the Appellants, particularly Sri Vikash Agarwal, Proprietor of M/s. Agarwal Gold House of Muzzafarpur, has discharged the burden of proof under section 123 of the Customs Act, 1962 with respect to the gold weighing 1958.240 gms. as was seized by DRI, Patna from the possession of the Appellant Mohanlal @ Ram on 27.02.2014 and if so, whether the respondent authority has controverted the same upon any evidence leading to confiscation of the same under section 111 of the Customs Act, 1962 and consequential imposition of penalties upon the various Appellants.

12. We find that it is not in dispute that the Appellant Sri Vikash Agarwal, Proprietor of M/s. Agarwal Gold House is the only claimant and owner of the seized gold. Even Appellant Sri Mohanlal @ Ram has stated the same fact to DRI, Patna on 27.02.2014. During investigation at Agarwal Gold House on 28.02.2014 i.e. immediately after the seizure, the DRI did not find anything contraband and/or incriminating in nature. The Panchnama dated 28.02.2014 shows that Ledger Account and Books of Account of Agarwal Gold House were seized on 28.02.2014 only. Sri Vikash Agarwal came forward and in his statement dated 28.02.2014 claimed ownership of the seized goods. He disclosed his opening stock of gold as on 01.04.2013 and also stated about his purchases of pure gold during 2013-2014. However, he stated to have a purchase of 1000 gms. of pure gold from Jalan & Co. of Kolkata, which was later changed as a purchase during February, 2014 from M/s. Harimanthan Jewellery House Pvt. Ltd. of Delhi. In support of such purchase, Appellant Vikash Agarwal produced his Purchase Invoice dated 15.02.2014 as well as Bank Statement reflecting payment of such purchase to the seller of the same through banking channel. The investigating authority has followed the trail and conducted discreet investigation with Harimanthan Jewellery House Pvt. Ltd. of Delhi when their Director, being one of the Appellants

here, in his statement u/s. 108 of the Customs Act, 1962 admitted the incident of sale and issuance of invoice dated 15.02.2014 in favour of Agarwal Gold House. It appears that investigating authority tried to emphasize the fact of change of mode of payment by Agarwal Gold House w.r.t. such purchase to impress upon that the transaction was not genuine. It is our considered view that such a conclusion is nothing but assumption on the part of the authority below and such assumption cannot sustain in law in absence of any corroborative evidence in this regard. Mode of transaction/ payment is at sole discretion/ domain between the parties in the transaction and any change in such mode at the understanding of the parties thereof cannot by any stretch of imagination lead to the conclusion that the transaction was not genuine. Moreover, the trail of purchase by Harimanthan Jewellery House Pvt. Ltd. of Delhi from M/s. Diamond Hut India Pvt. Ltd. of Karol Bagh, New Delhi was also available before the investigating authority, which could not even be disputed. The records and documents maintained by Harimanthan Jewellery House Pvt. Ltd. of Delhi was also subjected to verification by the investigating authority which could not deny the fact of sale by Harimanthan Jewellery House Pvt. Ltd. on 15.02.2014 in favour of Agarwal Gold House. Mere mentioning during investigation on 28.02.2014 by Vikash Agarwal that the purchase was from Jalan & Co. of Kolkata, cannot be even a circumstance to discredit the documentary evidences produced before the investigating authority and subjected to vivid investigation by DRI. It is apparent that DRI has also recorded subsequent statements of Vikash Agarwal and followed the trail of his purchase from Harimanthan Jewellery House Pvt. Ltd. and being unsuccessful in disproving such transaction between the parties, an effort has been made to raise doubts only upon suspicion, which cannot sustain in law. In such a circumstance, we are of the view that the genuity of transaction between Agarwal Gold House and Harimanthan Jewellery House Pvt. Ltd. under Invoice dated 15.02.2014 for purchase/ sale of 1000 gms. of pure gold is well established upon documents.

13. We further find that the authorities below have seriously erred by not taking cognizance of letter dated 21.10.2014 under Ref. No. HDFC/BO/MISC/2014-15/11 issued by the HDFC Bank, Bullion Operation, Mumbai acknowledging their sale of 3 kgs. of pure gold in favour of M/s. Ambika Jewellers of Patna. It is the case of the Appellant Ambika Jewellers that they had sold 774.600 gms. of gold to Agarwal Gold House under their Invoice dated 22.04.2013 out of such stock of pure gold purchased from HDFC Bank and to negate such fact, the authorities below proceeded on the basis of letter dated 12.06.2014 of HDFC Bank, Patna ignoring letter dated 21.10.2014 under Ref. No. HDFC/BO/MISC/2014-15/11 issued by the HDFC Bank, Bullion Operation, Mumbai, though admittedly the same was available before the authorities below for consideration. This is a serious mistake on facts. Had cognizance of letter dated 21.10.2014 under Ref. No. HDFC/BO/MISC/2014-15/11 issued by the HDFC Bank, Bullion Operation, Mumbai been taken, the authorities below could not have come to the adverse conclusion that the part of seized gold was smuggled in nature, more particularly when the seller of the same confirms the sale in favour of Agarwal Gold House.

14. We also find that there is nothing on-record from the investigating authority to deny the stock of pure gold available with Agarwal Gold House as on 01.04.2013 and as such, there is no evidence on-record to doubt that the seized gold was not from the said stock and subsequent purchases of Agarwal Gold House, which were handed over to Mohanlal @ Ram by Vikash Agarwal. The only question, thus, remains whether the appellants, specially Sri Vikash Agarwal, Proprietor of M/s. Agarwal Gold House has been able to discharge his burden of proof u/s. 123 of the Customs Act, 1962 in the facts of the present case.

15. In the light of above discussions and analysis of facts and evidences of the present case, we find that appellant Vikash Agarwal, Proprietor of Agarwal Gold House has duly discharged his burden of proof under section 123 of the Customs act, 1962 by producing his

books of accounts, purchase invoices, bank statements etc. in support of his statements that the gold seized from Appellant Mohanlal @ Ram, his employee, was part of his legally purchased/ procured gold in course of his legitimate business. Appellant M/s. Ambika Jewellers of Patna and M/s. Harimanthan Jewellery House Pvt. Ltd. of Delhi alongwith it's Director Davender Kumar had confirmed their respective deals with Agarwal Gold House and had also produced their respective books of accounts and purchase invoices from Bank or authorized bullion dealers before the DRI at the very first instance, which could not be denied by the authorities below. There is nothing on-record from the investigating and/or adjudicating authority to controvert the evidences produced by the Appellants in the present case. In such a circumstance, the order of confiscation of the seized gold weighing 1958.240 gms. under section 111(d) of the Customs Act, 1962 only on suspicion and presumption, is bad in law and cannot sustain and hence, we set aside the same with consequential relief to the claimant/ Appellant Sri Vikash Agarwal, Proprietor of M/s. Agrawal Gold House. Consequently, penalties imposed upon the Appellants under section 112 of the Customs Act, 1962, are also set aside with consequential relief.

16. In result, appeals under consideration are allowed in favour of the Appellants.

(Order pronounced in the open court on 17 August 2022.)

Sd/

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)