

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 10739 of 2021

(Arising out of Notification Order-VIII-25-08-D-DRI-17-1839 Dated- 30/07/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

SATISH MEHTA

303-304 Shraddha Co Op Society Ltd
Ganeshbaug Belgram Road Kurla W
Mumbai, Maharashtra

.....Appellant

VERSUS

C.C.-AHMEDABAD

Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

WITH

Customs Appeal No. 10746 of 2021

(Arising out of -VIII-25-08-D-DRI-17-1839 Dated- 30/07/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

DHANISTHA GOLD

102-103 18/22/ 1st Floor Aurum Building Near
Kalbadevi Telephone Exchange Zaveri Bazar
Mumbai, Maharashtra

.....Appellant

VERSUS

C.C.-AHMEDABAD

Custom House, Near All India Radio Navrangpura,
Ahmedabad, Gujarat

.....Respondent

APPEARANCE:

Shri. Hardik Modh and Amit Laddha, Advocates for the Appellant
Shri. Dharmendra Kanjani, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)**

Final Order No. A/ 11309-11310 /2022

DATE OF HEARING:28.06.2022
DATE OF DECISION:31.10.2022

RAMESH NAIR

In the present Appeals both the Appellants have challenged the letters/ order issued by the revenue granting refund of sale proceeds of Gold.

2. The brief facts of the case are that the officers of DRI intercepted Skoda Rapid Car owned by Shri Nitin Jain, Proprietor of M/s. Dhanishta Gold on the intelligence that the said car was allegedly carrying smuggled gold bars. After completion of interception and inquiry, the DRI seized the gold. The investigation was culminated into issuance of the show cause notice whereby the proposal for absolute confiscation of the gold was made with imposition of penalties upon the Appellant and Co-appellants under Section 112(a) of the Customs Act. The Adjudicating authority confirmed the charges levelled in the show cause notice and absolutely confiscated the gold seized under panchnamadtd. 13.11.2016 from Skoda Car and office of the PGM Joyeria, Ahmedabad. The Appellants challenged the adjudication order before the Tribunal and the Tribunal vide final order No. A/10561-10568/2019 dtd. 25.03.2019 allowed the appeals of Appellants and quashed and set aside the confiscation of the seized goods with consequential relief. In terms of CESTAT order the Appellant requested for release of confiscated gold and return the amount deposited at the time of preferring the appeal before the Tribunal. The appellant received response from the department that the confiscated gold belongs to the Appellants was deposited in the I.G. Mint, Mumbai and the said Gold was disposed of through SBI Bullion at market price on 01.08.2018. The department provided the cheques to the Appellants. The Appellants requested the department to refund the differential value of gold that was calculated by comparing the value of the gold melted on 01.08.2018 and date on which cheque was given to the Appellants. The department rejected the request for refund of the differential value of gold with interest. The Appellants requested the Deputy Commissioner to provide the information whether the decisions for granting the refund was taken by Principle Commissioner of Customs or the other officer so as to enable to take an appropriate decisions for filing the Appeal . The Deputy Commissioner informed the Appellant that decision for return of sale proceed of confiscated gold was taken by the Principal Commissioner of Customs. Being aggrieved, the appellants are before us.

3. Shri Hardik Modh learned counsel appearing on behalf of the Appellants submits that since gold is included in the sensitive list, the department ought to have followed the procedure as prescribed under Section 110(1A). The department without following due process of law, as mandated under Section 110(1A) of the Customs Act, disposed of the gold. The procedure prescribed under the Act is not mere formalities.

3.1. He also submits that Section 150 of the Customs Act provides procedure for sale of goods and application of sale proceeds. Section 150 provides that where any goods not being confiscated goods are to be sold under any provisions of this Act, the same shall be sold through public auction or by tender or with the consent of the owner after notice to the owner. Central Board of Excise and Customs vide Circular No. 711/4/2006-Cus dated. 14.02.2006 issued the clarification in respect of requirement of issuing notice to the owner of the goods as contemplated under Section 150 of the Customs Act in the case where seizure of the goods has been culminated into issuance of the order of confiscation. The circular clarified that the notice should be even issued in case of the goods that have been confiscated but in respect of which, the appeal/ legal remedies have not been exhausted by the owner of the goods. In the present matter department neither issued notice to the appellant nor had taken any consent for disposal of the goods. The department ordered for disposal of the confiscated gold without following due process of law. Therefore, such action is considered as violation of provisions of Section 110(1A) of the Customs Act read with Section 150 of the Customs Act. Had the Appellant been issued the notice for disposal of the gold, the Appellant would have adopted legal remedies available in the law. He placed reliance on the following decisions:-

- GirdharlalKalyandas Advani Vs. Union of India - 1992 (58) ELT 453
- Kailash Ribbon Factory Ltd. Vs. Commissioner of Customs – 2002(143)ELT 60
- Ashupati Nath Dhandania Vs. Union of India – 2014 SCC Online Cal 4557

3.2 He further submits that department ought not to have order for melting of gold in a case where the Appellants preferred the appeal within time limit before the Hon'ble CESTAT inter-alia praying to quash and set aside the order passed for confiscation of the gold seized by DRI. That the auction of the order for melting of gold was premature as the Customs Department did not wait for outcome of the Appeal filed before the Hon'ble CESTAT.

4. *Per Contra* the Shri. Dharmendra Kanjani, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue has argued that in the present case the Gold seized by the DRI was absolutely confiscated vide OIO No. AHM-CUSTM-000-COM-016-17-18 dated 09.03.2018. The Appellants had filed the Appeals before the Hon'ble Tribunal in June 2018. However, the Hon'ble bench had not passed any orders staying operations of the order passed by Adjudicating Authority. Language employed in Section -110(1A) *ibid*, is plain and clear wherein the proper officer shall dispose of the goods specified under the said section, as soon as may be after its seizure. Therefore, disposal of 'absolutely confiscated' gold in accordance with Section -110 (1A) *ibid* read with relevant notification is both legal and proper. Hence the request of the appellants, seeking refund of the amount as per the market value of gold on the date of handing over of cheque to Appellants is without any basis or support of law. He placed reliance on the following decisions.

- M/s Vijaybhav Vs CC, Airport Mumbai – 2014 (313) ELT 506 (Tri Ahmd.)
- M/s Raju Agarwal Vs. CC, Patna – 2013(296)ELT 339 (Tri. Kol.)
- Ajanta Music Palace Vs. CC – 1993 (68) ELT 414 (Tri.)
- Badri Naryan Sharma Vs. CCE, Jaipur – 2020 (372) ELT 873

4.1 He further submits that Circular No. 711/4/2006-Cus (AS) dated 14.02.2006 was issued with reference to Section 150 of the Customs Act 1962, which deals with procedure for sale of goods, not being confiscated goods. Whereas, the goods covered in present case i.e Gold, is covered under notification as specified goods and the section itself states that the said goods are to be disposed of by proper officer as soon as may be after its seizure. Even otherwise, in the present case, goods were absolutely

confiscated and the circular relied upon does not deal either with the disposal of specified goods covered under Section 110 (1A) *ibid* nor with absolutely confiscated goods.

5. After hearing the rival contentions and perusing the record, we find that the moot question to be decided herein is as to -

Whether in view of the given facts and circumstances, the appellants are entitled to receive the differential value of the seized gold between the value prevailing on the date of melting i.e. 01.08.2018 and value as on the date of which the cheque was given to the Appellant.

6. Admittedly, against the order-in-original dated 09-03-2018 the appellants had filed the appeals before the Tribunal challenging / questioning the correctness of the entire impugned order passed by Ld. Adjudicating authority ordering for absolute confiscation of gold and imposing penalties on Appellants. During the pendency of the appeal, it appears that the department took steps to dispose of the said disputed Gold, through the SBI Bullion Branch. During the pendency of the appeal before the CESTAT, it would not be appropriate for the Department to dispose the disputed seized goods, especially when the Appellants had filed appeals challenging the impugned order before the Tribunal and department also aware about the filing of Appeals by the Appellant. Therefore, the Department has to necessarily await the decision of the Tribunal and abide by the direction that has been issued by the Tribunal.

7. We do not agree with the argument of Ld. Departmental representative that Hon'ble tribunal had not passed any orders staying operation of the order passed by the Adjudicating authority. In the disputed matter appeals were filed by the Appellant after compliance of Section 129E of the Customs Act, 1962, therefore Appellant were not required to file any stay application for recovery of government dues during the pendency of Appeals. In this regard the circular dated 16th September, 2014 bearing No. 984/08/2014-CX, issued by the Central Board of Excise and Customs, Government of India. Clause-4 of the said circular is relevant. Clauses-4.1 to 4.3 of the said circular reads as under:

"4. Recovery of the Amounts during the pendency of Appeal :

4.1 *Vide Circular No. 967/1/2013, dated 1st January, 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.*

4.2 *No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% of 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities :*

(i) proof of payment of stipulated amount as predeposit of 7.5%/10%, subject to a limit of Rs. 10 crores, as the case may be; and

(ii) the copy of appeal memo filed with the appellate authority;

4.3 *Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeal)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over the above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme Court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment."*

7.1. The above circular clearly provides that recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeals)/ Tribunal in favour of Department. In the present matter the action of the department such as disposal of gold through the SBI Bullion during the pendency of the appeal is against the existing departmental instructions. Therefore, the argument of the revenue in that disposal of gold during the pendency of the appeal legally correct cannot be accepted. It may be mentioned that Hon'ble Supreme Court in the case of *Northern Plastics Ltd. v. Collector of Customs & Central Excise* - 1999 (113) E.L.T. 3 (S.C.) as well as in the case of *Shilps Impex v. U.O.I.* - 2002 (140) E.L.T. 3 (S.C.) held

that during the pendency of the appeal confiscated goods could not have been auctioned without prior permission of the appellate court.

8. In the instant case, during the disputed period the matter was sub judice before the Tribunal, but the Department in a haste manner has disposed of the goods without seeking permission from the appellate court where the matter was sub judice. Thus, the Department has committed a serious mistake by disposing the disputed goods which was a subject matter of an appeal.

9. We also noticed that in the present matter department also not intimated the Appellants regarding the disposal of confiscated gold. The act of the department ex-part cannot be held as proper and legal. In the *Kailash Ribbon Factory Ltd.* 2002 (143) E.L.T. 60 (Del.) (supra), the Hon'ble Delhi High Court held that it is a serious lapse on the part of the department when it auctioned confiscated goods without permission of the Tribunal during pendency of the appeal without even giving notice to the appellants. It was held that the department has to refund the declared value of the goods with interest per annum from the date of auction of the goods.

10. In the *Spring RPG India Ltd.* 2002 (140) E.L.T. 73 (Del.) case, while passing strictures against the Customs Department, the Delhi High Court has observed -

"It had, in our opinion, a moral obligation to inform the CEGAT as also the Supreme Court of India that the goods in question have already been sold in auction. It failed and/or neglected to do so. Prior to putting the goods in question to auction, it was expected that the petitioner would at least be put to notice that on payment of additional duty it could get the imported goods cleared. It is really also a matter of great surprise that the Airport Authorities also sold the goods within two days of the receipt of the list of such goods."

11. We have also gone through the provisions of Section 110(1A) *ibid*, from the plain the reading of the said provisions it nowhere permits the proper officers for dispose of the disputed goods during the pendency of appeal.

12. In view of our observations, we hold that the ratio of all the above-mentioned cases is squarely applicable to the present case. It is very clear that the department has disposed of /sold the goods on the understanding that the first order of the adjudicating authority is the final order. At the same time the department was well aware about the pendency of the appeals before this Tribunal. Therefore the action of the department is clearly in gross violation of principles of natural justice, hence the same cannot be allowed to sustain.

13. For the reasons discussed above, we are of the considered view that the appellants are entitled for the refund of differential value of the gold as claimed by them alongwith interest and we hold so. Accordingly, the appeals are allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 31.10.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)