

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

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 51709 of 2021-SM

(Arising out of order-in-appeal No. CC(A)/CUS/D-II/Prev./NCH/493/2020-21 dated 30.06.2021 (05.07.2021) passed by the Commissioner (Appeals), New Custom House, New Delhi).

Shri Rajesh Kumar

A-112, 1st Floor, Chander Nagar
Ghaziabad, Uttar Pradesh.

Appellant

VERSUS

Commissioner of Customs (Prev.)

New Customs House, Near IGI Airport
New Delhi.

Respondent

APPEARANCE:

Sh. Aakarsh Srivastava & Sh. Utkarsh Srivastava, Advocates for the appellant

Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 51030/2022

DATE OF HEARING: 12.08.2022

DATE OF DECISION: 31.10.2022

ANIL CHOUDHARY:

The appellant is in appeal against imposition of penalty of Rs. 40 lakhs under Section 112(b)(i) of the Customs Act.

2. Brief facts of the case are that the appellant was working in the bullion market as a broker in Kucha Mahajni, Chandani Chowk, Delhi. He was mainly selling gold/ bullion received on consignment basis from the consignor, for commission, which was Rs. 500/- to Rs.1,000/- per kg.

3. On the basis of specific information, the Directorate of Revenue Intelligence, Delhi Zonal Unit, New Delhi searched premises of the appellant situated at Kucha Mahajani, Chandani Chowk, Delhi on 14.10.2016 (Friday). During search 20.643 kgs. of gold of foreign origin, having total market value of Rs. 6,46,57,189/- was recovered from Shop No. 7 where the appellant and Sh. Pankaj Kumar Singh, an employee of Sh. Amit Goel (consignor) were present. On enquiry Sh. Rajesh Kumar could not produce any document for legal possession of the gold and informed that the said gold was received from Sh. Amit Goel, Director of M/s Pace Commodity Brokers Pvt. Ltd., through his employee Sh. Pankaj Kumar Singh. During search in Shop No. 8 located adjacent to Shop No. 7, currency of total face value of Rs.6,44,00,000/- was found. The appellant informed that this was sale proceeds of smuggled gold sold on that day and also sold during previous week. On a reasonable belief that the recovered gold was smuggled into India and that the said cash amount was sale proceeds of smuggled gold, the same appeared to be liable for confiscation under Section 111 of the Customs Act, 1962. Officers of DRI seized the same under the provisions of section 110 of the Act vide panchnama dated 14.10.2016.

4. The appellant in his statement dt. 15.10.2016 recorded under Section 108 of the Act, inter alia stated that-

- i. He was a broker in sale-purchase of gold, and he earns commission of Rs. 800-1000 per kg. of gold.

- ii. He mainly dealt in foreign origin gold and main sellers of foreign origin gold through him were Sh. Amit Goel and Sh. Atul Goel of Safdarjung Enclave, New Delhi.
- iii. Their two employees namely that Sh. Santosh and Sh. Pankaj Kumar Singh came to him to deliver gold bars of foreign origin belonging to Sh. Amit Goel and Sh. Atul Goel.
- iv. He used to receive gold bars and sold to purchasers, and gave the money received from buyers to the seller.
- v. Sh. Amit Goel had called him on 14.10.2016, that he wanted to sell gold and accordingly he sent Sh. Pankaj Kumar Singh and Sh. Santosh with 27 kgs. gold, out of which 7 kgs. was sold immediately for Rs. 2,04,76,000/-.
- vi. The currency of Rs. 6.44 crores recovered and seized from his shop contained the money received from the sale of 7 kgs. of gold which amounted to Rs. 2,04,76,000/-, and the remaining money was sale proceeds of gold bars of foreign markings of Sh. Amit Goel, sold by him (Rajesh) during last week.
- vii. Sh. Pankaj Kumar Singh had visited him 4-5 times in last four-five months and Sh. Santosh Kumar had visited him 6-7 times during last six months, and each time they have brought foreign origin gold of Sh. Amit Goel.
- viii. Out of 20.643 kgs. of gold, 20 kg. has been brought on that day and 0.643 kgs. was remaining portion of gold sent earlier by Sh. Amit Goel.

5. Sh. Pankaj Kumar Singh vide his voluntary statement dt. 15.10.2016, inter alia, stated that he along with Sh. Santosh (another employee of Sh. Amit Goel) had gone to the shop of the appellant, Shop No. 7 and 8, 1164, Kucha Mahajani, Chandani Chowk, New Delhi, to deliver him foreign marked gold bars totally weighing 27 kgs.

6. Both the appellant and Sh. Pankaj Kumar Singh retracted their statement before Hon'ble CMM, Patiala House Court on 20.10.2016 and 18.11.2016 respectively. Statement of the appellant was again recorded by DRI on 27.01.2017 wherein he again inter alia stated that Sh. Amit Goel used to send the foreign origin gold to him through Sh. Pankaj Kumar Singh and Sh. Santosh Kumar.

7. Searches were conducted at the office premises as well as residential premises of Sh. Amit Goel. Nothing incriminating was recovered during searches. Statement of Sh. Amit Goel was recorded under Section 108 of the Act on 18.11.2016, 20.12.2016 and 30.01.2017 wherein, he inter alia stated that-

- i) his job was of market analysis and research across asset classes and disseminating his research results to his clients.
- ii) he knew the appellant for last 10 months and had been interacting with him to ascertain the price information of bullion market and had never had any financial dealing with the appellant.
- iii) he had nothing to do with the seized gold and the currency, and why did the appellant take his name, is not known to him.

8. From the call detail records it appeared to Revenue that Sh. Pankaj Kumar Singh was present in the office of Sh. Amit Goel between 9 hrs. to 11 hrs. on 14.10.2016 and thereafter he went to Kucha Mahajni and reached there by 13 hrs.

9. Sh. Manoj Kumar and Sh. Ajay Mahto, both employees of the appellant, who were present in the shop at the time of seizure of gold and Indian currency notes, in their respective voluntary statements dated 15.10.2016, recorded under Section 108 of the Customs Act, 1962, stated, inter alia, that they were working at Sh. Rajesh Kumar's shop; that appellant purchased foreign marked gold in heavy quantity from different persons and sold in retail to other jewellers; that sometimes, many retailers of gold came to the shop of Sh. Rajesh Kumar i.e. Shop No. 7 & 8, Kucha Mahajni, Chandni Chowk, Delhi to purchase gold from the appellant, that sometimes the appellant sent them (Ajay and Manoj) to other jewellers' shops to deliver gold and receive payments; that one Sh. Pankaj Kumar Singh along with Sh. Santosh, both employees of one Sh. Amit Goel, visited the shop of the appellant to sell gold; that Pankaj Kumar Singh always came with (at least) 15-20 kgs. gold and take the payment later on after the same was sold by the appellant; that the gold seized by DRI officers on 14.10.2016 was brought by Sh. Pankaj Kumar Singh, for which payment was to be received by Sh. Pankaj from the appellant; that the appellant dealt in foreign marked gold bars similar to those seized on 14.10.2016 by DRI officers from the shop of the appellant; the marking on those gold bars dealt earlier by the appellant were similar to the markings that were on the seized gold bars; that they (Ajay and Manoj) did not know

that these gold bars had been procured illegally and that the seized currency of Rs. 6.44 crores was the proceeds of foreign marked gold bars sold by the appellant.

10. Sh. Amit Goel was summoned by the Revenue for his statement four times during the month of October, 2016. But instead of joining the investigation, he approached the Hon'ble Delhi High Court in writ petition for restraining the Revenue for taking any coercive action including his arrest. Thereafter, on the direction of the Hon'ble High Court, Sh. Amit Goel appeared before the authority on 18.11.2016 and on subsequent dates, wherein his statement was recorded as stated hereinabove. He inter alia also admitted that Sh. Pankaj Kumar Singh was his employee and was known to him for the last ten years. He admitted that the appellant is also known to him for the last ten months with whom he have been interacting regularly. However, he denied any financial dealing or trade dealing with the appellant nor claimed the ownership of the seized gold and currency. Sh. Amit Kumar also admitted that Sh. Santosh Kumar Singh is his regular employee.

11. Further, as per the CDR/CAF, it was evident that Sh. Amit Goel had called Sh. Rajesh Kumar on his landline from his mobile numbers 57 times during the period 01.10.2016 to 14.10.2016, even before the search on 14.10.2016 at 13.31 hrs there was conversation for about 47 seconds. Further on the date of seizure i.e. 14.10.2016, Sh. Amit Goel had conversed with Sh. Rajesh Kumar the appellant six times from his mobile numbers. The call detail recording have been obtained by Revenue from the respective telecom operator, with certificate under Section 65B of the Indian Evidence Act, 1972.

12. Pursuant to investigation, show cause notice dated 12.04.2017 was issued to the appellant alongwith Sh. Amit Goel, Sh. Pankaj Kumar Singh and Sh. Santosh Kumar Singh, calling upon them to show cause individually as to why the seized gold weighing 20.643 kg. (of gold bars) having market value of Rs. 6,46,57,189/- seized from the shop premises of this appellant be not confiscated under the provisions of Sections 111(d), 111(o) and 111(p) of the Act with further proposal to confiscated the seized Indian currency of Rs. 6,43,74,000/- being sale proceed of the gold under Section 121 of the Customs Act with proposal to impose penalty individually on all the noticees under Section 112 of the Customs Act.

13. In the course of adjudication proceedings, this appellant had sought cross examination of Sh. Amit Goel and Sh. Atul Goel (brother of Sh. Amit Goel). Sh. Amit Goel had appeared for cross examination on 21.03.2017, in answer to question - how do you know the appellant Sh. Rajesh Kumar and what kind of dealing you have with him?

Ans. I got introduced to Sh. Rajesh Kumar sometimes in end of 2015 at a social gathering. I used to take research inputs from Sh. Rajesh Kumar on phone of the bullion market for his research input, what he wanted to understand was the demand and supply of gold and silver so that we could understand the price movement of gold and silver prices in a better way. To question 7 - why do you want to obtain these mentioned above technical information from a person (Rajesh Kumar) who is just as a broker in Kucha Mahajani?

Ans. I did not know whether Sh. Rajesh Kumar is a broker or whether he trades in the bullion market in his personal capacity or for his

customers. He had introduced himself as a key player in the Delhi bullion market in our only meeting till date. The information that I asked from him had nothing to do with technical aspects. It was only about the demand and supply forces for the bullion prices.

14. Sh. Pankaj Kumar Singh had appeared for cross-examination, which was held on 17.06.2018 wherein he inter alia stated that he was drawing monthly salary of Rs. 25,400/- working with M/s Pace Stock Broking Services Pvt. Ltd., of which Sh. Amit Goel was the Director. In reply to question that how you came in contact with Sh. Rajesh Kumar, he stated that he never knew him before and had gone there on 14.10.2016 to seek employment.

15. Cross examination of this appellant was taken at the instance of Sh. Amit Goel by his Counsel on 03.05.2018, wherein this appellant stated that he is only class 8th pass and just literate. He inter alia stated that he can read and write only Hindi. In response to the question if he was paying income tax, he answered in the affirmative. He also stated that he has also rented out one of the shop to Sh. Neeraj Mehta, monthly rent of Rs. 50,000/- p.m. w.e.f. 01.07.2016. In answer to question, where from gold was recovered, he stated that Shop No. 7 from the bag of Pankaj. At the relevant time he was sitting in shop No. 13. He further stated that he was detained by the DRI on the day of search and taken him to their office around midnight. Further without any summons, his statement was recorded. In answer to the suggestions made by the Counsel of the appellant – you deposed to DRI and in particular - alleging that the gold was sent by Sh. Amit Goel was false to save yourselves. In answer the appellant stated that no,

whatever I said in regard to Sh. Amit Goel is correct. Further, during his cross examination on 03.05.2017, the appellant in answer to question No. 40 as to how much sale and purchase of gold do you do in a day. The appellant in answer stated that in a day, I transact approximately between 3 to 8 kg. On some days it can exceed 20 kgs. His business is only of brokerage. During his cross examination Sh. Amit Goel admitted the fact that he knew Sh. Pankaj Kumar Singh and Sh. Santosh Kumar who are working in his office as an employee for the last 8-10 years. He also stated that he is Research Analyst and Chief Investment Strategist of the company – M/s Pace Stock Broking Services Pvt. Ltd., and have been working since 1995.

16. Ld. Counsel for the appellant further submits that from the statement of Sh. Amit Goel, it is evident that he is highly educated and technically well equipped. Thus, he was having several channels of information and very unlikely that he was frequently calling this appellant to know the market rate of gold etc. Admittedly, this appellant works as a broker in the bullion market in Chandani Chowk, Delhi. Further, Sh. Pankaj Kumar Singh admitted at the time of search that he had brought the gold on behalf of his master – Sh. Amit Goel. Thus, although the gold was seized from this appellant, but in fact the gold was in the constructive possession of Sh. Amit Goel as it was lying in the cloth bag brought by his employee Sh. Pankaj Kumar Singh. Further, there is hardly any truth in the subsequent statement of Sh. Pankaj Kumar Singh wherein he stated that admittedly he was drawing salary of Rs. 25,400/- from M/s Pace Stock Broking Services Pvt. Ltd., controlled by Sh. Amit Goel. Thus, there is no truth in the subsequent

statement that he came to look for work / employment at the shop premises of the appellant. The averments of this appellant are also supported by fact, at the time of search and seizure in presence of Sh. Pankaj Kumar Singh, that the gold was seized from the cloth bag which has been brought by Sh. Pankaj Kumar Singh on behalf of Sh. Amit Goel, which statement was never objected to by Sh. Pankaj Kumar Singh. Under such facts and circumstances, this appellant has no reason to doubt the nature of gold being smuggled. Further, the provisions of Section 111(d) are not attracted in case of 'town seizure' and thus the order of confiscation under Section 111(d) is bad in law. The fact of gold brought for sale by Sh. Pankaj Kumar Singh alongwith Sh. Santosh Kumar on behalf of Sh. Amit Goel is also supported by the statement of the two employee of Sh. Rajesh Kumar recorded at the time of search - namely Sh. Manoj Kumar and Sh. Ajay Mahto. These facts are also supported by the statement of Sh. Pankaj Kumar Singh dated 15.10.2016 wherein he stated that he came to the shop of the appellant on 14.10.2016 alongwith Santosh Kumar, both employees of Sh. Amit Goel and brought 27 kgs. of gold for sale, out of which part was sold and balance 20.643 kgs. of gold was found and seized by the officers alongwith sale proceeds of Rs. 6,43,74,000/- of the gold already sold. It is further urged that as per the report of the Jewellery Appraiser, obtained by the Revenue, seized gold bars were of 995.0 purity. Admittedly, the smuggled / imported gold is usually of 999.0 purity. Thus, the assumption of Revenue that the gold appears to be smuggled, only on the basis of foreign marking, is without any reasonable basis. As such foreign marking are also put in local sanchas at Delhi to increase the saleability/ marketability of the gold. In the facts and

circumstances, the gold seized from the appellants is not prohibited goods. Further, gold is imported into India freely by the authorised importers and also by Indian citizen returning from abroad on payment of duty.

17. It is also urged that, the Adjudicating Authority have held in para 23.3.6 of the order-in-original, that although gold was recovered from the premises of this appellant, the de-jure possession of the gold is proved to be that of Sh. Amit Goel, which was brought to this appellant by Sh. Pankaj Kumar Singh/ Sh. Santosh Kumar, both employees of Sh. Amit Goel. It is further urged that neither this appellant nor Sh. Amit Goel have applied for release of the gold in their favour, as both of them had denied the ownership of the gold. Further, in the cross-examination, this appellant have stated that at the end of business hours, if any gold is not sold on the same day then the seller/ consignor takes back the unsold gold. This fact is also evident from the fact that Sh. Pankaj Kumar Singh was sitting at the shop of Sh. Rajesh Kumar – appellant on 14.10.2016 to take back the sale proceeds of the gold including unsold gold brought by him. In such facts and circumstances, the seizure and confiscation of cash found at the time of search is bad in law and on facts. Thus, no case is made out that this appellant was dealing or facilitating the sale of smuggled gold, as alleged.

18. The show cause notice was adjudicated on contest and vide order-in-original dated 31.01.2019 the Additional Commissioner have been pleased to confiscate absolutely the seized gold weighing 20.643 kgs. having market value of Rs. 6,46,57,189/- under Section 111(d), (o) and (p) of the Customs Act. Further, confiscated Indian currency

face value of Rs. 6,44,00,000/- actual value of Rs. 6,43,74,000/- under Section 121 of the Customs Act, holding the same to be sale proceeds and further imposed penalty of Rs. 40 lakhs under Section 112(b)(i) of the Customs Act and also imposed penalty of Rs. 50 lakhs on Sh. Amit Goel as well as Rs. 1 lakh each on Sh. Pankaj Kumar Singh and Sh. Santosh Kumar.

19. Being aggrieved, this appellant had preferred appeal before the learned Commissioner (Appeals) who vide the impugned order-in-appeal observed that the appellant has admitted that he had sold smuggled gold having foreign marking earlier in cash without any bill/invoice. Further, recovery of Indian currency having face value of Rs. 6.44 crore corroborates the admission of dealing in smuggled gold. Further, observed that the appellant was aware that he was dealing in smuggled gold and accordingly upheld the order of penalty dismissing the appeal. Being aggrieved, the appellant is in appeal before this Tribunal.

20. Heard the parties.

21. The preliminary objection was taken by the Revenue that this appeal be heard by Division Bench as the Revenue's appeal against the order-in-appeal of Sh. Amit Goel arising from the common order-in-original, is pending before the Division Bench. I find that this objection of Revenue is without any merit as appeal of the other appellant Sh. Amit Goel is separately dealt with by the Commissioner (Appeals). Secondly, this appellant had requested for a copy of order-in-appeal under RTI Act (of Amit Goel) being Order-in-appeal dated 28.02.2020.

Revenue denied to give the copy of the said order observing that the desired information cannot be given as the same cannot be disclosed as per Section 8(1)(i) of the RTI Act, 2005.

22. Having considered the rival contentions and on perusal of records, I find that this appellant is engaged in selling of gold as a consignment agent/ broker, wherein the owner of the gold either himself brings or through his trusted persons/ employee. This appellant after retaining his brokerage returns the sale proceeds and unsold gold, if any, to the consignor, normally on the same day. This fact is evident on the face of the record, as on the day of search and seizure, this appellant has stated that he has received gold for sale from Sh. Amit Goel through his employee Sh. Pankaj Kumar Singh who has come to his shop alongwith Sh. Santosh Kumar. Further, this appellant stated in presence of Sh. Pankaj Kumar Singh that he has received the gold from Sh. Amit Goel through Sh. Pankaj Kumar Singh, and this statement was not disputed rather affirmed by Sh. Pankaj Kumar Singh in his statement recorded on the same day or simultaneously. It is further evident from the facts on record that the seized gold 20.643 kgs. has been found in the cloth bag brought by Sh. Pankaj Kumar Singh. Thus, I hold that the gold was actually in possession of Sh. Pankaj Kumar Singh who was present in the shop. Thus, I hold that although this appellant was facilitating the sale of gold, the gold was in defacto and de-jure possession of Sh. Pankaj Kumar Singh on behalf of his master Sh. Amit Goel. Further, frequent inter action of this appellant with Sh. Amit Goel is proved from the call detail records obtained by Revenue, wherein on the date of search and seizure, there were six

conversations between them for about 216 seconds. I further find that there was no reason for this appellant to doubt that the gold received for sale on consignment basis is of smuggled nature. These facts are also supported by the statement of the employees of appellant - Sh. Manoj Kumar and Sh. Ajay Mahto at the time of search and seizure by the officer. Further, Sh. Amit Goel has admitted that Sh. Santosh Kumar and Sh. Pankaj Kumar Singh are his employee working for him for the last 8-10 years. The fact of dealing in gold on consignment sale basis by this appellant is also proved by his statement during cross-examination wherein he has categorically stated that at the end of business hours/ day the unsold gold is taken away by the owner or his representative. Further, as per the phone - tower location, Revenue found that Sh. Pankaj Kumar Singh came to the shop premises of the appellant on 14.10.2016 from the office of Sh. Amit Goel. Thus, the contention of having received the gold from Sh. Amit Goel is also corroborated by this undisputed fact. Further, I find that the subsequent change of statement of Sh. Pankaj Kumar Singh does not inspire confidence, has evidently been made in order to save his employer - Sh. Amit Goel from penal consequences. Further, the panch witness Sh. Yogesh - President of Bullion Association has also supported the contention of this appellant, that he is a broker dealing in bullion on consignment basis for brokerage. These facts are also corroborated with the Income Tax record of this appellant wherein he has declared annual income during the financial year 2014-15 to 2017-18 in the range of Rs. 3.9 to Rs. 9 lakhs. Admittedly, Sh. Amit Goel is a wealthy person of substantial means, which also support the contention of this appellant.

23. I further find substance in the submission of Id. Counsel for the appellant that investigation does not adduce any evidence to arrive at a definite conclusion, if the gold was smuggled or not. Penalty under Section 112(b) requires *mens rea* to be established i.e. conscious knowledge of the appellant that he was dealing in smuggled gold. This fact is not coming out from the evidence on record. Admittedly, it is a case of town seizure and not a seizure (or near) in customs area or in the vicinity of international border. Thus, the suspicion of Revenue that the gold is smuggled does not lead to inevitable evidence that the gold is smuggled. Admittedly, the seized gold was of 99.5% purity, whereas normally the smuggled gold is of 99.9% purity. On this score also there can be no presumption of gold being smuggled only on the basis of foreign marking. In absence of any chain of events supporting movement of smuggled gold from the border area or customs area to town or a person coming from an international border, I hold that simply possession of foreign marking gold without a bill does not lead to the conclusion that it is smuggled. It has been so held by this Tribunal in the case of **Nand Kishore Modi vs. CC (Prev.), West Bengal - 2015 (325) ELT 781 (Tri Kolkata)**. This Tribunal has held in the case of **Sanjiv Kumar & Others vs. CCE, Lucknow** vide Final Order No. 72924-72926/2018 dt. 27—(Tri. All.) that mere foreign marking on gold without any corroborative evidence is at best heresay evidence.

24. In view of my findings and observations, I hold that the confiscation of gold under the facts and circumstances is bad in absence of condition precedent, as provided under Section 111(d), (o) and (p) of the Customs Act. I hold that the appellant has not violated any of the

provisions of Section 111 as alleged. I further hold that appellant is not involved in acquiring possession of or is any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knew or has reason to believe are liable to confiscation under Section 111. Accordingly, I hold that no penalty is imposable on the appellant in the facts and circumstances under Section 112(b)(i). Accordingly, penalty imposed on this appellant is set aside.

26. Thus, the appeal is allowed with consequential benefits, in the aforementioned terms.

(Pronounced on 31.10.2022).

(Anil Choudhary)
Member (Judicial)