

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

CUSTOM Appeal No. 10233 of 2022

[Arising out of OIO-AHM-CUSTM-000-COM-015-016-21-22 dated 29/11/2021 passed by Commissioner of CUSTOMS-AHMEDABAD]

SHRI VYOMESH VINODRAI PATEL

18 Satyam Bungalows Opp Karnavati Club Satellite
Ahmedabad
Gujarat

.....Appellant

VERSUS

C.C.-AHMEDABAD

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

.....Respondent

APPEARANCE:

Shri Hardik Modh, Advocate for the Appellant

Shri. R. P Parekh, Superintendent (Authorized Representative) for the Respondent

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

FINAL ORDER NO. A / 11135 / 2022

DATE OF HEARING: 19.07.2022

DATE OF DECISION: 19.09.2022

RAMESH NAIR

This appeal is filed by the Appellant against the Order-In-Original No. AHM-CUSTM-000-COM-015-016-21-22 dated 29.11.2021 whereby the Commissioner of Customs, Ahmedabad imposed the penalty of Rs. 1,00,00,000/- under Section 112(b)(i) of the Customs Act 1962 in relation to his role in the smuggling of Gold activity.

2. The brief facts of the case as per the department is that the officers of Airport Intelligence Unit, Ahmedabad found that Shri Jignesh Savaliya working as Duty Officer, M/s Globe Ground India on 04.06.2019, to be

behaving in a suspicious manner with a passenger in the Aerobridge of Bay No.32 and found to be in possession with yellow metals. The officers conducted personal search of Shri Jignesh Savaliya whereby it was found to him carrying 9 brown packets in the presence of panchas under panchanama dtd. 04.06.2019. The officers opened the packet and found the same contained 47 gold bars. The officers seized the said gold under Seizure memo dated 04.06.2019. Statement of Shri Jignesh Savaliya was recorded wherein he stated that the said gold bars were given to him by a person named Shri Lokesh Sharma and he was supposed to hand over the same to Shri Rutugna Trivedi outside the Airport terminal. The officers further carried out the investigation and the evidences in the form of statements of persons involved in smuggling of gold, documents recovered after searches carried out at various locations, documents recovered and retrieved from the Mobile phones of various persons involved in smuggling of gold, data storage devices recovered from the residence of Ms. Nita C Parmar and also the email recovered from account of Shri Jignesh Savaliya and Shri Jitendra Rokad reveal that a Gold smuggling racket was orchestrated and operated by Shri Rutunga Trivedi, his wife Smt. Hina Rutunga Trivedi and their employee and key associate Ms. Nita C Parmar. This smuggling activity was aided by Shri Jignesh Savaliya, Asst. Duty Officer of M/s Global Ground India Pvt. Ltd., ground handling agency working at Sardar Vallabhbhai Patel International (SVPI) Airport, Ahmedabad, in as much as he received the gold from these carriers and brought them outside the airport by exiting from the cargo gates. It further emerges from the evidences that this smuggling racket was actively financed by Shri Jitendra Rokad, Mehul Bhimani, Raju Goswami, Vipul Joshi and Lalit Jain.

2.1 The smuggling of gold from Dubai to India was carried out with intent not to pay Customs Duty using the persons as carriers. Upon arrival at SVPI

Airport, Ahmedabad the gold carried by the carriers sent by Shri Rutugna Trivedi was handed over to Shri Jignesh Savaliya, either in the Aerobridge or in the ramp area of the airport. Shri Jignesh Savaliya had been concealing the gold in the dress worn by him and smuggled the same into India by exiting SVPI Airport, Ahmedabad and was handed over by him to Shri Rutugna Trivedi or the specific person sent by Shri Rutugna Trivedi and informed to Shri Jignesh Savaliya. Adopting the above modus operandi, Shri Rutugna Trivedi and his associates smuggled into India 4886.206 Kgs. Gold during the period from 07.03.2013 to 26.05.2019. The authenticity of the details of the gold smuggled into India by various carriers sent by Shri Rutugna Trivedi has also been corroborated by the travel details provided by the travel agent through whom the tickets were purchased for the carriers on the instruction of Shri Rutugna Trivedi & Ms. Nita C. Parmar and the dates of arrival of the carriers in India at SVPI Airport, Ahmedabad. The details recorded in the diary of Shri Jignesh Savaliya as well as in the We Chat messages recovered from his mobile phone were verified with the actual arrival dates of the persons as available in records of Airport and found to be correct.

2.2 With this background, show cause notices were issued proposing confiscation of the seized goods under Sections 111(d), 111(i), 111(I) and 111(m) of the Customs Act, 1962 and demanding customs duty and imposition of penalty under Section 112(a) & 112 (b) and Section 114A & Section 114AA read with Section 123 of the of the Customs Act. Appellant was also issued show cause notice whereby it was alleged that the Appellant had also given finance to Shri Rutugna Trivedi, which was used by him to procure Gold in Dubai and to smuggle the same into India. Thus it appears that Appellant was knowingly involved in smuggling of gold into India which he had reasons to believe the smuggle under Section 111 of the Customs

Act, 1062. After following due process, the adjudicating authority vide impugned order dated 29-11-2021 confirmed the charges and demands proposed in Show Cause Notice. He imposed the penalty of Rs. 1,00,00,000/- under Section 112(b)(i) of the Customs Act 1962 on the appellants. Being aggrieved, the appellants preferred appeal before this Tribunal.

3. Shri Hardik Modh, Learned Counsel appearing on behalf of Appellant submits that learned Commissioner erred in imposing penalty on Appellant. He relied upon the statements of Shri Mehul Bhimani and Shri Jitendra Rokad recorded on 28.06.2019 and 29.06.2019. Upon perusal of these statements, nowhere it has been stated that the Appellant had knowledge about the use of the fund in smuggling of gold. Shri Jitendra Rokad in his statement dated 29.06.2019 stated that after deducting expenses, surplus profit was distributed among Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi on equal ratio i.e. 33% of profit each. Shri Jitendra Rokad nowhere in his statement stated that the Appellant had knowledge of use of the fund in smuggling activity or earned any profit out of this activity.

3.1 He also submits that Shri Mehul Bhimani and Shri Jitendra Rokad retracted their statements since the same were recorded under coercive action. The said statements were retracted before the Jail Authority while both were in custody. Since their statements have been retracted, the same cannot be relied upon unless the conditions provided under Section 138B of the Customs Act have been applied with. Section 138B of the Act cast responsibility upon the Ld. Adjudicating Authority to examine the person before relying upon the statement of such witness. He placed reliance on the decision of Hon'ble Punjab and Haryana High Court in the case of M/s Jindal Drugs Pvt. Ltd. Vs. Union of India 2016 (340)ELT 67.

3.2 He further submits that Appellant's statement was recorded on 29.08.2019. Appellant had not confessed in his statement that he had knowledge about use of the funds provided to Shri Mehul Bhimani and Shri Jitendra Rokad for smuggling of gold. The Appellant had nowhere stated that this fund used by Shri Rutugna Trivedi for import of smuggling of gold. Since Shri Mehul Bhimani is cousin brother, the Appellant supported him by requesting to his friend to provide fund to Shri Mehul Bhimani under his guarantee.

3.3 He also submits that Ld. Commissioner erred in holding that the Appellant was not engaged in the business of providing finance on interest and therefore, it would not be believable that the Appellant financed to Shri Rutugna Trivedi. The stand of Ld. Commissioner is self –contradictory. In case, the Appellant has not lent money, there is no question of imposing any penalty as there is no proof of financing any amount.

3.4 He further submits that investigating authority recovered the documents from the Pen Drive seized from residential premise of Ms. Nita Parmar on 26.06.2019. One of the documents reflected name of the Appellant for paying an amount of AED 12,99,100 during the period from 1st September 2013 to 23rd October 2013. There is no other documents to show that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold in India. During the course of recording his statement, the Appellant categorically stated that Shri Mehul Bhimani required funds and therefore he requested his friend in Dubai to finance him AED 12,99,100 under his guarantee. Merely such amount had been reflected in the above document retrieved from Pen Drive of Ms. Nita Parmar, it does not mean that the

Appellant financed Shri Rutugna Trivedi or any other persons for smuggling of gold into India or had knowledge about smuggling of gold into India.

3.5 He also submits that Ld. Commissioner heavily relied upon the documents retrieved from Pen Drive seized from residential premises of Ms. Nita Parmar on 26.06.2019. Basis on such documents it is held that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold. The Appellant denied that he financed to Shri Rutugna Trivedi for smuggling of Gold. The Appellant is not concerned with the documents/ emails retrieved from Pen Drive seized from residential premises of Ms. Nita parmar. Even statements of Shri Mehul Bhimani, Shri Jitendra Rokad, Shri Rutugna Trivedi and Ms. Nita Parmar were recorded whereby they did not say that the Appellant had knowledge about smuggling of gold into India or financed them for smuggling of gold. In absence of any documentary evidence to show that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold, the impugned order imposing penalty based on the documents retrieved from third party cannot be sustained as it does not implicate the Appellant. He placed reliance on the following decisions:

- Raipur Forging Pvt. Ltd. Vs. Commissioenr of Central Excise – 2016(335) ELT 297
- Commissioner of Central Excise Vs. P.D. Industries Pvt. Ltd. – 2016(340)ELT 249

3.6 He further submits that Airport Intelligence unit did not find incriminating documents against the Appellant to show prima facie that the Appellant financed money for smuggling of gold into India. Even no evidence whatsoever was found to substantiate the finding of the Ld. Commissioner that the Appellant financed to Shri Rutugna Trivedi for smuggling of gold.

3.7 He also submits that in the absence of any charges on malafide intention in as much as not having dealt with smuggled gold, penalty under Section 112(b) cannot be sustained. He placed reliance on following decisions:

- Deepak Kumar Vs. Commissioner of Customs 2017 (358) ELT 854 (T)
- JaisukhGobarbhaiSavalia Vs. Commissioner of Customs 2019(367) ELT 290 (T)
- A V Global Corporation Pvt. Ltd. Vs. CC 2018 (363) ELT 676 (T)

The appellant also filed a written submission dated 29.08.2022 post hearing then his counsel which is taken on record.

4. Shri R P Parekh, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

5. We have carefully considered the submissions made by both sides and perused the record. The appellant has challenged the penalty imposed upon him under Section 112(b)(i) the Customs Act, 1962 which reads as under:-

"112. Penalty for improper importation of goods, etc. - Any person,-

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a

penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

From the perusal of above provision, it will be seen that for imposition of penalty on a person under Section 112(b), the following conditions must be satisfied.

(i) The person must have acquired possession of or must be in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which are liable for confiscation under Section 111 of Customs Act, 1962.

(ii) The person must have knowledge or have reason to believe that the goods acquired by him or dealt with by him in the manner as mentioned above, are liable for confiscation under Section 111 i.e. he has knowledge or has reason to believe that any one or more of the contraventions mentioned in Clause (a) to (p) of Section 111 have been committed in respect of the imported goods acquired or dealt with by him. For imposition of penalty under Section 112(b) of Customs Act, 1962, it is also necessary to prove that the person had knowledge or had reason to believe that the goods acquired or dealt with by him are liable for confiscation under Section 111.

5.1 We find that as regard the role of Appellant Ld. Commissioner in impugned order observed as under:

"The name of Noticee No.21 has appeared in the printouts of the sheets retrieved from the pen-drive seized from the residential premise of Ms. Nita Chunilal Parmar. Accordingly, the inquiry was extended to Noticee No. 21 and his statement was recorded on 15.10.2019. During the course of recording his statement, he has stated he used to lend and borrow some amount ranging between Rs. 5 to 50 Lacs with Shri Mehul Rasikbhai Bhimani and he did not have any business relations with Shri Rutugna Arvindkumar Trivedi. Regarding the data contained in the printouts where his name is appearing, he

clarified that the same pertained to transactions made by Shri Nilesh Dhakan to Shri Mehul Rasikbhai Bhimani. He further clarified that total receipts from Vyomeshbhai & Lamore of 12,99,100 AED, as shown in the entries, pertained to the amount given by Shri Nilesh Dhakan to Shri Mehul Rasikbhai Bhimani on his request/ Guarantee. The Noticee has argued that the amount was given to Shri Mehul Rasikbhai Bhimani and not to Shri Rutugna Arvindkumar Trivedi. The question as to why the said transaction of Shri Mehul Rasikbhai Bhimani is reflected in the records maintained by Ms. Nita Chunilal Parmar remains unanswered by the Noticee. Secondly, Noticee No. 21 has not specified any reason as to why he had requested Shri Nilesh Dhakan to give an amount of Rs. 12,99,100 AED to Shri Mehul Rasikbhai Bhimani and that too in cash. The allegation that the amount had been funded to Shri Rutugna Arvindkumar Trivedi is fortified by the fact that the said amount has been reflected in the records pertaining to the activity of smuggling of gold. It is also pertinent to note that Shri Mehul Rasikbhai Bhimani is also involved in financing the activity of gold smuggling. Such circumstantial evidence is a pointer that Noticee 21 had provided funds of Rs. 12,99,100 AED to Shri Rutugna Arvindkumar Trivedi.

"In the light of the above documentary evidence and discussion , I find that Noticee No. 21 has knowingly funded an amount of 12,99,100 AED (equivalent to Rs. 2 crores appx.) to Shri Rutugna Arvindkumar Trivedi in the activity of smuggling of gold. I have already come to the conclusion that such gold is covered under the category of prohibited goods and is liable for confiscation in terms of the provisions of Section 111 of the Customs Act, 1962 in my discussion at paras 119.20 to 119.20.8 hereinabove. Therefore, I find that Noticee No. 21 has concerned himself in selling or purchasing and dealing with any goods which he knew were liable to confiscation and thereby, rendered himself liable to penalty in terms of the provisions of Section 112(b)(i) of the Customs Act, 1962.

5.2 We find that role of the Appellant in the whole episode has been derived only from the printout sheet retrieved from the pen-drive seized from the residential premise of Ms. Nita Chunilal and statements of persons. Statements of said persons remained uncorroborated during the investigation. As per the department Shri Rutugna being the mastermind of the smuggling racket, however during the investigation Shri Rutugna has nowhere stated the name of Appellant as connected to his alleged activity of smuggling of gold. He nowhere stated that Appellant has funded the amount

for smuggling of gold. We have also gone through the statements of Shri Mehul Bhimani and Shri Jitendra Rokad recorded on 28.06.2019 and 29.06.2019 in impugned matter. Upon perusal of these statements we nowhere found that the Appellant had knowledge about the use of fund in smuggling of gold. The Appellant himself has not financed the fund to Mehul Bhimani but on his guarantee it was financed by Shri Nilesh Dhakan. Except this the department nowhere produce any evidences to show that Appellant was involved in smuggling gold activity. We also reproduce the relevant paras of the Appellant's statement dtd. 29.08.2019 as under: -

" Today on being specifically asked about one Shri Mehul Rasikbhai Bhimani, I state that Mehul Rasikbhai Bhimani is my real cousin brother. He is from my native village. He was earlier working with me into the construction business of my firm Satyam Developers as Sales Executive from 2006 to 2011. On being asked further about him, I state that after 2011, he started his own business of construction and then in some pharmaceuticals. After Shri Mehul Bhimani left me, we used to meet mainly on some occasions viz mostly family functions. Now on being specifically about one Shri Jitendra Rokad, I state that Jitendra Rokad is also from my native village. I know through one of my cousin brother. I know that Shri Jitendra Rokad and Mehul Rasikbhai Bhimani are partners earlier into one construction business and then into business of pharma company in the name of M/s Aprica Pharmaceuticals.

Further on being asked about my business relations with Shri Mehul Bhimani & Shri Jitendra Rokad state that I don't have any other business relations with them. However, on rare occasions, I used to lend and borrow some amount ranging between Rs. 5 to 50 Lacs.

Now, on being asked about one Shri Rutugna Arvindbhai Trivedi, I state that I know him through my cousin brother Mehulbhai and as also he was one of the member in our scheme at Sentossa Neemland, Adalaj, Gandhinagar. I further state that I have met him 1-2 times that to 5-6 years back. However, I possibly not be able to recognise him now. Further on being asked about any business relations with Shri Rutugna Arvindbhai Trivedi, I state that I don't have any business relations with him.

Now I am being shown Page No.41 of the print outs taken from Pen Drive No.3 marked as & "Imation 16GB" & under Panchnama dated 27.06.2019 and I read and understand the

contents and after putting my dated signature on the sheet I explain that the document is in the tabular form with heading "Payment Received from Partner" I find that the table has columns "Date, Description, Amount in Rs., Amount in AED, Amount in USD". And above the heading of Amount there is mention of "Mehulbhai/Jitubhai". My attention is invited to entry at dated 01.09.2013 which shows 'cash received from Vyomeshbhai' and an amount of 10,39,100 is shown under the heading Amt in AED. I am also shown another entry dated 01.09.2013 which shows 'cash received from Vyomeshbhai' wherein amount of 2,75,000 is shown under the heading amount in AED. On being asked to explain I state that one of my friend Sh Nilesh Dhakan had a firm by the name Lamore Jewels LLC in Gold & Diamond Park, Dubai. I joined with him by share purchase of about 20% in the said firm and I had arranged this amount of 10,39,100 AED for Mehulbhai at Dubai for his business through Nileshbhai at Dubai. The said amount was given by Nileshbhai to Mehul on my instruction/Guarantee. On being asked regarding the amount of 2,75,000 AED, I further state that the amount of Rs. 50 lacs was given to Mehulbhai in Ahmedabad as requested by him. I don't know how he sent to Dubai for conversion into AED. In token of having seen and explain the contents of the panchnama, I put my dated signature on the last page of the Panchnama dated 27.06.2019 & page no. 41 shown to me."

"On being asked I state that I have not earned any returns from the said amounts shown to me above till date. On being asked I state that I have not received or dealt in any Gold dealing with Shri Mehul Bhimani & Jitendra Rokad. On being further asked I state that I don't recall any other payment or transfer of funds to or from Dubai to Shri Mehul Bhimani & Jitendra Rokad."

5. 3 The above statement clearly reveals that the Appellant has not financed to Shri Rutugna Trivedi as held in the impugned order. Since Shri Mehul Bhimani required the fund, the Appellant requested his friend Shri Nilesh Dhakan, Partner of Lamore Jewels LLC which is engaged in the business of gold and diamonds at Dubai to provide such funds to Shri Mehul Bhimani on his guarantee. The Appellant did not state that he provided fund to Shri Mehul Bhimani in Dubai. The Appellant had given assurance to Partner Shri Nilesh Dhakan staying in Dubai for such payment in case Shri Mehul Bhimani failed to make such payment.

5. 4 Similarly, another entry of 75000 AED reflected in the sheet retrieved from Pen-drive recovered from residential premise of Ms. Nita Parmar, the Appellant stated that the amount of Rs. 50,00,000 was given to Shri Mehul Bhimani in Ahmedabad as requested by him. He further stated that he did not know how he sent such amount to Dubai for conversion into AED.

5.5 It is also observed that after recording the statement of the Appellant on 29.08.2019, the investigating authority did not record statement of Shri Mehul Bhimani and Shri Jitendra Rokad to ascertain the correct facts. Statements of Shri Mehul Bhimani and Shri Jitendra Rokad were recorded on 28.06.2019 and 29.06.2019. Both the above persons did not state anything in respect of fund provided by the Appellant to Shri Mehul Bhimani. Statement of both the above persons are exculpatory.

5.6 From the evidence available on record and statement of Appellant it is clear that he was in normal course arranged the lending of fund that to Shri Mehul Bhimani, however, the activity of facilitating the financing of fund has been turned by the Ld. Commissioner into participation in the conspiracy to smuggle gold which in our view is based on assumption. For imposition of penalty under Section 112(b) of the Customs Act, 1962 the knowledge with regard to the offence on the part of the person has to be established. In the present matter department failed to do so. From the statement of Appellant it is also clear that he had not confessed in his statement that he had knowledge about use of the funds provided to Shri Mehul Bhimani for smuggling of gold. The Appellant had nowhere stated that this fund used by persons for import of smuggling of gold. During the investigation officers did not find any documents/ piece of paper or any other evidence against the Appellant to show that the Appellant financed money for smuggling of gold

into India. Clearly, the Appellant did not have knowledge of use of fund financed on his pretext, if any.

5.7 In spite of this, the Department has not taken any steps to confirm with Shri Rutugna whether the Appellant was also involved with him. The evidence on record is not sufficient to hold that the appellant was involved in alleged activity of smuggling of gold. It is well settled law that the statements of the co-noticee cannot be adopted as a legal evidence to penalize the accused unless the same are corroborated with material particulars by independent evidence. The statement of co-accused cannot be relied upon, particularly when appellant has denied his involvement in respect of the goods in question. In this connection, the following judgments are relevant and they fortify the stand taken by the appellant:

- *Punam Chand Bhotrav. Collector of Customs - 1993 (63) E.L.T. 237.*
- *Jai Narain Verma v. Collector of Customs, New Delhi - 1995 (76) E.L.T. 421.*
- *Jaswinder Singh v. Collector of Customs, New Delhi - 1996 (83) E.L.T. 175.*
- *Mahabir Prasad v. Commissioner of Cus. (Prev.), I.N.B., Patna - 2000 (126) E.L.T. 803.*
- Pradeep Shah Vs. Commissioner of Customs, Patna -2006 (197) E.L.T. 301 (Tri. - Kolkata)
- Vikram Singh Dahiya Vs. Comm. Of Cus.(Export), New Delhi - 2008 (223)ELT 619 (Tri. Del.)
- Surinder Kumar Khanna Vs. Intelligence Officer, DRI- 2018(362) ELT 935 (SC)
- Habib UzZaman Vs. Commissioner of Customs, New Delhi - 2021(376) ELT 666 (Tri. Del.)

- K.K. Jain Vs. Commissioner of Customs, Kandla – 2009(235)ELT 170 (Tri. Ahmd.)

5.8 We also find that there is absolutely no evidence on record connecting the appellant with the commission of any offence in relation to the alleged gold smuggling activity. Merely because name of Appellant was appearing in printout sheet retrieved from the pen drive of Ms. Nita Parmar, that would not *ipso facto* make the appellant in any way privy to the commission of any offence with reference to the alleged gold smuggling activity. It will be unfair to fasten the appellant with penal consequences merely on the basis of a printout sheet recovered from the third party and statements of third party. The said printout at the most shows that Shri Rutugna Trivedi has borrowed money from the appellant, this is not under dispute. Now how that borrowed money was accounted for by borrower and use thereof is not relevant to the appellant. Moreover we also observed that during the investigation statements of Ms. Nita Parmar, Shri Mehul Bhimani, Shri Jitendra Rokad and Shri Rutugna Trivedi were recorded whereby they did not say that the Appellant also involved in alleged activity of gold smuggling or Appellant had knowledge about smuggling of gold into India or financed them for smuggling of gold.

From the above-reproduced section 112(b) it can be seen that penalties can be imposed only if the individual is in knowledge of the act of smuggling. Further, for imposition of penalty under Section 112(b) of the Customs Act, 1962 the knowledge on the part of the person has to be established. In the present matter department failed to do so. During the investigation officers did not find any document/ piece of paper or any other evidence against the Appellant to show that the Appellant had financed the money for smuggling of gold into India. Even if it is assumed that the appellant has arranged the

finance but appellant did not deal with alleged gold smuggling activity in question. Facts borne on record reveal that the appellant has maintained all along that it never had the possession of the impugned goods nor was in any way concerned with the carrying, removing, etc., of the consignments in question and hence, it was beyond their comprehension that the goods in question were *per se* liable for confiscation under Section 111(d) *ibid*. It is nowhere on record that the appellant, in his capacity, was knowingly involved in alleged activity of smuggling gold. Section embodies the phrase "*...which he knows or has reason to believe are liable to confiscation under Section 111...*" which is of specific importance in this situation. Revenue has nowhere ascertained as to the knowledge of the appellant whether he knew or had reason to believe that the goods in question were liable for confiscation. Undisputed peculiar facts of the case are that the appellant is neither the importer nor the owner who had acquired possession nor in any way concerned with the carrying, removing, etc., of the goods in question, and Revenue has nowhere ascribed knowledge of the appellant as to the confiscation.

5.9 Penalty under Section 112(b) can be imposed when a person acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111. It is submitted that it is not the case of the Revenue that the Noticee was indulged in any of the activities as mentioned under Section 112(b) of the Customs Act. As the Appellant did not acquire possession of or in any way concern with import of gold, penalty under Section 112(b) ought not to have been imposed.

5.10 Section 112(b) of the Customs Act is identical to earlier Rule 209A of the Central Excise Rules, 1944 and Rule 26 of Central Excise Rules, 2002. Relevant extracts of the provisions of Customs Act, 1962 Central Excise Rules, 1944 and Central Excise Rule, 2002 are reproduced hereunder:-

“Section 112 *Penalty for improper importation of goods etc.*

(a) ****

(b) *who acquires possession of or is in any way concerned in carrying removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 shall be liable –*

Rule 209A of the Central Excise Rules, 1944:

“Rule 209A. *Penalty for certain offences.* –

Any person who acquires possession of, or is any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater.”

Rule 26 of the Central Excise Rules, 2002

Rule 26 came to enacted which came in force with effect from 1st March, 2007. Rule 26 reads as under :

*“Rule 26. **Penalty for certain offences.** - (1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.*

(2) *Any person, who issues -*

(i) *an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or*

(ii) *any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules*

made thereunder like claiming of Cenvat credit under the Cenvat Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.”

The Hon'ble Bombay High Court in the case of **Commissioner of Central Excise Vs. Rakesh Kumar Rajendra Kumar & Co. – 2015 (325) ELT 506** while interpreting Rule 209A held as under:

“The sine qua non for a penalty on any person under the above rule is : either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of goods is, indisputably, a physical act i.e. the act which could not have been done without handling or movement of excisable goods as mentioned in the rule. The words “who acquires possession” would indicate that the person sought to be penalized under this rule has to first acquire the possession and then do the activity of transportation etc. as contained in the rule. It is, thus, clear that the physical possession of the goods is a must for doing the activity of transporting referred in Rule 209A. The ratio laid down by this Court in Jayantilal Thakkar & Co. (supra) covers the issue. In the said judgment, it is held that in the given situation, if the assessee is only issuing invoices wherein there is no movement of the goods, they cannot be visited with penalty under Rule 209A.”

5.11 The Larger Bench of the Tribunal in the case of **Steel Tubes of India Ltd. Vs. Commissioner of Central Excise – 2007 (216) ELT 506**, after referring to the decision of the Hon'ble Bombay High Court in the case of **Jayantilal Thakkar and Co – 2006 (195) ELT 9 (Bom.)** held that for imposition of penalty under Rule 209A of the Central Excise Rules, 1944, the person must have dealt with excisable goods with knowledge that they are liable for confiscation.

5.12 Similarly, in the case of **R.C. Jain Vs. Commissioner of Central Excise and Service Tax – 2016 (334) ELT 115**, the Hon'ble Tribunal held

that penalty under Section 112(b) of the Customs Act cannot be imposed if the assessee has not dealt with or transported goods physically in any manner.

5.13 The Tribunal in the case of **D. Ankneedu Chowdhry Vs. Commissioner of Customs – 2004 (178) ELT 578** held that “**in any other manner dealing with**” used in Section 112(b) of the Customs Act has to be read ejusdem generis with the preceding expression in the clause viz. carrying, removal or depositing etc. It is held that accordingly to the above doctrine, meaning of expression “in any other manner of dealing with” should be understood in sense similar or comparable to how preceding words viz. carrying, removing, depositing etc. are understood. In other words, “in any other manner dealing with” of the goods is also to some physical manner of dealing with the goods. In absence of the finding in the impugned order that the assessee has dealt with the goods physically or any allegation to this effect raised in the proceeding, penalty under Section 112(b) cannot be imposed.

5.14 We also find that the appellant cannot come within the ambit of Section 112(b) because appellants had never acquired possession or in any way concerned in any of the activities mentioned in the Section or any measure dealing with any goods which the appellant knew or had reason to believe are liable to confiscation. In the absence of the department having not proved the knowledge of the appellant in the activities relating to the smuggled gold, there were no grounds for imposition of penalty on him. It is now well established that *mens rea* is an important ingredient for imposing a penalty on the persons enumerated in Section 112(b) of the Customs Act. The evidence brought out by the department nowhere suggests that the

appellant was aware that the goods in question were smuggled into the India. The penalty imposed on Appellant, therefore, cannot be sustained.

6. As per our above discussion and finding, we are of the considered view that the appellant is not liable for imposition of penalty under Section 112(b) of the Customs Act, 1962. Therefore, we set aside the penalty and allow the appeal with consequential relief.

(Pronounced in the open Court on 19.09.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Palak