IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75619 of 2025

(Arising out of Order-in-Appeal No. KOL/CUS(AIRPORT)/KS/71/2025 dated 17.02.2025 passed by Commissioner of Customs (Appeals), Kolkata)

Md. Mostafa Kamal,
S/O-Atur Islam, 119, Shalakshet,
Shobhapur, Shobhapur (Part), Sepahijala,
Tripura-799131

Appellant

VERSUS

Commissioner of Customs, Kolkata
NSCBI Airport, Kolkata-700052.

Respondent

APPERANCE :
Shri Pranab Shikdar, Advocate for the Appellant
Shri S.Debnath, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO…76537…./2026..

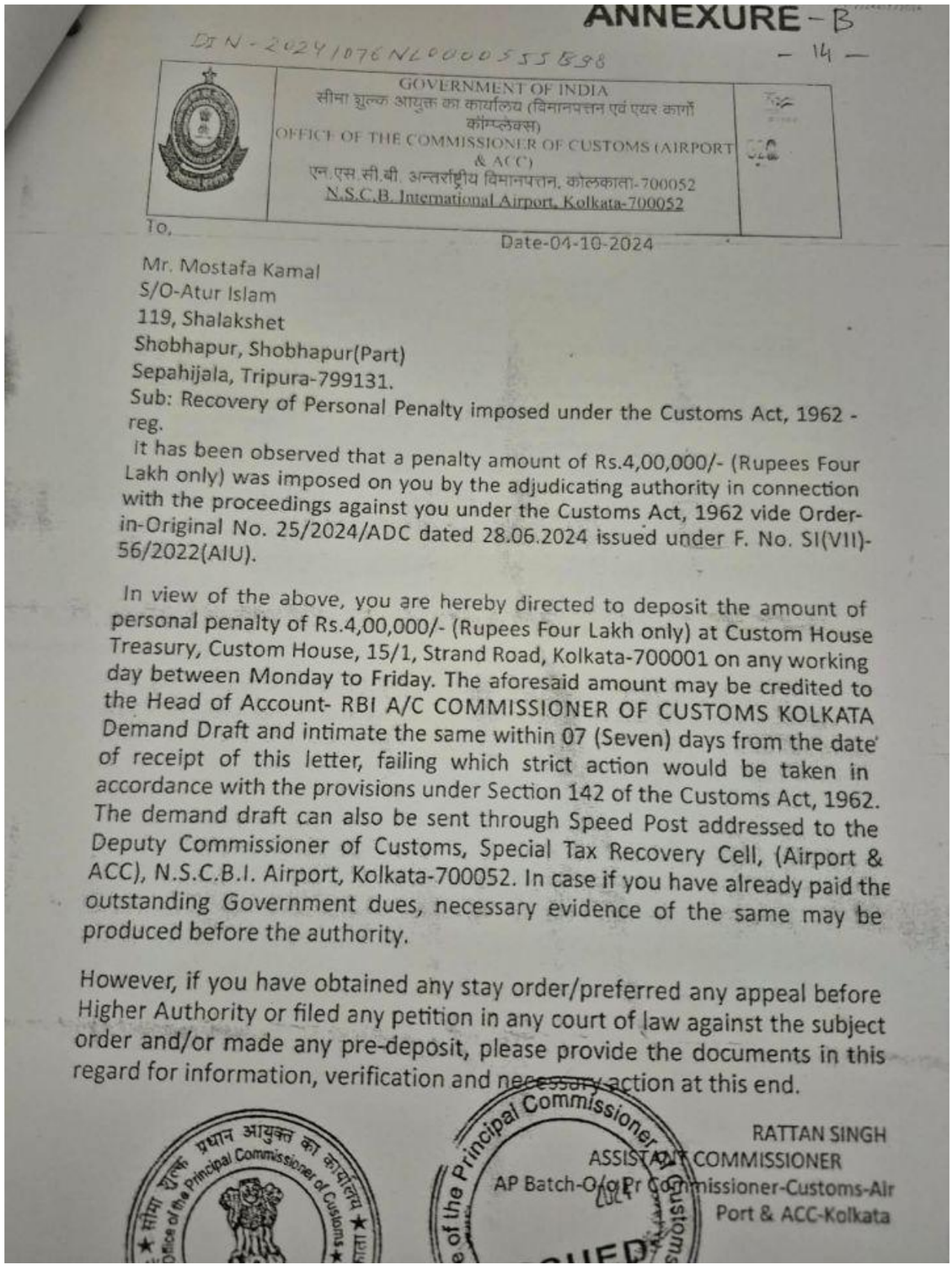
DATE OF HEARING : 08.10.2026
DATE OF DECISION :28.10.2026

Per R.Muralidhar :

On 25.07.2022 the Appellant, a resident of Sepahijala, Tripura, was travelling on a domestic sector from Kolkata to Agartala by IndiGo Flight 6E 994. At pre-embarkation security, CISF detected a gold strip in his baggage and handed him and the gold over to the Air Intelligence Unit, Customs, NSCBI Airport, and seized the gold. Vide Order-in-Original No. KOL/CUS/A&A/ADC/AIU CELL/25/2024 dated 28.06.2024 the Adjudicating Authority has (i) absolutely confiscated one gold strip weighing 255.210 gms, valued at Rs. 13,14,331/-, under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962; and (ii) imposed a penalty of Rs. 4,00,000/- upon the Appellant under Section 112(b) of the Act. Being aggrieved, the appellant filed the appeal before the Commissioner (Appeals) which came to be dismissed on the ground of delayed filing. Therefore, the appellant has filed the present appeal before the Tribunal.

2. The Ld Consultant appearing for the Appellant, first takes up the issue of dismissal of the appeal by the Commissioner. It is submitted that the OIO dated 28.06.2024 was not received by the appellant. They came to know about the same only when the penalty recovery notice dated 04.10.2024 was received by them. After that they have filed the RTI application seeking copy of the OIO. The RTI authority vide letter dated 30.10.2024, provided the copy. Thereafter the appeal was filed before the Commissioner (Appeals) on 25.11.2024. Thus the appeal was filed within the appealable period of 60 days from the date of receipt of the OIO, which happens to be 30.10.2024 in this case. The appellant produces the copies of the Penalty recovery letter and response letter received from RTI authority as evidence.

3. Since, it is important to take up this issue first so as to know as to whether the appellant has filed the appeal with a delay before the Commissioner (Appeals), I have gone through the relevant documents submitted by the appellant.



ANNEXURE - B

DIN-20241076NL0000555B98

- 14 -

GOVERNMENT OF INDIA
सीमा शुल्क आयुक्त का कार्यालय (विमानपत्तन एवं एयर कार्गो कॉम्प्लेक्स)
OFFICE OF THE COMMISSIONER OF CUSTOMS (AIRPORT & ACC)
एन.एस.सी.बी. अन्तर्राष्ट्रीय विमानपत्तन, कोलकाता-700052
N.S.C.B. International Airport, Kolkata-700052

To,

Date-04-10-2024

Mr. Mostafa Kamal
S/O-Atur Islam
119, Shalakshet
Shobhapur, Shobhapur(Part)
Sepahijala, Tripura-799131.

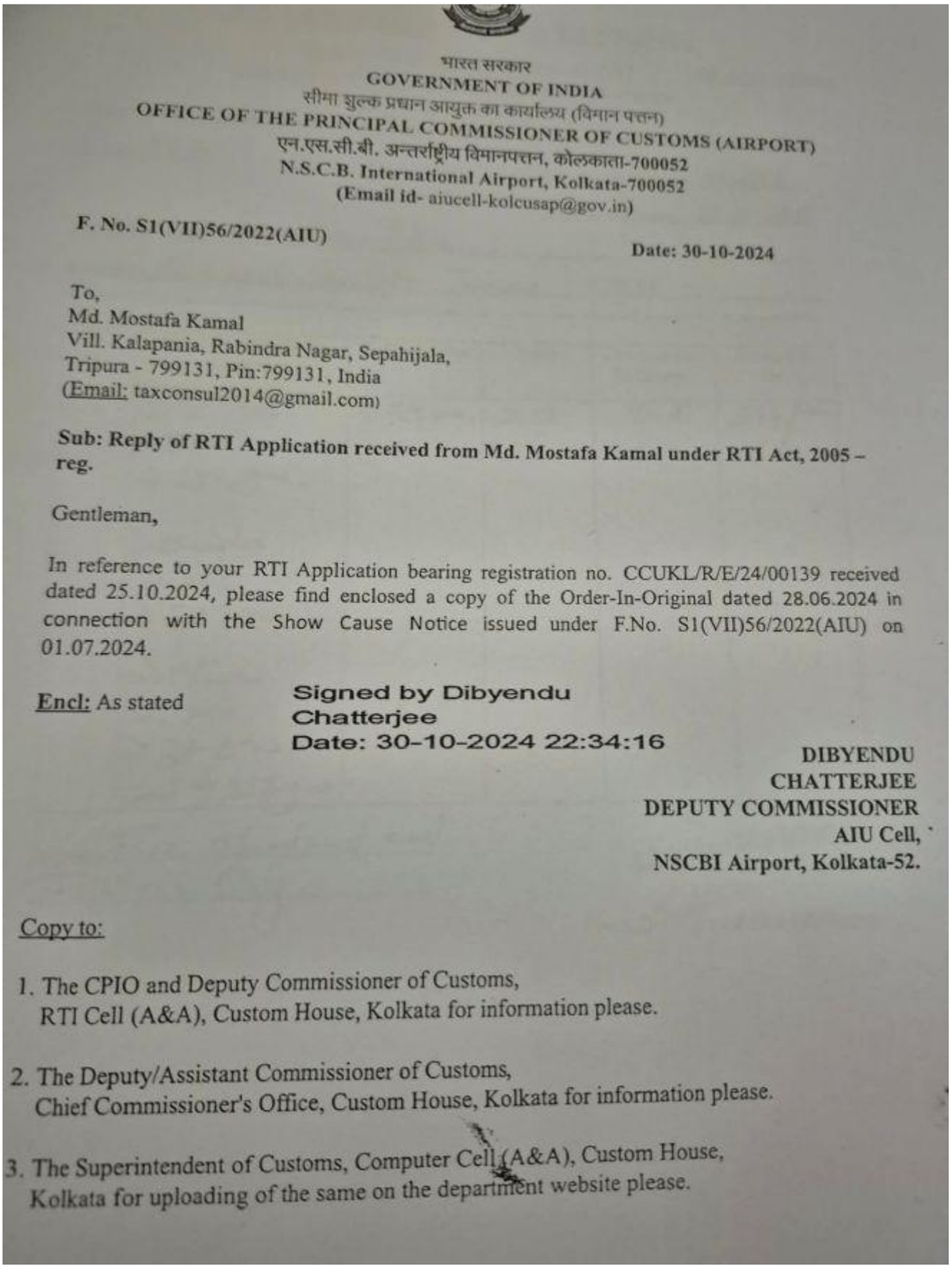
Sub: Recovery of Personal Penalty imposed under the Customs Act, 1962 - reg.

It has been observed that a penalty amount of Rs.4,00,000/- (Rupees Four Lakh only) was imposed on you by the adjudicating authority in connection with the proceedings against you under the Customs Act, 1962 vide Order-in-Original No. 25/2024/ADC dated 28.06.2024 issued under F. No. SI(VII)-56/2022(AIU).

In view of the above, you are hereby directed to deposit the amount of personal penalty of Rs.4,00,000/- (Rupees Four Lakh only) at Custom House Treasury, Custom House, 15/1, Strand Road, Kolkata-700001 on any working day between Monday to Friday. The aforesaid amount may be credited to the Head of Account- RBI A/C COMMISSIONER OF CUSTOMS KOLKATA Demand Draft and intimate the same within 07 (Seven) days from the date of receipt of this letter, failing which strict action would be taken in accordance with the provisions under Section 142 of the Customs Act, 1962. The demand draft can also be sent through Speed Post addressed to the Deputy Commissioner of Customs, Special Tax Recovery Cell, (Airport & ACC), N.S.C.B.I. Airport, Kolkata-700052. In case if you have already paid the outstanding Government dues, necessary evidence of the same may be produced before the authority.

However, if you have obtained any stay order/preferred any appeal before Higher Authority or filed any petition in any court of law against the subject order and/or made any pre-deposit, please provide the documents in this regard for information, verification and necessary action at this end.

RATTAN SINGH
ASSISTANT COMMISSIONER
AP Batch-O/o Pr Commissioner-Customs-Air Port & ACC-Kolkata



भारत सरकार
GOVERNMENT OF INDIA
सीमा शुल्क प्रधान आयुक्त का कार्यालय (विमान पत्तन)
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS (AIRPORT)
एन.एस.सी.बी. अन्तर्राष्ट्रीय विमानपत्तन, कोलकाता-700052
N.S.C.B. International Airport, Kolkata-700052
(Email id- aiucell-kolcusap@gov.in)

F. No. S1(VII)56/2022(AIU)

Date: 30-10-2024

To,
Md. Mostafa Kamal
Vill. Kalapania, Rabindra Nagar, Sepahijala,
Tripura - 799131, Pin:799131, India
(Email: taxconsul2014@gmail.com)

Sub: Reply of RTI Application received from Md. Mostafa Kamal under RTI Act, 2005 – reg.

Gentleman,

In reference to your RTI Application bearing registration no. CCUKL/R/E/24/00139 received dated 25.10.2024, please find enclosed a copy of the Order-In-Original dated 28.06.2024 in connection with the Show Cause Notice issued under F.No. S1(VII)56/2022(AIU) on 01.07.2024.

Encl: As stated

Signed by Dibyendu Chatterjee
Date: 30-10-2024 22:34:16

DIBYENDU CHATTERJEE
DEPUTY COMMISSIONER
AIU Cell,
NSCBI Airport, Kolkata-52.

Copy to:

1. The CPIO and Deputy Commissioner of Customs, RTI Cell (A&A), Custom House, Kolkata for information please.
2. The Deputy/Assistant Commissioner of Customs, Chief Commissioner's Office, Custom House, Kolkata for information please.
3. The Superintendent of Customs, Computer Cell (A&A), Custom House, Kolkata for uploading of the same on the department website please.

4. When these documents are considered together, it is seen that the appellant has sought the details through RTI application. Subsequently

the authority has issued the copy of the OIO on 30.10.2024. The Revenue has not come out with any other evidence to the effect that the OIO was indeed served on the appellant. Therefore, I hold that the appeal before the Commissioner (Appeals) was filed on time. Hence, his dismissal of the appeal is erroneous.

5. The Ld Consultant pleads that since it is more than 18 months from the date on which the OIA was passed and the appellant is suffering financial loss, the appeal may be taken up for disposal at Tribunal stage itself, since the factual details can be proved by him. He relies on the case law of ***Maya Devi v. Smt. Raj Kumari Batra*****,** Civil Appeal No. 10249 of 2003, where the Supreme Court held that whether to remand is within the discretion of the appellate court and depends, inter alia, upon the nature of the dispute, the evidence available and whether remand would result in avoidable prolongation of litigation. The Court expressly observed that remands are ordinarily to be avoided where they would prolong the litigation

6. After going through the factual details, with the consent of both the sides, I have taken up the appeal for disposal.

7. The Ld Consultant makes the following submissions:

8. On 25.07.2022 the Appellant, a resident of Sepahijala, Tripura, was travelling on a domestic sector from Kolkata to Agartala by IndiGo Flight 6E 994. At pre-embarkation security, CISF detected a gold strip in his baggage and handed him and the gold over to the Air Intelligence Unit, Customs, NSCBI Airport, which seized the gold. The seizure inventory records only that the article was '*believed to be gold'*; it records no belief that the gold was of foreign origin. The gold strip bears no foreign marking and was made by melting old family ornaments, to be pledged for a gold loan at Agartala.

9. The statement dated 25/26.07.2022, in which the Appellant, a semi-educated person, disowned the gold under threat of arrest, was

retracted by letter dated 28.07.2022 sent by Speed Post and e-mail to the Additional Commissioner of Customs (Airport), Kolkata (Annexure F). This fact is acknowledged in Para 7 of the SCN

10. In the appeal the following questions arise:

(a) whether the seizure under Section 110(1) was founded on any '*reason to believe'*;

(b) whether the burden under Section 123 shifts to the Appellant in a domestic seizure of unmarked gold, where foreign origin is neither alleged nor proved;

(c) whether absolute confiscation and penalty can rest on a retracted statement; and

(d) whether the Appellant's inability to appear can be held against him when it arose from the Department's own default.

(e) Whether the confiscation of the seized gold under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962, is legally justified, given that the seizure occurred in a town and involved unmarked gold.

(f) Whether the imposition of a penalty under Section 112(b) of the Customs Act, 1962, was legally warranted.

11. In the absence of any proof that the Gold was of foreign origin, it was apparent that the CISF /Customs Authorities did not have requisite '*reason to believe'* that the said gold was smuggled and, therefore, exercise of power under section 110 (1) of the Customs Act, 1962, was wrongful in violation of the fundamental rights of the Petitioner.

12. It is necessary to form some belief before affecting the seizure, which is absent. The custom officials have conducted the seizure on mere suspicion or in the absence of belief. It is a condition precedent for the proper officer to form an opinion on some reasonable grounds. It is only to check the arbitrary powers of the custom officer; thus, seizure is illegal.

13. The mere finding of gold in the liberalized economy does not render it liable for seizure unless there is cogent and positive evidence proving its foreign origin as the first condition, as precursor to seizure . The Hon'ble Supreme Court, in **Gian Chand v. State of Punjab (1962 AIR 496)**, has categorically held that mere suspicion is not sufficient to justify seizure, and the prosecution must provide substantive evidence of foreign origin. Similarly, in **Union of India v. Mahesh Raj (1990 SCC (3) 115)**, the Hon'ble Supreme Court ruled that the burden under Section 123 arises only if there is prima facie evidence indicating foreign origin, which is entirely absent in this case. Furthermore, in **D. Bhoormull (1974 AIR 859)**, the Hon'ble Supreme Court emphasized that suspicion alone is not a substitute for evidence. In **Umrao Lal v. Commissioner of Customs (2016 (331) ELT 216 (Tri.-Del.))**, it was explicitly held that in the absence of markings or material evidence proving foreign origin, confiscation is not sustainable.

14. In view of the above submissions, the appellant prays that the OIO may be set aside and the present appeal may be allowed.

15. The Ld AR submits that at the time checking by the CISF personnel at the Airport, the appellant could not produce any licit documents towards the gold carried by him. Even at the time of Adjudication order, no documents were produced by him. Therefore, he justifies the confiscation of the gold the penalty imposed on the appellant.

16. I find that admittedly, the appellant was travelling from Kolkata to Agartala and not the other way round. It is also specified in the SCN

that the gold was carried in the bag. There is nothing to the effect the gold strip was being carried in a concealed way.

17. The gold strip weighing 255.210 grams did not have any foreign marking. Even the strip of this weighment is not the one which is associated with foreign gold with 99.9 percent purity. The purity as per the quality check done by the Customs also shows the same as 99.7 percent as recorded in the SCN

18. This seizure taking place in Kolkata airport is in the nature of town seizure. The initial statement recorded by him on 25.07.2022 has been retracted by him on 28.07.2022, wherein he has stated that the initial statement was given out of fear during the interrogation and actually the gold strip is his family property. This fact is also recorded in the SCN.

19. The Kolkata Tribunal, in the case of **Commissioner of Customs, Patna** *Vs* **Lalit Krishna Agrawa,** in Customs Appeal No.75499 of 2022 vide Final Order No.77506/2023 dated 08.11.2023, has held as under:

> *6. In fact, during the course of investigation, it is a fact on record that boondi silver and silver jewellary were recovered from the shop of the respondent. So, the question arises that in the absence of any seizure of Port or Airport or not having any foreign markings on the goods seized from the respondent, how the officers came to the conclusion that the goods are third country origin goods. Therefore, first, onus on the Revenue is to make a reasonable belief that the goods are of third country. Admittedly, no such evidence has been produced by the Revenue to allege that to make a reasonable belief, thegoods are of third country origin. In the absence of that, the goods in question cannot be confiscated.*

20. The Hon'ble High Court Of Judicature At Patna in **Om Sai Trading Company Versus Union Of India, 2020 (372) E.L.T. 542 (Pat.) affirmed by the Hon'ble Supreme Court 2022 (382) E.L.T. 9 (S.C.)** has held as under:

> ***18.*** *The consignor and the consignee are recorded and are identified. The goods are not seized at any notified custom zone or area. Save and except for what is recorded in the seizure memo, there is no other material available on record. The Learned Additional Solicitor General has tried to supplement the reasons for formation of 'reason to believe', which also are on mere suspicion, through the affidavit of the authority. In the light of what is laid down by the Apex Court in Mohinder Singh Gill and Another v. The Chief Election Commissioner, New Delhi and Others, AIR 1978 SC 851, it would be impermissible for the authority to do so. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise, for a bad order, with the passage of time, and supplementing the reasons would become good, which is not how the authorities are required to function, more so, in a case of confiscatory legislation. But assuming hypothetically, accepting the reasons furnished by the officer, even then it is nothing more than a mere suspicion. A general practice in trade cannot be, ipso facto, applied and adopted to the instant case, for unless it is shown that the act and the conduct of the petitioner makes him to be a part and parcel of the trading community, based in the area or dealing with the illegal activities of such like nature. There is no track record of past history of the instant petitioners.*
>
> ***20.*** *While dealing with the same very provision, Rohinton Fali Nariman J., in Tata Chemicals Limited v. Commissioner of Customs (Preventive), Jamnagar, (2015) 11 SCC 628 = 2015 (320) E.L.T. 45 (S.C.), has explained the meaning of "reason to believe" by opining it to be not the subjective satisfaction of the officer concerned, for "such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law" and that such belief must be that of an honest and reasonable person based upon reasonable grounds. Further, if the authority would be acting without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open for the Court to examine the same, though sufficiency of the reasons for the belief cannot be investigated.*

24. *While dealing with the expression 'reason to believe' in relation to another confiscatory statute, i.e. Narcotic Drugs and Psychotropic Substances Act, 1985, S.B. Sinha J., in Aslam Mohammad Merchant v. Competent Authority and Others, (2008) 14 SCC 186, opined that proper application of mind on the part of the competent authority is imperative prior to issuance of a show cause notice, intending to confiscate the goods. Also there has to be some material leading to formation of some opinion or reason to believe for such action cannot be taken on mere ipse dixit and roving enquiry is not contemplated in law. Further "It is now a trite law that whenever a statute provides for "reason to believe", either the reasons should appear on the face of the notice or they must be available on the materials which had been placed before him."*

37. *Perusing the impugned judgment, we find the Single Judge to have heavily relied upon the contents of the affidavit filed by the Revenue, wherein it stood averred that "the Areca Nuts of Indian origin are normally oval in shape" and it is this which made the Customs Officer forms a reasonable belief that cut dried Areca Nuts were illegally smuggled into India. As we have already observed that supplementation of reasons is impermissible in law, more so in the attending facts.*

43. *Who were those "customs officers" who informed the seized nuts not to be of Indian origin, as recorded in the Panchnama, is embedded only in the mind of the officer and despite a period of 10 months, has not surfaced on the record. In any were they experts in the field, judging the Areca Nuts not to be of Indian origin by visual inspection? Fact, not known to anyone. Mere suspicion cannot be a reason sufficient enough to derive such a conclusion forming a belief 'for reason to believe'.*

49. *We find no reason to take a contrary view, more so, when the goods in question are yet raw, as an unfinished product, meant to be transported to another State for it to be processed and packaged, whereafter, only, eventually sold in an open market and if the goods are actually unsafe food then it is not the provision of the Customs Act which can be invoked, for not falling within its purview.*

50. *Thus, in view of our aforesaid discussions, we set aside the judgment dated 5-9-2019 passed in CWJC No. 10109 of 2019 titled as M/s. Om Sai Trading Company & Anr. v. The Union of India & Ors. by a Learned Single Judge of this Court and allow the writ petitioners' prayer of quashing the seizure memo dated 6th of February, 2019, as also all consequential actions seizing the goods and*

vehicle in question, for such action to be without any basis having no mandate of law.

21. The Kolkata Tribunal in **Daleep Kumar Verma proprietor of M/s. Shreeji Traders and Manufacturers** Customs Appeal No.75315 of 2022 has held as under:

18.xxxxxxxxxxxxThere is no evidence on record to show that the goods were smuggled into India from Myanmar. It is only an assumption of DRI that the gold bars of foreign origin were smuggled into India and later converted into gold bangles, without any supporting evidence. There is no evidence other than the statements of the Co Noticees, which were also retracted later. In view of the above, they contended that the gold bangles and silver bar, not having any foreign markings were not liable for confiscation. They have relied upon many decisions to support their argument. We find the following case laws squarely covers the case on hand.

18.2 The Tribunal in the cases of :-

(i) Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking – other than statement of passenger no other proof produced by Revenue to substantiate claim that jewellery was smuggled into India.

(ii) Commissioner of Customs (Prev), Shillong Vs. Manisha Devi Jain [2019 (370) ELT 401 (T) held that Indian origin remelted gold/gold ornaments could not be legally confiscated as its possession not prohibited under any provisions of law.

18.3 We find merit in the argument of the Appellants. The gold bangles seized from Indigo airlines, does not have any foreign markings. They were claimed by Mr Karan Sehdev of KSTE that they have sent the raw gold for job work to M/S STM, Imphal.

19.1 The next ground raised by the Appellant is regarding Burden of Proof as envisaged under Section 123 of Customs Act,1962 . As per this section, the burden of proving that the goods are not smuggled, lies on

the person fromwhose possession the goods were seized. For the sake of easy reference, the said section 123 is reproduced below:

19.3 We find that Section 123 applies inter-alia to gold/silver bullion seized on the reasonable belief that they are smuggled goods . The burden of proving that they are not smuggled goods shall be on the person, who claims to be the owner of the goods so seized or from whose possession the goods are seized. The contention of the Department is that in the instant case, the onus of proving that the gold biscuit/bars and the Silver bar were not of smuggled in nature, lies on Shri Rohit Kumar Suri and Shri Harshit Gakhar from whose possession the impugned goods were seized. The Department contended that both Shri Rohit Kumar Suri and Shri Harshit Gakhar did not produce any document for their lawful possession of the recovered gold and silver bar. They themselves admitted that the seized gold has actually been smuggled into India from Myanmar without any legal documents in biscuit form and they have melted and made it in strip form in the guise of crude ornament (bangles).

19.4. The contention of the Appellant is that the gold bangles and silver bar were not of foreign origin. Section 123 of Customs Act is applicable only to foreign marked gold and silver. Since, there is no foreign mark available on the gold bangles and silver bars seized from the Appellants, the provisions of section 123 is not applicable in this case

21.1 The next ground raised by the Appellants is that the Appellant Rohit Kumar Suri and the Noticee Harshit Gatkhar have retracted their satements and hence the Department cannot rely on the retracted statements to prove that the gold were of foreign origin.They also stated that the retracted statements does not have higher evidentiary value than facts on record .In support of their contention they relied upon the decision of the Tribunal :

(i) Triveny Spinning Mills (P) Ltd. & Ors Vs. CCE, Ludhiana [206 (201) ELT 220 (T), wherein it has been held that Confessional statement recorded under section 14 of Central Excise Act, 1944 cannot get higher evidentiary value than contemporaneous records.

(iii) In the case of Shabnam Synthetics Vs. CCE [2006 (202) ELT 379 (Tri.-Mum), it has been held that documentary evidence to be preferred over statements. (iii) In the case of Market Chase Advertising Vs. CCE [2008 10) STR 598 (T)], it has been held that reply to show cause notice supported by documentary evidence to be preferred viz-a-viz statement given under section 14 of CEA.

21.2 We find that the Impugned Order mainly relied upon the statements o fRohit Kumar Suri and the Harshit Gatkhar to establish the foreign origin nature of the gold. Other than the statements, there is no other evidence available on record to show that the gold were smuggled into the country from Myanmar. The silver bar is of Indian origin. It is incorrect to rely only on the statements of the co-accused without any corroboration, to prove the smuggled nature of the gold. It 20 Customs Appeal Nos.75315, 75342 & 75343 of 2022 is a settled law that the statement of the co-accused cannot be relied without any independent corroboration.

21.4 The Tribunal in the cases of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking – other than statement of passenger no other proof produced by Revenue to substantiate the claim that jewellery were smuggled into India.

21.5 In view of the above discussion and relying upon the the decisions cited above, we hold that the gold and silver bar cannot be confiscated based on the retracted statements alone.

22. Tribunal Hyderabad, case of **Balanagu Naga Venkata Raghavendra vs CC Vijayawada 2021 (378) ELT 493 (Tri-Hyd),** where in it has been held that:

12. *The assertion of the appellants is that Revenue has not discharged its onus and therefore had no reasonable belief that the gold was smuggled gold. In none of the statements has anyone admitted or even suggested that the gold was smuggled. Investigations conducted by the Department as detailed in the show cause notice also do not show that the gold was smuggled. There were no foreign marks on the gold to indicate that it was*

foreign gold. On the other hand, Learned D.R. relies on the judgment of the Hon'ble High Court of Kerala in the case of Shri Om Prakash Khatri (supra) to assert that whether the gold appears and pieces are found to be of 99.9% purity even unmarked gold seized by the Customs Authorities is sufficient to constitute reasonable belief that the gold is smuggled.

15. *In view of the above, we find that the officers of the Department had no reasonable belief that the gold was smuggled and therefore they have not discharged their responsibility of forming reasonable belief under Section 123 without which the burden of proof will not shift to the person from whom the gold is seized. The impugned order and show cause notice suffer from this infirmity and therefore the confiscation as well as the penalties need to be set aside.*

23. The factual details emerging in the present case is as under:

(a) The gold in strip form was seize at Kolkata port, when it was being carried to Agartala. In fact, the destination station being nearer to the Bangladesh Border, is known for such activities.

(b) The appellant did not conceal the gold, but was simply carrying the same in the hand luggage.

(c) The seized gold did not have any foreign marking

(d) The size and quantity of the gold is not that of any standard 24K gold

(e) The purity ascertained by the Revenue is to the extent of 99.7 percent

(f) The case is more or less built entirely on the statement given at the time seizure, which was retracted subsequently within the next few days.

24. These facts read with the case laws cited supra, would lead to the conclusion that the Revenue has not been able to discharge their obligation to prove the gold to be of foreign origin in terms of Section 123 of the Customs Act 1962.

25. This is a case wherein a domestic passenger is carrying the gold strip from Kolkata to Agartala can note be equated with an international passenger making a baggage declaration under Section 77. Consequently, the essential statutory ingredients of Sections 111(l) and 111(m) are found to be absent.

26. I find that the ratio laid down in the decisions cited supra, is squarely applicable.

27. Hence, I set aside the impugned Order in Original. Consequently, the absolute confiscation stands set aside along with the Penalty imposed on the appellant.

28. The appeal stands allowed. The appellant would be eligible for consequential relief, if any, as per law.

(Pronounced in the open court on 28.10.2026)

(R.Muralidhar)
Member (Judicial)

RG