

Rasilaben H. Rathod Vs. Commr. of Cus. (Prev.)

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-30-2005

Judge : T Anjaneyulu, S Sekhon, T

Appellant : Rasilaben H. Rathod

Respondent : Commr. of Cus. (Prev.)

Judgement :

1.1. The bunch of appeals have been filed against an order of Commissioner of Customs (Prev.), Gujarat, Ahmedabad dated 28.2.2001 ordering the confiscation under Section 111(d) of Customs Act, 1962, of 500 Gold Bars bearing Foreign Companies marks and imposed penalties under Section 112 of Customs Act, 1962 as follows:(1) Shri Vijaya Dasrathbhai Patel Proprietor Rs. 50,00,000/- of M/s. Paras Bullion, Ahmedabad.

(Rupees fifty lakhs only)(2) Shri Shailesh Ratilal Patel Proprietor Rs. 50,00,000/- of M/s. S.K Jewellers, Ahmedabad (Rupees fifty lakhs only)(3) Shri Devang Amrutlal Patel Rs. 50,000/- Proprietor of M/s. Patel Bullion, Ahmedabad (Rupees fifty thousand only)(4) Shri Natubhai Babubhai Patel Rs. 5,000/- (Rupees five thousand only)(5) Shri Jashwant Kanjibhai Patel Rs. 5,000/- (Rupees five thousand only)(6) Shri Arvindhvai Kantilal Patel Rs. 5,000/- (Rupees five thousand only)(7) Shri Bhikhabhai Tulsibhai Patel Rs. 5,000/- (Rupees five thousand only)(8) Smt. Rasilaben Harshadbhai Rathod Rs. 5,000/- (Rupees five thousand only)(9) Shri Satishbhai Amrutlal Patel Rs. 5,000/- (Rupees five thousand only) 2.1 After hearing both sides and considering the material on record it is found: (a)

Officers of Crime Branch of the Ahmedabad Police pursuant to an information stopped 8 persons, in two groups, a Lakudi Talao crossing Ahmedabad at about 8 pm on 23.10.1999. On interrogation and verification, after this interception, and these persons disclosing that they were carrying gold, the police officers searched them and found 551 Foreign Brand marled gold bars of 10 tolas (hereinafter referred to TT bars) to be with them as detailed below: (i) Shri Shaileshbai Ratilal Patel, -100 TT bars kept in 4 plastic packets each of 25 bars having the marking "AGGOR HEARES" which was kept in a bag being carried by him.

(ii) Shri Arvindbai Kantibai Patel - From his black sport shoes of "Action" brand worn, 27 TT bars from one and 28 from another were recovered from the soles of the black shoes, which were having mark "AGGOR HEARES".

(iii) Shri Jaswantbai Kanitibai Patel - 25 T.T. bars from each shoe found wearing hidden in the sole were recovered. 9 were having the mark Johnson, 9 "PAMP SUISSSE" and 32 "Armored".

(iv) Shri Nattubhai Brijlal Soni - 25 and 26 TT bars were recovered from sole of his shoes bearing the brand U.B.S. (v) Vijaybhai Dashratilal Patel - 90 TT bars from a small green bag carried by him, having the marks, "Credit Suisse".

(vi) Bhikhabhai tulsibhai Patel - 27 and 28 T.T. bars from each shoes sole bearing the mark "Credit Suisse".

(vii) Nattubhai @ Nitinbhai Bababhai Patel - 27 and 28 T.T. bars from each shoes bearing the mark "Credit Suisse".

(viii) Smt. Rasilaben Rathod - 95 TT bars from band under her attire tied, which was rectangular in shape with a chain in the center with two strips of slots stitched in which two TT bars could be filled total 95 TT bars or so "Agor" brand were which she was found wearing.

(ix) Nandu Vrijlal Soni - 25 TT bar from one shoe and 26 from the other shoe of U.B.S. mark were found.

(b) An invoice of M/s. Amarpali Industries, (Bullion Divn) bearing No. G4277/99, dated 23.10.99 issued in the name of M/s. S.K. Jewellers, Ashram Road, Ahmedabad was produced by Nattubhai Vrijlal Soni, and the TT bars found with him were returned back to said Nandubai Vrijlal Soni in the original conditions in the presence of panch, Shri Shaileshbai Patel and Sub-Inspector Shri Desai. The other TT bars were seized by the Customs Officer as it appears from the panchanama dated 29.10.1999 drawn by the Customs Officer under the reasonable belief, that the other T.T. bars seized, were imported into India without paying import duty since the persons from whose possession they were seized could not produce any paper, documents or challan about the payment of Customs Duty as recorded in this panchanama.

(c) At the time of the said seizure by the Customs Officer, all these persons and the gold, were at the premises belonging to M/s.

S.K. Jewellers situated at 13-B, Jeewandeep Building, where the said persons from whom the gold was recovered were taken by the police officers after intercepting them at Lakudi Talao crossing, Ahmedabad. These persons and the gold was admittedly under the police guard from 23.10.99 when the police intercepted these persons up to the final panchanama drawn by the Customs officers on 29.10.99.

(d) Shri Vijay D. Patel, Proprietor of M/s. Paras Bullion, Ahmedabad and Shri Shailesh Patel, Proprietor of M/s. S.K. Jeweller another Bullion, dealer of Ahmedabad have owned up the 500 bars seized, on 29.10.99 (300 TT bars by Shri Shailesh Patel and 200 by Shri Vijay D. Patel). Shri Shailesh Patel had claimed the total 351 TT bars (300 seized and 51 returned to Shri Nandubhai Brijlal Soni by the Customs officers) and Shri Vijay D. Patel had claimed 200 TT bars seized on 29.10.99 and also had disclosed to the officers on 23/24.10.1999 that these 300 bars claimed by Shailesh were sold by Vijay to Shailesh.

(e) The Customs Officers started their enquiry in the early hours of 24.10.99 by reaching Jeevandeep building premises after receipt of information from the police. In the statements recorded on 24.10.1999.

(i) Shn Vijay D. Patel, disclosed that, he is the proprietor of M/s.

Paras Bullion and he is purchasing the imported FM Gold from M/s.

Riddhi Siddhi Bullion Ltd., M/s. K.L. Chokshi and M/s. Amarpali Industries Ltd. who are authorised dealers of FM gold. He further stated that he is neither directly importing FM Gold nor he is purchasing FM gold from any Bank. He said that 200 pieces of 'Credit Suisse' marking found from him and his two employees namely, Bhikabhai D. Patel, Nathubhai D. Patel are purchased by him from M/s. Riddhi Siddhi Bullion Ltd., Ahmedabad (hereinafter referred as 'RBL') at about 19:00 hrs. on 23.10.99 and Shri Dineshbhai of RBL had given the delivery at his premises. At that time of delivery Shri Dineshbhai had given him Xerox copy of the delivery challan dated 23.10.99. He produced a Xerox copy of the delivery challan issued by ABN Amro Bank in the name of M/s. RBL. He further said that he had sold 300 pieces of FM Gold to Shri Shailesh R. Patel, Proprietor of S.K. Jewellers. He further said out of 300 FM Gold bars he had purchased 130 FM GB of UBS marking from M/s. K.L. Choksi on 22.10.99 and rest of assorted markings from different parties.

(ii) Shri Shailesh R. Patel, stated that he had purchased 102 foreign marked gold Biscuits of UBS Branch from M/s. Amarpali Industries Ltd. He produced bill for 51 pieces of Gold Biscuits of UBS Branch recovered from the shoes of Arvindbhai K. Patel. He further stated that he had purchased 300 pieces of foreign mark Gold Biscuits of assorted marking from M/s. Paras Bullion on 23-10-99 but no bill was issued to him. He also said that he had not made any payment for this purchase. Enquiries were thereafter made by the officers on 1-3-2000, a show cause notice was issued to the above-said persons (other than Nattubhai Vrijlal Soni) and to M/s.

S.K. Jewellers, M/s. Paras Jewellers, M/s. Patel Bullion and Shri Devang Amritlal Patel, Proprietor of M/s. Patel Bullion and one Shri Satishbai Amritlal Patel, as to why; (i) 500 FM gold TT bars total weighing 58,320 Kgs. valued at Rs. 2,70,000,00 (Two crores seventy lakh) seized under panchanama dated 28/29-10-99 should not be confiscated under the provisions of Section 111(a), 111(b), 111(d) and 111(o) of the Customs Act, 1962.

(ii) Duty at tariff rate should not be charged from them under Section 28 of the Customs Act, 1962.

(iii) Interest should not be charged from them under provisions of Section 28AB of Customs Act, 1962.

(iv) Penalty should not be imposed on each of them under the provisions of Section 112(a)/112(b)/114A of the Customs Act, 1962.

(v) The articles shown against each in Annexure-D used for concealing the FM Gold TT bars should not be confiscated under Section 118 of the Customs Act, 1962.

The Commissioner ordered the confiscation of the 500 TT marked gold, the waist band, shoes and imposed penalty as recorded hereinabove.

(f) Since M/s. S.K. Jewellers, M/s. Paras Bullion, and M/s. Patel Bullion, were found to be Proprietary firms and penalty was arrived at and imposed on the proprietor of these firms vide the order impugned therefore the Commissioner held the same to be good for the proprietary concern and he refrained from imposing separate penalty upon the proprietors the said firms are not in appeal.

(g) It is an admitted fact that Smt. Rasilaben Rathod and S/Shri Arvindbai Kantibai Patel and Shri Jaswant K. Patel, are trusted persons, employees/carriers for TT bars for Shri Shailesh R. Patel, Proprietor M/s. S.K. Jewellers and Shri Bhikhabhai Tulsibhai Patel and Nattubai @ Nitinbai B. Patel, were engaged in similar occupation with Shri Vijaybai B. Patel, M/s. Paras Bullion and they have been found to have rendered themselves liable to a penalty under Section 112 of the Customs Act, 1962, by the Commissioner on the grounds: 48. ...It is observed that none of the aforementioned five persons namely, S/Shri Arvind Kantilal Patel, Jaswant Kanjibhai Patel, Smt.

Rasilaben H. Rathod, S/Shri Bhikhabhai Tulsibhai Patel and Natubhai alias Nitinbhai Babubhai Patel had demanded any documents in support of illicit import/acquisition of the aforementioned gold biscuits received by them from S/Shri Shailesh R. Patel, Proprietor of M/s.

S.K. Jewellers and Vijay D. Patel, Proprietor of M/s. Paras Bullion, while receiving the aforementioned gold biscuits from them. Further, on their own admission it is established beyond doubt that the aforementioned gold biscuits of foreign mark were transported by all of them by way of concealment in their shoes and other body parts, which itself indicates that they have adopted the age-old well practiced popular modus operandi adopted by smugglers of foreign gold. No man of ordinary prudence will transport legally imported/acquired foreign marked gold bars in the way the aforementioned Noticees have been found to be doing. The facts and circumstances of the recovery of foreign marked gold bars which were concealed in their shoes and other body part of the aforementioned Noticees is a positive circumstantial evidence to suggest that the gold was illegally acquired and hence it was transported in a surreptitious and clandestine manner generally adopted by smugglers.

In this way, the aforementioned five Noticees have abetted S/Shri Shailesh R. Patel, Proprietor of M/s. S.K. Jewellers and Vijay D. Patel, Proprietor of M/s. Paras Bullion in committing contravention of the provisions of the Foreign Trade (Development and Regulation) Act, 1992 as enumerated in the SCN dated 1.3.2001 issued to them, and thereby all of the aforementioned five Noticees, i.e. Noticee Nos. 3, 4, 5, 6 and 7 have rendered themselves liable to penalty as provided under Section 112 of the Customs Act 1962.

The above reasons and the findings arrived by the Commissioner, over-looks, a fact, that one Nandubai V. Soni was also found carrying 51 TT bars, concealed in the shoes he was wearing, in a similar manner. He was not even issued the show cause notice, nor the gold found concealed and carried by him seized. It was returned on production of a bill of M/s. Amarpali of Ahmedabad even though it was not in his name. This Nandubai was intercepted by the police, along with the other persons on the same errand on the same date i.e. at about 8 pm on 23.10.1999. The possession of gold by this person was obtained in a similar fashion from the Bullion dealers, as in other cases. The said bullion dealers were carrying TT bars with them and accompanying these carriers. From these facts it is evident that the carriage of the TT bars concealed in the shoes was not a modus operandi adopted to transport concealed smuggled gold, as arrived at by the Commissioner in the

findings as extracted hereinabove. Transportation of gold, packed in a similar manner, of almost same quantities, in the shoe soles, appears to be a normal fashion of transporting gold bars, by carriers in the bullion market, irrespective of the fact, whether they have bills/vouchers or they do not have the same. The panchanama dated 29.10.1999 records the production of a bill of M/s. Amarpali by Nandubai. The claim of this gold carried by Nandubhai was made to the police officers as well as the Customs officers on 23/24.10.99 by one of the bullion dealers. These persons were intercepted on 23.10.1999 interrogated and thereafter the gold was kept in custody along with the persons till 29.10.1999 under police guard. Therefore it cannot be concluded that Nandubhai was exclusively and separately carrying the bill of M/s. Amarpali or whether the bullion dealer was carrying the same. The persons other than Shaileshbai and Vijay Patel are carriers of TT bars employed, in the errand, for safe transportation of the TT bars by the bullion dealers who were accompanying them.

Therefore there was no reason for these carriers to have sought for or insisted upon bills/vouchers for the gold which they were carrying when the dealers (their masters) were accompany the carriers themselves carrying such gold. Since the claimant (master/dealer) was accompanying the employees, there was no reason for them to seek from the master, in the normal course, evidence of duty paid nature of gold, to be carried separately by them. The bullion dealers on 23.10.1999 and 29.10.1999 themselves claimed and explained and produced photocopies of ABN Amro Dank Sale and other documents. Therefore, there was no reason to believe that gold covered by the ABN Amro Bank document was not duty paid. The other persons were not even carrying the gold concealed in shoes but had it in a cloth bag. Rasilaben was found, carrying it in a belt, tied to her waist. How else would a female carrier wearing the Indian attire carry such large quantity 95 bars, (950 tolas about 10 Kgs) of gold securely when she has no pockets or shoes proved to be worn by her? A waist belt, under the attire, appears to be a logical answer. Therefore, we cannot uphold the imposition of penalty, on these carriers of and in for the reasons arrived by the Id. Commissioner, more so when in the year 1999, availability of foreign marked gold, legally imported, would be within the knowledge of these carriers of the bullion market Ahmedabad and the fact that M/s. S.K. Jewellers and M/s. Paras Bullion were dealing in foreign

marked gold and this was not only the day/trip/errand they had embarked upon. We therefore find these trusted person/carriers/employees to be innocent carriers of TT bars, indulging in the normal course of their trade/profession to be carrying the same from the Bullion dealers premises in Ahmedabad to a safe destination as per the requirement of the Bullion dealers, in the normal course of their profession. They are not found to have dealt with TT bars, knowingly that the said bars were non-duty paid and therefore liable to confiscation. They cannot be held liable to penalty as held by the Commissioner. Penalty on these trusted persons/employees/carriers is therefore to be set aside and their appeal allowed.

(h) As regards Shri Satishbai A. Patel, the Commissioner has found that while working as an accountant of M/s. S.K. Jewellers he has been preparing the bills for the said firm and as admitted that Shri Devang A. Patel had given him Bill No. 11931, dated 23.10.1999 on behalf of M/s. Paras Bullion issued in favour of M/s. S.K. Jewellers and the said bill was kept with him and recovered from his possession during the search of his residential premises. His further statement that he does Accounting work for M/s. S.K. Jewellers was aware of this. After recording this in para 47 the Id. Commissioner finds ...I find from the bill books of M/s. S.K. Jewellers that no details in regard to the identity marks of the gold TT bars have been shown in the bills issued by M/s. S.K. Jewellers as mentioned above. Thus I find that Shri Satishbhai A. Patel has abetted Shri Shailesh R. Patel, in contravention of the various provisions of the Customs Act, 1962 and other allied acts/rules as enumerated in the aforesaid SCN dated 1.3.2000 and thereby he had rendered himself liable to a penalty under Section 112 of the Customs Act, 1962.

We cannot uphold these reasons, as arrived at by the Commissioner, to bring in Shri Satishbai A. Patel under the ambit of Customs Act, Section 112 penalty since no contravention of the Customs Act, 1962 could be found in not mentioning the identity marks on bills. The Commissioner has relied upon the Chartered Accountant Audit Manual Instructions, on accurate prescriptions on invoices and recordings thereon. Therefore, since the bills/delivery challans/ vouchers prepared by the noticees were not having serial numbers the said documents were found to

be not credible; thereafter he has concluded that the Bill Nos. 11930 and 931 showed to have been issued on 23.10.1999 were infact prepared on 24.10.1999 as per the directive of Shri Devang A. Patel after having been informed about the foreign marked gold/bars by police and the entries in the sales register was false. Therefore, he held that M/s. Paras Bullion had not maintained the correct stock books in respect of foreign gold bars purchased by them or sold. The findings, as it appears, from para 42 do not impugn the records of M/s. S.K. Jewellers in clear terms. Therefore the imposition of penalty on Satishbai A. Patel Accountant of M/s.

SSK Jewellers, as arrived at cannot be upheld. The proven practice of sales in this market would lead us to find nothing amiss in invoices being written/prepared, with or without brand marks, subsequent to sales and deliveries. The penalty as arrived on this appellant is to be set aside and his appeal allowed.

(i) As regards the reasons to arrive at a penalty on Devang A. Patel, Proprietor of M/s. Patel Bullion, the Commissioner records in para 46 of the order as follows: 46. It may be mentioned here that consequent upon the recovery of gold by Police from the said Shri Vijay D. Patel and Shri Shailesh R. Patel along with the aforementioned persons, Shri Devang A. Patel had tried to get the bills prepared for the 500 gold, biscuits of foreign markings recovered from the abovementioned Noticees by Police on 23.10.1999 as is evident form his own statement dated 7.12.99 and the statement dated 6.12.99 of Shri Ashwinbhai I. Patel just to legalise, as an afterthought, the sale/purchase of the aforementioned 500 gold biscuits of foreign mark placed under seizure on 28/29.10.99. Further, Shri Devangbhai Patel has claimed the ownership of the 200 pcs of 'CREDIT SUISSE' mark gold TT bars seized from Shri Vijay D. Patel vide his statement dated 6.11.99. He has further stated therein that on 23.10.99 they had prepared packets of the aforesaid 200 gold TT bars and that they had kept 90 pcs of gold bars in waist cotton belt and rest of the gold TT bars were packed in inner sole of shoes. He has fabricated the 2 bills i.e. Bill Nos. 11930 and 11931 both dated 23.10.99 shown to have been issued by M/s. Paras Bullion in favour of M/s. Patel Bullion and S.K. Jewellers respectively by getting them prepared by Shri Ashwinbhai I. Patel, his material nephew, on 24.10.99 consequent upon the recovery of gold biscuits of foreign markings from Shri Vijay D. Patel by Police as is evident from

the statement of Shri Ashwinbhai I. Patel recorded under Section 108 of the Customs Act, 1962 on 6.12.99. Further, the facts stated by him in his statement dated 6.11.99 claiming the ownership of the aforementioned 200 gold bars of foreign markings are quite far from truth because of the fact that Shri Vijay D. Patel Proprietor of M/s. Paras Bullion from whom the gold biscuits of foreign markings in question had been recovered by Police on 23.10.99 and were subsequently seized on 28/29.10.99 has categorically stated in his statement recorded under Section 108 of the Customs Act, 1962 on 28.10.99 that 90 gold biscuits recovered by Police from him and 110 gold biscuits recovered from the shoes of both his employees by police on 23.10.99 belonged to him only. Further, the two employees of Shri Vijay D. Patel, Proprietor of M/s. Paras Bullion, Ahmedabad, namely Shri Bhikhabhai Tulsibhai Patel and Shri Natubhai alias Nitinbhai Babubhai have categorically admitted in their statements recorded under Section 108 of the Customs Act, 1962 on 28.10.99 that the ownership of 110 gold biscuits concealed in their shoes belonged to Shri Vijay D. Patel, the owner of their Company namely M/s. Paras Bullion and that they have been serving in M/s. Paras Bullion, Ahmedabad. In view of the foregoing facts, it is established, beyond doubt that the ownership of 200 gold biscuits of foreign markings, i.e. 'CREDIT SUISSE' brand recovered by Police on 23.10.99 and subsequently seized by the Customs officers on 28/29.10.99 belonged to Shri Vijay D. Patel, Proprietor of M/s. Paras Bullion. Thus it is seen that Shri Devang A. Patel, Noticee No. 8 has committed the offence in contravention of the provisions of Foreign Trade (Development and Regulation) Act, 1992 and Customs Act, 1962 as enumerated in the SCN dated 1.3.2000 issued to them and thereby he has rendered himself liable to penalty under Section 112 of the Customs Act, 1962.

On considering the reasons, as arrived at for imposition of penalty on Devang Patel, we cannot find the backing of law or facts to uphold the same. On the ground that Devang A. Patel has made attempts to produce documents for the 200 gold XT bars and the reliance on the statements of Vijay D. Patel dated 23-10-99 and his employees to conclude that the ownership of the 200 bars rested with Mr. Vijay Patel of M/s. Paras Bullion and that he said gold was not delivered to M/s. Devang A. Patel, as claimed and therefore an offence under the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962, as the

cause to arrived at to penalty on Devang Patel is not upheld. Even assuming that a false claim was made by Devang in a proceeding under the Customs Act, 1962, such an effort cannot result in confiscation of the goods per se. For producing forged/fabricated false documents in a proceeding under the Customs Act, 1962 may call for a prosecution under Section 132 of the Customs Act, 1962, it cannot be a reason to arrive at a penalty under Section 112 of the Customs Act, 1962. In any case, invoices prepared subsequent to Sale/delivery and payment thereafter appears and is demonstrated to be a norm in the market by the Id. Sd Advocate for the appellants. Therefore we cannot uphold the penalty arrived at by the Id. Commissioner on Devang Patel. The same is required to be set aside and his appeal allowed.

(j) After interception by the police, a fax copy of a delivery challan dt. 23.10.1999 issued by ABN Amro Bank, Ahmedabad in respesct of 250 gold TT bars, which was with Vijay D. Patel of M/s.

Paras Bullion, was shown to the Police Officers and thereafter to the Customs Officers. The said challan had been issued in favour of RBL Ahmedabad by the bank. Shri Vijay D. Patel, had stated that 200 XT bars were part of 250 TT bars purchased by him from RBL. This was confirmed by Shri Dinesh Jain Director of RBL on 24.10.99 itself to the Customs investigators. Shri Jain not only confirmed the said sale/delivery but also informed that he had sold the said 250 TT bars which were purchased by RBL from ABN Amro Bank and confirmed the correctness of the said delivery challans. During the course of investigation it appears ABN Amro bank vide letter dated 12.11.99 addressed to Assistant Commissioner of Customs confirmed that the gold bars sold and delivered by them to RBL were of "CREDIT SUISSE" mark. The Commissioner had ordered confiscation on the grounds that such gold bars were found to be having "CREDIT SUISSE" mark but no such markings appeared on the invoice or delivery challans issued by RBL. From the document prepared by ABN Amro Bank and the other documents on record it is apparent that marks are not indicated on the document of sales/delivery of TT bars in the normal course of sale/delivery transactions in Ahmedabad bullion market. No orders or statutory stipulations, have been shown to us which prescribe the invoices/delivery challans of TT bars to show foreign

marks. There is no provision under the Customs Act for duty paid documents to accompany TT bars at all time. TT bars can be freely traded after import as per the EXIM policy without any such prescription of mention of marks. The Commissioner not only has rejected this vital piece of documentary evidence of M/s. ABN Amro Bank which were with the investigators and thus before him but has also concluded that the documents produced in defence was not credible and in para 45 has concluded as follows: 45. In view of the above facts and circumstances, I am fully convinced that the seized 500 foreign marked gold T.T. bars weighing 58.320 kgs valued at Rs. 2,70,00,000/- were imported into India in contravention of the provisions of Foreign Trade (Development and Regulation) Act, 1992 and Baggage Rules, 1998 framed under Section 79 of the Customs Act, 1962. The restrictions imposed under Foreign Trade (Development and Regulation) Act, 1992 are deemed to have been imposed under Section 11 of the Customs Act, 1962. Gold can be imported into India through the following routes: (i) by passenger (as per provisions of Notification No. 171/94, as amended).

(ii) By MMTC Ltd, the Handicraft and Handloom Export Corporation, State Trading Corporation, PEC Ltd. or any other agency authorised by RBI as per provisions of Notification No. 117/94, as amended.

I find from the records that the Noticees have not produced any evidence to prove that the gold biscuits of foreign mark under seizure were imported through any one of the three routes described above and the Customs duty leviable on the gold was actually paid.

In absence of the adequate cogent evidence in support of the licit import/acquisition of the aforementioned gold biscuits of foreign mark under seizure and payment of necessary Customs duty leviable thereon, I hold that all the aforementioned 500 gold biscuits of foreign mark were brought into India through ports/places other than those notified under Section 7 of the Customs Act, 1962 and they have been illegally imported by the concerned persons without any valid import licence. Consequently, it is held that the aforementioned seized 500 gold bars of foreign mark are of smuggled nature and the Noticees have failed to discharge the burden of proof under the provisions of Section 123 of the Customs

Act, 1962. The seized 500 gold TT bars of foreign mark are, therefore liable to confiscation under Section 111(d) of the Customs Act, 1962 and all the noticees are also liable to penal action under the provisions of Section 112 of the Customs Act, 1962.

It is observed that the main persons who were the owners of the gold are Shri Vijay D. Patel, Proprietor of M/s. Paras Bullion and Shri Shailesh R. Patel, Proprietor of M/s. S.K. Jewellers and therefore, they deserve to be penalised heavily, whereas the other 6 persons are merely servants/employees or minions who worked on the dictates of these two persons and therefore, they deserve to be imposed a mere token penalty.

This finding of the Commissioner cannot be upheld since the Appellant has produced documentary evidence of having purchased/procured the 200 bars from RBL who in turn have got the same from M/s. ABN Amro Bank, Ahmedabad, the importers of TT bars at Ahmedabad, one of the permissible route as per the findings of the Commissioner. In any case the Commissioner and the department do not reject the letter dated 12.11.99 of ABN Amro Bank certifying "CREDIT SUISSE" TT bars to RBL nor does the Commissioner find RBL to have given forged/fabricated delivery challan/invoices to the appellants, ABN Amro Bank or RBL or M/s. K.L. Choksi or/and M/s. Amarpali Industries were thus not held liable to penalty as he found liability in case of Shri Devang Patel of M/s. Patel Bullion to be.

Once the documents produced by ABN Amro Bank or RBL or M/s. K.L.

Choksi or/and M/s. Amarpali Industries are not being questioned on their credibility the TT bars supplied by them cannot be found to be non-duty paid or/and cleared from an unauthorised port without payment of duty and thus liable to confiscation under Section 111D of the Customs Act, 1962. The Commissioner has positively rejected credible documents on flimsy grounds of a xerox copy not being legible etc. The order of confiscation of the 500 bars of gold can be set aside only on this ground.

(k) It was further submitted on behalf of the Appellant by the Id. Counsel, Shri Sanjanwala, that since no Notice is issued of M/s.

K.L. Choksi, M/s. Amarpali and M/s. Ridhisidhi Bullion who had purchased the gold from authorised dealers (Banks in this case) and admitted having sold the same to the Applicant, the show cause notice against the Applicants cannot be sustained. Since the obligation to pay the import duty, if any, is on the importers and not on the subsequent purchasers. The other submission is since adjudicating authority has dropped the charges under Sections 111(a), 111(b) and 111(d) cannot be sustained. Section 111(d) is concerned with the Prohibited Goods and the gold is no longer a prohibited item. We find force in this submission to not uphold orders of confiscation under Section 111(d) and thereafter consequent penalties under Section 112 of the Customs Act 1962 from all the Appellants herein.

(l) The Appellant submitted that they had discharged the burden cast on them, if at all, as was required, by producing all documents, bills and accounts regarding the gold justifying that the gold was validly imported and that they had purchased the same from the Authorised dealers. Shri Sanjanwala pleaded that he has given all the details regarding the same in his two written submissions made by him. The details of 351 gold bars has been explained as under: NAME VOUCHER NO. & DATE NO. OF GOLD BARS SOLD TO WHOM MARKINGS Naresh K. 90 f.m. gold M/s. Paras SUISEE Choksi st- bars 163 f.m. gold bars bullon....

JOHNSON Natement 201 f.m. gold bars M/s. S.K. MATHE-Under Jewellers ARGORYashwant G/4371/99 54 f.m. gold M/s. S. K. K.UBSBhai A dated 22-10-99 bars 51 f.m.

Jewellers Brand (ii) The 300 gold bars sold by M/s. Paras Bullion to Appellant under Bill No. 119431 dt. 23.10.99 were the balance of gold bars purchased by him from two gold dealers M/s. K.L. Choksi and M/s. Amarpali Industries Ltd. as under: NAME GOLD BRAND QTY. SOLD BILL NO /DT QTY SOLD PG.OF Choksi to 81 21-10-99 81 10M/s. Paras V-B Bullion 11M/s.

ARGOR 200 G/3983/99/ 81 V-CAmarpali dated 9-9-99 12Ind. ltd.M/s. K.L.

JOHNSON 119 5960 dated 9 V-D-13Choksi to MATHEW 22-10-99M/s. ParasM/s. Amra- PAMP 370 G/4135/99 9 V-E-14pali Ind.

dated 16-9-99Ltd. to M/s.

(iii) Dealer-wise the gold acquired by M/s. Paras Bullion and sold to M/s. S.K Jewellers as under:
Name of No of gold bars No. of gold bars No of bal No. ofgold
Dealer acquired sold to others gold bars gold bars sold to M/sM/s. K.L. Choksi 320
110 210 210M/s. Amrapali Ind.

570 480 90 90Ltd. These transactions are covered by Sale Bills and have been confirmed under Section 108 of the Customs Act, 1962 by Shri Naresh K. Choksi Proprietor of M/s. K.L. Choksi in his statement dated 24.10.99 and by Shri Yashwantbhai A. Thakkar, Managing Director of M/s. Amarpali Industries Ltd. Branch-wise gold in balance sold by M/s. Paras Bullion to M/s. S.K. Jewellers and found in search Customs from the Appellant and his employees.Brand Balance sold by M/s. Paras Bullion As per the Customs to M/s. S.K. Jewellers Panchanama ARGOR 282 282PAMP SUISEEJOHNSON 9 9MATHEW 9 9 (iv) These tallies in toto with the Police Panchanama dated 23.10.99 and Customs Panchanama dated 28/29.10.99. All the 300 gold bars have thus been tallied brand-wise piece by piece.

(All the above mentioned Sale Receipts are part of the Show Cause Notice and appear Sr. No. 26 to 30 of Annexurc-A to the Show Cause Notice-PB/118).

(v) The statement of Shri Naresh K. Choksi Prop. of M/s. K.L. Choksi recorded under Section 108 and reproduced at Addl. PB/25 is as under: As called upon by you under your summons, I produced herewith the following commercial bills for purchase of legally imported, gold, and bullion (silver) and sales bills of sale of gold and silver as under: Shri Naresh A. Choksi of M/s. K.L. Choksi has further given details of sale of goods to M/s. Paras Bullion in the same statement as under:
S.No. Particulars Weight kg Rate Rs. Total amount Rs. Remarks
1 B/No. 5936/ 13916.00 556.00 6672000 120GB2 116.640 B/No. 13880.160 55685.00
6626515 9 GB3 Pc wt. 116.640 9447.840 54850.00 4442850 81GB Shri Naresh K.C. Choksi of M/s. K.L. Choksi has further informed that he received payments by

cheque from M/s. Paras Bullion, the details of which are as mentioned below :
(Addl. P.B./27)Sl. No.Bill No. & date Amt. to be Payment done by Difference
collected M/s. Paras Bullion1 5826/16/10/99 5098500 5000000 (-)985002
5877/18/10/99 2497000 2500000 30003 5936/21/10/99 6672000 6600000 (-
)720004 5960/22/10/99 6625515 7000000 3734855 5981/23/10/99 4442850
4400000 (-)42850 Naresh K. Choksi of M/s. K.L. Choksi has further stated that he
sold following foreign mark gold biscuits to M/s. Paras Bullion: (Addl. P B/27) (vii)
The Customs officers who were investigating the case were satisfied about the
legal purchase of gold by M/s. K.L. Chokshi and M/s.Amarpali Industries Ltd. And
legal sale thereof to M/s. Paras Bullion did not issue any notice to them.

These submissions have force and discharge the burden of the TT Bars to be duty
paid and not smuggled, if the same is cast on the appellants. On 25.10.99, the
police had also called the Income tax Department at 13B, Jeevan Deep Building,
Narayan Pura, Ahmedabad who started their investigation independently, Shri
Sanjanwala Id. Sr.

Advocate, relied upon the order passed by the CIT (A), Ahmedabad dated 24th
Sept., 2002 in support of their arguments and maintain that all the documents
which are produced before the Income tax Authority also. On close scrutiny of the
said documents, Income tax Appellate Authority has clearly come to the
conclusion that the gold bars completely tally and the accounts produced were
genuine. The appellants pleaded that full support should be derived from the Order
of Income tax, Commissioner (Appeals) in which after due consideration of the
accounts books and the material facts about acquisition and payment for the gold
transacted by M/s. S.K. Jewellers and also separately in the case of M/s. Paras
Bullion, it was established and held that gold TT bars were procured/taken by and
on a system known as Jhangad system and payments were effected to the seller
by the noticees only after selling the same. It was pointed out that there is ample
proof to support the 'Jhangad' system from the document of 51 gold TT bars found
from Shri Nandubhai Vrijlal Soni which was not even seized on 29.10.1999; for the
said bars claimed by Shri Shailesh Patel, payment to Shri Amarpali was effected
only on 1.11.99 by cheque which is reflected in the ledger account of M/s. S.K.
Jewellers and M/s. Amarpali. It was emphasised before us that no adverse

inference could therefore be drawn for non-payment for the 500 bars under dispute seizure and confiscation in this case as was contended by the Id. DR and the department before us. We agree with the same. In this view of the matter we do not consider anything to be amiss in payments for the 500 bars not having been effected. Sale of goods can be on deferred payment. Such a practice, has been established in the case of gold TT bars by the Appellants. An established practice in the trade, cannot be ignored by the authorities under the Customs Act, 1962.

The accounts maintained by the two dealers have been found by the Income tax authorities, to be proper and genuine cannot be ignored.

(m) The Revenue's contention is that the adjudication order is legal and proper and the written and oral contentions raised, that the accounts have been subsequently manipulated and since no payments have been made for the gold in question should be held to be smuggled. In view of the practice as shown by the Id. Sr. Counsel, for procurement of gold, we cannot uphold the gold to be of smuggled nature only because there is no proof of payment of the same to the said suppliers Viz. M/s. RBL, M/s. Amarpali, M/s. K.L. Choksi and M/s. Paras Bullion.

(n) On a perusal of the order of the Income tax Commissioner, and on finding that they have clearly held that the entire transaction of acquisition of all gold bars were legal and accounted for, and there is nothing doubtful about the said transaction, we do not find any justification for holding a contrary view. Income tax Officers, are, in the course of their dealing with Account books maintenance, better-equipped to arrive at the quality and accuracy of account books, maintained and about manipulations therein. The findings of the Id. Commissioner (Customs) that entries have been manipulated in the books of M/s. Paras Bullion are only on the assumption based on so many entries could not be effected within the time period, as deduced by him. When in the present case, sales could be effected during the course of the day, and it is admitted by the Accountant that the entries are not made as and when each transaction takes place, but are made in a consolidated fashion, subsequent to the transactions, on a given day; there is no statutory

requirement of the entries to be made in account books and thereafter effect sales/delivery as is the case under the Central Excise Act, 1944 procedures which mandates to make entries in the RG-1, PLA register and other books and thereafter effect delivery. Then the Commissioner (Customs) appears to be led by the concept of stock ledger account maintenance under the Central Excise Law, where it has been statutorily provided to enter even the time of removal to arrive at finding of manipulated accounts. No such statutory provision of an entry in stock ledger book before delivery is applicable to a bullion dealer in the year 1999 for TT bars. The mind set under former Gold (Control) Act and Central Excise Act entertained by the Officers of the Department, has led to a conclusion to doubt the account books. We do not share the doubts of Commissioner (Customs) and mind set. We would rely on the Income-tax Commissioner (Appeals), concurrent findings, on the same account books to arrive and find nothing amiss or and/any entry manipulated in the books herein.

(o) We have carefully considered the written as well as oral submissions made by both sides and have perused lower authority's order confiscating the gold in question and imposing the penalty on the appellants. Commissioner has dropped the proceedings insofar as Section 111(a), 111(b) and 111(o) of the Customs Act, 1962 are concerned. We find it a bit strange that when the charge of illegal importation and prohibition in terms of Section 111(o) has been set aside, it is indeed inexplicable that charge under Section 111(d) thereof which also deals with import of goods into India contrary to any prohibition etc. should have been upheld. (p) The Id. DR for revenue vehemently argued that seizure of gold in question was under the provision of Customs Act backed by the reasonable belief being an essential ingredient thereof and hence the burden in terms of Section 123 of Customs Act, 1962, is on the persons from whose possession the gold was seized. It was submitted that the Ahmedabad Police had only 'detained' the gold in question while simultaneously intimating the Customs Authorities as it was Foreign Marked Gold. It was only in order to keep custody of gold safely, as also the persons carrying it, they were kept under Police "Dekhrek". In this regard, we note that eight person in question were stopped by the police on 23.10.99 when they were walking alongside one of roads of Ahmedabad and it was not in dispute that all eight of them were taken to the office of M/s. S.K. Jewellers nearby, where

they had remained till 29.10.99 under police guard.

Why they were not taken to a Police Station? Explanation is not forth coming. Normally Police would take a person detained on a suspicion to a Police Station for safety/security and/or place them in a Police Lock up. It is also not in dispute that the Police Officers were present throughout in the office of S.K. Jewellers with Lady Constables. In other words, the said 8 persons were free to move themselves of their own will nor they were not free to deal with the gold in question, in a manner they would like to. It is therefore difficult for us to believe, that after their interception by Police, on prior information, the said 8 persons remained voluntarily along with the gold at the office of M/s. S.K. Jewellers under a Police guard during the period 23.10.99 to 29.10.99. No Police guard has ever been proved to have been sought by M/s. S.K. Jewellers or others, for these office premises of theirs anytime in the past or subsequent to 23.10.99. Why should a guard be placed if goods/person are not under detention? The panchanama therefore drawn by the Customs Officers is under the supervision of the police officer and the entire 'panchanama' is a suspect document. While the Appellants want to rely on the rulings in case of Gianchand v. State of Punjab , the Id. DR is strongly contesting the application of the said ruling and relies on various case law of this Tribunal and of other higher courts. Since we are arriving at our findings that the entire 551 gold TT bars which were found by the police on 23-10-99 stand accounted for in the books of Bullion dealers and have been claimed by M/s. Paras Bullion and M/s. S.K. Jewellers, to be duty paid gold, acquired by them in the normal course of their business, and the said gold was been transported along with the assistances of their trusted person/employees/carriers in Ahmedabad, at the close of the business hours on 23.10.1999 for delivery and safe keeping elsewhere, we find that the onus, even if cast on the notices, to prove the gold to be smuggled stands discharged. We therefore do not propose to arrive at any findings regarding the ruling in case of Gianchand v. State of Punjab to favour the noticee or Revenue.

(q) Commissioner has confiscated 200 gold pieces of Credit Suisse marks claimed by Vijay D. Patel on the ground that on 11.11.99 Vijay D. Patel had produced three vouchers i.e. 5677 dated 18.10.99 for 44 pieces of Johnson Methew, 5960 dated

22.10.99 for 119 piece of Johnson Mathew and 5936 dated 21.10.99 for 120 pieces of Argor Brand. He held that when the gold found from Shri Vijay D. Patel was of Credit Suisse markings, the voucher produced are of some other brands. If we see the facts of the case, this is not true. This also is not the case of the appellants. We find that on 23.10.99 Vijay D. Patel had claimed that these 200 pieces of bars which he had purchased from RBL and that Shri Dinesh C. Jain of RBL given the delivery of the same to him at their premises at about 1830 pm. It was never the claim of Vijay D. Patel that these 200 pieces of bars are covered under the above referred bills. Therefore the confiscation of the 200 FM gold bars is apparently uncalled for on the facts on record.

(r) Shri Vijay D. Patel had claimed that he had sold 300 gold bars to Shri Shailesh R. Patel on 23.10.99. He had further claimed that out of these 300 FM gold bars, 120 GM gold bars of Argor brand were purchased by him from M/s. K.L. Choksi and balance were from his stock. The stock register maintained by him, which was taken over by the department from the residence office, Accountant Shri Satish Patel shows that there was a opening stock of 472 Pcs. On 23-10-1999 and had purchased 531 pcs. From M/s. RBL and M/s. K.L. Choksi on 23.10.99. Further, in their statements recorded on 24.10.1999 itself, everybody i.e Dinesh C. Jain of RBL, Shri Naresh K. Choksi of M/s. K.L. Choksi and Shri Yeshwant A. Thakkar of Amarpali Ltd., not only admitted having sold the gold to the appellants but also provided documentary evidence of having purchased the gold from Banks. By not issuing any Show Cause Notice to those persons, we find that the Revenue agrees and were fully satisfied that the gold was legally acquired by them and supplied to the appellants. There is thus absence of evidence, statement or material even leading any suspicion that the gold is smuggled. We are not in a position to disagree with this position and arrive at any reason to uphold the confiscation as arrived. Confiscation is to be set aside.

(s) When 500 bars' confiscation is not upheld, there can be no confiscation of shoes, waist belt etc. and penalty being called for.

(t) When no confiscation is being upheld, the penalties are not called for.

2.2 We come to conclusion that the Appellants had fully accounted for the gold and other articles under seizure and therefore no justification for confiscation and imposition of penalty on any or all of the noticees. We therefore have to accept the appeal and set aside the order impugned.

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