

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
CHENNAI**

REGIONAL BENCH – COURT NO. I

**Customs Miscellaneous [Stay] Application No. 40090 of 2020**  
(on behalf of Appellant)

**In**

**Customs Appeal No. 40244 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**The Commissioner of Customs**

Chennai-III Commissionerate,  
No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Appellant**

**VERSUS**

**Shri M.S. Alaudeen,**

No. 13/39, K.M.P. Koil Street,  
Ayanavaram, Chennai – 600 023

**: Respondent**

**WITH**

**Customs Miscellaneous [Stay] Application No. 40091 of 2020**  
(on behalf of Appellant)

**In**

**Customs Appeal No. 40245 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**The Commissioner of Customs**

Chennai-III Commissionerate,  
No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Appellant**

**VERSUS**

**Shri S. Nagoor Gani**

No. 520, Ward No. 33, M.K.B. Nagar,  
4<sup>th</sup> Cross Street, Vyasarpadi,  
Chennai – 600 039

**: Respondent**

**AND**

**Customs Miscellaneous [Stay] Application No. 40092 of 2020**  
(on behalf of Appellant)

**In**

**Customs Appeal No. 40246 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

Misc. Appln. No(s): C/Misc/S/40090-40092/2020

In Appeal. No.(s): C/40244-40246 /2020

& Appeal No(s): C/40253-40255/2020

**The Commissioner of Customs**

Chennai-III Commissionerate,  
No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Appellant**

**VERSUS**

**Shri G. Umapathy**

9A, Pandiyar Veedhi,  
Sengunthar Nagar,  
Thiruthani, Thiruvallur – 631 209

**: Respondent**

**WITH**

**Customs Appeal No. 40253 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**Shri M.S. Alaudeen**

No. 13/39, K.M.P. Koil Street,  
Ayanavaram, Chennai – 600 023

**: Appellant**

**VERSUS**

**The Commissioner of Customs**

No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Respondent**

**WITH**

**Customs Appeal No. 40254 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**Shri S. Nagoor Gani**

No. 520, Ward No. 33, M.K.B. Nagar,  
4<sup>th</sup> Cross Street, Vyasarpadi,  
Chennai – 600 039

**: Appellant**

**VERSUS**

**The Commissioner of Customs**

No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Respondent**

Misc. Appln. No(s): C/Misc/S/40090-40092/2020

In Appeal. No.(s): C/40244-40246 /2020

& Appeal No(s): C/40253-40255/2020

**AND**

**Customs Appeal No. 40255 of 2020**

(Arising out of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**Shri G. Umapathy**

9A, Pandiyar Veedhi,  
Sengunthar Nagar,  
Thiruthani, Thiruvallur – 631 209

**: Appellant**

**VERSUS**

**The Commissioner of Customs**

No. 60, Rajaji Salai, Custom House,  
Chennai – 600 001

**: Respondent**

**APPEARANCE:**

Shri S. Balakumar, Authorized Representative for the Appellant

Shri A.K. Jayaraj, Advocate for the Respondents

[in Customs Appeal Nos. 40244 to 40246 of 2020]

Shri A.K. Jayaraj, Advocate for the Appellants

Shri S. Balakumar, Authorized Representative for the Respondent

[in Customs Appeal Nos. 40253 to 40255 of 2020]

**CORAM:**

**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**

**FINAL ORDER NOS. 40152-40157 / 2022**

DATE OF HEARING: 13.04.2022

DATE OF DECISION: **05.05.2022**

**Order :**

These cross-appeals arise out of the impugned of Order-in-Appeal Seaport C.Cus.II Nos. 233-236/2020 dated 06.02.2020 passed by the Commissioner of Customs (Appeals-II), Chennai. The First Appellate Authority has, vide impugned order, dismissed the Department's appeal and partly allowed the assessee's

appeals by reducing the redemption fine and penalties. The Adjudicating Authority had *inter alia* ordered confiscation of the seized gold weighing 2.810 kgs. valued at Rs.91,95,725/-, had given an option to redeem the same under Section 125 of the Customs Act, 1962 on payment of fine of Rs.9,20,000/- along with payment of applicable duty on the above gold, apart from imposing penalty under Section 112 *ibid.* of Rs.10,00,000/- on Shri M.S. Alaudeen, Rs.2,00,000/- on Shri S. Nagoor Gani and Rs.1,00,000/- on Shri G. Umapathy. The First Appellate Authority modified the above by reducing the redemption fine to Rs.4,60,000/- and penalty under Section 112 *ibid.* to Rs.2,00,000/-, Rs.20,000/- and Rs.10,000/- respectively.

2. Brief facts leading to the filing of these appeals, as gathered from the arguments of the representatives of both sides, *inter alia*, are that:-

- (i) A specific intelligence was gathered that foreign origin gold were being smuggled into India by way of concealment, cleared through Anna International Airport and brought to the premises of Shri M.S. Alaudeen, one of the assessee-appellants herein.
- (ii) The officers of CZU-DRI identified the premises of the assessee-appellant, entered on 12.12.2018 with a search warrant.
- (iii) The assessee after going through the search warrant had affixed its signature with date for having read the same.
- (iv) During the search the officers found *inter alia* dismantled power tools such as Ryobi brand 6" Orbital Buffer car cleaning machine, steel measuring tapes, etc.
- (v) One car cleaning buffer machine was found lying on the floor with the upper portion of the machine in loose condition and when the officers removed the

- upper portion, they found a piece of yellow coloured metal appearing to be gold, stuck inside the motor.
- (vi) Upon removal of the same, the yellow metal was found to be half cut piece of 100 gms foreign marked gold with the marking "Cambi, Suisse 100 gm Gold 999.9" with last five digits of Sl. No. "09053" visible.
  - (vii) Three small square type, yellow coloured metal, appearing to be gold, amidst pieces of steel measuring tape strips strewn in one corner of the floor was also found and recovered.
  - (viii) The officers also found a granite slab with two strings attached to the centre of the slab, upon lifting of which, a sump/secret chamber with a hot furnace like machine installed inside was found. The officers recovered seven gold bars converted into ring shape by melting in the furnace inside the sump/secret chamber.
  - (ix) The Government approved Assayer certified that the seven ring shaped gold, three square shaped strip of gold and one half cut piece of 100 grams of gold bar (foreign marked) weighed 2.810 kgs. and valued at Rs. 91,95,725/-.
  - (x) The said goods were thereafter seized under Mahazar dated 12.12.2018.
  - (xi) The Central Board of Excise and Customs (C.B.E.C.) vide Circular No. 34/2013 dated 04.09.2013 has *inter alia* clarified that henceforth gold shall be permitted to be imported only by the agencies notified by DGFT.
  - (xii) In the Show Cause Notice, it was *inter alia* proposed to confiscate the seized gold under Sections 111 (d), 111(i) and 111(l) of the Customs Act, 1962 read with Section 123 of the Customs Act, 1962.

2. Heard Shri A.K. Jayaraj, Learned Advocate for the assesseees (appellants in Customs Appeal Nos. 40253 to 40255 of 2020) and Shri S. Balakumar, Learned Assistant Commissioner (Authorized Representative) for the Revenue (appellant in Customs Appeal Nos. 40244 to 40246 of 2020).

3.1 Learned Advocate for the assesseees-appellants briefly contended, *inter alia*, that:-

- (i) Shri M.S. Alaudeen, one of the assesseees-appellants herein, had taken a place for rent and was running lathe business of smelting and melting gold used melting furnace.
- (ii) Since a lot of referred customers wanted the services of this assessee-appellant only, he used to be in charge of all the business activities.
- (iii) A search was conducted on 12.12.2018 which resulted in seizure of seven ring shaped gold, three square shaped strip of gold and one half cut piece of 100 grams of gold bar (foreign marked) to an extent weighed 2.810 kgs.
- (iv) On the very same day, the said assessee was taken by the officers to their office, severely beaten, threatened and dictated to give statement.
- (v) He chose to retract, vide his communication dated 13.12.2018 i.e., the very next day, his statement made on 12.12.2018.
- (vi) A writ petition in W.P. No. 8527 of 2019 was filed for a direction seeking to return the seized gold. The Hon'ble High Court vide Order dated 24.06.2019, while disposing of the above writ petition, however, *inter alia* directed the appellant to make an application for provisional release.
- (vii) Another Writ Petition in W.P. No. 22333 of 2019 was filed against the issue of Show Cause Notice, but however, the Hon'ble High Court vide its Order dated 30.07.2019 disposed of the writ petition,

*inter alia* directing the Revenue to afford an opportunity of personal hearing, etc.

3.2 The primary contention of the Learned Advocate for the assessee-appellants is that the Revenue has relied solely on the voluntary statements of the assessee while passing the Order-in-Original wherein the confiscation was ordered, however with an option to redeem within the meaning of Section 125 of the Customs Act, 1962 on payment of fine, apart from applicable duty and penalty under Section 112 of the Customs Act, 1962 on each of the assessee-appellants herein. He would also submit that the Adjudicating Authority has not at all considered the retraction statement dated 13.12.2018, which was sent by Shri M.S. Alaudeen (the first assessee / appellant in Customs Appeal No. 40253 of 2020), apparently by Speed Post, wherein he has *inter alia* mentioned that his statement was not voluntary, but was obtained under coercion / threat.

3.3 Learned Advocate for the assessee-appellants would further submit, without prejudice to the above, that the seized gold was not a prohibited item and hence, redemption was rightly offered; that since the fine was on the higher side, the same though had been reduced, should have been deleted by the First Appellate Authority; that the penalty under Section 112 *ibid.* though partly sustained by the First Appellate Authority, which was also very much on the higher side, which was not called for and should have been deleted *in toto* by the First Appellate Authority.

3.4 He drew support from the decisions of various higher judicial fora.

4.1 *Per contra*, the Learned Departmental Representative submitted that the assessee-appellants had not established the source of the gold, including the one bearing foreign mark and hence, the same should

have been ordered to be confiscated absolutely instead of giving an option of redemption.

4.2 He would also submit that in their statements, the assessee-appellants have admitted to the *modus operandi* and therefore, the involvement of the assessee stands established. He therefore justified the levy of penalty under Section 112 *ibid*.

4.3 Insofar as the retraction referred to by the Learned Advocate for the assessee-appellants, he would submit that there is no specific retraction and hence, the same cannot be relied upon; but, however, there is no specific retraction insofar as the half cut piece of gold having foreign marking and hence, the same was required to be absolutely confiscated since the appellant has not discharged burden under Section 123 *ibid*. He further relied on decisions of various courts in support.

5. I have considered the rival contentions, have gone through the documents placed on record as well as the orders of lower authorities and have also gone through the judgements / orders relied upon by both the parties during the course of arguments, by which it is clear that judgements are available which are supporting the counter-stand of both the parties. This makes it clear that the applicability of the judgements would depend on the facts of each case and hence, it is essential that proper facts be brought on record in the first place, to apply the judgements.

6. I find force in the contentions of the Learned Advocate for the assessee-appellants that a general retraction saying that the statement was not voluntary is sufficient. In the said retraction letter dated 13.12.2018, one of the appellants, Shri M.S. Alaudeen, has *inter alia* mentioned as under:

*"I submit that your officers today searched my Workshop situated in the above address. When we are doing our job with regard to melting of the Gold Pieces converting to Gold Rings which was given by our customers, your officer without verifying anything had taken the total Gold including all the Gold Rings and taken to their office along with me...."*

7. On perusal of the Order-in-Original, it is seen that the same does not contain any discussion on the above retraction. Especially when the said appellant admits that they were doing their job with regard to "...melting of the gold pieces..." which were given by their customers, the voluntary statement recorded under Section 108 of the Customs Act, 1962 on 12.12.2018, therefore, requires to be weighed in the light of the retraction dated 13.12.2018. When the assessee-appellant himself admits that the gold pieces given by the customers were being melted and converted into gold rings, there should be some documentary evidence, at least identifying the owner of such gold pieces, but apparently no such attempt seems to be made to place on record any such vital documentary evidence. This minimum effort having not been done, mere reliance on the voluntary statement is not justified.

8.1 I find from the records that the Revenue had entertained a doubt that the assessee-appellant had improperly imported gold into India. Section 11 of the Customs Act, 1962 deals with the power to prohibit importation or exportation of goods; (2) (f) thereunder prohibits uncontrolled import and export of gold or silver. Section 101 *ibid.* empowers the Revenue to search suspected persons in certain cases.

8.2 Apparently based on the intelligence gathered, Revenue authorities carried out a search suspecting the assessee-appellant and they were able to seize gold in various forms, as mentioned in the Mahazar / Show Cause Notice, from the possession of the assessee-appellant. Thus, the initial burden is on the assessee in terms of Section 123 *ibid.* to dislodge the suspicion entertained by the Revenue and prove that the goods in question that was seized from his possession, were not smuggled.

8.3 From the pleadings of the Learned Advocate for the assessee-appellants and the requirements of law, it is for the assessee-appellant, who has canvassed to having retracted his statement recorded under Section 108 *ibid.*, to explain before the Revenue authorities as to the source of the gold in question, including the names and addresses of its customers. The same would also apply to the half cut piece of gold bar with the marking "Cambi, Suisse 100 gm Gold 999.9", since the initial burden, within the meaning of Section 123 *ibid.*, is always on the person from whose possession the gold, including the one with foreign marking, is seized, to prove that none of the seized gold was smuggled.

8.4 The retraction statement does not deny the seizure of gold through the Mahazar and in the said retraction, he has clearly admitted, voluntarily, that the gold in question belonged to his customers. It is well-settled that when a retraction is made, then both the original statement as well as the retraction statement have to be looked into very carefully and hence, once a retraction is made, the burden is more on the appellant to place on record the identity of his customers since he had only admitted that the gold seized belonged to them.

8.5 When gold weighing 2.810 kgs. was seized under the Mahazar, which is not disputed, mere whooping denial without justifying as to how his earlier statement or a

part of it was false, would not serve any purpose since he has to discharge the initial burden under Section 123 *ibid.*

9.1 In the Order-in-Original, apparently, the so-called retraction is not considered; as admitted in the said retraction, if the first assessee-appellant is able to place on record the details of his customers, who are the owners of the seized gold, then, the situation may be different, in which event, perhaps, the order of confiscation may vary. In respect of the seizure of gold bar with foreign marking, undoubtedly it is a town seizure. The assessee-appellant has nowhere offered any explanation as to the source of the same and hence, the same is liable for absolute confiscation.

9.2 These aspects have not at all been considered and discussed in the orders of the lower authorities and hence, to this extent, the Order-in-Original is a non-speaking order. The First Appellate Authority has also not considered these aspects, including the contentions of the assessee-appellant as to retraction and hence, to this extent, the impugned order is also a non-speaking order. For the above reasons, the same is set aside to this extent and the matter is remanded to the file of the Adjudicating Authority. The Adjudicating Authority shall consider the retraction statement in the light of the discussions contained hereinabove and the requirement of law and then pass an appropriate order regarding confiscation and / or redemption. Admittedly, the assessee-appellant is not an importer, but a person from whose possession the gold in question has been seized. He says that he is not the owner, but clearly asserts that the same belonged to his customers, whose identity has to be brought on record now. If he satisfactorily proves the source of the said gold, then, perhaps, the situation may be different since there remains nothing to allege irregularity as to importation. Redemption may have to be offered in terms of Section 125 of the Customs Act,

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1962, subject to redemption fine as per the provisos thereunder and the discretion is always subject to the second proviso to Section 125 ibid. The gold bar with foreign marking, the source of which is not explained, is liable for absolute confiscation since the same would amount to the importation of a prohibited goods. Insofar as the other two assessee-appellants are concerned, the penalty on them would depend on the penalty, if any, that would be levied on the first assessee-appellant, since it is the case of the Revenue that all the three assessee-appellants were involved in the alleged activity.

10. In view of the above, the common impugned Order-in-Appeal is set aside to the above extent.

11. All the above appeals are allowed, by way of remand, as indicated above. In view of the same, the stay petitions filed by the Revenue do not survive and hence, are treated as disposed of.

(Order pronounced in the open court on **05.05.2022**)

Sd/-  
**(P. DINESHA)**  
MEMBER (JUDICIAL)

Sdd