

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/214/B/WZ/2022-RA / 8146 Date of Issue 01.12.2023

ORDER NO. 875/2023-CUS (WZ)/ASRA/MUMBAI DATED 29.11.2023
OF THE GOVERNMENT OF INDIA PASSED BY SHRI. SHRAWAN KUMAR,
PRINCIPAL COMMISSIONER - & EX-OFFICIO ADDITIONAL SECRETARY TO
THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS
ACT, 1962.

Applicant : Shri. Prashant J. Thadeshwar

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject : Revision Applications filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal F. No.
MUM-CUSTOM-PAX-APP-1945/2021-22 dated 21.03.2022
and issued on 23.03.2022 through F. No. S/49-
488/2021 passed by the Commissioner of Customs
(Appeals), Mumbai-III.

ORDER

This Revision Application has been filed by Shri. Prashant J. Thadeshwar [herein after referred to as the Applicant] against the Order-in-Appeal F.No. MUM-CUSTM-PAX-APP-1945/2021-22 dated 21.03.2022 and issued on 23.03.2022 through F.No. S/49-488/2021, passed by the Commissioner of Customs (Appeals), Mumbai-III.

2.1 The brief facts of the case are that on 24.07.2019, the officers of Air Intelligence Unit, CSI Airport intercepted one passenger namely Ms. Marin Kataigi holding Japanese Passport No. TK6154160, who was to depart to Bangkok by Thai Airways flight No. TG-318 dated 24.07.2019, after she cleared the emigration and was proceeding to board the flight. Examination of her cabin baggage resulted in the recovery of foreign currency viz. 12 bundles of notes of 100 Dollars each, ie. totally 1,20,000 U.S. Dollars, concealed in the bag amongst her clothes and other items. Further examination of her hand bag also resulted in the recovery of foreign currency viz. 06 bundles of notes of 100 Dollars each, i.e. totally 60,000 U.S. Dollars, concealed in the bag amongst her clothes and other items, totaling to 1,80,000 Dollars equivalent to Rs. 1,22,31,000/- (Rupees One Crore Twenty Two Lakhs Thirty One Thousand only). The Customs officers took over and seized the Foreign Currency of USD 1,80,000 equivalent to Rs. 1,22,31,000/- under the reasonable belief that the same were attempted to be smuggled out of India and hence liable for confiscation under provisions of the Customs Act, 1962, read with Foreign Exchange management Act, 2000 and the rules and regulations issued there under. In her statement recorded on 25.07 2019 under Section 108 of the Customs Act, 1962, she admitted possession, concealment, carriage, non-declaration and recovery of the seized foreign currency from her and that it

was given to her by investor Mr. Shigeru Hikawa and that he was residing in Mirage hotel Room No 602 & 604, Andheri;

2.2 On the basis of statement of Ms. Marin Kataigi, search was carried out at Mirage hotel Room No 602 & 604 under panchanama dated 25.07.2019 and one laptop, two mobile phone and one diary had been taken over under panchanama, but on scrutiny, nothing incriminating in nature was found from seized electronic devices. Statement of Mr. Shigeru Hikawa was recorded on 25.07.2019, under Section 108 of the Customs Act, 1932, wherein he inter alia stated that amount of USD 1,80,000/- recovered from Ms. Marin Kataigi were actually handed over by him; that he got the said money from selling the gold which he smuggled from Bangkok; that he produced the purchase bill nos. 78965 & RC-20190711-0011, both dt.11/7/2019 in the name of Ms Marin Kataigi for purchase of gold of 99.99% purity from Bangkok and that he sold the said gold in Mumbai to Shri Prashant Thandeshwar (the applicant), who is the owner of Jayantilal Maansurbhai & Co., Shop no. 4, Chandlok Apartment, L.T. Road, Borivali (West), Mumbai-400 092. On 22.07.2019 Ms Marin Kataigi brought 4 kgs of gold and he sold it for USD 1.80,000/- and that he himself had gone to sell the gold to the applicant on 23.07.2019 and received USD 1,80,000/- in return. The applicant used to pay for the gold in US Dollars and that money was handed over to Ms Marin Kataigi to carry the same to Bangkok, Thailand, to hand it over to one of his friends as proceeds of smuggled gold; that Ms. Marin Kataigi used to bring gold from Bangkok for handing over to him and used to carry the foreign currency handed over to her by him on her return journey to Bangkok, that he had not any valid documents for the foreign currency seized under panchanama dated 24.07.2019, that he had brought total 9.5 Kgs of gold, 04 times in India which was smuggled by Ms. Marin Kataigi into India on his behalf, that he sold that to the applicant; that he always received the payments for sale of gold in U.S. Dollars and he used to

send the same to Bangkok through various Japanese people including Ms. Marin Kataigi, that he paid 70,000/- Japanese yen for that month to Ms. Marin Kataigi; that he was a frequent flier and the purpose of his trips to Bangkok was to arrange purchase of gold from there and get it smuggled into India and sell it in India; that Mr. Shunsuke Ohashi is his friend and accompanies & helps him in his business activities and smuggling activities.

2.3 Statement of Mr. Ohashi Shunsuke was recorded on 25.07.2019 under Section 108 of the Customs Act, 1962, wherein he inter alia stated that he knew Mr. Shigeru Hikawa since last 4 years and he developed website for him for his grave stone business in Japan and also assist him in his business in Mumbai; that he looked for business for Japanese shops in Mumbai like Japanese foods shops and Massage shops; that he was not aware about Hikawa's gold smuggling into India and carrying foreign currency out of India; that he had produced a diary written by him in that he had maintained the accounts of massage parlor at Bangkok and transactions of gold done in Mumbai, that diary was showing three entries of gold sold to M/s Jayantilal Mansurbhai & Co. 1 kg, 2 kg and 4 kg total 7 kgs.

2.4 On the basis of statement of Mr. Shigeru Hikawa and Mr. Shunsuke Ohashi search carried out at Jayantilal Maansurbhai & Co., shop No. 4, Chandralok CHS, L.T.Road, Opp. Manubhai Jewellers, Opp. Tanishq, Borivli (West), Mumbai-400 092, in presence of Mr. Pramod J. Thadeshwar under panchanama dated 25.07.2019 wherein the officers of AIU had seized the following items:

(1) Samsung Mobile of Mr. Pramod J. Thadeshwar bearing IMEI No. 354737083535822/01 and IMEI No 354738083535820/01 and Sr. No. R58J20P042P.

(2) CP Plus cosmic HD Digital Video Recorder without Harddisk S/N CP4C06DC1PBQ00864.

(3) Intex CPU one piece.

Later the forensic analysis was carried out but nothing incriminating in nature was found. Also 350.7 grams foreign marking gold recovered during search, was taken over in panchanama dated 25.07.2019, which was later seized under seizure memo dated 06.01.2020

2.5 Statement of Mr. Pramod J. Thadeshwar was recorded on 25.07.2019 under Section 108 of the Customs Act, 1962, wherein he inter alia stated that the jewellery shop at Shop no. 4, Chandlok Apartment, L.T. Road, Borivali West Mumbai-91, was in the name of his younger brother Mr. Prashant Jayantilal Thadeshwar, that he would sit in the shop, when Mr. Prashant Jayantilal Thadeshwar used to be absent, that he did not remember any person by name Mr. Hikawa Shigeru and he had not purchased any gold weighing 4 kg from him, that they were in the business of buying old gold jewellery in small quantity and he was not aware whether his brother had purchased such a huge quantity of gold; that they are in the business of buying old gold since last 40 years. That the gold seized was of foreign marking, but he had all the legitimate bills of the procurement of the same and he would submit the bills at the earliest at the next given opportunity.

2.6 Search was also carried out at the residential premises of Mr. Prashant Jayantilal Thadeshwar, Flat No. C-1804, Tower Orchid Saburbia CHS, Link Road, Kandivali (W) Mumbai on 26.07.2019, however nothing incriminating in nature was found.

2.7 Further statement of Mr. Shigeru Hikawa was recorded in the Arthur Road Jail under section 108 of the Customs Act 1962, on 28.08.2019 wherein he agreed with his previous statement and with the content of the panchanama; His further statement was recorded on 07.01.2020, wherein he accepted that the transactions written in the Diary maintained by Mr. Ohashi Shunsuke indicate the gold was sold at Mumbai at Jayantilal Maansurbhai & Co.

2.8 Further the statement of Ms. Marin Kataigi was recorded in the Byculla District Prison under section 108 of the Customs Act 1962, on 27.08.2019 wherein she agreed with her previous statement and with the content of the panchanama dated 24.07.2019. She interalia stated that the foreign currency USD 1,80,000/- seized from her under Panchanama dated 24.07.2019 did not belong to her. She told that Shri Hikawa was into the business of selling Gold at India and after selling Gold he gives her US Dollars for takeout of Mumbai to Bangkok. She stated that she brought the Gold from Bangkok and other cities and gave it to Shigeru Hikawa who further sold the same in Mumbai; that she didn't ever go with him for selling Gold and she didn't know where he sold the gold in Mumbai; that the sale proceeds of Gold was taken back to Bangkok, by her in USD; that she did not have any valid documents for the foreign currency USD 1,80,000/- seized under Panchanama dated 24.07.2019; that as stated by her, the currency ie. USD was given to her by Shri Shigeru Hikawa and were the sale proceeds of Smuggled Gold which she brought into India; that she stated that she had bought Gold nearly six times, on previous occasions to India; that this time she had bought four (04) kg of Gold from Bangkok which were hidden by her in her shoes and on her waist that is to say 02 kg in shoes and 02 on her waist, that she used to get USD 700 per trip excluding flight tickets and at a hotel; that this time when she arrived on

22.07.2019, she was carrying 04 kg Gold which was handed over to Shigeru Hikawa at Mirage Hotel Andheri for further disposal; that after sale and disposal of Gold, Shigeru Hikawa gave her the seized USD to be taken out of India; that she had carried out foreign currency in all her earlier visits out of India; that nearly 05 times she had taken foreign currency outside and this was the sixth time when she was taking the USD 1,80,000/- outside India when she was caught by the Customs; that she was a frequent flier and generally the purpose of her trips to Bangkok to Mumbai and back to Bangkok from Mumbai was to carry Gold and Currency respectively and every time she came to India she met Mr. Hikawa; that the receipt No. 78965 dt. 11.07.2019 and RC-20190711-0011 dt 11.07.2019 belongs to her, the gold was bought at Bangkok and smuggled into India and handed over to Shri Shigeru Hikawa, who further sold it.

2.9 Statement of Shri Prashant J. Thadeshwar was recorded under section 108 of the Customs Act 1952, on 18.09.2019 wherein he inter alia stated that he knew Mr. Shigeru Hikawa as he came to his shop approximately 3 months back and asked him whether he dealt in Diamond trade or not and he replied in affirmative; that after that he left his office after they had exchanged their contact nos; that he had never brought the gold from Mr. Shigeru Hikawa; that he met Mt. Shigeru Hikawa once or twice in the last few months that too only for the purpose of trading Diamonds and that deal never happened. He further stated that he did not know any person by the name Ms. Marin Kataigi; that he never purchased gold from Mr. Shigeru Hikawa, that the 350 grams foreign marking gold which was taken by the Custom Officer under panchanama dated 25.07.2019 was purchased from the bullion market and all documents, purchase bills and tax invoices are deposited by him.

2.10 During the course of investigation, it was revealed that the invoice submitted by Shri Prashant J. Thadeshwar did not have details of foreign marking gold. Further, on verifying GSTRI of Kamal Bullion for the month of July 2019, it was observed that it was filed on 21.12.2019 after seizure of foreign currency from Ms. Marin Kataigi. Further, GST officers visited the premises of M/s Kamal Bullion at the address given in the invoices submitted by Shri Prashant J. Thadeshwar on 07.11.2019, it turned out to be an empty premises. While the owner of the said premises showed rent agreement with M/s Kamal Bullion, it was informed that the premises were vacated more than three months ago,

In view of the findings of the investigation, Show cause Notice was issued on 17.01.2020 to Ms Marin Kataigi, Mr. Shigeru Hikawa, Mr. Ohashi Shunsuke and Shri Prashant J. Thadeshwar.

3. After due process, Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSMI Airport, Mumbai by vide his Order-In-Original i.e. OIO No. ADC/VDJ/ADJN/01/2020-21 dated 11.01.2021 issued on 11.01.2021 through F.No. S/14-6-42/2019-20/Adjn-SD/INT/AIU/242/2019-AP 'B' ordered for absolute confiscation of the seized foreign currency of USD 1,80,000/- totally equivalent to Indian Rs.1,22,31,000/- under section 113(d) and (h) and section 121 of the Customs Act, 1962 read with FEMA, 1999 and Foreign Exchange Management (Export & Import of Currency) Regulation, 2015. Personal Penalty of Rs.25,00,000/- was imposed on Ms. Marin Kataigi under section 114(i) of the Customs Act, 1962; PP of Rs. 10,00,000/- was imposed on Ms. Marin Kataigi under section 114 AA ibid for her act to provide false information during the investigation; P.P. of Rs 25,00,000/- was imposed on Ms. Shigeru Mikawa under section 114(i) ibid; P.P. of Rs. 10,00,000/- was imposed on Mr. Ohashi Shunsuke under section 114(i) ibid. Custom duty demand of Rs.60,73,654/- was confirmed under section 28(8) of the Customs

Act, 1962 along with interest thereof under section 28AA of the Customs Act, 1962 on the gold smuggled into India by Ms. Marin Kataigi; the smuggled gold was held liable for confiscation under section 111(d), 111(1) and 111(m) of the Customs Act, 1962; however the adjudicating authority refrained from confiscating the same as the said goods were not available for confiscation and also refrained from imposing a penalty on Ms. Marin Kataigi under section 114A ibid as the penalty under section 112(a) ibid was being imposed. P.P. of Rs.5,00,000/- was imposed on Ms. Marin Kataigi under section 112(a)/(b) of the Customs Act, 1962; P.P. of Rs.5,00,000/- was imposed on Mr. Shigeru Hikawa under section 112(a)/(b) of the Customs Act, 1962; P.P. of Rs.2,00,000/- was imposed on Mr. Ohashi Shunsuke under section 112(a)/(b) of the Customs Act, 1962, Further the gold seized from the shop of Shri Prashant J. Thadeshwar totally weighing 350.7 grams was not held liable for confiscation under section 111(d), 111(1), 111(m) of the Customs Act, 1962 and dropped the proceedings initiated in the SCN against Shri Prashant J. Thadeshwar.

4. Aggrieved by the said order, the respondent department filed an appeal before the Appellate Authority (AA) i.e Commissioner of Customs (Appeals), Mumbai – III, only against the OAA's order dropping the proceedings initiated in the SCN against Shri Prashant J. Thadeshwar. The Appellate Authority vide his Order-in-Appeal F.No. MUM-CUSTOM-PAX-APP-1945/2021-22 dated 21.03.2022 and issued on 23.03.2022 through F.No. S/49-488/2021 set aside the OIO dated 11.01.2021 passed by the OAA and ordered for the absolute confiscation of the foreign marked gold weighing 350.7 grams under Section 111(d), (l) and (m) of the Customs Act, 1962 and also imposed a penalty of Rs.1,10,000/- on the applicant under Section 112(b) (i) and (iii) of Customs act, 1962.

5. Aggrieved with the above order, the Applicant has filed this revision application before the Revisionary Authority, Mumbai inter alia on the following grounds of revision;

5.1 That the impugned Order-in-Appeal dated 21.03.22 is not an order on merits and not a speaking order. Commissioner (Appeals) made simple observation that it is settled law that statements recorded under section 108 of Customs Act, 1962 are relevant and admissible in evidence as held in number of legal pronouncements and passed the order without countering the entire defense submission, contention of the applicant placed before. There is absolutely no evidence to show that the applicant was in any way concerned with the currency under seizure and also with the gold alleged to have been smuggled in the past. From his own statement and also from the statements of co-accused it cannot be inferred that the applicant had any knowledge or connection with the alleged smuggling of gold.

5.2 The applicant further submitted that there is no proof that USD 1,80,000/- seized on 24-7-19 was sale proceeds of gold which was handed over by him and attempted to be smuggled out of India. The Investigating Agency failed to prove the fact that the money was sale proceeds of smuggled goods. In terms of Section 121 of the Customs Act, it is for the Revenue to establish that the money was sale proceeds of the smuggled goods. Investigation did not bring out any evidence that he was dealing with the activity of purchase and sale of smuggled goods or gold. There is no evidence on record to show that there was seizure of any incriminating goods or documents from his residence or business premises. Therefore, the contention of the applicant that the money recovered from co-accused Ms Marin Kataigi is not sale proceeds of smuggled goods handed over by applicant was accepted by the Adjudicating Authority after due consideration and scrutiny of all the findings on records.

5.3 That the applicant is the owner of the gold totally weighing 350 grams under seizure. He purchased the gold from M/s Kamal Bullion on payment of applicable taxes. There is no proof that the said gold was smuggled into India. Considering all the above facts, the Adjudicating Authority ordered unconditional release of the gold to the petitioner and dropped the proceedings initiated against him.

5.4 The applicant submitted the purchase invoice and discharged the burden of proof under section 123 of Customs Act, 1962. The Appellate Authority failed to appreciate the fact that the petitioner had discharged the onus required under Section 123 of Customs Act, 1962 by producing the Invoice issued by M/s Kamal Bullion and also submitted that the gold weighing 350.7 grams was duly accounted for in his record. The applicant points out that the burden to prove that the goods are smuggled ones is on the Revenue. This burden was not discharged and mere marking of foreign origin on the goods by itself could not render the goods to be smuggled ones. The applicant further submitted that it is an admitted fact that 350.7 grams of gold are reflected in the stock statement maintained by him and the said gold was legally purchased under purchase invoice. The above said gold was purchased by the applicant from M/s Kamal Bullion and duly accounted for in his record. The sellers of the goods normally purchase these goods from any other gold/bullion dealer after payment of all taxes and duties and, therefore, it cannot be said that the goods are smuggled ones. The applicant points out that the burden to prove that the goods are smuggled ones is on the Revenue. This has not been discharged and mere marking of foreign origin on the goods by itself could not render the goods to be smuggled ones and more particularly in the facts and circumstances of the present case, for the reason that these goods are openly available in the market and freely available for sale and hence there is no violation of EXIM Policy.

5.5 That the seizure was made in town and not in any Customs area. Allegation of smuggling against the applicant is rebutted. The seizure was made in Mumbai on 25-7-19 at the business premises of the petitioner which is not a Customs area. The applicant submitted that it is for the departmental authorities to prove in a positive manner that the goods are smuggled and not for the applicant to prove the negative fact that the goods are not smuggled. In the present scenario of liberalized import regime, where practically every article of a foreign make can be legally imported on payment of duty and such goods are freely available in the market and since the investigation failed to bring on record with conclusive proof that the applicant was involved in smuggling of the gold bars under seizure, there was no requirement for him to show any bill/invoice to prove the legality of the import in respect of the gold bars seized from him. The contention of the applicant is that the goods are not smuggled ones and they were seized in the town and therefore, the question of its confiscation does not arise, besides imposing penalty. It is his contention that mere fact of foreign origin does not by itself amount to holding that the goods are smuggled ones. In this regard the applicant relied on the following judgements.

- 1) Shiv Sunder Shukla (2000 (131) ELT 465 (T.Kol)
- 2) Rajendra Kumar (2001 (134) ELT 148(T.Kol)
- 3) Tayyub juner Khatri (2002 (139) ELT 433 (T.Kol).

The burden of proving of non-notified goods to be seized is on the department as held in the following judgements.

- 1) Dasa Kashinath Bengal (2001 (132) ELT 380 (T)
- 2) Anil Gupta (2001 (135) ELT 35 F)
- 3) Rajesh Kumar (2001 (134) ELT 148)
- 4) Dinanath Maurya (2001 (131) ELT 203)
- 5) Ganesh Pd Agarwal (2001 (128) ELT 519 T)
- 6) Harison Mountain (2001 (137) ELT 767 T.K.) He also relied on the following two judgements to submit that no penalty is leviable.
- 7) Raj Kumar Keshari [(2001 (136) ELT 745 (T)] Harjom Mour (2001 (137) ELT 767)

- 8) Md Abdul Jabbar (2002 (141) ELT 443)
- 9) Anil Kumar Shaw (2002 (140) ELT 263)
- 10) Jtin Mehta (2002 (120) ELT 263)
- 11) Hasan Ali (2001 (138) ELT 197 T)
- 12) Rajendra Prasad (2001 (136) ELT 925)
- 13) Brijendra Kumar Singh (2001 (134) ELT 490 T)
- 14) Raj Kumar Keshari (2001 (136) ELT 745)
- 15) Dasan Kashinath Bengal (2001 (132) ELT 380 T)
- 16) Tahol Mondal (2002 (49) RLT 866 T)
- 17) Akbar Badruddin Jiwani (1990 (47) ELT 163 SC)

The applicant submitted that having procured the gold from M/s Kamal Bullion has been clearly established by him. The only material available against the petitioner on which cognizance appears to have been taken is the statements of co-accused without any corroboration.

5.6 That the Confession of Co-accused should not have been relied upon against the applicant. The Appellate Authority relied upon the statements of co-accused Mr Shiguru Hikawa and Mr Ohashi Shunsuke as a proof for establishing the allegations against the applicant. It is well settled that a confession statement recorded under Sec.108 of the Customs Act is substantive evidence against the maker of the statement. But in respect of the co-accused the said statement can never be treated as substantive evidence. At the most it can be considered as relevant evidence under Sec.30 of the Indian Evidence Act. In absence of any substantive evidence, no judgment of conviction can be recorded only on the basis of confession of the co-accused, be it extra judicial confession or a judicial confession;

5.7 The applicant submitted that criminal nexus between the accused persons not clearly proved. That in the present case, the nexus between the four accused as well as their participation in the alleged crime of smuggling is not established beyond reasonable doubt. Notably, the requirement of casual

nexus is not a definitional element of every crime. Apart from the confessional statements of the co-accused persons there is nothing on record to suggest that the petitioner was involved in the smuggling of gold;

5.8 That the discretionary power of Quasi-Judicial Authority cannot be interfered;

5.9 That the Applicant is not liable for any penal action under Sections 112(b) of the Act. Section 112(b) of the Act would be attracted only if the person has been concerned in the offence of importation or exportation of goods which are, for the time being, prohibited or restricted. If that clause is attracted, there should be specific reference to it in the proceedings initiated and the findings rendered, and if there is a failure to do so, the order of penalty cannot be sustained. In the case against the applicant, the allegation of any omission or commission on his is not proved. Therefore, he is not liable for any penal action u/s 112(b) of the Act.

5.10 The applicant finally concluded that he did not commit any act of omission or commission which can be termed as a crime or manifesting of a smuggling activity. The test in such a case is to see whether the act is such that it gives rise to an inference that the petitioner was an offender. The case against the petitioner fails this test. The petitioner was never concerned with acquiring possession of or was in any way concerned in carrying, removing, depositing, harboring, keeping, concealing or in any other manner dealing with any prohibited goods which he knew or had reason to believe were liable to confiscation under section 111. Therefore, he is not liable for any penal action u/s 112 of Customs Act, 1962. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the

accused would be entitled to acquittal. Leaving aside the cases of statutory presumptions, the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. The petitioner submits that he is a law abiding citizen and he has never come under any adverse remarks. He was falsely implicated in the case of smuggling.

Under the circumstances the applicant requested that the gold may be released to him unconditionally and penalty imposed on him may be set aside and further proceedings against him may be dropped.

6. Personal hearing in the case was scheduled for 05.10.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing and submitted that the applicant is a jeweller and small quantity of gold was seized from his shop. He further submitted that original authority has correctly released the gold as applicant has produced evidence to support purchase of the same. He further submitted that absolute confiscation by Appellate Authority is excessive and is without any basis. He requested to restore Order in Original unconditionally.

7. The Government has gone through the facts of the case, the oral and written submissions, Order in Original, Order in Appeal and the Revision Applications. Government notes that in this case the applicant has filed the appeal against the absolute confiscation of the 350.7 grams gold seized from his shop and the penalty imposed on him, vide the impugned OIA.

8. On going through the Order in Appeal, Government finds that the Appellate Authority has absolutely confiscated the gold mainly on the grounds that the applicant has failed to produce conclusive documentary evidence in support of their procurement of the impugned marked gold as required under

Section 123(2) of the Customs Act, 1962 and that the statements recorded under Section 108 of the Customs Act, 1962 is relevant and admissible evidence.

9.1 Government observes that in the instant matter

i) The applicant has maintained in his recorded statement that he has purchased the seized gold from M/s Kamal Bullion. He has also produced the purchase invoice for the gold from M/s Kamal Bullion and the bank statement. The applicant has also submitted that the entry of the impugned gold is reflected in the stock statement maintained by him.

ii) The Appellate Authority has not disputed the bank statement with respect to the payment made against the said purchase invoices. The quantity of gold purchased against the said invoice is also not disputed i.e the quantity seized and the quantity shown in the invoice. The only dispute is that the gold purchased vide the said invoice do not show the details of foreign marking.

iii) The applicant has submitted their invoice and bank statement and hence discharged their burden of proof as required under Section 123(2) of Customs Act. Government finds that it is mentioned in the OIO and OIA that the applicant has not submitted the return filed under GST to establish licit procurement from M/s Kamal Bullion and that M/s Kamal Bullion has filed the GST1 returns late, however this late filing of return does not prove that the claim of the applicant regarding the sale/transaction of the impugned gold was not genuine.

iv) The investigation could not in anyway establish that the 350 grams of gold seized from the applicant's shop is the same as the gold brought by Ms Marin Kataigi.

v) Nothing incriminating in nature was found in the search of the applicant's shop and residence, forensic analysis of CPU, mobile phones and from the CCTV footage of his shop.

9.2 The Original Adjudicating Authority has at Para 42.5 of his Order-in-Original gone into the intricacies of this case while holding that the applicant is not involved in smuggling activity, which is re-produced below:

“.....42.5 I find that section 123 of the Customs Act 1962 was invoked in the present case which deals with burden of proof. I find that in the instant case, Mr Prashant J Thadeshwar has produced the purchase invoices from M/s Kamal Bullion. Only mentioning incomplete description of goods in invoice cannot be a ground for rejecting the validity of invoice. I find that M/s Kamal Bullion existed and also produced on 21.12.2019, the GSTR-1 Return filed for the month of July 2019. I find that without verifying the authenticity of said GSTR-1 return for month of July 2019, the conclusion drawn, that the said GSTR-1 Return is an afterthought as it is filed after six months of seizure of currency, is unfounded as the notice vide letter dated 29.12.2020 submitted the Notification No 74/2019 Central 6.12.2020 wherein the late fee payable under section 47 of the CGST Act 2017 stands waived for registered person who failed to furnish the details of outward supplies in FORM OS I for the month/quarters from July 2017 to November 2019 by due date but furnished the said details on FORM GSTR-1 between period from furnish 19 December 2019 to 10 January 2020. In view of above, I find that filing the GSTR-1 return belatedly going through the content of the said GSTR-1 return and drawing adverse conclusion against the notice is uncalled for. I find that Shri Prashant J. Thadeshwar submitted purchase invoice for the said foreign mark gold from M/s Kamal Bullion and bank statement to AIU and therefore I find force in his advocate's

claimed that he had discharged the burden of proof in terms of Section 123 of Customs Act, 1962, I find that beside the statement of Shri Shigeru Hikawa claiming that the gold is sold to Shri Prashant J. Thadeshwar , which Prashant J. Thadeshwar refuted vide his statement dated 18.09.2019, there is no corroborative evidence to suggest that the gold seized from the premises of M/s Jayantilal Mansurbhai and Company is the same as that of gold smuggled by the syndicate of Ms. Marin Kataigi, Mr. Shigeru Hikawa and Mr. Ohashi Shunsuke. Beside the only fact that Shri Prashant J Thadeshwar knew Mr Shigeru Hikawa, there is no evidence to link or connect the smuggled gold by Ms Marin Kataigi to that of seized gold from the premises of M/s Jayantilal Mansurbhai and company. Therefore, I find that there is no corroborative or substantive evidence to support the statements of Mr Shigeru Hikawa that he has sold the gold to Shri Prashant J Thadeshwar of M/s Jayantilal Maansurbhai & Co. Therefore, I come to the conclusion that seized gold from the premises of M/s Jayantilal Mansurbhai and company is not liable for confiscation under the provisions of the Customs Act 1962 and no case is made against Shri Prashant J Thadeshwar of M/s Jayantilal Maansurbhai & Co.”

10. Government agrees with the above observation and finds that there is no substantive evidence linking the foreign currency, smuggled gold and Ms Marin Kataigi to the applicant and hence the gold seized from the applicant's shop cannot be considered as part of this smuggled gold. Further, submission of purchase invoice and proper reflection of 350.7 grams of gold in books of account brings out that this gold was legitimately procured. Hence Government finds that the OAA has used his discretion correctly, in dropping the proceedings initiated against the applicant after going into the details of the

case. Government finds that the OIO passed by the OAA to be fair, legal and proper and is inclined to restore the same.

11. Accordingly, in view of the above, Government sets aside the OIA passed by the AA and restores the OIO passed by the OAA.

12. Revision Application filed by the applicant is disposed of on above terms.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 875/2023-CUS (WZ) /ASRA/MUMBAI DATED 29.11.2023

To,

1. Shri. Prashant J Thandeshwar, Flat No. C-1804, Tower Orchid Suburbia, Link Road, Kandivali (W)-4000676
2. The Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal – 2, Sahar, Andheri East, Mumbai – 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059

Copy to:

4. Shri. Prakash Shingrani, Advocate, 12/334, Vivek New MIG Colony, Bandra East, Mumbai – 400 051.
5. Sr. P.S. to AS (RA), Mumbai.
6. File Copy.
7. Notice Board.

