IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL Nos. C/70111-70112 & 70114/2017-CU[SM]

(Arising out of Orders-in-Appeal No. MRT/EXCUS/000/APPL-I/205 & 206/2016-17 dated 04/11/2016 passed by Commissioner of Central Excise (Appeals-I), Meerut)

Shri Alam (in Appeal No. C/70111/2017),
Mohd. Waseem alias Babu (in Appeal No. C/70112/2017) &
Shri Javed (in Appeal No. C/70114/2017) Appellant(s)
Vs.
The Commissioner (Appeals-I), Customs, CE & ST, Meerut
Respondent(s)

Appearance:
Shri Dushyant Kumar (Consultant) (in Appeal Nos. C/70112 & 70114/2017) for Appellant(s)
Shri Mohd Altaf (Asstt. Commr.) AR for Respondent(s)

CORAM:
Hon'ble Mr. Anil Choudhary, Member (Judicial)

Date of Hearing : 15/12/2017
Date of Pronouncement : 21/02/2018

FINAL ORDER NOs. 70386-70388/2018

Per: Anil Choudhary

These appeals have been preferred against impugned Orders-in-Appeal confirming the absolute confiscation of eight pieces of Foreign Origin Gold Bar bearing "Suisse" mark with 999.9 purity without any serial numbers, collectively weighing 933.120 gms and also penalty under Section 112(b)(i) of the Customs Act, 1962.

2. Brief facts of the case are that the Police of Muzaffarnagar on 02.01.2015 arrested two persons (appellants) viz Mohd. Waseem and Shri Javed alongwith eight gold biscuits and registered Criminal Case No. 12/2015 (State vs. Mohd Waseem and others vide FIR No. 5/2015 dated 02.01.2015). The said gold biscuits were recovered from possession of Mohd Waseem who was travelling in the taxi of Shri Javed.

3. The Police further transferred the case to the officers of Customs (Prev) Commissionerate, Lucknow who detained the said gold on 01.04.2015 by serving Detention Memo upon Inspector Indharge of Thana Chapaar Sadar, Muzaffarnagar.

4. The Customs Officers also searched the residential premises of all the above named Appellants viz Mohd. Waseem, Shri Javed and Shri Alam and search resulted in nil recovery of any contraband goods or incriminating documents.

5. On 24.01.2015 Mohd. Nasim, brother of Mohd. Waseem submitted one application to the Customs Department alongwith duty paying documents relating to legal import of the seized gold biscuits from the possession of Mohd Waseem.

7. It is further submitted that Shri Nasim, brother of Mohd Waseem had furnished Baggage Receipt No. 1589 dated 20.11.2014 and Cash Receipt No. 52156 dated 20.11.2014 of Mohd. Wahab, Cash Receipt No. 51608 dated 31.10.2014 of Shri Usman and Detention Receipt No. 3430 dated 22.09.2014,

Cash Receipt No. 52067 dated 17.11.2014 of Mohd. Faisal with his affidavit dated 24.02.2015 before special C.J.M, Meerut, which are relied upon documents no. 16 to 20 of the Show-Cause-Notice under reference, which are clear testimony of legal import of goods biscuits seized from Mohd Waseem in present case.

8. Statement of Mohd Waseem was recorded on 5th January, 2015 under Section 107 of the Customs Act at the District Jail, Muzaffarnagar with the permission of Hon'ble CJM Court, Muzaffarnagar, wherein he stated that he is engaged in the work of whitewashing at Saudi Arabia and admitted to have contributed for the first time alongwith Aftaab, Faizal and Saartak Rs. 5.75 lakh each, for smuggling of Gold Biscuits by way of their share from Saudi Arabia i.e., UAE through the aid of settings of Alam at Delhi International Airport. Regarding the knowhow of settings of Alam at Delhi International Airport he showed his innocence and could not produce any document in support of illicit import. On the same day Shri Jawed also in custody in his submission stated that he is a taxi driver and on 02 January, 2015 was drunk and alongwith Mohd Waseem had got into altercation with driver/owner of the Ambassador who had not given him pass and he had no connection with the smuggling of the Gold Biscuits nor any Gold Biscuits had been recovered from his possession in the search of his person by the Police of Kotwali, Chapaar Sadar, Muzaffarnagar. The seized gold bars were valued by the Approved Government Valuer on 04 March, 2015 totally weighing 933.120 gms, totally valued at Rs. 25,47,418/-. On the reasonable belief that the Gold Bars appeared to be smuggled and are liable for confiscation the same was seized vide Panchnama dated 04 March, 2015 by the Customs Officers.

9. Further statement of Mohd Waseem was recorded on 27.02.2015 under Section 108 of the Customs Act inside the District Jail, Meerut in which he admitted to have known the said Mohd. Wahab, Mohd. Usman and Mohd. Faizal for the last 4-5 years and also stated that Mohd. Wahab and Mohd. Usman had given him three gold biscuits each and Shri Abdul Samad has given two gold biscuits for disposal and making of ornaments.

10. Whereas, to ascertain the veracity of the Baggage Receipts and Cash Receipts adduced and the version of their said to be owners, Summons dated 10.03.2015, 01.04.2015 and 21.04.2015 for appearance on 23.03.2015, 15.04.2015 and 05.05.2015 were sent to each Mohd. Wahab and Mohd. Usman but none of them turned up. Summons dated 10.03.2015, 01.04.2015 and 21.04.2015 were also sent to Mohd. Faisal and his attorney holder Shri Abdul Samad for appearance on 24.03.2015, 16.04.2015 and 06.05.2015 but Summons in respect of Mohd. Faisal dated 01.04.2015 and 21.04.2015 "Pata karne par prapt karta ka pata nahi lagta, wapas dated 19.04.2015" and "Sahi prapt karta ka pata nahi lagta wapas date 28.04.2015". Likewise, only one Summon in respect of Shri Abdul Samad was received back in the office with the remarks of the postal authority on the envelop "Sahi prapt karta ka pata nahi lagta wapas".

11. Accordingly, it appeared to Revenue that the defence put up by Mohd Naseem brother of Mohd Waseem is by way of afterthought and not reliable. Accordingly, vide the show cause notice issued on these appellant dated 29 June, 2015 proposed to confiscate the seized eight pieces of Gold Bars and further penalty was proposed on the appellants under Section 112(b)(i) of the Customs Act, 1962. Defence reply was filed by Mohd Alam denying all the charges and allegations. Mohd Javed also denied all charges stating that he was nowhere involved in the smuggling and he was only faring the appellant Mohd Waseem in his taxi, the appellant Mohd Waseem also contested the show cause notice by filing a reply reiterating the defence taken at the investigations page that he was carrying the gold for disposal/sale which was legally imported. Further furnished evidence being baggage receipt of import by Mohd Usman, detention receipt, cash receipt of Mohd Faizal alongwith affidavit dated 24 February, 2015 to Special CJM, Meerut which are relied upon documents in

the show cause notice and thus are testimony of legal import of gold biscuits seized from the appellant-Mohd Waseem. Further, Adhar Card of Shri Abdul Samad alongwith affidavit, Election Commission card of Mohd Usman, Xerox of his Passport alongwith affidavit wherein Shri Abdul Samad and Mohd. Usman clearly indicated that they had given their gold biscuits to Mohd Waseem. The copy of Passport of Mohd Waseem was also produced to indicate that he too served in Riyad, Saudi Arabia. Further stating that the whole proceedings initiated in absence of non-joinder of essential parties namely Shir Abdul Samad and Mohd Usman and Mohd Faisal are vitiated and bad. It was further contended that so far the proposed penalty under Section 112(b)(i) is concerned, there is no evidence on record in support of "dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111." Hence penalty is not imposable. The Additional Commissioner adjudicating the show cause notice, confiscated the eight gold bars absolutely and further imposed penalty under Section 112 (b)(i) of the Customs Act, 1962 as follows:-

- Mohd Waseem – Rs. 2 lakhs,
- Shri Javed – Rs. 2 lakhs,
- Mohd Alam – Rs. 3 lakhs.

12. Being aggrieved by this order, appellant(s) preferred appeal before learned Commissioner (Appeals) who was pleased to reject the appeal of Mohd Waseem and Shri Javed vide OIO dated 16 November, 2016 as both of them had filed appeal jointly. The appeal of Mohd Alam was rejected as time barred.

13. Being aggrieved the appellants are before this Tribunal. Learned counsel states that the appellant of Mohd Alam was not time bar as the impugned order was communicated and received by him on 26 September, 2015 and the appeal was filed on 28th December, 2015 before the learned Commissioner (Appeals). Thus, time taken was total 89 days and as such it was within the condonable period of 30 days, within the power of the learned Commissioner (Appeals).

14. Learned Counsel further states that the appeal of Mohd. Alam has been rejected by the Commissioner (Appeals) holding it as time barred under O-I-A dated 04.11.2016. The appeal of Mohd Alam is not time barred which is explained under Para A at page 8 of Memo of appeal filed by Mohd. Alam. There is nothing on record against Mohd Alam except his role in arranging the gold biscuits, in the statement of Shri Mohd. Waseem. Even he could neither be traced nor his statement could be recorded by the Customs Officers.

15. The Hon'ble Additional Commissioner adjudicating the case has absolutely confiscated the gold by observing that the Noticee No. 1 (Mohd. Waseem) has confessed his involvement in trading of smuggled gold bars and has quoted 'what is admitted need not to be proved', the observation of Hon'ble Apex Court in the case of Commissioner of Central Ecise Madras vs. Systerm and Components (P) Ltd. [2004(165) ELT 136(SC)]. He has totally ignored the documentary evidence affidavits and duty paying documents which were submitted to the department during investigation after seizure.

16. The seized gold has been seized by the police (who are not Customs Officers) and thus Section 123 of the Customs Act is not invokable and burden lies on the department to prove that gold bars in question were smuggled one, especially when the documentary evidence for legal import of the same were submitted before the department.

17. Importation of gold is not prohibited and thus Adjudicating Authority has erred and absolutely confiscated the same contrary to the provisions Section 125 of the Customs Act, 1962.

18. Mere failure on the part of the appellant, Mohd. Waseem to produce the duty paying documents immediately at the time of recovery, does not lead to the inevitable conclusion that the recovered gold bars were smuggled.

In view of the above/foregoing premises it is prayed that the absolute confiscation be set aside, gold may be ordered to be released to Shri Mohd. Waseem from whose possession the gold bars were recovered.

19. The learned AR for the Revenue relied on the impugned order.

20. Having considered the rival contentions and on perusal of record, I find that it is an admitted case of Town Seizure of the Gold. I further find that gold was seized by the Police who are not the Customs Officers. I further find that although the appellant Mohd Waseem had given a plausible explanation as to the licit import of gold but the same could not be strongly supported by him in absence of examining his witnesses and or producing his witnesses before the Revenue in the adjudication proceedings. Further I find that in the circumstances although the case of smuggling is not made out, but the appellant Mohd Waseem have failed to discharge the onus under Section 123 of the Customs Act, as to the licit import of the gold originally seized by the Police Officers and subsequently seized by the Customs Authority. Further, I find that gold is otherwise importable on payment of appropriate duty and is not prohibited. Accordingly, in the interest of justice I modify the impugned order as follows:-

"The order of absolute confiscation is set aside and modified to confiscation with option to redeem the gold in favour of Mohd Waseem from whose possession the gold was recovered on payment of duty and redemption fine Rs. 5 lakhs. Further under the facts and circumstances, the penalty imposed under Section 112(b)(i) of the Customs Act, 1962 is set aside with respect to all the appellants."

21. Thus, the appeal of Mohd Waseem is allowed in part and appeal of others are allowed. On payment of duty and fine, the gold be released forthwith.

(Pronounced in Court on 21.02.2018)

Sd/-

(Anil Choudhary)

Member (Judicial)Ankit

1