FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 26/12/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71168/2016-SM[BR] dated 30/11/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 129-A(4) of the Customs Act, 1962.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1 C/COD/51012/2014	C/50861/2014	VISHNU THAPA PROPRIETOR,ABC TOURS AND TRAVELS (PVT) LTD,K.M.C. WARD NO-6,BAUDDHA, KATHMANDU,NEPAL 44600

Name and Address of Respondent

2 C.C.E. & S.T.-Lucknow
7-A...ASHOK MARG,
LUCKNOW,
UTTAR PRADESH-
226001

Copy To

3 Advocate(s) / Consultant(s):

B. R. Tripathi
A-23/90, RAJA WADI CHS,
CHITRANJAN NAGAR, GHAT KOPAR
(E), MUMBAI,
MAHARASHTRA
400077

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise, I.P. Estate, Delhi
6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3
7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17
8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. 2

APPEAL No. C/50861/2014-CU[SM]

(Arising out of Order-in-Original No. 02/Commissioner/Lucknow/2013 dated 13/08/2013 passed by Commissioner of Customs (Preventive). Lucknow.)

For approval and signature:

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

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

AC

Sri Vishnu Thapa S/o Narhari Thapa Proprietor of ABC, Tours & Travels (P) Ltd, Kathmandu — **Appellant**

Vs.

Commissioner of Customs (Preventive), Lucknow — **Respondent**

Appearance:

Shri B.R. Tripathi, Advocate, for Appellant
Shri D.K. Deb, Assistant Commissioner, (AR), for Respondent

CORAM:

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

Date of Hearing & Date of Decision: 30/11/2016

FINAL ORDER NO...71168/2016........

Per: Anil Choudhary

The present appeal is filed by the appellant, M/s Vishnu Thapa, against Order-in-Original No. 02/Commissioner/Lucknow/2013 dated 13/08/2013 passed by Commissioner of Customs (Preventive), Lucknow. The issue involved in this appeal filed by the appellant-owner of the bus, if the appellant is involved in the smuggling of gold found from the possession of the driver of the bus.

2. The brief facts of the case are as follows:-

1. On 26/09/2012, at about 10 A.M., the officers of the Customs, Nautanwan, acting on a tip of, stopped a Nepalese Bus bearing No. 1-PA-122, going from Kathmandu, Nepal to Delhi, India, intercepted the bus at Nautanwan Bypass, near Banauliya Temple, Nautanwan and carried out the checking. In the Course of checking, a weighty packet, wrapped with plastic tape was recovered from pant pocket of the Bus Driver - Shri Hari Bahadur Shreshtha S/o Shri Man Bahadur Shreshtha R/o Milang-8, Dist., Dolakha, Nepal. On interrogation by the officers and nothing being revealed by Shri Hari Bahadur Shreshtha, in presence of two independent witnesses, two gold biscuits were found in the pocket, and each biscuit bore 'TAISHAN' mark and 1000gms. On being asked by the Customs Officers to produce valid documents relating to import of the recovered gold, Shri Hari Bahadur Shreshtha could not produce any papers. On being

interrogated by the Officers Shri Hari Bahadur Shreshtha said that, the said gold biscuits recovered from him had been given to him by a person named, Gokul R/o Bauddha, Kathmandu, who works as Guide in Nepal and who had told him that after reaching Delhi, he (Hari Bahadur Shreshtha) was required to reach Tibetan Camp, Majnu Ka Teela, Delhi and inform him (the said person Gokul) and that somebody would come and collect the gold biscuit. For this service, Gokul had promised to give him two thousand rupees. Thereafter, the Customs Officers took custody of the recovered foreign biscuits of gold, and detained Shri Hari Bahadur Shreshtha and the Bus No. 1-PA-122, in the presence of the two independent witnesses and brought them to Customs Division Office, Nautanwan.

2. The Customs Officers in the presence of the two independent witnesses sent for Shri Vinay Kumar, the goldsmith, from Nautanwan market and the weight and the purity of gold was checked. The goldsmith weighed the two biscuits one by one and reported that both the biscuits weighted 997.5 gms. & 997.5 gms, respectively and the purity was 99.9%. Shri Vinay Kumar, the goldsmith said that the total value of both the biscuits was Rs.62,64300/-. On search of the personal assets of Shri Hari Bahadur Shreshtha, one Chines passport, one Chinese travel document and five Nepalese Passports were also recovered from his bag. On the basis of valuation of gold done by the goldsmith, the officers

of Customs, Nautanwan made assessment of the gold and then assessed the value of the Bus No. 1-PA-122, as follows:-

Sr. No.	Description of the goods	Quantity/Weight	Value of the goods
1.	Foreign biscuit of gold ('TAISHAN') mark	02 biscuits. Per biscuit 997.55 gms Total weight = 1955 gms.	Rs.62,64,300/-
2.	Nepalese Bus Registration No. 1-PA-122	01 piece	Rs.10,00,000/-
		Total	**Rs.72,64,300/-**

The statement of the driver – Shri Hari Bahadur Shreshtha, was recorded under Section 108 of the Customs Act, 1962 wherein he stated that the recovered gold was given to him by a person – named – Gokul, who was resident of Bauddha, Kathmandu and worked as guide. He was required to carry the gold to New Delhi (Majnu Ka Teela, near Tibetan Camp) and then contact Mr. Gokul who will arrange for some unknown person to receive the delivery of the gold. GoKul did not inform him any whereabout of the above of the said unknown person. For this service/work, Gokul had promised to pay him Rs.2000/- Nepalese. On being interrogated about Passports recovered from him he said that all the Passports had been given to him by a person called Ballkrishna, who also worked as guide in Kathmandu. The said Passports were to be delivered to a person, named, Neema Lama in Delhi, who was expected to approach him in bus and receive them. He only knew that Neema Lama ran a hotel in the vicinity of

Kullu Manali hotel in Majnu Ka Teela, New Delhi.

3. The Officers of the Customs (Nautanwan) on a reasonable belief that they have recovered foreign gold which had been brought illegally from Nepal by the driver of the bus, Shri Hari Bahadur Shreshtha, in violation of the provisions Section 11 of the Customs Act, 1962 read with Notification No. 09/1996 dated 22/01/2006, seized the gold and also the Nepalese Bus Registration No. 1-PA-122, on the belief that the bus was being used for transporting the recovered gold from Nepal to India and the bus was also liable to be seized under Section 111(d) and under Section 115(2) of Customs Act, 1962.

4. In pursuance to Show Cause Notice dated 25/04/2013, the driver of the bus, Shri Hari Bahadur Shreshtha, replied that he has been falsely implicated. The allegations in the Show Cause Notice are imaginary, false and beyond truth. At the time of seizure, he was driving the said bus with passengers from Kathmandu to New Delhi. After crossing the Sonauli, Customs Border at Indo-Nepal Border (land Customs Station), where complete checking of the bus and the passengers, including the driver was done, including personal checking and thereafter on satisfaction of the Customs Authority, the bus had been allowed to proceed. Thereafter in about 15 minutes the Customs Authorities again checked the bus at Nautanwan Bypass wherein the Customs Authorities claimed to have found two gold biscuits wrapped in polythene

A-27

lying unclaimed in the bus, which was not claimed by any passengers. As none of the passengers claimed the said gold, the Customs Authorities have falsely framed the driver and alleged that the said gold have been recovered from his person. The said driver, further, claimed that it is not possible for a person to drive a bus with about 2 kg of gold in his pocket. He has further averred that had he been carrying the gold on his person, he would have definitely hid at the time of checking at the Customs Borders or Check Post.

5. In the reply, the appellant bus owner - Vishnu Thapa & his agent, Sunil Chaalise stated that they have not in anyway involved themselves, in the smuggling of the recovered gold nor the bus have been anyway used as a means of transport with their knowledge, in the alleged smuggling of the recovered gold. Further, under the fact that the gold have been recovered from the person of the driver and further in the statement of driver he has nowhere claimed that the gold was being carried by him at the instruction of either the owner or the tourist agency or its incharge Mr. Sunil Chaalise. Hence, the vehicle is not liable for confiscation under the provisions of Section 115(2) of Customs Act, 1962 nor any penalty is imposable on them as they have not violated any of the provisions of the Customs Act, 1962.

6. The ld. Commissioner vide the impugned Order-in-Original No. 02/Commissioner/Lucknow/2013

dated 13/08/2013, have recorded the finding that foreign gold was being smuggled from Nepal to India. The fact of gold being of foreign origin stand confirmed as no one have claimed the said gold nor any valid papers or certificates were produced in connection with import of the gold. Both the gold biscuits marked ('TAISHAN') and of 1000 gms, was embossed and from the same it stands confirmed that the gold was of foreign origin, under Notification No. 09/1996 dated 22/01/2006, it is provided that import of third country made goods from Nepal to India is prohibited. As regards, whether the owner of the bus is liable to face confiscation of the bus under provisions of Section 115(2) of Customs Act, 1962, the ld. Commissioner have recorded the following findings:-

"From this it is clear that above foreign gold was being illegally imported from Nepal to India. Generally, in absence of the owner of the vehicle, the driver is considered as person in charge of the said vehicle and that for any incident/action in bus, it is the driver who is responsible. In this context, Shri Hari Bahadur Shreshtha taking undue benefit, being the driver engaged himself in gold smuggling. The gold biscuits were recovered from Shri Hari Bahadur Shreshtha, who was working as a driver at that time. The driver, the person who is in complete control of the vehicle and it is his duty that he should not indulge in any illegal work nor should he use the bus illegally. Thus, Shri Hari Bahadur Shreshtha being in charge of the vehicle and in that capacity misused the Bus No. 1-PA-122 in smuggling of the gold and for that reason, I find the reasonable belief of the Customs Officers as proper at the time of seizure and found it (Bus) liable for confiscation under provisions of Section 115(2) of the Customs Act, 1962.

Since, the said seized Bus No. 1-PA-122 had already been released on furnishing of cash security of Rs.10,00,000/- and executing the bond of Rs.10,00,000/- the vehicle was released to Shri Sunil Chaalise, in charge, Transport Department of M/s ABC Tours & Travels Pvt. Ltd., Kathmandu, Nepal, (power of attorney holder), therefore the security amount Rs.10,00,000/- is liable to be appropriated to the account of Central Government.

Further, penalty and under Section 112 was imposed on the driver – Shri Hari Bahadur Shreshtha of Rs.10,00,000/- and no penalty was imposed under Section 112 of Customs Act, 1962, on owner of the bus and his agent, namely, Mr. Vishnu Thapa, & Shri Sunil Chaalise respectively, recording the finding that there is no evidence against Mr. Vishnu Thapa & Shri Sunil Chaalise in the act of smuggling of foreign gold.

7. Heard both the parties.

8. From the findings recorded by the ld. Commissioner and perusal of records, I find that no case of involvement of the

owner–Mr. Vishnu Thapa the appellant herein has been found in the alleged smuggling of gold. Further, I find that no involvement of the agent of the owner, namely, Shri Sunil Chaalise of Transport Department of M/s ABC Tours & Travels Pvt. Ltd., Kathmandu, Nepal, (power of attorney holder), have been found by the ld. Commissioner and no penalty was imposed under Section 112 of Customs Act, 1962. Further, I find that the ld. Commissioner have erred in holding that the driver of the bus, Shri Hari Bahadur Shreshtha, to be the agent of the owner, which is without any basis. In view of the findings on record, I find that no case for confiscation is made out of the bus under Section 115(2) of Customs Act, 1962. The owner–appellant have proved that the bus was so used without knowledge or connivance of the owner himself or his agent in using the conveyance for smuggling. Further, it is admitted fact on record that the gold was not concealed in the bus but was found on the person of the driver. Accordingly, I set aside the confiscation of the bus and fine on its owner the appellant under Section 115(2) of Customs Act, 1962.

9. Thus, the appeal is allowed. The appellant will be entitled to refund of the Redemption fine deposited.

(Dictated and pronounced in Court).

(Anil Choudhary)
MEMBER (Judicial)

प्रमाणित प्रति / Certified True Copy
28/12
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001

Ansari