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

Dated: 15/06/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70565/2017-SM[BR] dated 09/06/2017

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/70143/2015	Commissioner of CUSTOMS(PREVENTIVE)-Lucknow HALL NO.3... 5TH FLOOR, KENDRIYA BHAWAN...SECTOR-H, ALIGANJ,LUCKNOW, UTTAR PRADESH
		Name and Address of Respondent
2		MOHD RASHEED ANSARI S/O PAHANAM ANSARI,SAURAHA BUJURG,NANDAN CHHAPRA,SINGAHA RAMKOLA,,KUSHINAGAR ,UP

Copy To

3 Advocate(s) / Consultant(s): SH A.P.MATHUR,ADV
167, TAGORE TOWN
ALLAHABAD

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. I

APPEAL No. C/70143/2015-CU[SM]

(Arising out of Order-in-Appeal No. 331-332-CUS./APPL-LKO/LKO/2015 dated 21/08/2015 passed by Commissioner of Central Excise Service Tax & Customs (Appeals), Lucknow)

Commissioner of Customs, Lucknow **Appellant**

Vs.

Mohd. Rasheed Ansari **Respondent**

Appearance:

Shri Sandeep Kumar Singh Deputy Commissioner (AR) for Appellant
Shri A.P. Mathur (Advocate) for Respondent

CORAM:

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

Date of Hearing : 09/06/2017
Date of Decision : 09/06/2017

FINAL ORDER NO. 70565/2017

Per: Anil Choudhary

Revenue is in appeal against order of the Commissioner (Appeals), whereby after considering the cross appeals, both the appeals were dismissed holding that the ground raised by Revenue and assessee are not tenable in view of evidence recorded.

2. The brief facts are that the respondent Mohd Rasheed Ansari arrived by Flight No. WY-263 on 16 February, 2014 at Lucknow Airport from Muscat. The Air Customs Intelligent Unit (ACIU for short) intercepted the respondent and enquired about the dutiable goods in his possession, if any, which was

replied in the negative. His Disembarkation card was also having no mention of dutiable goods. However, on subsequent frisking and checking, two bars/biscuits appeared to be made of Gold wrapped in carbon paper and tape and marked as "SUISSE, 10-TOLAS, FINE 6010,999.9" were recovered from him, which he had secreted in his underwear. As per the assaying report prepared by approved valuer, recovered two Gold bar/biscuits weighing 233.280 gms. in total were made up of Gold and were valued at Rs. 7,23,168/-. On the belief that the respondent was illegally importing/smuggling Gold in contravention of the Customs Act/Baggage Rules/FTP, the Department officers seized the two Gold bars/biscuits along with the packing material, namely Carbon paper and Cello tape used for wrapping and concealing vide Seizure Memo dated 16 February, 2014 and Panchnama was also drawn. Further in the statement recorded of the respondent on the same day under Section 108, he inter-alia stated that the recovered two Gold bars/biscuits were illegally imported from Riyadh (Saudi Arabia). He further stated that his friend, namely, Shri Faiyan lives with him at Riyadh and one of his close friend met him at Riyadh Airport and handed over the said two Gold bars to him for delivering the same to a person who would contact him at the Lucknow Airport. He also told that his ticket from Muscat to Lucknow was arranged for such illegal smuggling of the said two Gold bars.

3. Accordingly, SCN dated 29 July, 2014 was issued

proposing to confiscate the seized Gold bars along with proposal to confiscate the packing material and also proposing to impose penalty under Section 112 and Section 114 AA of the Act.

4. On adjudication, the same was decided on contest. The respondent appeared and stated that he was working in Riyadh – Saudi Arabia as a cutter and tailor on monthly salary of 3000 Riyals for the last 7 years. Apart from his salary, he also earned by working overtime. He was a valid passport holder issued by the Government of India. During the last 7 years he had come to his native village 4 times to take care of his family, which consists of his uncle, two sisters, four sons, wife and self. He had brought the two Gold biscuits for making of ornaments for his wife and sisters. He had purchased the two Gold biscuits and brought it on his person, keeping in the pocket of his pant. Unfortunately, when he was to proceed to the Customs Officer from Disembarkation Hall for making declaration and assessment of his Gold biscuits to duty, he was intercepted by an officer of the Customs and taken to his office where he was questioned about possession of any dutiable goods. The respondent admitted possession of two Gold biscuits and produced his passport and purchase receipt for perusal. Despite this fact he was made to wait in the office of the Customs and ultimately the Gold biscuits were seized alleging that the respondent was passing through green channel when

intercepted which resulted into recovery of two Gold biscuits secreted in his inner garments wrapped in carbon paper with cello tape. The Gold biscuits were actually kept in the pocket of the pant because Gold biscuits cannot be brought openly in hand. The respondent was aware that a passenger holding valid passport and living abroad for more than six months can import Gold biscuits not exceeding one Kg in weight. That is why he had brought two Gold biscuits with him and intended to discharge Customs duty payable thereon, but unfortunately he was intercepted by the Customs Officer prior to reaching the Customs post for making the declaration. He also urged that Gold is not restricted or prohibited goods for bringing by person returning after more than a year of stay abroad. The only requirement is to pay the concessional amount of Customs duty leviable on the Gold imported with the baggage of the person. It was also urged that the respondent on the day of arrival was required to sign on the purported statement under Section 108, of which he had no opportunity to know the contents thereof. Accordingly, the said statement had no evidentiary value.

5. The Joint Commissioner passed the Order-in-Original dated 5th March, 2015 holding that the two Gold biscuits are liable to confiscation weighing 233.280 gms valued at Rs. 7,23,168/- (Tariff value Rs. 6,18,237/-) under Section 111(d), (l) and (m) of the Act, seized vide Panchnama dated 16 February, 2014. However, he was pleased to give an option to

the respondent for redemption of the two Gold biscuits in lieu of confiscation on payment of fine of Rs. 1,40,000/- under Section 125(1) of the act along with payment of duty as applicable and other charges, if any. Further confiscation of the packing material was also ordered and further penalty was imposed under Section 112 Rs. 70,000/- and also 114 AA of Rs. 10,000/-.

6. Being aggrieved, both the parties herein preferred appeal before learned Commissioner (Appeals), Lucknow. The respondent importer had urged that he was a genuine passenger and had brought the two Gold biscuits as permissible under Baggage Rules and was wrongly intercepted in the Disembarkation hall before he reached the Customs post. That the statement under Section 108, recorded on the date of Seizure is not voluntary and hence not reliable. Further, there is no evidence that the respondent was intercepted while passing through green channel. In such circumstances, Gold, being neither restricted nor prohibited item for import and further the same being brought for personal use, the order of confiscation and penalty is bad. In the appeal by Revenue, it was urged that the Joint Commissioner have erred in holding that Gold is not under the prohibited category, while, on the other hand, he has held that import is in violation of Para 2.20 of FTP, saving Clause 31(h) of Foreign Trade (exemption from application of Rules in certain cases) Order, 1993 and the provisions of Foreign

Trade Regulations, Rules, 1993. Further, the joint Commissioner have overlooked the fact that the seized goods were concealed and would not be declared as is evident from Panchnama and thus, the same was liable to be confiscated absolutely for attempted smuggling. Further, the order to release the goods on payment of RF imposed, is not sufficient and the same should have been equal to the market value of goods less the duty payable. Further, as the respondent-assessee in his statement had stated that the Gold biscuits belong to his friend and the respondent is merely a carrier, option to redeem could not have been given to him. Further, prayer for enhancement of penalty was made under Section 112 of the Act.

7. The learned Commissioner after considering the cross appeals have been pleased to hold and observe that the respondent has categorically admitted his mala fide in his first statement dated 16 February, 2014, on the date of Seizure. Though the respondent have claimed that the statement was recorded under duress but the same was not accepted by the learned Commissioner, as there was no protest in the near vicinity by the respondent before the Higher Officials of the Department, or any statement amounting to retraction. Further, cross-examination of panchas was only sought in the defence reply to the SCN. Thus, the purported retraction was made after more than eight months. Accordingly, the said retraction was held to be

having no evidentiary value. It was further observed that the respondent have claimed that the Gold was kept in his pant pocket wrapped in carbon paper. Further, it is observed as a matter of common understanding, the carbon paper and cello tape is not required if the goods are to be simply kept in the pant pocket. Such things are needed if the goods are to be glued/attached with the surface of cloth. Thus, the version of packing up the Gold for keeping in pant pocket was not believed. Further observed that the respondent have not given convincing reason as to why the Gold in question, was not declared in the Customs declaration as required. So far the plea that the respondent was intercepted in the disembarkation hall before he could reach the Customs Post, the said plea was rejected observing that disembarkation card is provided to a passenger during the flight with the purpose, the same would be filled by him prior to reaching the Customs checkpoint, so that the Customs Authority may inspect the declared goods, if found needed. Thus, as no dutiable goods were filled in the card for declaration, it appeared to learned Commissioner that the respondent was taking chance of crossing the Customs checkpoint without paying duty on dutiable goods in his possession, but he got trapped. He presented a precooked story, as it appears. So far the plea that the respondent was returning after more than six months, stay abroad and he was working in Riyadh, Saudi Arabia. As the Joint Commissioner have held the stay of six months was not continuous, before returning to India, it is a point of deliberation whether for bringing the admissible quantity of Gold, the stay of six months should be a continuous period or a total period of six months with interruption was sufficient. He further observed that in view of Rule 31(h) of FT (EFAR) Order, 1993, Clause 8 of second proviso of the said Rule prescribes the condition that the person importing Gold should be coming to India after a period of not less than six months of stay abroad. The Joint Commissioner observed that the six months stay abroad was not evident from the records, before him. Thus, the condition of bringing the admissible quantity of Gold was not fulfilled. He further held that the order of confiscation was just and proper as in the case of improper import and further the option to redeem on payment of redemption fine of Rs. 1,40,000/- along with applicable duty and other charges was also proper.

8. The learned Commissioner further considering the Revenue's appeal held that the option of redemption given by the Joint Commissioner is proper as Section 125 of the Act provides for option to be given for redemption either to the owner or where owner is not known, the option to be given to the person from whose possession or custody such goods were seized. It was further held that the redemption fine imposed is just and proper as Section 125(1) of the Act only sets the upper limit of RF and is open to the adjudicator to fix

the amount of RF anywhere because such upper limit as per the facts and circumstances. So far the ground that the Order in Original is self-contradictory, it was observed that if this ground of Revenue is accepted for a moment, even then it is not understandable as to what else, except the confiscation of subject goods, which is already done, could have been done by the adjudicator. Hence, the ground is fit to be rejected. As regards penalty, it was held that the penalty imposed to Rs.70,000/- is just and proper as the Section provides that imposition of penalty is discretionary and cannot exceed the duty sought to be evaded or Rs. 5000/-, whichever is greater.

9. Being aggrieved the Revenue is in appeal before this Tribunal on the ground that the smuggled Gold is liable to absolute confiscation, as the import under the Baggage Rules is for an eligible passengers who is coming to India after a period of not less than six months of stay abroad and short visits if any, made by the eligible passenger, during the aforesaid period of six months, shall be ignored, if the total duration of stay on such visits does not exceed 30 days and such passenger has not availed of the exemption under this Notification or under the Notification being superseded at any time of such short visits. It is further urged that for any passenger who brings Gold to India, must satisfy two essential conditions namely – (I) The passenger should be a regular passenger and the Gold should be part of it bona fide household goods or personal effects. In the circumstance of

this case, it is evident that the 'carrier of gold', being a smuggler, cannot be equated with an 'eligible passenger' and should not be given rights to import gold as his bona fide baggage of the personal effects. Further referring to CBEC Circular issued vide F. No. 495/5/92 - CUS, (VI) dated 10 May, 1993, it was the same situation when the gold is not declared by passenger and as to whether the same is liable to absolute confiscation. The Board clarified that even if the gold is not prohibited goods as per the Exim Policy, in respect of gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the authority is satisfied that there was no smuggling of Gold in question. It is further urged that the quantum of redemption fine should be maximum as per law and further the option to redeem should have not been provided to the respondent. It is also urged that the penalty imposed under Section 114 AA of the Act is less and needs enhancement. The learned AR for the Revenue have supported the grounds of appeal.

10. The learned advocate for the respondent urges that it is not the case of the Revenue that the appellant tried to walk out through Green Channal with the Gold, without declaring. Actually the respondent was intercepted by the Customs Authority, before he could reach the Customs Post for making the decoration. Further, there is no finding that the respondent was not a bona fide passenger or a person

returning to India after more than six months of stay abroad. Under these facts and circumstances, the appeal of Revenue is fit to be dismissed.

11. Having considered the rival contentions, I find that the issue herein is no longer res integra. This Tribunal under similar facts and circumstances in the case of CC, Lucknow v/s Mohd. Nayab and another vide final order No. 71006-7007/2016 dated 20th June, 2016, have held as follows:-

"Having considered the rival contentions, I find that the respondents had been working abroad in Saudi Arabia for the last 14 months. I further find that the quantity of 233.280 gms of gold, each, is not a commercial quantity and is valued at Rs. 7,05,672/- which cannot be said to be a quantity which the respondents could not purchase and import into India from their savings out of their earnings. Further, I find that the respondents could have imported gold up to 1 Kg each subject to proper declaration. Thus a case of non-declaration is made out at best, against the respondent. In the circumstances of the case, I do not find any reason to interfere with the order of the learned Commissioner (Appeals) who have upheld the order of confiscation with redemption fine, redeemable on deposit of duty and fine. I further find that the penalty imposed on the respondents, is adequate. Accordingly, the appeal of Revenue is dismissed and the order of learned Commissioner (Appeals) is upheld. The respondents will be entitled to consequential benefits, in accordance with law."

12. I find that the facts and circumstances in the present appeal are similar and accordingly, no case of smuggling of the Gold is made out and at best it may be the case of non-declaration at best, against the respondent. Accordingly, I hold that the order of learned Commissioner (Appeals) is just and proper and there is no reason to interfere with the said order, upholding the confiscation with option to redeem on payment of fine alongwith duty and further, the penalties imposed under Section 112 and 114 AA have been upheld. Accordingly, the appeal of Revenue is dismissed and the order of learned Commissioner is upheld. The respondents will be entitled for the consequential benefits, if any, in accordance with law.

(Dictated and pronounced in Court)

-Sd/-

(ANIL CHOUDHARY)

Member(JUDICIAL)

Anku

सत्यापित प्रति/Certified True Copy

16/06/2017

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