

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

Dated: 27/10/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/71006-71007/2016-SM[BR] dated 20/06/2016

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/70144/2015	COMMISSIONER OF CUSTOMS(PREVENTIVE)-LUCKNOW HALL NO.3... 5TH FLOOR, KENDRIYA BHAWAN...SECTOR-H, ALIGANI,LUCKNOW, UTTAR PRADESH
2	C/70145/2015	Commissioner of CUSTOMS(PREVENTIVE)-Lucknow HALL NO.3... 5TH FLOOR, KENDRIYA BHAWAN...SECTOR-H, ALIGANI,LUCKNOW, UTTAR PRADESH
3		Name and Address of Respondent MOHD. NAYAB S/O ABDUL HAFFIZ, R/O ZAHIRUDDINPUR, SAGRI, JEAN PUR,,, AZAMGARH ,U.P.
4		IMTIYAZ IDRIS S/O SHRI MOHD. ANWAR, R/O CHAK HUSSAIN BAGAI KHURD, PHULPUR,,, ALLAHABAD ,U.P.

ISSUED ON
23-11-16

SIGN. (DESPATCH SECTION)
CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
38, M. G. MARG, ALLAHABAD 211001.

Received order copy

N. L. Ray / post clerk

To A.P. Mathur Adt

18/11/2016

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

A. P. MATHUR
167, TAGORE TOWN,
ALLAHABAD,
UTTAR PRADESH

6 Bar Association, CESTAT, Allahabad

7 Director Publications, Customs, Excise, I.P. Estate, Delhi

8 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

9 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

10 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

11 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

12 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

13 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

14 The ICAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad.-500082

15 M/S Knowledge Processing Pvt. Ltd. (taxmanagementindia.com), FF-19, 1st Floor, Cross River Mall, CBD Ground, Near Karkardoma Court, Delhi-110032

16 C.D.R. 17 Office Copy 18 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. 1

APPEAL No.C/70144 & 70145/2015-CU[SM]

(Arising out of Order-in-Appeal No. 337-338/Cus/APPL-LKO/LKO/2015
dated 31/08/2015 passed by Commissioner of Central Excise & Customs
(Appeals), 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 his Lordship wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Commissioner of Customs, Lucknow

Appellant

Vs.

Mohd. Nayab & Imtiyaz Idris

Respondents

Appearance:

Shri V.K. Shastri, Assistant Commissioner (AR),
Shri A.P. Mathur, Advocate

for Appellant
for Respondents

CORAM:

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

Date of Hearing : 20/06/2016
Date of Decision : 20/06/2016

FINAL ORDER NO. 71006-71007/2016

Per: Anil Choudhary

The revenue is in appeal against common Order-in-Appeal No.

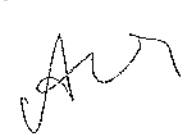
337-338/Cus/APPL-LKO/LKO/2015 dated 31/08/2015 passed by



Commissioner (Appeals) Central Excise, Customs and Service Tax,
Lucknow.

2. The issue in this appeal is whether under the facts of circumstances whether absolute confiscation was warranted for the two Gold Bars/Biscuits recovered from each of the respondents weighting 111 gms approximately each, which was not declared to the Customs and found while respondents were walking out through green channel.

3. The brief facts are that the respondents arrived at Lucknow Airport from Saudi Arabia on 19/01/14. Both the respondents were having an Indian passport and were passing through green channel were intercepted by Customs and on the disembarkation card handed over by them, no dutiable goods were mentioned. On suspicion, the baggage of the respondents/passengers were taken for the X-Ray, scanning, in which no dutiable goods were found. Thereafter, during process of frisking, while checking the wallets, two gold bars each, wrapped in white paper and tape were recovered from the wallet of the respondents. The said gold bars were marked as '1HBTM, SUISSE, 10-Tolas, Fine Gold, 999.9'. The said four gold bars on examination by approved valuer, were certified that the recovered bars/biscuits were of gold, totally weighting 466.560 gms valued at Rs.14,11,344/-. The goods were seized vide Panchanama on the same day as it was believed that the same is liable to confiscation under section 111 (i), (l) & (m) of Customs Act, 1962 read with baggage Rules, 1998 as amended.



4. In their statement dated 23/02/2014 recorded under Section 108 of Customs Act, 1962, both of them stated that they were working as welder in Saudi Arabia and further stated that they have returned to India after 14 months and the said gold found and seized were given to them by Shri Imtiyaz Idris, who told them to secret the same in their wallet and deliver the same outside at Lucknow Airport to a person, after verifying his identity. They were required to call Shri Imtiyaz Idris in Riyadh for which they were promised to be paid some money and in greed, they had resorted to this illegal import. They also stated that the number of Shri Imtiyaz Idris is 9877664504. They also stated that their Air tickets were arranged by Shri Imtiyaz Idris. He stated that two gold bars/biscuits 10 Tolas each were recovered from him, were given by one of the friend of Mazaharul Haq named Shri Imtiyaz Idris in Riyadh and he had to deliver the same at Lucknow Airport for which Shri Imtiyaz Idris arranged Air ticket. Further, he does not know the address of Shri Imtiyaz Idris. The other respondent in response to summons, also appeared on 27/06/14 and a statement was recorded under Section 108 of the Customs Act, 1962 wherein he stated that two gold bars/biscuits weighting 10 Tolas each recovered from him were given by Shri Imtiyaz Idris besides that he knew nothing. Pursuant to enquiry, show cause notice was issued as to why the goods be not confiscated and held liable for confiscation under Section 111 (i), (l) and (m) of the Customs Act, along with confiscation of the two black color leather like material purse/wallet consisting white paper wrapped with cello tape used as concealing



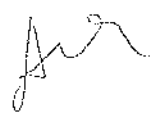
material under Section 119 of the Act *ibid*. Further, two Nokia mobile phones are also liable to confiscation under Section 111 of the Act being used for smuggling activity and further why not penalty be imposed upon the respondents under Section 112 and Section 114AA of the Act.

5. The respondent contested the show cause notice and filed written statements. Imtiyaz Idris stated that on arrival at Lucknow Airport, as he was waiting at conveyer belt for his luggage, one Inspector of Customs came and enquired from him whether he had anything to be declared. The Respondents admitted that he had two gold bars each wrapped with white paper and kept in the leather wallet in his pocket of the shirt. Thereafter, he was taken to Customs office, and asked to sit in the room and wait till 8:30 PM, when an officer asked him to sign his statement as dictated. The respondent tendered his statement as was dictated to him and the same was not voluntary & true and the respondent was bringing these two gold biscuits for the marriage of his sister. It was not concealed anywhere but kept in his wallet in the pocket of his shirt along with the purchase receipts. The gold biscuits, wallet, Nokia mobile phone and the purchase receipt of gold biscuits were taken over by the seizing Officer and a confessional statement had been extracted from him by intimidation and detaining him late in the night. The respondent could not dare to refuse for recording of his statement because of intense fear due to the fact that he had never faced such a situation. The respondent was working in Saudi Arabia since the year 2012 and was returning after

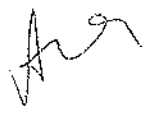


14 months of stay. He had purchased the gold biscuits with relevant receipt through Mr. Waliullah. He was not a carrier for the said Mr. Wali. Further, as he was intercepted from the embarkation hall, at the time of fetching his luggage from conveyor belt, the time for the filing of declaration to the Customs officer, had not come. Since he was working in Saudi Arabia, he had requisite amount to purchase the gold biscuits and had the receipts, which have been seized. The respondent would have definitely paid Customs duty leviable thereon, at the post of Customs officer but was intercepted before the occasion to make the declaration & pay duty could be reached. Further, gold is not restricted/prohibited goods for being brought by person returning to India after more than one year of stay abroad. The requirement is to pay the concessional amount of Customs duty leviable on the gold imported with the baggage by the person. Under the circumstances, the Clauses (i)(l), and (m) of Section 111 and Section 119 Customs Act, are not attracted. Further, there is no case of any misdeclaration made out against the respondents. As gold is importable and was seized before the respondent could reach at the post of Customs officer for making declaration and paying duty, there is no breach of Section 112 of the Act. Further, under the circumstances, the imported gold biscuits are not liable to confiscation and the respondent is ready to pay the concessional rate of duty. A similar statement was given by the other respondent, in his written submissions.

6. The SCN was adjudicated by Order-in-Original dated 10/02/15 wherein it was found that the quantity and the nature of goods, are



such that they were allowed for importation under Baggage Rules, 1998, upon fulfillment of stipulated conditions. As the respondents failed to fulfill the declaration of the seized dutiable goods, the same were recovered by the Customs officers, on finding that the same are not declared in the disembarkation card, but the same was claimed by respondents to have been declared orally on being intercepted by the Customs Officer at the conveyer belt. It was further found that the respondents have returned to India after staying abroad for more than one year and hence, they were eligible for bringing gold up to 1 Kg. Further, it is admitted fact that they have imported two gold bars/biscuits each weighting about 116 gm each or 232 gms approximately, by each of the respondents. It was further found that the quantity of gold imported by the respondents, cannot be termed as commercial quantity and further the gold/goods being carried by them, are otherwise permissible for import subject to declaration as per the baggage Rules, 1998. As such it was held, they have violated the para of 2.20 of Foreign Trade Policy-(2009-14) read with clause 3(1)(h) of Foreign Trade (Exemption from application of Rules in certain cases) Order, 1993 and the provisions of Foreign Trade (Regulation) Rules, 1993. The imported gold was held to be illegally imported as not declared properly in terms of Section 77 of the Act and was held liable to confiscation in terms of Section 111 of the Customs Act, 1962. The Nokia mobile phones were held not liable to confiscation.



7. Being aggrieved the respondents preferred appeal before the Commissioner (Appeals) on the grounds that the gold biscuits were imported for personal use and no fine and penalty was imposable under the facts that they were apprehended and intercepted before the occasion to make declaration to pay the duty could come, and on further ground that gold biscuits are neither prohibited nor restricted goods and importability have been, admitted by the adjudicating authority. Further, the respondents had prayed for cross-examination of the punchanama witness which could not be produced by the Revenue & as such, seizure was vitiated. Further, penalty imposed under section 112 is also fit to be set aside and the same was imposed without specifying the exact clause thereof. Further, penalty under section 114AA is imposable, only where knowingly any false or incorrect material is used for the purposes of the Customs Act. The revenue was also in appeal before the Commissioner (Appeals) on the ground that as the gold have been concealed by the respondents, could not be considered as bona-fide baggage and hence would fall under the category of prohibited goods and thus, is liable for absolute confiscation. The order-in-original is self contradictory to the extent that at one place it holds that that eligibility criteria of an eligible passenger is not satisfied while, at the other place, it is held that such eligibility criteria is satisfied. Further the adjudicating authority has over looked facts that the gold had been concealed and was not declared and hence, the same was liable to be confiscated absolutely as there was an attempt to smuggle into India. Further, the redemption



option was given to the respondents, though the actual owner of the goods, i. e. Shri Imtiyaz Idris (in Riyadh), who is known and the same is in contravention of section 125 (1) of the Customs Act.

8. The learned Commissioner (Appeals) was pleased to dismiss the appeals of both the respondents herein and the Revenue observing that it is a case of improper import of goods and hence, liable to confiscation and not absolute confiscation. Further, absolute confiscation is a matter of discretion under circumstantial exigencies which comes into play in such cases where no claimant of trapped goods is identifiable/available. In the present case, since the concerned persons or the respondents from whose possession, the goods were seized, are available, hence, it makes no sense to confiscate the goods in absolute terms. He further found that the address of Shri Imtiyaz Idris (in Riyadh), is not available which indicates that the person, who have handed over the gold bars to the respondents, is not known by location or otherwise. Section 125 of the Customs Act, 1962 while using the term "owner", identifies such owner as a person to whom the goods may be redeemed practically. It is for this reason that section 125 of the Act, also prescribes that where the "owner" is not known, the option of redemption would be given to the person from whose possession or custody such goods were seized. Further, holding that the option of redemption given to the respondents by the adjudicating authority, is correct. Further, the quantum of redemption fine imposed, was also found to be proper and reasonable, so far, penalty under section 112 of the Act is



concerned, it was observed that the same was discretionary and cannot exceed the duty sought, to be evaded and thus, the penalty imposed of Rs.1,30,000/- each was held to be proper and sustainable.

9. The learned A.R. for revenue have taken me through, the facts and circumstances of the appeals and relying on the ground of appeal, stated in the case of goods smuggled, warrant absolute confiscation in absence of proper declaration under Section 77 of the Act. It is further stated that under the Baggage Rules, 1998, import of gold is allowed to a bona-fide passengers, in permissible quantity at prescribed rate of duty. In the present case, the facts indicate that the respondents were carriers of gold and attempted to smuggle the same and thus, cannot be equated as eligible passenger. Further, the right of a smuggler could not be and should not be equated with the right of a bona-fide passenger. In the present case, the facts indicate that the gold did not belong to the respondents/passengers who were simply carrier for some other person and further, attempted to smuggle the gold by concealing the same and not declaring the same before the Customs authority and further were involved in smuggling for a pre-decided consideration.

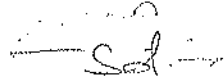
10. The learned advocate for the respondents have taken me to the findings of the adjudicating authority and the Commissioner (Appeals) and have emphasized that under the facts and circumstances, no serious offence is made out against the respondents as they had kept the gold biscuits in their pocket, which does not amount to concealment and further they were intercepted at the



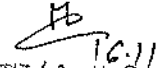
conveyer belt before they could reach at the Customs post for declaration and paying duty.

11. 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 respondents. 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, if any, in accordance with law.

(Dictated in Court)


(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

प्रमाणित प्रतिलिपि / Certified True Copy


सहायक पंजीकार / Asstt. Registrar
सीमा शुल्क, राजस्व विभाग एवं सेवा कर
अपील अधिवक्ता / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALAHABAD-211001