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CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. C/1053/1993-1054/1993 - EX[DB] Date 11/02/2009

Assistant Registrar
C.E.S.T.A.T. New Delhi

To :
1. SHRI DINESH KHINDERIA
2. SHRI DINKAR KHINDERIA
   H.NO.101. BIKRAMPURA,
   JALLANDHAR CITY, PUNJAB.

SHRI DINESH KINDRIA Appellant

Vs

CCE NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/78-79/09-CUS DATED 02.02.9

passed by the Tribunal under Section 129, (B) of the Customs Act.1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent COMMISSIONER OF CUSTOMS, NEW CUSTOMS HOUSE, NEAR IGI AIRPORT, NEW DELHI - 37.

2. Adv. / Consult SH. S.C. KATHURIA, ADV.
   E-5, FIRST FLOOR, KIRTI NAGAR,
   NEW DELHI - 15.

3 S.D.R
4 J.C.D.R.
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT. U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagarayа Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd. B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
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Assistant Registrar
(Excise Appeal Branch)

THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI

COURT – III

CUSTOMS APPEAL NO. 1053-1054 of 1993/CUST. BR.

[Arising out of Order-in-Original No. 2/MMS/93 dated 17.8.1993 passed by the Collector of Customs, New Delhi]

For approval and signature:

Hon'ble Mr. M. Veeraiyan, Member (Technical)
Hon'ble Mr. P.K. Das, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
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 Departmental authorities?	Yes

Shri Dinker Khindria,
Shri Dinesh Khindria — Appellants

Vs.

Commissioner of Customs,
New Delhi — Respondent

Appearance:

Shri Prem Kumar, Shri Mayank Bansal &
Shri S.C. Kathuria, Advocates for the appellants;
Shri S.K. Panda Jt. CDR & Shri A.K. Madan, SDR,
for the Revenue,

Coram:

Hon'ble Mr. M. Veeraiyan, Member (Technical);
Hon'ble Mr. P.K. Das, Member (Judicial),

Date of hearing/decision: 2nd February, 2009

FINAL ORDER NO. C/78-79/09 **dated** ________

Per M. VEERAIYAN:

1.1 These 2 appeals filed by Shri Dinker Khindria and Shri Dinesh Khindria arise out of the order-in-original No. 2/MMS/93 dated 17.8.1993 passed by the Collector(now known as Commissioner) of Customs, New Delhi.

1.2 There was another party to the said order of the Collector, namely Shri Mohit Thakore who also filed appeal before the Tribunal and the Tribunal vide order dated 6.5.1994 reported in 1994 (72) ELT 865 upheld the order of confiscation but allowed redemption 2 gold biscuits of one Kg each on payment of fine of Rs. 25,000/- and also reduced the penalty from Rs 15,000 to Rs. 5,000/-. This order has not been appealed against by either side.

1.3 In the appeals by Shri Dinker Khindria & Shri Dinesh Khindria , the Tribunal by order dated 25.7.2000 upheld the order of the original authority insofar as these two appellants are concerned. Against the said order an ROM was filed by the appellants which was also dismissed by the Tribunal vide order dated 3.6.2005. Against these 2 orders the appellants moved the Hon'ble High Court of Delhi and the Hon'ble Delhi High Court vide order dated 23.9.2008 set aside the orders of the

Tribunal dated 25.7.2000 and 3.6.2005 and remanded the matter for de novo consideration with the following observations/directions:-

"13. With the above observations we set aside the impugned orders dated 25.07.2000 and 03.06.2005 and remit the matter to the Tribunal for a consideration afresh. The Tribunal will also take note of its decision in the case of Mohit Thakore v. Collector of Customs, New Delhi: 1994 (72) E.L.T. 865 (T), which was in respect of a co-passenger and who was involved with the present appellants in the same case under similar circumstances."

2. Heard both sides.

3.1. The relevant facts, in brief, as emanating from the investigation are as follows:-

(a) Shri Dinker Khindria and Shri Mohit Thakore were settled in Canada. Shri Mohit Thakore was living in Vancouver and Shri Dinker Khindria was living in Toronto but they knew each other very closely. Both of them travelled together and landed at Delhi airport on 13th April, 1992 at about 1 A.M.

(b) Around 4 A.M. Shri Dinesh Khindria, brother of Shri Dinesh Khindria was apprehended at the exit gate with 2 biscuits of 1 kg. gold and, thereafter Shri Dinker Khindria was located and 3 biscuits were found out of which 2 biscuits were seized. The co-passenger Shri Mohit Thakore was interrogated. Shri Dinker Khindria who brought 3 gold biscuits handed over 2 biscuits without declaring to Customs and without payment of duty to his brother who came to receive him and who managed to come to Customs Hall; the said 2 biscuits have been taken out of the airport by Shri Dinesh Khindria; Shri Mohit Thakore who had 2 biscuits handed over the same to Shri Dinker Khindria and also handed over Rs. 90,000/-, equivalent of foreign currency to enable Shri Dinker Khindria to declare the gold and pay customs duty.

3.2. Show cause notice was issued alleging that the 2 biscuits seized from Shri Dinesh Khindria were brought by Shri Dinker Khindria, the same was not declared and the same were cleared out of the airport without payment of duty. Show cause notice also alleged that 2 biscuits seized from Shri Dinker were those brought by Shri Mohit Thakore the ineligible passenger and the same were declared as if brought by Shri Dinker Khindria and duty paid.

3.3. On the basis of show cause notice the Commissioner passed order which is as follows:-

"1. I, therefore, absolutely confiscate 2 Kgs. of gold seized from Sh. Dinesh Khindria under section 111(d) & (1) of the customs act, 1962.

2. I also absolutely confiscate the 2 Kgs. of gold brought by Shri Mohit Thakur and sought to be cleared through Sh. Dinker Khindria on payment of Customs duty, under section 111 (d) & (1) of the Customs Act, 1962.

3. I also impose a penalty of Rs. 15000/- (Fifteen thousand only) each on S/Sh. Dinkar Khindria, Dinesh Khindria and Mohit Thakur, under section 112 of the act ibid.

This order is being passed without prejudice to any other action that may be taken against the aforesaid S/Shri Dinkar Khindria, Dinesh Khindria and Mohit Thakur or any persons under this act or any other act/law for the time being in force."

4.1. The Tribunal in the case on appeal by Shri Mohit Thakore has upheld the confiscation of 2 biscuits and allowed to redeem the same on payment of redemption fine with following observations:-

"10. We have considered the above submissions. We observe that ld. JDR's argument that the FERA Notification No. 111/92, dated 29-2-1992 has to be read with Customs Notification No. 117/92, dated 1-3-1992 and I.T.C. Order No. 83/90-93, dated 29-2-1992, along with other relevant provisions of the Customs Act in order to comprehend the situation is correct.

11. At the same time, the ld. Advocate is correct in pointing out that the RBI Circular No. 15, dated 30-3-1992 cannot be ignored and has to be simultaneously kept in view.

12. A perusal of the above provisions show that first and foremost a passenger has been allowed to import gold *as baggage* subject to the limitations and conditions provided in the above notifications and Section 77 CA, 1962 casts the *duty of making a declaration on the owner of the baggage* in the following words "77. Declaration by owner of baggage - The *owner* of any baggage shall, for the purpose of clearing it, make a declaration of its contents to the proper officer." Therefore, in as much as

the appellant did not make a declaration himself, there was violation of Section 77 CA, 1962.

13. In so far as the question of the conditions of the notifications are concerned, the Customs Notification grants partial exemption from duty subject to fulfilment of the conditions mentioned therein to *'passenger of Indian origin or a person holding a valid passport issued under the Passport Act, 1967 as baggage provided that 'such passenger is coming to India after a period of not less than six months of stay abroad.'*

In other words this notification *does not make any distinction between non-resident Indians and Indians visiting abroad.*

14. Similarly, the Import Trade Control Order No. 83/90-93 does not make any such distinction and exempts the import of gold (as baggage) from licensing restrictions subject to fulfilment of the conditions which are the same as above i.e. *it also does not make any distinction between NRI and others in view of the words "gold ... will be allowed to be imported as part of baggage by passengers of Indian origin or a passenger holding a valid passport...".* i.e. it also does not make any distinction between NRI and others.

15. In so far as FERA Notification No. 111/92 is concerned, this Notification also grants permission (subject to conditions) to 'a passenger being *a person of Indian nationality or origin* as part of his baggage while coming to India subject to the condition that such person *is resident*

outside India or is coming to India after having stayed outside India continuously for a period of not less than six months immediately preceding his coming to India, provided that in the case of a person resident outside India he has not pursuant to the permission grant herein, brought gold within the preceding six months. This notification *covers persons of Indian nationality as well as Indian origin and puts the condition of six months time gap in the case of Indian visiting abroad as well as NRI as evident from the repetition of the clause/words "persons resident outside India" in the proviso as well.*

16. In other words, this provision is in harmony with the Customs and the ITC Notifications. A problem is, however, created by RBI Circular No. 15, dated 13-3-1992 which mentions that while in the case of non-resident the general permission is available once in six months, in the case of others the general permission is available provided their stay outside India preceding their coming has not been less than six months i.e. this circular distinguishes between NRI and others and indicate time gap of six months only in the case of latter.

17. Learned JCDR is of course right in stating that normally a section of the Act or a Rule or a Gazette Notification issued under the Act or the Rules must take precedence over an executive instruction or a circular. But in this case the circular has been issued under Section 73(3) of FERA, 1973. It has been addressed to all authorised dealers in Foreign Exchange and indicates that the amendment to the Exchange Control Manual will be revised in due course and *emphasises that contravention*

or non-observance will be subject to penalties under the Act. Therefore, this circular cannot be lightly brushed aside as a mere execution instruction and has to be taken into account, although on the face of it, this circular does not seem to be in harmony with the FERA Notification No. 111/92 read with Customs Notification No. 117/92 and I.T.C. Order No. 84/90-93. Since the RBI Circular itself puts an interpretation on FERA notification and allows scope for an interpretation that the condition of six months time were not applicable in case of NRI, the appellant cannot be blamed or penalised if his act was in consonance with this circular. However, violation of I.T.C.A. and CA 62 have to be taken note of.

18. A question therefore, arises whether in the peculiar circumstances of this case, gold was rendered liable to confiscation and the appellant was rendered liable to penalty and if so was the appellant required to be visited with such severe punishment as has been inflicted by the Collector.

19. In this respect violation of Section 77 CA, 1962 cannot be taken lightly as, correct and proper declaration in accordance with this relevant sections was one of the basic premises of the Customs Act. The fact that duty had been paid by a co-passenger does not in any way affect the position that there was violation of Section 77 CA, 1962 and it could at best be pleaded as a mitigating factor.

20. At the same time, it is to be kept in view that from the admitted facts, it is evident that there was no intention on the part of the appellant to evade customs duty which was paid (although by a co-passenger on his behalf) and therefore the charge of evading Customs Duty falls through.

21. Since the duty was paid in foreign exchange, one of the essential conditions of the Customs, I.T.C. as well as FERA Notifications has been duly fulfilled and there was no violation on that score.

22. Looking to the totality of facts and circumstances, we hold that the gold was liable to confiscation for violation of the Customs Act read with the Import Trade Control Act and order, but in the circumstances of the case absolute confiscation was not justified. We, therefore, allow it to be redeemed on payment of a fine of Rs. 25,000/- taking note of the fact that full duty has been admittedly paid. We also reduce the penalty to Rs. 5,000/-."

4.2. In other words, the Tribunal has held that there was violation of section 77 inasmuch as the declaration was not filed by Shri Mohit Thakore; there was no intention on the part of Shri Mohit Thakore to evade payment of customs duty as the duty was paid through a co-passenger; the duty was paid in foreign exchange and, therefore, conditions of ITC as well as Customs notification have been duly fulfilled.

5. As already mentioned, the present appeals by Shri Dinker Khindria and Shri Dinesh Khindria are against the very same order of the

Collector dated 17.8.1993 and are being heard afresh in the light of directions dated 23-9-2008 of the Hon'ble High Court.

6.1. Learned Advocate for the appellants made the following important submissions:-

a) Shri Dinker Khindria brought 3 gold biscuits; he had produced relevant invoices for purchase of the same; he declared 3 biscuits before the Customs authorities; he paid the applicable duty of Rs. 1,35,000/- by tendering foreign exchange and, he was paid back the excess of Indian Rs. 315/-.

b) The allegation and findings of the Commissioner that Shri Dinesh Khindria came into the Customs Hall around 1 A.M., stayed there for nearly 3 hours is not unbelievable as the Customs area is within the protected security area.

c) The claim that Shri Dinker Khindria handed over two of the three biscuits brought by him to his brother and he declared three biscuits including two biscuits handed over by Shri Mohit Thakore as belonging to him is also inconceivable.

d) While it is true that Shri Dinker Khindria knows Shri Mohit Thakore, it is not correct to say that he helped Shri Mohit Thakore in evading customs duty and circumventing the prohibition in importing the gold by him.

e) Shri Mohit , who , according to the Commissioner, has not satisfied one of the conditions to import gold has been allowed to redeem the gold by the Tribunal on payment of fine of Rs. 25,000/-.

Therefore, Shri Dinker Khindria, who is admittedly eligible to bring the gold and who has paid duty in foreign exchange should be allowed at least the same lenient treatment meted out to Shri Mohit Thakore.

f) He also disputed the seizure of gold biscuits from Shri Dinesh Khindria and submitted that the entire story attributed about the activities against Shri Dinker Khindria, Shri Dinesh Khindria and Shri Mohit Thakore is unnatural and not convincing.

g) There is discrepancy between Panchnama and statements. Some times seized items are referred as biscuits and some times as gold bars. As per Panchnama the gold biscuits were seized from Shri Dinesh Khindria's back and front pockets whereas the statements refer to seizure from back and side pockets. The seizure proceedings have taken place for long duration from 4 A.M. to 9.45 A.M. The statements given by three persons are not voluntary and, therefore, retraction should be taken into account. It was also submitted that no foreign currency said to have been given by Shri Mohit Thakore was found in the possession of Shri Dinker Khindria.

7.1 Learned Jt. CDR made the following important submissions:-

Shri Dinker Khindria and Shri Mohit Thakore knew each other closely, purchased the gold from the same shop and travelled in the same flight and planned the violation. They felt that Shri Mohit, has not satisfied one of the conditions to import gold and accordingly planned getting out the gold brought by Shri Mohit Thakore and also to evade customs duty. The statement of each of the three persons closely corroborates those of others. The retractions are clearly after thought as held by the Commissioner. In the given facts and circumstances of the case, Shri Dinker Khindira is the owner of the 2 biscuits in dispute in the present proceedings; in respect of these 2 biscuits no declaration under section 77 has been made as the same have been clandestinely sent out though his brother; no applicable duty has been paid; after they have been clearly smuggled out, they were seized at the exit gate. Even though Shri Dinker Khindria might be eligible for importing the gold, inasmuch as the same have not been declared, not duty paid, they are liable for absolute confiscation.

7.2 The Tribunal in the case of Shri Mohit Thakore, has held that as an NRI he was eligible to import the gold but he did not personally declare the gold. However, the Tribunal taking into account that the gold brought by him was declared through Shri Dinker and the duty was paid in foreign exchange given by Shri Mohit Thakore, took a lenient view. Thus, while upholding the order of confiscation allowed him to redeem the gold on payment of a fine of Rs. 25,000/-. The violations in respect of two gold biscuits in the present proceedings are more serious than those relating to gold owned by Shri Mohit Thakore.

7.3 The present value of the gold is more than 29 lakhs. He seeks upholding absolute confiscation of the 2 gold biscuits and sustaining the penalties imposed on both Shri Dinker Khindria and Shri Dinesh Khindria.

8.1 We have carefully considered the submissions from both sides. The order of the Commissioner dated 17.8.1993 related to 3 parties, Shri Dinker Khindria, Shri Dinesh Khindria and Shri Mohit Thakore. The activities leading to the findings of the offences against them as held by the Collector were closely interlinked. All the three had filed appeals against the order. When the appeal filed by Shri Mohit Thakore was decided on 6-5-94 by the Tribunal, the appeals of other two parties (already filed and pending) should also have been taken up together but it appears that the same were not linked. It is stated that the Tribunal's order in the case against Shri Mohit Thakore has not been appealed against by both sides.

8.2 Coming to the facts of the case, we find that Shri Mohit Thakore living in Vancouver and Shri Dinker Khindria living in Toronto knew each other very closely, though these places in Canada were thousands of miles from each other. It is noticed that both have purchased the gold from Toranto on the same day from the same shop and travelled to India by the same flight and reached Delhi on 13-4-92. It is also on record that Shri Dinesh Khindria (the brother of Shri Dinker Khindria) had come from Canada to India on 21/22.3.1992 and has gone to receive his brother to the airport. A submission was made by the learned Advocate that Shri Dinesh Khindria was also known to Shri Mohit Thakore. This is, perhaps, with a view canvas support for the submission that the gold seized from Shri Dinesh Khindria belonged to Shri Mohit. However, it cannot be denied that he knows his brother more closely than Shri Mohit Thakore.

The initial version given by them runs as follows. Totally five gold biscuits of one Kg each was brought by them. Two out of the three biscuits brought by Shri Dinker Khindria, without declaring to the customs and with out payment of duty were handed over in the customs hall to Shri Dinesh Khindria who has clandestinely them taken out of the air port. It was their understanding that Shri Mohit Thakore was not eligible to bring the gold and, therefore, Shri Mohit Thakore , as per prior arrangement, had handed over the two biscuits brought by him to Shri Dinker Khindria who declared 3 gold biscuits, (one brought by him and two handed over by Shri Mohit Thakore) and paid total customs duty of Rs 1,35,000/ in foreign exchange and in this connection he has used foreign exchange given by Shri Mohit equivalent to Rs. 90,000/-.

8.3 The order dated 6-5-94 of the Tribunal in the case of Shri Mohit Thakore has held that he, as an NRI was eligible to bring gold in his own right. The order has been passed on the appreciation of the facts that Shri Mohit Thakore brought the gold ; he failed to declare it himself and, that he got it declared through his friend Shri Dinker Khindria and also got the duty paid. The Tribunal's order in the case against Shri Mohit Thakore has not been appealed against by both sides. These facts have to be clearly taken into account by us as per the direction contained in the order dated 23-9-2008 of the Hon'ble High Court.

8.4 Totally 5 gold biscuits (three owned by Shri Dinker Khindria and two owned by Shri Mohit Thakore) have been brought by them and two biscuits were found in the possession of Dinesh Khindria when he was out side airport near the exit gate and seized in the presence of two independent witnesses. The denial that no gold was seized from Shri Dinesh is clearly an after thought and is not acceptable. The discrepancies pointed out by the Ld Advocate are not significant. The wordings in a statement can not be read like words in a statute especially in an departmental adjudication proceedings . The panchnama referred that seizure was from back and front packets. The statements refer the seizure from back and side packets. It is not uncommon for people to use terms like 'back side' and 'front side'. The terms like bars and biscuits are also synonymously used to denote 'standard gold bars'. Therefore there is no significant discrepancy as claimed by Ld Advocate. Out of these 5 biscuits, by the order of the Tribunal 2 biscuits (though held liable for confiscation) have been released to Shri Mohit Thakore on payment of redemption fine, treating the gold as having been declared through third party , treating them as duty paid and treating him as owner of the said biscuits. There are 3 biscuits left in balance. Duty stands paid only for a total of three biscuits and two of them already held as duty paid and released to Shri Mohit Thakore. There was no offence found in respect of one biscuit and was not seized.These 2 biscuits, connected to the present proceedings are, therefore, to be treated necessarily as belonging to Shri Dinker Khindria, not covered by declaration made by him and also as non-duty paid. This view is supported by the initial version given by the above mentioned three persons and we hold that the retractions are clearly an after thought. Consequence is that these 2 biscuits have not been covered by the declaration filed by Shri Dinker Khindria. No duty has been paid for these 2 biscuits and, therefore, the offending nature of the gold is established. Therefore, confiscation of the gold has to be upheld.

8.5 Having held that the gold is liable for confiscation, the issue to be considered is, whether the same should be allowed on redemption fine or not in terms of Section 125 of the Customs Act? Section 125(1) of the Customs Act envisages as follows:-

"**SECTION 125. Option to pay fine in lieu of confiscation.** – (1) Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon."

In other words, if the goods are not prohibited, the confiscated goods are necessarily to be allowed redemption on payment of fine. However, if the goods are prohibited, redemption may or may not be given. In the given circumstances, we hold that Shri Dinker Khindria is entitled to import the gold. If we may say so, the import of 3 biscuits were not prohibited insofar as Shri Dinker Khindria is concerned. As the import of gold was not prohibited the option of redemption has to be allowed.

8.5 This takes us to the next issue as to the quantum of redemption fine. Taking the totality of the facts and circumstances of the present case and also the decision of the Tribunal in the case of Shri Mohit Khindria, we direct that the gold confiscated shall be allowed to be redeemed by Shri Dinker Khindria on payment of fine of Rs. 2,5 0,000. (two lakhs and fifty thousand only)This option should be exercised within a period of 3 months from the date of receipt of order.

8.6 The role of the appellants in clearing the gold clandestinely is evident. The retractions made by them are already held to be after thought. Therefore, they are liable to penalties. We also do not fine the penalties imposed as excessive. Therefore, we do not interfere with the amounts of penalties imposed.

9. The appeals are disposed of on the above terms.

(Dictated & pronounced in the Open Court.)

(M. VEERAIYAN)
MEMBER (TECHNICAL)

(P.K. DAS)
MEMBER (JUDICIAL)

RK