

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

F.No. 371/424/B/2019/566

Date of Issue 01.02.2023

ORDER NO. ¹³⁹/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023 OF THE
GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE
GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT,
1962.

Applicant : M/s Nandlal Dayabhai Masrani

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai

Subject : Revision Application filed under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP/311/19-20 dated 29.07.2019 [Date of
issue: 31.07.2019] [S/49-465/2018/AP] passed by the
Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by M/s Nandlal Dayabhai Masrani (herein referred to as "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP//311/19-20 dated 29.07.2019 [Date of issue: 31.07.2019] [S/49-465/2018/AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. The Applicant is a CHA firm M/s Nandlal Dayabhai Masrani. The Applicant had allowed Shri Pinakin Sodha to use the G-card issued in the name of the Applicant for clearance of goods on behalf of clients. Brief facts of the case are that the Officers of Directorate of Revenue Intelligence, Mumbai Zonal Unit (DRI) developed specific intelligence that a consignment of gold would be smuggled in from Sharjah by concealing the same in unaccompanied baggage, covered vide Baggage Declaration Form (BDF) No. 200892 dated 17.02.2017 filed in the name of one Ms. Usha Mudaliyar at Air Cargo Complex, Mumbai. Accordingly, the officers of DRI intercepted the said consignment consisting 10 cardboard boxes when the same was being loaded in a vehicle. On conducting a detailed examination of the said 10 cardboard carton boxes, 91 trousseaux containing total of 364 pieces of silver coloured gold in the form of hooks were recovered. The gold pieces collectively weighing 4202 gms valued at Rs. 1,14,04,228/- were seized under the reasonable belief that the same were smuggled into India in contravention of the provisions of the Customs Act, 1962. Further investigations in the case revealed that one Mr. Taher Patanwala based in Dubai used to send consignments containing chocolates and used clothes as unaccompanied baggage to India and his friend Mr. Yusuf Asgar Lokhandwala used to clear these consignments in India. Mr. Yusuf used to clear these consignments in the name of different persons using their passports which were arranged with the help of one Mrs. Durriya Esmail Soni.

Mr. Yusuf also admitted that the said consignments used to contain small/big hooks of gold or gold pieces concealed inside the hooks. The present and past consignments were cleared through the Applicant and Shri Pinakin Sodha, ex-employee of the CHA firm, and user of the G-Card issued to the Applicant handled the clearances of all the consignments.

3. Pursuant to issue of show cause notice and following the process of law, Original Adjudicating Authority (OAA) viz: Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-in-Original No. ADC/AK/ADJN/188/2018-19 dated 08.08.2018 [S-14-5-49/2017-18 Adjn DRI/MZU/B/INT-38/2017], ordered absolute confiscation of the seized gold collectively weighing 4202 grams valued at Rs. 1,14,04,228/- under Section 111(d), (1) & (m) of the Customs Act, 1962 and confiscation of the 91 trousers used to conceal the gold in the form of hooks under Section 119 of Customs Act, 1962. Penalties were also imposed on Mr Yusuf Asgar Lokhandwala, Ms Durriya Esmail Soni, Ms. Usha Mudaliyar, Mr Pinakin Sodha and the Applicant under Section 112(a) & (b) and Section 114AA of the Customs Act, 1962. Personal penalty of Rs. 5,00,000/- was imposed under Section 112(a) & (b) of the Customs Act, 1962 and penalty of Rs. 5,00,000/- was imposed under section 114AA of the Customs Act, 1962 on the Applicant.

4. Aggrieved by this order, the Applicant filed an appeal with the Commissioner of Customs (Appeals), Mumbai Zone-III pleading for waiver/reduction of the personal penalty. The Appellate Authority (AA) vide Order-in-Appeal No. MUM-CUSTM-PAX- APP//311/19-20 dated 29.07.2019 [Date of issue: 31.07.2019] [S/49-465/2018/AP] rejected the appeal.

5. Aggrieved with the order of the Appellate Authority, the Applicant has filed this revision application against the imposition of penalty, inter alia on the grounds:

5.01. That the AA erred in holding that the Applicant had consciously allowed Shri Pinakin Sodha, an ex-employee, to use G-card issued in the name of the Applicant and that the Applicants' name was misused without the Applicants consent and that the ex-employee had failed to surrender his G-card.

5.02. That there was no confession in the statement of Applicants partner and that investigations proved that the Applicant firm was a victim whose name was misused by Pinakin Sodha.

5.03. That the Applicant was not aware of the filing of the BDF in its name and that there was no payment received by the Applicant from Pinakin Sodha and that the Applicant is a reputed CB firm and it was not in any manner involved in the import of gold in unaccompanied baggage;

5.04. That the charge of aiding and abetting can only be sustained when prior knowledge is proved and established beyond doubt, which was not there in the instant case and that imposition of penalty in the absence of any abetment is contrary to and in violation of the decision of case laws cited as under:

- (i) M Vasi [2003(151) E.L.T. 312(T)]
- (ii) Kamal Kapoor [2007(216) E.L.T. 21(P& H)]
- (iii) Liladhar Pasoo Forwarders Pvt Ltd [2000(122) E.L.T. 737 (T)]
- (iv) U.Sivasubramanian [2004(165) E.L.T. 97(T)]
- (v) Hargovind Export [2003(158) E.L.T. 496(T)]

5.05. That the Applicant did not commit any act of omission rendering the goods liable for confiscation under Section 111 of the CA, 1962 and hence penalty was not imposable;

5.06. That the Applicant did not knowingly make any false declaration making it liable for penalty under Section 114AA of CA, 1962 and that penalties cannot be imposed simultaneously under Section 112 and 114 AA of CA, 1962 for the same act;

5.07. That penalty cannot be imposed under Section 112 of CA, 1962 for violation of CBLR and is contrary and in violation of the law laid down in the following cases:

- (i) P.D. Prasad and Sons [2017(358) E.L.T. 1004(T)]
- (ii) Adani Wilmar Ltd [2015 (330) E.L.T. 549(T)]
- (iii) Sarosh Nagarwala [2017(358) E.L.T. 542(T)]
- (iv) Boria Ram [2017(354) E.L.T. 661(T)]

5.08. That the question of vicarious liability of the Applicant did not arise as Pinakin Sodha was not under the employment of the Applicant and that the act was not committed by Pinakin Sodha under the instructions of the Applicant. The Applicant has relied on the judgement in the case of Sitaram Motilal Kalal [1996 AIR 1697]

In view of the above submissions, the Applicant prayed to set aside the OIA in question and also quash the penalties imposed on the Applicant.

6. Personal hearing in the case was scheduled for 10.08.2022 or 24.08.2022. Shri Anil Balani, Advocate, appeared online for the personal hearing on 24.08.2022, on behalf of the Applicant. He submitted that the Applicant is a customs broker and had filed the BDF for unaccompanied baggage based on documents provided by the passenger to one of his previous employee who misused their Customs Broker licence. He submitted that there is no ground for penalty under Section 112 or 114AA of the Customs Act, 1962. He requested to drop the penalty as penalty under Section 112 cannot be imposed even if there was a violation of CBLR.

7.1. The Government has gone through the facts of the case. The issue involved in the instant application is the imposition of penalty under Section 112 and Section 114 AA of the Customs Act, 1962 on the Applicant, a custom broking firm and whose ex-employee and user of the G-card issued to the Applicant

handled the clearance of the consignments on behalf of the Applicant, from which gold was smuggled by concealment in goods cleared as unaccompanied baggage.

7.2. Government observes that it is on record and admitted by Pinakin Sodha that he used the G-card of the Applicant and handled a total of 43 consignments, on a regular basis for a considerable period of time for Mr. Yusuf Asgar Lokhandwala and that the original passports of different persons were handed by the other accused, Mr. Yusuf Asgar Lokhandwala /Mrs. Durriya Esmail Soni and the same was used for the clearance of goods with the concealed gold. It is also on record that the Pinakin Sodha, user of the G-card of the Applicant had not met the passport holders at the time of obtaining signatures on the BDF and about whom no due diligence regarding the genuineness had been exercised by the Applicant or the person who handled the clearance of the 43 consignments. It is also on record that the goods cleared by G-Card holder of the Applicant had been delivered to Mr. Yusuf Asgar Lokhandwala and not to the persons whose passports and address were used in filing Baggage Declaration Form and getting the gate pass and the vehicle entry permit issued. Government observes that on the contrary, the Pinakin Sodha, the holder of the G-card in the name of the Applicant had ensured and in some cases personally escorted the goods to the premises of Mr. Yusuf Asgar Lokhandwala, the kingpin in the smuggling racket. Further, the declared value of each consignment was abysmally low and that the remuneration received by the Pinakin Sodha was in excess of the value of the goods declared in the BDF.

7.3. For a better understanding of the issue, the provisions of the Customs Brokers Licensing Regulations, 2018 need to be elaborated. Rule 10 of the CBLR, 2018 specified the obligations of the Customs Broker and the relevant obligation are reproduced as under:

10. Obligations of Customs Broker –

A Customs Broker shall —

- (a).....;*
- (b).....;*
- (c).....;*
- (d) advise his client to comply with the provisions of the Act, other allied Acts and the rules and regulations thereof, and in case of non-compliance, shall bring the matter to the notice of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be;*
- (e) exercise due diligence to ascertain the correctness of any information which he imparts to a client with reference to any work related to clearance of cargo or baggage;*
- (f).....;*
- (g).....;*
- (h).....;*
- (i).....;*
- (j).....;*
- (k).....;*
- (l).....;*
- (m) discharge his duties as a Customs Broker with utmost speed and efficiency and without any delay;*
- (n) verify correctness of Importer Exporter Code (IEC) number, Goods and Services Tax Identification Number (GSTIN), identity of his client and functioning of his client at the declared address by using reliable, independent, authentic documents, data or information;*
- (o).....;*
- (p).....; and*
- (q)*

7.4. Government notes that the clearances of the consignments were handled by Pinakin Sodha, ex-employee and holder of the G-card issued to the Applicant, being a trusted employee of the CHA firm and experienced in handling the clearance of consignments and the Applicant, being a reputed Customs Broker firm ought to be well-aware of all the provisions relating to him including the CHA's obligations as enshrined under Rule 11 of Customs Brokers Licensing Regulations, 2013 and is duty-bound to advise the client to comply with the provisions of the Act and the regulations diligently ensuring the imparting of correct/relevant information to the client for clearance of cargo or baggage.

7.5. The CHA firm and the employee handling the clearances also was duty bound to have brought the non-compliance by the client, which were at various levels in the instant case, to the attention of the Deputy or Assistant Commissioner. It is his fiscal accountability that he must promptly pay the Government all moneys received from the client for duties and taxes. Also, any money received from the client or from the Government should be promptly and fully accounted to the client. The CHA and its employee are duty bound to deliver goods to the passenger after completing necessary export formalities with the Customs.

7.6. Government observes that The High Court of Kolkata in the case High Court of Delhi in *Ashiana Cargo Services v. Commissioner of Customs*, [2014 (302) E.L.T. 161 (Del.)], in a case pertaining to exports, has held that the role of CHA does not come to an end till the goods are stuffed and the containers got sealed. His responsibility comes to an end only when the sealed containers are moved out of his supervision. *'In the given circumstances, I opine that the Commissioner (Appeals) has rightly held about the appellant's plea to be nothing but an eye-wash. The appellant's plea that he was never concerned with the goods illegally exported, being merely an agent of the exporter is nothing but an*

eye-wash keeping in view the obligations of the CHA as enshrined in Rule 11 of the Regulations 13 of the Regulations' 2013, it is crystal clear that no inferior quality goods can be exported and imported, that too, for a period of more than two years continuously without the knowledge of the CHA.'

Government notes that the ratio the case is applicable to the facts and are similar to the fact and circumstances of the instant case, as the records of the instant case indicate that the Applicant turned a blind eye towards the indiscretions of the holder of the G-Card issued in name of the Applicant and allowed to handle clearances irrespective of irregularities at every stage of the clearance of goods and documentation.

8. Government observes that in the instant case, the ingredients of Section 112(a) has been brought out with clarity, so that the penalties can be imposed on the Applicant. Section 112(a) of the Customs Act, 1962 stipulates that a person shall be liable to penalty, who, in relation to any goods does or omits to do any act, which act or omission would render such goods liable to confiscation under Section 111 or abets the doing or omission of such an act. In the instant case, the Pinakin Sodha, an ex-employee of CHA and cousin of the partner of the Applicant firm, who was allowed by the Applicant to use the licence of the Applicant, dealt with the documentation and processing of the goods cleared. Both the Applicant firm or Pinakin Sodha had lacked in doing due diligence and not taken more precautions particularly in view of the declared value of the goods being abysmally low and his remuneration for the clearance being considerably higher than the declared value of the goods cleared. The Applicant firm or Pinakin Sodha has acted on the basis of the documents and details provided not by the purported passenger but by the alleged kingpin/aide of the smuggling racket. The *bona fide* existence of the passport holders had not been verified by the Applicant or the G-card holder and had merely acted on the documents provided by other accused involved in the smuggling racket and also

delivered the smuggled goods to the premises of the other accused, using the passports of the persons whom they never met, to file declarations and obtain clearance documents. Government notes that the said act was not in respect of a one off clearance but all through the 43 consignments, admitted by the user of the G-card issued to the Applicant to have been cleared by him, over a considerable period of time till the smuggling racket came to light. This make it crystal clear that the Applicant had the prior knowledge of the illicit nature of the clearances being facilitated by the user of the G-Card issued to the Applicant and regarding violation of the provisions of Customs Act, bringing in penal consequences under Section 112(a) and thus establishing the positive act of mala fide/abetment for imposition of penalty under the Customs Act, 1962.

9. As regards the imposition of penalty under Section 114AA of the Customs Act, 1962, Government observes that the penalty under the said section can be invoked only on establishment of the fact that the declaration, statement or document made/ submitted in transaction of any business for the purpose of the Act, is false or incorrect. In the instant case, it is evident that the Applicant firm and Pinakin Sodha, being entrusted with the job of clearance of the goods, submitted the Baggage Declaration Form which contained information and other particulars of the goods which were false and incorrect to facilitate the other accused in the smuggling of the gold on a regular basis. Government opines that in view of the same the imposition of penalty on the Applicant under Section 114AA of the Customs Act, 1962 is justified.

10. In view of the above discussions, Government observes that the it is clear that the Applicant by allowing Pinakin Sodha, their ex-employee and cousin of the partner of the Applicant firm to use the G-card issued in the name of the Applicant for filing of documents and clearance of goods in 43 consignments in which the gold was concealed suggests that the Applicant had been in know

of the concealment and smuggling of the gold but had turned a blind eye to the indiscretions and acted in cahoots with the other accused to avail of gains for each other and thus penalty imposed on the Applicant is confirmed. Government also observes the quantum of penalty imposed is excessive and reduction of penalty would be considered fair in the circumstances of the case and the nature of indiscretions of the Applicant and thus the revision application filed by the Applicant is allowed partially.

11. In view of the above, the Government reduces the penalty imposed on the Applicant in the impugned Order under Section 112(a) & (b) of the Customs Act, 1962 from Rs. 5,00,000/- to Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand only) and the penalty imposed under Section 114AA of the Customs Act, 1962 from Rs. 5,00,000/- to Rs. 3,00,000/- (Rupees Three Lakhs only)

12. The Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 39/2023-CUS (WZ) /ASRA/

DATED 30.01.2023

To,

1. M/s Nandlal Dayabhai Masrani, CHA, R.No 13, Hemprakash Bulding, 90/92, Kazi Sayed Street, Mumbai 400 003.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai Zone-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai – 400 059.

Copy to:

1. Shri Anil Balani, 717, Raheja Chambers, 213, Free Press Journal Marg, Nariman Point, Mumbai 400 021.
2. Sr. P.S. to AS (RA), Mumbai.

3. File Copy.

4. Noticeboard.