

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. 371/01/B/2012-RA/1991

Date of Issue 22/11/2018

ORDER NO. 718/2018-CUS (WZ) / ASRA / MUMBAI/ DATED 18-09-2018
OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR
MEHTA , PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL
SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION
129DD OF THE CUSTOMS ACT, 1962.

Applicant : Shri Y.R. Iyer.

Respondent : Commissioner of Customs Navrangpura,
Ahmedabad -380009.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
138/09/Cus/Commr(A)/Ahd dated 23.06.2009
passed by the Commissioner of Customs (Appeals)
Ahmedabad.



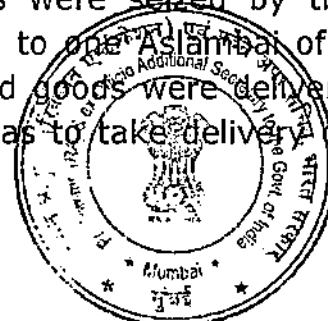
ORDER

This revision application is filed on 13.01.2012 by Mr.Y.R.Iyer against the Order in Appeal No.138/2009 dated 23.06.2009 passed by Commissioner of Customs (Appeals), Ahmadabad with respect to Order in Original No. 1/2007 dated 12.01.2007 passed by the Additional Commissioner of Customs, Custom House, Ahmedabad. The said Revision Application was rejected vide order No.65/13-cus Dated 19.02.2013 as being time barred in terms of section 129 DD of the Customs Act, 1962.

2. The said order was challenged by the Applicant before The Honourable High Court of Gujarat, Ahmadabad vide Special Civil Application No.12794/2013.The Honourable High Court, while quashing the order dated 19.02.2013 passed by the Joint Secretary to the Government of India, directed for restoration of Revision Application allowing the exclusion of time spent before the wrong forum with a bonafide belief.

3. The Revision Application stands restored to this appellate authority as per order of the Hon'ble High Court of Gujarat dated 19.9.2013 in Special Civil Application No.12794/2013 filed by the applicant.

4. Brief facts of the case are that the applicant, Shri.Y.R.Iyer was superintendent of Customs. On 19.04.2005, he was on duty as batch in charge at SVP International Airport. On screening, suspicious baggage of a passenger viz Shri.Arifbhai Rasulbhai Vohra(here in after referred as "The Said Passenger"), who arrived on IC-564 flight from Sharjah, was diverted for detailed examination. On detailed examination ,the said baggage was found to contain Diamond dust, rough Diamonds, Gold Jewellery and Indian currency totally valued at Rs.12,38,141/- which was seized and confiscated subsequently. An offence case was made against the passenger, as he was carrying dutiable goods undeclared. During investigations, a statement of Shri.Arifbhai Rasulbhai Vohra was recorded under section 108 of the Customs Act,1962, wherein he interalia stated that he arrived on 19.04.2005 at SVP International Airport ,Ahmedabad by Flight No.IC 564 ;that customs officer asked him about the contents of the Bags; that he could not reply about the contents of the bags; that he was diverted to counter for re-examination of his hand bag, packets of diamond powder, rough diamonds and gold jewellery were recovered by the custom officers; that the said goods were seized by the custom officers; that these seized goods belonged to one Aslambai of surat and he did not know Aslambai; that the seized goods were delivered to him by one Shahid at Sharjah and Aslambai was to take delivery of the said



goods from his residency in Anand; that one custom officer ,who had come to his garage for getting his car repaired ,had taken his embarkation slip and asked him to give Rs.1000/- for allowing to clear Customs and go out of the Airport; that the name of the customs officer was displayed as Shri.Y.R.Iyer on his name plate .

5. On the aforesaid incident, the Assistant Commissioner of Customs,SVP International Airport submitted a report dated 19.04.2005 to the Additional Commissioner of Customs that while screening the baggage of Shri.Arifbhai Rasulbhai Vohra by Shri.M.M.Bhatt Airport Customs Officer (ACO) ,Shri .Y.R.Iyer, superintendent batch in charge on that day, interfered during the screening of the baggage and told that the passenger Shri.Arifbhai Rasulbhai Vohra was known to him and ordered Shri.M.M.Bhatt to allow him to go without observing further process for clearance; Shri.M.M.Bhatt did not accept this and referred the baggage of the said passenger for detailed examination; that Shri.Y.R.Iyer also requested him (the Assistant Commissioner)to allow the said passenger to go without observing customs formalities but the same was not accepted by him; that he directed Custom Officers for re-examination and thereafter he may be allowed if there is nothing objectionable; that on re-examination the custom officers recovered gold jewellery ,Diamond powder, rough diamonds and Indian currency from the said passenger's possession; that directions were issued for seizure of the goods: that a case was booked against the passenger: that Shri.Y.R.Iyer has not performed his duty properly.

6. During his statements dated 21.04.2005 and 25.05.2005 under section 108 of the Customs Act, 1962, Shri.Arifbhai Rasulbhai Vohra has stated that he left India on 11.04.2005 from SVP International Airport, Ahmedabad for Sharjah and returned on 19.04.2005 from Sharjah; that his Air Ticket was purchased by Shri.Iqbalbhai valibhai Muhammad from World Wide Overseas Pvt Ltd; that he does not know full address of Iqbalbhai but he is residing beside Sindhi Society on 100 feet road Anand.

7. Shri.Y.R.Iyer in his statement ,recorded under section 108 of the customs Act,1962, on 20.05.2005 he has interalia stated that he did not know Shri.Arifbhai Rasulbhai Vohra; that he had not met Shri.Arifbhai Rasulbhai Vohra who arrived by Flight No.IC-564 on 19.04.2005;that he had not talked with Shri.Arifbhai Rasulbhai Vohra on 19.04.2005;that he never visited A.S.Motors garage of Shri.Arifbhai Rasulbhai Vohra;that he never got his car repaired at A.S.Motors; that he did not interfere in the duties of Shri.M.M.Bhatt ACO on 19.05.2005; that he neither talked to



Shri.M.M.Bhatt nor asked him to allow Shri.Arifbhai Rasulbhai Vohra without observing customs formalities.

8. Investigations further revealed that Shri.Y.R.Iyer has made 240 telephone calls to a mobile telephone no. 98250-26408, registered in the name of one Shri. Usmanbhai Abdulbhai Vohra during the period 3.12.2005 to 18.05.2005. During his statement on 08.09.05, Shri Y.R.Iyer has stated that he used to give his Mobile phone to his colleagues and he did not remember the calls made by his colleagues from his number; the he did not know Shri.Iqbalbhai.

9. Based on the above findings and investigations, a Show cause Notice dated 29.09.2005 was issued. Further an Addendum to the Show cause Notice was issued on 11.08.2006 (close to a year after the issuance of SCN) with the findings of the investigation that the passenger Shri.Arifbhai Rasulbhai Vohra has made 26 calls from his mobile phone No.98251-36161 to Mobile No.98250-26408 registered in the name of Usmanbhai Abdulbhai Vohra during the period from 01.12.2004 to 11.04.2005. Similar calls were made from the Mobile Number of Shri Y.R.Iyer to this Mobile Telephone number. There appeared a nexus between the passenger Shri.Arifbhai Rasulbhai Vohra, Shri.Y.R.Iyer and the person who was using the telephone no 9825026408. The registered address of the said Mobile Telephone belongs to one Shri Iqbal Dawoodbhai Vohra and he, however, has denied having ever used the said mobile number. Since Shri.Arifbhai Rasulbhai Vohra has stated that his Air Tickets to Sharjah were arranged by a person named Shri. Iqbal Vohra, it appeared to prove that Shri.Iqbal Vohra residing at the registered address of the Mobile no-9825026408 is the same person who was using the said mobile phone and who has arranged tickets for Shri.Arifbhai Rasulbhai Vohra for going to Sharjah.

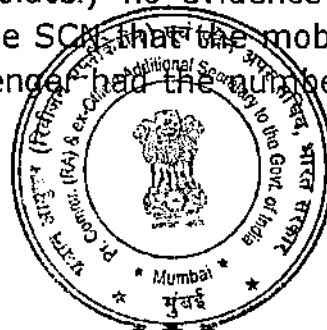
10. The Additional Commissioner, vide order in original dated 12.01.2007 ordered for confiscation of goods valued at Rs.12, 18,141/- , allowing redemption on payment of redemption fine of Rs.3, 00,000 and imposed a penalty of Rs.1.00.000/- on Shri. Shri.Arifbhai Rasulbhai Vohra , a penalty of Rs.10.000 on Shri.Iqbal D.Vohra and a penalty of Rs.20,000 on Shri.Y.R.Iyer, the Applicant.

11. Being aggrieved by the said order in original, the applicant preferred appeal before Commissioner (Appeal), who rejected the appeal vide Order in Appeal dated 23.06.2009.



12. Aggrieved by the impugned Order in Appeal, the applicant has filed this Revision Application under section 129 DD of the customs Act, 1962 before the Central Government on the following grounds:

- The Commissioner (Appeal) while rejecting the appeal has strongly relied on the statement of Shri.Arif Vohra dated 19.04.2005 and completely ignored the confessions of Shri.Arif Vohra at the time of cross examination before the adjudicating authority. Wherein, he has stated that he did not know the applicant; that the name of the applicant recorded in the statement dated 19.04.2005 was not as per his say; that the applicant did not demand any money; that he had informed the commissioner, Metropolitan Court at Meghaninagar and High Court of Gujarat that his statement was recorded under duress. The adjudicating authority clearly overlooked the above deposition of Shri.Arif Vohra and therefore, impugned order is passed without considering the facts deposed during the cross examination.
- The Commissioner (Appeals) erred in holding that the statement of the passenger was corroborated by the facts that phone calls were made from the mobile number of the applicant to the mobile number of 9825026408 pertaining one Usmanbhai Abdulbhai Vohra at whose address one Iqbalbhai Dawoodbhai Vohra was found residing and the same Iqbalbhai ,according to the department was the person who had arranged Tickets for the passenger. The department has not shown any link or connection between Usmanbhai Abdulbhai Vohra and the passenger. Secondly, the appeal of Iqbalbhai Dawoodbhai Vohra has been allowed and penalty on him has been set aside by the Hon'ble CESTAT vide order dated 23.10.2009 and further observed that department could not establish that Iqbalbhai arranged any Tickets to the passenger.
- The Commissioner (Appeals) should have held that, the allegations in the Addendum to the SCN that phone calls were also made to mobile number 98250-26408 of Usmanbhai Abdulbhai Vohra from the mobile number 9825136161 seized from the passenger on 19.04.2005, are baseless and unsustainable in law. Firstly, there is no evidence to show that the mobile phone which was seized from the passenger had the number 98251-36161 as alleged in the Addendum to the SCN. There is absolutely no evidence either in panchanama, SCN or Addendum to the SCN that the mobile phone which had been seized from the passenger had the number 98251-36161.



- The appellate authority has summarily presumed that the applicant had made 240 calls to the co accused. The appellate authority has not considered the submissions as to the fact that the owner of the phone whom the applicant has been alleged to have made calls has not been brought on record. Therefore, it is only the owner of the phone who could have testified the details and the contents of the talk. In the absence of any evidence on record, the findings of appellate authority are baseless and deserve to be quashed.
- The adjudicating authority had passed order in utter violation of principles of natural justice as the applicant was not allowed the cross examination of the Panchas and the Assistant Commissioner.
- The commissioner (Appeals) has wrongly concluded that the entire case was made out of connivance and the Commissioner (Appeals) order travelled beyond the scope allegations made in the Show cause Notice.
- The entire proceedings were based on the statement of Shri Arif Vohra, who is the main accused in the case and department has failed to throw up any independent evidence to corroborate the statement of Shri Arif Vohra.
- The applicant submits that there being no material evidence, to suggest that the goods seized were imported by the applicant or the applicant had the knowledge or reasonable belief that the goods imported were liable for confiscation, the imposition of penalty is unjustified and deserves to be set aside.
- The applicant submits that a defence reply to the SCN dated 29.05.2005 was filed on 11.11.2005 and an Addendum to the said SCN was issued on 11.08.2006 i.e. after a period of nearly 10 months. This is not permissible in law and SCN itself becomes invalid and unsustainable.

14. A personal hearing was fixed on 21.12.2017, 30.05.2018, 23.08.2018 and 05.09.2018. Shri.Y.R.Iyer along with his advocate Shri.B.C.Macwana appeared for personal hearing on 05.09.2018 .None appeared on behalf of the respondent department. The applicant reiterated the submissions filed in the Revision Applications and along with case laws filed on the date of hearing along with written submissions. In view of the same it was pleaded that the O-I-A against the applicant be set aside and RA be allowed.



15. The Government has carefully gone through the relevant case records, the impugned Order-in-Original, Order-in-Appeal and the applicant submissions.

16. The Government notes that the main issue to be decided in the instant revision application is whether penalty u/s 112 (a) of the Customs Act, 1962 was imposable on the applicant on the basis of charges levelled and confirmed by the Department in the impugned order.

17. The main charges against the applicant is that Shri.Y.R.Iyer, Superintendent of customs, was found to have abetted a passenger Shri.Arifbhai Rasulbhai Vohra to execute smuggling of goods and attempted to influence his colleagues and senior officer to exempt the said passenger and his baggage from routine customs scrutiny and examination .To buttress the charges, the department has placed reliance on the following evidences:

- The statement of the passenger recorded under section 108 of the Customs Act, 1962 on 19.04.2005 that the applicant demanded Rs.1000/-in return for clearance of his baggage
- The Report of Assistant Commissioner on duty at the Airport that Shri.Y.R.Iyer interfered by ordering Air Port Customs Officer (ACO) to clear the said passenger without further screening and examination and Shri.Iyer has further requested him to permit the clearance of the baggage without further observing the formalities of customs.
- Exchange of telephone calls from the Mobile number of the applicant and the mobile number of the passenger Shri.Arifbhai Rasulbhai Vohra to the mobile number, purportedly belonging to one Shri.Usmanbhai Abdulbhai Vohra during the relevant period i.e. 03.12.2004 to 18.04.2005. Though Shri.Usmanbhai Abdulbhai Vohra could not be located, the registered address of the mobile telephone with the service provider was found to be the residence of one Shri.Iqbalbhai Dawoodbhai Vohra.Although, Shri.Ismailbhai denied having ever user the said mobile number, finger of suspicion was raised on him by the department on the basis of statements of the passenger as well as the travel agent that one Iqbal has arranged flight tickets for the passenger's trip to Sharjah. Thus, the telephonic calls among the three have completed the full circle of nexus towards abatement of smuggling directly or indirectly by the respective persons.



18. The Government examines the requirements for imposition of penalty under section 112 (b) of the Customs Act, 1962 to verify the applicability of the same in the instant Revision matter. The extracts of section 112 (b) of the customs act, 1962 is reproduced below:

"Section 112- Penalty for improper importation of goods, etc.- Any person, -
(a)

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111"

19. To impose a penalty under sec.112 (b) of the customs act,1962 a person must be proved to have acquired possession of the smuggled goods or to have been concerned in carrying, removing ,depositing ,harbouring ,keeping ,concealing, selling or purchasing or in any other manner dealing with any goods which or has reason to believe that the goods are liable for confiscation. Therefore, knowledge of goods being of smuggled nature is an essential element for imposition of penalty under section 112 (b) of the customs act, 1962.

20. The main charge against the applicant is that he is said to have abetted the smuggling of goods by a passenger viz Shri. Arifbhai Rasulbhai Vohra. Evidences against the said charge are the said passengers statement that the applicant has demanded a bribe of Rs.1000/- for clearance of the baggage without customs duty and Assistant Commissioners report that the applicant has unsuccessfully interfered in the functions of ACO ordering the clearance of the baggage without observing further customs formalities and re-examination of the goods .

21. The Government finds that the said passenger has stated that the applicant demanded a bribe of Rs.1000/- for allowing goods without customs formalities and he did not say anything about the applicant's knowledge of the contents of the baggage. The Assistant Commissioner in his report dated 19.04.2005 has informed that the applicant has tried to influence the ACO ,who is on screening duty, to allow the passenger without further examination of the goods and it is also found that the applicant has requested AC to allow the passenger without observing further customs formalities like re-examination. From the records, it is evident that at the material time of the applicant's interference in favour of the passenger, the goods were yet to be fully ascertained and decision on the confiscation of the goods was not made. Therefore, the Government observed that the evidences cited by the Department could



not establish applicant's knowledge of the contents of the baggage and its liability for confiscation beyond doubt. The applicants actions of demanding bribe and attempt to influence the officers for facilitating non bonafide passenger may or may not warrant disciplinary proceedings under the CCS(Conduct) Rules,1964 but cannot bring penal consequences in terms of section 112 (b) of the customs act, 1962.

22. The Government further examines the corroborative evidence adduced in the form of call data of mobile phones pertaining to the applicant, the said passenger and one Shri. Usmanbhai Abdulbhai Vohra. It is found that the applicant as well as the said passenger made calls from their mobile phones to one mobile phone registered in the name Shri. Usmanbhai Abdulbhai Vohra during the period 01.12.2004 to 11.04.2005. The registered address of the mobile phone was in fact the residence of Shri.Ismailbhai D.Vohra. Since the travel agent and the said passenger had confessed before the department that one Ismailbhai arranged cash for the tickets of Shri.Arifbhai Rasulbhai Vohra,it was presumed that the Ismailbhai is one and the same who arranged the tickets for the said passenger and owning a mobile phone ,to which calls are made both by the said passenger and the applicant.

23. The Government observes that exchange of telephone calls among the co-accused may raise a needle of suspicion and may indicate towards involvement of the said persons in the smuggling, this crucial lead was not further worked upon by the investigative officers to prove the said person's involvement in abetting smuggling of the goods. This observation found resonance with CESTAT findings in the matter of another co accused of the case, Shri Iqbhalbhai D.Vohra. The Hon'ble CESTAT was surprised to find that the investigating officers did not check the photographs of the owner of the mobile phone number with the mobile company.

Shri Iqbhalbhai has denied any connection with the telephone calls and role in the arrangement of ticket for the said passenger.The Hon'ble CESTAT vide its order dated 23.10.2009 2012 (252) ELT 415 (Tri-Ahmd) has set aside penalty on Shri.Ismailbhai D.Vohra on the ground that department has not been able to make case against the appellant.

24. The Government holds that the presumption or suspicion of the department on telephonic calls can never take the place of proof to establish the complicity or nexus of the accused. Further, the Government observes that department could not produce details of conversation of these telephonic calls and therefore the presumption or suspicion cannot

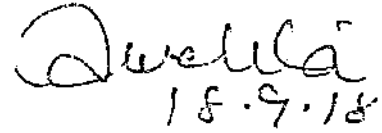


take the form of evidence particularly when there is no corroborative evidence available. There does not seem to be any other tangible or direct evidence against the applicant that he was abetting the alleged smuggling by the passenger Arifbhai Rasulbhai Vohra. Moreover, the CESTAT has also held that Mr. Ismailbhai D. Vohra is not liable for penal action.

25. In view of the foregoing discussion, Government finds that there is no conclusive material evidence against the applicant fulfilling the requirement for imposition of penalty under section 112 (b) of the Customs Act,1962. The penalty of Rs. 20,000/- imposed on the Applicant is therefore set aside.

26. The Order-in-Appeal No.138/2009/CUS/commr(A)/AHD dated 23.06.2009 passed by the Commissioner (Appeal), Ahmedabad is modified to the above extent and Revision Application is allowed.

27. So, ordered.


18.9.18

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 718/2018-CUS (WZ) /ASRA/MUMBAI DATED 18.09.2018

To,

Shri Y.R. Iyer,
Supdt. Of Customs (Retd.)
04, Ashok Park Society, B/h Gemini Park Society,
Smt. Indira Gandhi Marg,
Nadiad, 387002
Dist: Kheda Gujarat

ATTESTED


22/11/18
S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Principal Commissioner of Customs, Customs House, Navarangpura, Ahmedabad 380 009.
2. The Commissioner of Customs (Appeals), Customs House Navarangpura, Ahmedabad 380 009.



3. Deputy Commissioner, Sardar Vallabhbhai Patel (SVP)
International Airport, Airport Road, Sardarnagar, Ahmedabad,
380012.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.

