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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 380/163/B/16-RA/3443 Date of Issue 28.08.2020

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ORDER NO. 79/2020-CUS (SZ)/ASRA/MUMBAI DATED 22.06.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT. SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

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Applicant : Commissioner of Customs, Chennai

Respondent : Shri K. Soundrarajan

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal C. Cus I No. 267/2016 dated 07.07.2016 passed by the Commissioner of Customs (Appeals), Chennai.



## ORDER

This revision application has been filed by Shri K. Soundrarajan (herein referred to as Applicant) against the order no 267/2016 dated 07.07.2016 passed by the Commissioner of Customs (Appeals), Chennai.

2. Briefly stated facts of the case are that the officers of Directorate of Revenue Intelligence on specific intelligence intercepted a passenger by name, Shri Abubaker Sithkali who arrived from Singapore. 4 (Four) kilograms of gold valued at Rs. 1,08,12,000/- ( Rupees One Crore Eight Lakhs Twelve thousand) was seized from the passenger. Enquiries conducted revealed that the gold was to be handed over to a person at the Gents toilet in the Airport by responding to coded knocks. The officers accordingly intercepted the one person Shri P. Paulraj Security Guard, Bureau of Immigration at the gents toilet, who informed that he had gone to the toilet to receive the gold on behalf of the Respondent by responding to the coded knock on the plywood panel of the toilet panel. Shri P. Paulraj revealed that he was sent by the Applicant to collect the gold.

3. The Original Adjudicating Authority, vide order No. 517/19.03.2016 absolutely confiscated the gold mentioned above under section 111(d) & (l) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992. A Personal penalty of Rs. 5,00,000/- ( Rupees Five lacs) was also imposed under Section 112 (a) (b) of the Customs Act, 1962.

4. Aggrieved by this order the Respondent filed an appeal with the Commissioner of Customs (Appeals) Chennai. The Commissioner of Customs (Appeals) Chennai, vide his order No. 517/19.03.2016 interalia observed that the Respondent and Shri Paulraj never came in contact with the gold as it was seized before he took part in the conspiracy. The subsequent part of the conspiracy never took place and the none of the activities envisaged under section 112(b) of the Customs Act, 1962 have been done by the Respondent and set aside the penalty imposed on the respondent.

5. The Applicant department has filed this Revision Application interalia on the grounds that;

5.1 After the DRI officers identified & intercepted Shri Abubacker Sithkali Further enquiries were conducted where Shri Abubaker informed the officers that the seized gold bars were given to him at Singapore by one Shri Ajmal Kaka; that he would be handing over the same to some person waiting in the gents toilet at the immigration hall. During the course of enquiry, Shri Abubaker.



received a call in which he was instructed to proceed to the gents toilet inside the immigration Hall of the arrival side of the Anna International Airport. The officers rushed to the toilet and Shri P. Paulraj, Security Guard, Bureau of Immigration, waiting in the toilet to receive the gold was held. As informed by Shri Paulraj that Shri Soundararajan, also a Security Guard with the Immigration department had engaged him for a monetary consideration to collect the gold at the immigration toilet and hand over the same to him. Shri Soundararajan, the Applicant, was also held.

5.2 Shri P. Paulraj, Security Guard, Bureau of Immigration in his voluntary statement dated 24/09/2014 has stated Shri Soundarajan gave him a mobile phone with no.9176346642 to be exclusively used for this purpose and also informed that a passenger coming from Singapore was carrying foreign marked gold bars, which he had to collect in the gents toilet near the arrival immigration Hall. He further stated that he received instructions from Shri Soundararajan from about the manner in which he (Paulraj) should collect the foreign origin gold bars from the passenger in the toilet at the immigration hall.

5.3 Shri Soundararajan in his voluntary statement dated 24/09/2014 has admitted and agreed with the same and accepted that he instructed Shri Paulraj, also working as Security Guard, Bureau of Immigration to wait inside the gents toilet situated in the immigration Hall. He further admitted that he became acquainted with Shri Mohammed Yoosuf (mobile no.9176406641), who has arranged for the smuggling of gold bars from Singapore and offered to pay him Rs. 50,000/- for facilitating in clearing the smuggled gold bars out of the Airport. The appellant has also admitted that he has already cleared more than five consignments of smuggled gold bars and handed over to Shri Yoosuf outside the Airport.

5.4 Further the Call Detail Records were obtained from the respective Service Providers. Analysis Of revealed that there has been periodic exchange of calls between S/shri, Soundararajan and Paulraj on various occasions/dates

5.5 The Additional Commissioner of Customs (Adjudication-AIR), vide Order-in-Original No.517 dated 19/03/2016 has rightly imposed penalty under Section 112 (a) and 112 (b) o the Customs Act, 1962 on the appellant for his involvement in the entire gamut of smuggling. The appellant in his voluntary statement has admitted to have cleared smuggled foreign origin gold bars on five earlier



occasions This proves that the appellant along with his co conspirators had orchestrated and played his part in this whole unscrupulous activity of smuggling. All these facts were not considered by the Commissioner of Customs(Appeals) while passing the Order in Appeal.

5.6 In view of the above, it is prayed that the order of the appellate authority may be set aside or such an order be passed deemed fit.

6. A personal hearing in the case was held on 05.12.2019, the Advocate for the respondent Shri Somesh Arora attended the hearing he stated that the case of abatement was set aside by the Appellate Authority and made further written submissions as under;

6.1 The issues before the Revisionary Authority for consideration are whether the impugned Order in Appeal passed by the Commissioner setting aside the penalty under Section 112 (a) and 112(b) of Customs Act, 1962 imposed on the Respondent is legal and proper; and Whether the Applicant Principal Commissioner, Customs Chennai has adduced sufficient ground before the Revisionary Authority for annulling the impugned order.

6.2 The Commissioner (Appeals) Order is legal and Section 112[a] of Customs Act, 1962 mandates penalty on persons entering into conspiracy [abetting] leading to seizure of imported/smuggled goods; an unsuccessful intent which does not lead to smuggling is never punishable. This is the reason channels like green and red are created at the international airports worldwide to allow a person to declare before he imports the goods in to the territory of India by crossing Customs port. Any assertion that a person would have smuggled or imported takes the matter to the domain of assumption and presumption and away from the realm of sustainable evidence. Once this legal position is appreciated the correctness of the decision of Commissioner (Appeals) as well as concurrent findings of this Revisionary Authority (different Constitution) on the same footing on facts for a different person becomes easy to appreciate and sustain.

6.3 According to the Order in Original the Department had intercepted the carrier of the gold at the aero bridge, brought to him to the arriving hall, packed and recovered the gold. Further, the O I O proceeds that after the Department's custody at the material time, proved conspiracy theory involving



the Respondent herein. Again, here the evidence sought to be relied enters in the domain of presumption and assumption of 'would have done' or 'would have passed on' or 'would have smuggled', which is impermissible in law, as it can merely show an intent but not an attempt or actual smuggling.

6.3 Penalty - Personal penalty - Imposition of - Penalty under Section 112(a) of Customs Act, 1962 is imposable only when persons alleged have dealt with goods in any manner which they knew are liable to confiscation - No goods held liable to confiscation were handled by the Respondent therefore penalty imposed set aside.

6.4 Thus, the so called conspiracy theory did not result in seizure of the gold instead the seizure of the gold led to the assumption of conspiracy theory. A work of fiction can never be a piece of sustainable evidence.

6.5 The Respondent submits that Commissioner [A] in accordance with the provision has held that penalty under Section 112[a] would lie on a person only when the entire conspiracy was allowed to play, enabling trapping the accused person red handed. But a differential treatment appears to have been meted out ignoring the legal basis, in this particular case while approving filing of this revision application by the department. The case laws relied upon by the Applicant have nojudicial mind and have been filed mechanically.

6.6 Reliance in this regard is placed on: 1986 (26) E.L.T. 931 (Bom.) TATA OIL MILLS COMPANY LTD. AND ANOTHER Versus UNION OF INDIA AND ANOTHER:- In para 6- " The expression "abetment" has been defined under the General Clauses Act as one known in the Indian Penal Code and under the Indian Penal Code, the person is said to abet when such person instigates or participates in commission of the offence." Therefore without instigation or actual participation in commission of crime there cannot be abetment.

- 2005 (187) E.L.T. 362 (Tri.-Mumbai): ELECTRONIK LAB Versus COMMISSIONER OF CUSTOMS (11, MUMBAI.-Penalty - Customs - Entire case against the appellants of having dealt with impugned goods knowingly, based on presumptions and assumptions - Penalty not imposable -Section 112 of Customs Act, 1962. [para 1(d)]

- 2004 (176) E.L.T. 165 (Tri. - Mumbai) JOSEPH ITTEYARA Versus COMMISSIONER OF CUSTOMS, MUMBAI: -Allegation of appellant being



abettor to smuggling of foreign currency levelled only on the basis of statements of co-accused - Independent corroboration of the version figuring in such statement lacking - Penalty having been imposed on the basis of assumptions and presumptions, lacking any cogent, tangible or reliable evidence, hence, not sustainable -Section 112 of Customs Act, 1962. (para 3]

• CARGO & TRAVEL SERVICES (P) LTD. Versus COMMISSIONER OF CUS., BANGALORE 2010 (252) E.L.T. 82 (Tri. - Bang.)- For imposing penalty under Section 112(a), it has to be brought on record that the appellant had abetted in the offence committed by the importer.

• 2008 (230) E.L.T. 91 (Tri. - Mumbai) COMMISSIONER OF CUSTOMS (EXPORT), MUMBAI Versus M.K. INDUSTRIES- Penalty - Personal penalty - Imposition of - Penalty under Section 112(a) of Customs Act, 1962 is imposable only when persons alleged have dealt with goods in any manner which they knew are liable to confiscation - No goods held liable to confiscation therefore penalty imposed set aside - Section 312(1) ibid as parimateria with Rule 209A of erstwhile Central Excise Rules. 3944. loam 7.1- approved in 2010(251)E.L.T.A115(BOM).

7. The Government has gone through the facts of the case. At the outset the Government observes the passenger Shri Abubaker Sithikali was intercepted as soon as he stepped out of the Aircraft. It is therefore clear that the passenger was prevented from filing a declaration as required under section 77 of the Customs Act, 1962. The conspiracy theory of the Department also suffers from a lot of lacunae/ omissions and assumptions. Even if such a plan was in existence, the officers having specific intelligence the act of transfer of the gold in the toilets was stalled and the event did not take place.

8. Further, since the seizure of the gold took place at the aero bridge and according to the mahazar, the Respondent has not received the gold from the passenger nor has he come into contact with him or the gold. The entire case on the respondent has originated from the statement given by Abubaker Sithikali in which he has stated that he was to proceed to Gents Toilet to hand over the gold to the Respondent. To put it shortly, there is no tangible proof of involvement of the Respondent leading to seizure of gold. The passenger with gold was intercepted at the Aero Bridge itself i.e. before the entire conspiracy took place. The officers alongwith the passenger and the gold then proceeded to the Toilet and intercepted one Shri P. Paulraj, who was present at the instruction of the Respondent, at the Toilet. However, by then the gold was already taken into possession



by the officers, the intended plan of smuggling the gold out of Airport as a part of conspiracy did not take place, as the plan has not been executed. As the gold was seized before the Applicant came in the picture, the offence associated with the mensrea was not allowed to happen. The investigations revealed the conspiracy, But the conspiracy never attained fruition. The gold was seized/recovered before this conspiracy could play out. Therefore, the offence of the Respondent remained unfulfilled and therefore in the area of speculation, and hence penalty cannot be imposed on an offence yet to be committed.

9. Government further observes for penalty under section 112 (a) of the Customs Act, 1962, the offence should have taken place. If the entire conspiracy was allowed to take place and the Respondent was caught with the gold or had he taken out the gold out of the Airport, penalty would have become applicable. The Adjudication Authority has imposed penalty under section 112( a) on the Applicant, The Section 112 (a) is reiterated below;

*112; Penalty for improper importation of goods, etc. —Any person,—  
(a) 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 this situation, the Respondent never came in contact with the gold. The appellant never came in possession of the gold at all, as it was seized before he came into the conspiracy, and therefore there was no contact of commission or omission by the Respondent, which rendered the goods liable for confiscation. The subsequent actions of unravelling the conspiracy and implicating the applicant did not take place and therefore there is no reason for invoking Section 112 (a) of the Customs Act, 1962. In view of the above the government holds that section 112 (a) cannot be invoked in the case and penalty is not imposable. The penalty imposed is therefore rightly set aside in the Appellate order. The impugned Appellate order is therefore upheld and the Revision Application is liable to be dismissed.

10. Accordingly, the Revision application is dismissed.

11. So, ordered.



(SEEMA ARORA)  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India.

**ATTESTED**

**B. LOKANATHA REDDY**  
Deputy Commissioner (R.A.)

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DATED 22/06/2020.  
~~0.6.2020-~~

To,

Shri K. Soundararajan,  
S/o Shri R. Ksi,  
Flat No. 13/3, Police Qtrs,  
Alandur, Chennai- 600 016.

Copy to:

1. The Commissioner of Customs, Chennai.
2. Shri Somesh Arora, D-302, Shubam Apts., Plot No. 13, Sector 22, Dwarka  
New Delhi 110 077.
3. Sr. P.S. to AS (RA), Mumbai.
- ✓ 4. Guard File.
5. Spare Copy.

