F. No. 373/84/B/2019-RA
F. No. 373/85/B/2019-RA
F. No. 373/86/B/2018-RA

SPEED POST

F. No. 373/84/B/2019-RA
F. No. 373/85/B/2019-RA
F. No. 373/86/B/2019-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 30/10/23

Order No. 260-262/23-Cus dated 27.10.2023 of the Government of India passed by Ms. Shubhagata Kumar, Additional Secretary to the Government of India, under section 129DD of the Custom Act, 1962.

Subject : Revision Applications, filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. CAL-EXCUS-000-APP-1069-2018 dated 26.11.2018, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi.

Applicants : Sh. Anvar Shabeer Elangotil, Kozhikode
Sh. Moosakutty T, Malappuram
Sh.Anvar Shaibin, Kozhikode

Respondent : The Commissioner of Customs, (Preventive), Cochin.

ORDER

Revision Application Nos. 373/85/B/2019-RA, 373/84/B/2019-RA & 373/86/B/2019-RA dated 28.02.2019, 06.03.2019 & 28.02.2019 respectively, have been filed by, Sh. Anvar Shabeer Elangotil, Kozhikode Sh. Moosakutty T, Malappuram and Sh.Anvar Shaibin, Kozhikode (hereinafter referred to as Applicant-1, Applicant-2 & Applicant-3, respectively) against the Order-in-Appeal CAL-EXCUS-000-APP-1069-2018 dated 26.11.2018, passed by the Commissioner of Central Tax, Central Excise & Customs (Appeals), Kochi. Vide the above mentioned O-I-A, the Commissioner (Appeals) had allowed the departmental appeal filed against the Order-in-Original No. 35/2014-15 dated 30.01.2015 passed the Joint Commissioner of Central Excise & Customs, Calicut Commissionerate, Calicut and imposed penalties of Rs.4,00,000/- on Applicant-1, Rs.3,00,000/- on Applicant-2 and Rs.3,00,000/- on Applicant-3 respectively under Section 112 of Customs Act,1962. Vide the above mentioned OIO, the original authority had dropped the proceedings initiated against the Applicants vide Show Cause Notice No. DRI/CRU/4/2013 dated 29.07.2014.

2. Brief facts of the case are that acting on a specific intelligence that Applicant-1 would attempt to smuggle gold through Calicut airport, officers of DRI intercepted Applicant-1 on 28.05.2013 at Calicut Airport after he had arrived from Sharjah by Air Arabia flight No.G9-452. No contraband was recovered from him during examination. However, from further intelligence, it emerged that gold brought by Applicant-1 was handed over by him to Applicant-2, who was a supervisor with air Arabia. Voluntary statements of both Applicant-1 and Applicant-2 were recorded under Section 108 of the Customs Act, 1962 from which it transpired that Applicant-1 had brought 300 grams of gold with him which he handed over to Applicant-2 immediately after getting down from the aircraft and thereafter Applicant-2 handed over the said gold to Applicant-3 outside the airport. After the subsequent investigation, all the three Applicants were made noticees to show cause notice no. DRI/CRU/4/2013 dated 29.07.2014, wherein, Applicant-1 was made to show cause as to why 300 gms. Gold valued Rs. 7,73, 640/- in international market and valued at Rs. 8,08,500/- in domestic market brought illegally by him should not be held liable to confiscation under Section 111 of the act ibid and why penalty under Sections 112 and

114AA should not be imposed on him. Vide the same show cause notice, Applicant-2 and Applicant-2 were made to show cause as to why penalty should not be imposed on them for aiding and abetting in smuggling of gold weighing 300 gms. The LAA vide his OIO dated 23.04.2015 held that in absence of seizure of gold and also evidences to prove the import of gold by Applicant-1, the LAA was inclined to give benefit of doubt to the passenger (Applicant-1 herein) and other notices viz. other notices (Applicant-2 and Applicant-3 herein) and held that the proposals in the show cause notice were liable to be dropped. Accordingly, the LAA dropped the proceedings. The respondent department herein preferred an appeal with the Commissioner (Appeals), who vide the impugned OIA allowed the departmental appeal and imposed penalties of Rs. 4,00,000/- on Applicant-1, Rs.3,00,000/- on Applicant-2 and Rs.3,00,000/- on Applicant-3 respectively under Section 112 of the act ibid.

3. The revision applications have been filed, mainly, on the grounds that the order of the Commissioner(Appeals) has been passed without speaking as to how the findings of the original authority were not correct and acceptable; that the Commissioner (Appeals) has simply quoted the averments in the purported voluntary statements; that corroboration of the purported voluntary statements of Applicant-1 and Applicant-2 have only vague similarity; that Commissioner (Appeals) grossly erred in placing reliance on the decision in Surjeet Singh Chabra's Vs UOI {1997 (89) ELT 646 (SC)} which is not applicable to the subject case in hand since the original authority never held that the statement of Applicant-2 is not acceptable because it is retracted; that it is a well settled law that voluntary nature of the statement has to be proved by the department and that retracted statements required other corroborative evidence for reliance; that the Commissioner (Appeals) totally ignored and overlooked the findings of the Original Authority that in view of the fact that the gold purported to have been smuggled was not seized, and hence the nature, purity and other details of the gold was not ascertainable and consequently valuation arrived was not supported by any evidence and was merely on the basis of assumptions and presumptions; that while the original authority noted that both the statements of applicant-1 did not contain any description about the gold

imported by the applicant, the Commissioner(Appeals) ignored the finding altogether. Finally, it has been contended that the commissioner(A) could not state in the impugned order as to why the findings of the original authority were not acceptable to him; that his order was not speaking one.

4. Personal hearing in the matter was held in virtual mode on 21.08.2023. Sh. Mohammed Zahir, Advocate appeared for the Applicants. He stated that the entire case has been made on the basis of statements alone, with no corroborative evidence, without any seizure of the impugned gold and without interception of any of the three Applicants while they were purportedly involved in carrying the gold. The basis of valuation is not established, since no gold was seized and thus could not be proved for purity and therefore valuation. The purported purchase invoice of 1220 grams of gold has not been made part of the SCN; that the case law cited by the Commissioner (Appeal) is not applicable in this case; that one of the applicants retracted his statement; that Commissioner (Appeal)'s order is not speaking and therefore the original adjudicating authority's order should be restored.

5.1. The Government has carefully examined the matter. It is observed that impugned gold of 300 grams alleged to have been brought illegally into India by Applicant-1 was not seized. On the other hand from the material placed on record, it has been observed that voluntary statement of Applicant-1 was recorded on 28.05.2013 under section of 108 of the act ibid which was further corroborated from the statement of Applicant-2 also recorded on 28.05.2013. From both the statements, it emerged that the impugned gold was brought by Applicant-1 on the instructions of Applicant-3 on 28.05.2013; that further on the instructions of Applicant-3, Applicant-1 handed over the impugned gold to Applicant-2 immediately after disembarking from the aircraft. From the statement of Applicant-2, it emerges that the impugned gold received by him from Applicant-1 was handed over to Applicant-3 outside the airport. It has been admitted by Applicant-2 that he transferred the impugned gold brought by Applicant-1 to Applicant-3 for a monetary consideration of Rs.5,000/- promised to him by Applicant-3. From the voluntary

statements of both the Applicant-1 and Applicant-2, it has further been observed that both of them were in regular touch with Applicant-3 on phone number 9048227585 used by Applicant-3. Usage of phone number 9048227585 by Applicant-3 has been corroborated by the voluntary statement dated 11.06.2013 tendered under section 108 of the act ibid by Ms. Shalu Mahamood, wherein, she stated that she is sister of Applicant-1 & Applicant-3 and phone number 9048227585 was used by Applicant-3. From the sequence of events, it appears that a nexus for smuggling of impugned gold was made with Applicant-3 master minding it, Applicant-1 as the carrier and Applicant-2 as facilitator to take the smuggled gold out of the airport delivering it to Applicant-3. Thus, the voluntary statements establish that 300 grams of gold was smuggled into India by Applicant-1 and Applicant-2 & Applicant-3 aided and abetted in this smuggling. For confronting Applicant-3 with the voluntary statements of Applicant -1& Applicant-2, he was issued summons to join the investigation but he did not join the investigation. For these acts of omission and commissions on part of all the three Applicants, they were issued with show cause notices, wherein, penalties were proposed to be imposed on all the three Applicants. Original authority observed that proceedings under Customs Act, 1962 were initiated on the basis of statements recorded under Section 108 of the act ibid in absence of any seizure of the impugned gold, hence, proceedings were dropped. Commissioner (Appeals) in the impugned OIA held that from the voluntary statements under section 108 of the act ibid of Applicant-1 and Applicant-2, it is clear that 300 grams of gold was smuggled into India by respondent no.1 (Applicant-1 herein) with the assistance of respondent no.2 (Applicant-2 herein) and under the instructions of respondent no.3 (Applicant-3 herein) . It was also held by the Commissioner (Appeal) that the original authority erred in not imposing penalty on the applicants. Accordingly, the Commissioner (Appeals) imposed penalties on all the three Applicants under section 112 of the act ibid. Therefore, the main issue involved before this authority is to examine as to whether penalty is imposable on the basis of admissions made in voluntary statements tendered under section 108 of the Customs Act, 1962, even when one of the statements has been retracted.

5.2. On the issue emerged at Para 5.1. above, the Government observes that in the case of Naresh J. Shukawani Vs. Union of India 1996 (83) ELT 258 (SC), Hon'ble Supreme Court observed that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the Hon'ble Court that if such a statement incriminates the accused, inculpating him in the contravention of the provisions of the Customs Act, it can be considered as substantive evidence to connect the accused with the contravention of the provisions of this Act.

From the above ruling, it is an easy inference that voluntary statements tendered by Applicant-1 on 28.05.2013 & 31.05.2013 and Applicant-2 on 28.05.2013 under section 108 of the act ibid incriminates both Applicant-1 and Applicant-2, which further incriminate Applicant-3, for abetting Applicant-1 in smuggling gold.

In light of above, the Government observes that these voluntary statements create a strong and sufficient ground to proceed against all the three Applicants under the provisions of the Act ibid.

5.3. One of the Applicants i.e. Applicant-2 has contended that no weightage can be given to his statement under section 108 of the act ibid as he had retracted it later. On this contention of the Applicant, the Government observes that Applicant-2 was working as Supervisor of Air Arabia at Calicut airport; that examination of baggage of applicant-1 and thereafter questioning of Applicant-1 and staff of Air Arabia by Customs officers was conducted in presence of Sh. Faijas and Sh. Naveen das, colleagues of Applicant-2 in Air Arabia and who were on duty on 28.05.2013; that during the said proceedings, Applicant-2 admitted his role in abetting smuggling of gold; that the details of customs proceedings were recorded in a mahazar which was signed by both the colleagues of Applicant-2. Applicant-2 himself admitted his abetting Applicant-1 in smuggling of the impugned gold vide statement dated 28.05.2013 tendered his statement under section 108 of the act ibid. Further his role in abetting Applicant-1 in smuggling of impugned gold was corroborated

by the voluntary statements dated 31.05.2013 of his own colleagues Sh. Faijas and Sh. Naveendas, wherein, they specifically stated that Applicant-2 admitted his role in abetting smuggling of gold in their presence.

Further, it has also been observed that Applicant-2 was arrested on 28.05.2013 itself under section 104 of the act ibid and produced before the Hon'ble Judicial Magistrate (Economic Offences), Ernakulam from where he was remanded to judicial custody. Only on 04.06.2013, the Applicant in the letter addressed to the assistant director DRI retracted his statement. During the adjudication proceedings before the original authority, the applicant contended that the contents of the statement which he was forced to sign were absolutely false. Now the moot question that arises is as to why Applicant-2 did not bring into the notice of Hon'ble Judicial Magistrate (Economic Offences), Ernakulam that he was forced to sign the statement under section 108 of the Customs Act,1962, when he was produced before the said judicial authority on 28.05.2013 itself. Even though he had retracted his statement, Applicant-2 did not state that his statement was recorded under inducement, threat, promise etc. either before the original authority or before the appellate authority. Thus, the claimed retraction appears to be an afterthought to escape from the penal provisions under the Act ibid and, hence is unsustainable.

6. The Government observes that the valuation of the impugned 300 gms of gold has been challenged in the absence of seizure of the impugned gold. It has been contended that the Commissioner (Appeals) totally ignored and overlooked the findings of the original authority that in view of the fact that the gold purported to have been smuggled was not seized, hence the nature, purity and other details of the gold was not ascertainable and consequently valuation arrived is not supported by any evidence and was merely on the basis of assumptions and presumptions. On this aspect the Government observed that the original authority in the OIO at para 26 has recorded:

"26. I have considered the rival contentions. My findings and conclusions are discussed herein below..... From the facts , I find that admittedly, the

quantity of gold imported was 300 gms purchased from the Jewellery M/s Killoty Wahab, Dubai."

The Government further observes that in the said para, the original authority has also recorded that "In his second statement dated 31.05.2013, Sh. Shabeer (Applicant-1 herein) had stated that the quantity of gold imported by him was 300 gms and that he was having with him the bill issued by another Jeweler M/s Killoty Wahab which was destroyed by him. Here the Government observes that the original authority has taken note of the mentioned bill issued to Applicant-1 by M/s Killoty Wahab, Dubai as admitted by Applicant-1, but the impugned OIO is silent about the value of the 300gms of gold mentioned in the bill issued to Applicant-1 by the Jewelers. Further, in the Applicant's statement dated 31.05.2013, recorded under section 108 of the act ibid, Applicant-1 had specifically stated inter-alia that *"along with the gold he carried to India from Killoty Jewellery, Dubai, he was given one letter and invoice in the above model; in that letter and invoice the weight of gold was mentioned as 300 grams and total value as around forty nine thousand Dirham(AED)."*

The Government observes that the OIO is silent on as to why the original authority did not take cognizance of the value of 39,000 AEDs which had been admitted by Applicant-1 in his statement. If for establishing the quantity, the original authority is placing reliance on the statement of Applicant-1 that he imported 300 gms of gold then the same ought to have been done in respect of the value, which was stated to be 49,000 AEDs. This does not appear to be in consonance with laid down judicial principles. Moreover, it is not understood as to how, in absence of the impugned gold and without any clear reasoning, the appellate authority has arrived at the value of the impugned gold, on the basis of which penalties have been imposed on the Applicants herein. Mere reliance on the statement of Applicant-1, without any substantive corroboration of quantity, purity and/or documents indicating value of the offending goods, cannot be a prudent basis for imposition of penalty, especially in a case where the goods were not physically available for appraisement. Therefore, the Government is constrained to record that the investigating branch could not adduce substantive/corroborative evidence which could

have led to a crystal clear conclusion in the case. However, from the statements tendered by Applicants-1 & Applicant-2 under Section 108 of the Customs Act, 1962, which have not been retracted, it emerged that on the instructions of Applicant-3, Applicant-1 brought the impugned goods into India which were received by Applicant-2 and later handed over to Applicant-3 outside the airport. Thus, it can be concluded that a nexus existed between all the three Applicants to smuggle gold into India, in which they apparently succeeded. As per various judicial pronouncements, statements recorded under Section 108 of the Customs Act, 1962 have evidentiary value to connect the accused with the contravention of the provisions of this Act. Reliance is placed upon the case of Surjeet Singh Chhabra vs. U.O.I {1997 (89) ELT 646 (SC)} and K.I. Pavunny {1997 (90) ELT 241 (SC)}. In light of the above discussion, the Government observes that the penalties imposed on the Applicants herein are on the higher side. Accordingly, penalty on Applicant-1 is reduced to Rs.50,000/-, penalty on Applicant-2 is reduced to Rs.40,000/- and penalty on Applicant-3 is also reduced to Rs.40,000/-.

7. The revision applications are disposed of in above terms.

27/10/23

(Shubhagata Kumar)
Additional Secretary to the Government of India

1. Sh. Anvar Shabeer Elangotil,
   S/o Mohmood, Raroth Chalil House,
   Kozhikode-673572.
2. Sh. Moosakutty T.,
   S/o Late Eanihaji, Thankathil,
   P.O. Vadakkangara,
   Kizhakekolamb, Mankada, Perinthalmanna,
   Malappuram Dist.
3. Sh. Anvar Shaibin,
   S/o Mohmood, Raroth Chalil House,
   Kozhikode-673572.

Order No. 960 -962/23-Cus dated 27.10.2023

F. No. 373/84/B/2019-RA
F. No. 373/85/B/2019-RA
F. No. 373/86/B/2018-RA

Copy to:

1. The Commissioner of Customs (Preventive), Cochin, 5th Floor, Cochin Centre, Broadway, Cochin-682031.
2. The Commissioner of Customs (Appeals),4th Floor, C.R Building, I.S Press Road, Cochin-18.
3. Sh. Mohammed Zahir (Advocate), 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut-673011.
4. PPS to AS(RA).
5. Guard File.
6. Spare Copy.
7. Notice Board.

ATTESTED

27/10/2022

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