

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Judgment Reserved On 24.02.2021	Judgment Pronounced On 18.03.2021
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C.M.A.No.929 of 2020
and
C.M.P.No.5782 of 2020

Lieutenant Colonel Ganesan S. (Retd.),
Flat No.7, Citadel Apartments,
No.1A, Cenotaph 2nd Lane,
Alwarpet, Chennai-600 018. ..Appellant/Appellant

-vs-

The Commissioner of Customs,
Chennai VII Commissionerate Air Cargo,
New Custom House, Meenambakkam,
Chennai-600 027. ..Respondent/Respondent

Appeal under Section 130 of the Customs Act, 1962 against
the order dated 06.02.2020 in Final Order No.40083/2020 passed
by the Customs Appeal No. 42206/2017 passed by the Customs,
Excise and Service Tax Appellate Tribunal, South Zonal Bench,
Chennai.

For Appellant : Mr.Hari Radhakrishnan
For Respondent : Mr.J.Vasu,
Junior Standing Counsel

JUDGMENT

T.S.Sivagnanam, J.

This appeal filed under Section 130 of the Customs Act, 1962
(hereinafter referred to as "the Act") is directed against the
order dated 06.02.2020, passed by the Customs, Excise and
Service Tax Appellate Tribunal, South Zonal Bench at Chennai
(for brevity "the Tribunal") in Final Order No.40083/2020.

2.The appellant is an individual and has established a
Security Service Agency under the name and style M/s.Ganesan
Security Agency (for brevity "the Security Agency") and has been

empanelled in the Ministry of Defence, Directorate General of Resettlement, as the appellant is a retired Lieutenant Colonel.

3.The appellant has raised the following substantial questions of law for consideration:-

"i. Whether the first respondent authority and the Tribunal is correct in holding that the charges of Section 112(a) of Customs Act, 1962 is made out in the facts and circumstances of the case against the appellant, warranting imposition of penalty?

ii. Whether the Hon'ble Tribunal had erred in relying upon retracted statements of the co-accused particularly when at the time of remand the Hon'ble Magistrate had specifically noted that the statements were recorded under threat and coercion?

iii. Whether the Hon'ble Tribunal had erred in relying upon retracted statements of the co-accused without independent corroboration in view of the decision of this Hon'ble Court in D.V.Kishore vs. CC (Seaports-Imports), Chennai reported in 2017 (350) ELT 527 (Mad)?

iv. Whether the Hon'ble Tribunal has traversed beyond the show cause notice by relying upon certain call records which were not relied upon in the show cause notice issued to the appellant under Section 124 of the Customs Act, 1962?

v. Whether the Hon'ble Tribunal had erred in relying upon the alleged call records without the actual subject matter of the conversation in view of the decisions quoted by the appellant, namely Shafeek P.K. vs. CC, Cochin reported in 2015 (325) ELT 199 (Tri-Bang) and Anil Gadodia vs. CC, Mundra reported in 2016 (343) ELT 983 (Tri-Ahmd)? and

vi. Whether the Hon'ble Tribunal had erred in relying upon the call records given by the mobile service provider without the mandatory certificate that is required to be issued under Section 138C of the Customs Act, 1962?"

4.The facts leading to the impugned order are as hereunder:-

4.1.The Directorate of Revenue Intelligence, Chennai Zonal Unit (DRI), received specific intelligence to the effect that a consignment of biscuits in four cartons covered under bill dated 09.04.2015 has arrived from Singapore and that foreign marked gold bars were concealed in the said consignment and the

consignment would be stored in the cold storage shed in import examination area of the Air Cargo Complex, Chennai Airport and that it would be cleared by one Mr.K.Francis, Field Officer of the Security Agency being run by the appellant with the assistance of fellow security personnel.

4.2.The officers of DRI appear to have maintained surveillance near the cold storage shed on the early hours of 10.04.2015. On identifying Mr.K.Francis at the in-gate of the Air Cargo Complex at around 04.00 am, the officers of DRI apprehended him. The officers also identified Mr.Vijayakumar, Security Guard of the appellant's Security Agency, Mr.Karthikeyan, Loader of M/s.Badhra International, who were suspected to be helping Mr.K.Francis and they were also apprehended. The officers examined Mr.K.Francis and recovered 6kg of foreign marked gold bars. This led to issuance of show cause notice dated 07.10.2015 to the appellant and five others. The importer was M/s.Solai Exports & Importers, Virudhunagar, represented by its Proprietor Mr.V.S.Mathi Arasu from Virudhunagar. Other than the importer and the appellant, the other noticees were Mr.Khaja Mohideen @ Khaja, Mr.Shahul Hameed, Mr.K.Francis and Mr.P.Karunanithi.

4.3.The show cause notice proposed to seize the 6kg of gold bars of foreign origin valued at Rs.1,60,86,000/- and why it should not be confiscated under Sections 111(d), 111(i) and 111 (l) of the Act; why the biscuits totally valued at Rs.48,000/- should not be confiscated under Section 119 of the Act; and why penalty should not be imposed on each of the noticees under Section 112 of the Act and also under Section 114AA of the Act separately.

4.4.The appellant submitted his reply on 02.12.2015, denying the allegations levelled against him, stating that he has absolutely no connection whatsoever with the case and there is not even an iota of material evidence placed by DRI pointing out the appellant's involvement with the gold alleged to have been seized and he has been implicated in the case without evidence and with mala fide intention. Further, the appellant stated that he has no connection whatsoever with either the gold bars or the biscuits, he has not seen 1kg gold bar in his life and that he is not the owner of the gold bars. Further, it was submitted that Section 114AA of the Act would have no applicability to the appellant, as there was no transaction of business by the appellant for the purposes of the Act and the appellant has not made any declaration or statement of document in the transaction of the business.

4.5.With regard to the proposal to levy penalty under Section 112 of the Act, it was submitted that the show cause

notice is not specific as to under which sub-Section of Section 112, penalties were proposed against the appellant and therefore, it is vague and bad in law. Notwithstanding the stand, the appellant contended that sub-Clause (a) of Section 112, is applicable to a person, who in relation to any goods, does or omits to do any action, which would render the case liable for confiscation under Section 111 or abets the doing or omission of such act and sub-Clause (b) would be applicable to a person, who acquires possession, which is not the case alleged against the appellant. Further, the appellant has been implicated based on statements, which have been recorded from the other co-noticees, which are not voluntary statements and when the noticees were produced before the Judicial Magistrate for remand, they had stated that the statements were obtained by threat and coercion. With regard to the telephonic conversations, which were relied on in the show cause notice, the appellant submitted that none of the allegations would point a finger to the appellant with regard to the alleged smuggling of gold.

4.6. The appellant also relied upon certain decisions of the Tribunal to support his contention that the statements recorded by the DRI from the other co-noticees cannot be relied upon, as they are not voluntary statements, but have been obtained by threat and coercion about which they had stated to the Judicial Magistrate when they were produced before him for remand. The other co-noticees also submitted their reply.

4.7. The Adjudicating Authority afforded an opportunity of personal hearing on 28.09.2016 during which, the appellant submitted his written reply dated 02.12.2015, which was earlier filed with the Department and stated that he is innocent and requested to drop the penal proceedings against him. The Adjudicating Authority by order dated 29.04.2017, confirmed the proposal in the show cause notice and imposed penalty of Rs.20,00,000/- on the appellant under Sections 112(a) and 112(b) of the Act and Rs.30,00,000/- under Section 114AA of the Act. Penalty was also imposed on the other co-noticees. The order dated 29.04.2017 contains annexures, which are call detail records of the noticees including the appellant.

4.8. Aggrieved by such order, the appellant preferred appeal to the Commissioner of Customs (Appeals-I), Chennai (for brevity "the Commissioner (Appeals)"). By order dated 11.09.2017, the Commissioner (Appeals) partly allowed the appeal by confirming the penalty to be under Section 112(a) of the Act and vacated the penalty under Section 114AA of the Act.

4.9. Aggrieved by such order, the appellant preferred appeal before the Tribunal contending that Section 112(a) of the Act

would not be applicable to the appellant. The penalty imposed solely based on the retracted statements of the co-accused is contrary to the settled legal position. Relying upon the statement of the co-accused, which is not inculpatory of person making the statement, is bad in law. The finding of the first appellate authority in paragraph 18.2.1 of the order dated 11.09.2017 is that there are extensive corroborative evidences in the form of call records, the forensic report and unretracted statements of Mr.V.S.Mathi Arasu are contrary to facts and not supported by material evidences. Written submissions were also placed for the consideration of the Tribunal. By order dated 06.02.2020, the Tribunal dismissed the appeal and aggrieved by the same, the appellant is before us by way of this appeal raising the aforementioned substantial questions of law.

5.Mr.Hari Radhakrishnan, learned counsel appearing for the appellant after elaborately setting out the factual details and persuasively taking us through the order of the Adjudicating Authority dated 29.04.2017, as well as the order of the Appellate Authority dated 11.09.2017, submitted that the Tribunal failed to exercise the jurisdiction vested in it, as it has given only a prima facie finding regarding the involvement of the appellant in the alleged smuggling of gold and that the Tribunal, being the final fact finding authority, ought to have gone into the various submissions made by the appellant and the various evidences relied on by the appellant and given a final finding on the merits of the case.

6.Further, it is submitted that though written submissions were placed before the Tribunal, the same were not referred to and the decisions relied on were not considered and to that extent, the impugned order is a non-speaking order. Further, the Tribunal failed to appreciate that the statements of the co-noticees have been retracted and they have clearly stated before the Judicial Magistrate that their statements were obtained under threat and coercion and to implicate the appellant based on those statements, is wholly erroneous.

7.Relying upon the decision in the case of D.V.Kishore vs. Commr. of Cus. (Seaports-Imports), Chennai [2017 (350) E.L.T. 527 (Mad)], it is submitted that on the basis of retracted confession of a co-accused, penalty cannot be sustained. For the same proposition, reliance was placed on the decision in the case of Directorate of Revenue Intelligence vs. Mahendra Kumar Singhal [2016 (333) E.L.T. 250 (Del)]. Further, the statement of ICE holder, viz., Mr.V.S.Mathi Arasu does not implicate the appellant and he has only stated that the appellant has helped him in obtaining the IEC and that the appellant had informed him that the officers of DRI had recovered gold in the consignment imported under airway bill, which showed the consignee as

M/s.Solai Exports & Importers and had asked him to go to his native place. Further, it is submitted that though the appellant maintained that he did not interact or communicate with Mr.V.S.Mathi Arasu, the alleged statement by itself does not in any way suggest that the appellant had a role in abetment of the illegal import or that the appellant had done any commission or omission.

8.Further, the learned counsel submitted that Mr.V.S.Mathi Arasu had given an affidavit dated 05.02.2018 stating that his earlier statement was not given voluntarily and the IEC was misused by Mr.K.Francis and this affidavit though was produced before the Tribunal, no finding has been rendered on the same. Further, the finding of the Tribunal with regard to the call record details is wholly erroneous and to substantiate this submission, the learned counsel for the appellant very elaborately referred to the call details and submitted that they are beyond the scope of the show cause notice. The learned counsel referred to certain portions of the show cause notice, the Order-in-Original and the Order-in-Appeal and submitted that the findings are clearly beyond the scope of the show cause notice and the call records mentioned in paragraph 11.2 were the invention of the Adjudicating Authority, which is out of the purview of the show cause notice.

9.Further, it is submitted that the Tribunal relied on certain calls alleged to have been made with Mr.Khaja on 04.03.2015 and 09.03.2015 and it is not known from where the Tribunal has produced the call records, as in Annexure-2 of the Order-in-Original, it nowhere mentions that the appellant spoke simultaneously to Mr.Khaja and Mr.V.S.Mathi Arasu. Further, the call records produced as Annexure-2 have been tampered to the extent that on 10.03.2015, four calls were received from mobile no.8056899163 for a total duration of 439 seconds only against the alleged duration of 1,02,589 seconds by the Tribunal to fabricate the story that Mr.Khaja spoke to Mr.V.S.Mathi Arasu in these calls on the appellant's mobile number. Further, the learned counsel elaborated upon the submissions, which have been referred to in paragraph G(II) of the grounds of appeal. Further, it is submitted that the call records relied on in the show cause notice is a printout given by the mobile service provider and this printout is an electronic evidence, which can be relied upon only if it is backed with a certificate as required under Section 138C of the Act. In this regard, the learned counsel placed reliance on the decision of the Delhi Bench of the Tribunal in S.N.Agrotech vs. Commissioner of Customs, New Delhi [2018 (361) E.L.T. 761 (Tri-Del)].

10.Further, it is submitted that Section 112(a) of the Act is applicable to a person, who in relation to any goods, does or

omits to do any action, which act or omission would render such goods liable for confiscation under Section 111 or abets the doing or omission of such an act. It is submitted that even as per the evidence relied on in the show cause notice, the appellant was neither responsible, nor actually did any act or omitted to do any act mentioned in Section 111 of the Act. In such circumstances, the provision "abets the doing" would also not be applicable to the appellant and therefore, the penalty imposed under Section 112(a) is not sustainable.

11. It is further submitted that the modus operandi envisaged by the DRI is based only on assumptions, as nobody was caught in commission of the said act of smuggling, nor even attempted. Further, the man Mr. P. Karunanithi, who was believed by the DRI to be clandestinely removing the gold biscuits, was not on duty and was sleeping at his residence some 30kms away. The appellant was also nowhere near the cold storage of the Air Cargo Complex. Further, the Adjudicating Authority did not permit the appellant to cross examine the co-accused.

12. The learned counsel for the appellant placed reliance on the decision of the Hon'ble Supreme Court in Commissioner of Customs, Mumbai vs. Unimac India Ltd., [2006 (198) E.L.T. 488 (SC)] for the proposition that the Tribunal, being the final fact finding authority, should give considered finding after delving into the facts on record. For the same proposition, reliance was placed on the decision in Commissioner of Customs, New Delhi vs. Siddhartha Polymers Ltd., [2008 (231) E.L.T. 202 (SC)]; Metroark Ltd. vs. Commissioner of Central Excise, Calcutta [2004 (164) E.L.T. 225 (SC)]; the decisions of the Division Bench of this Court in Nandhi Spinning Mills (P) Ltd. vs. Commissioner of C. Ex., Salem [2018 (8) G.S.T.L. 103 (Mad)]; Alkraft Thermotechnologies (P.) Ltd. vs. Commr. of CGST & C. Ex., Chennai [2019 (30) GSTL 433 (Mad)]; Commr. of C. Ex., & S.T., Chennai vs. Chennai Petroleum Corpn. Ltd., [2019 (369) E.L.T. 267 (Mad.)]; the decision of the Bombay High Court in Mahindra Cie Automotive Ltd. vs. Commissioner of Central Tax, CGST [2019 (367) E.L.T. 142 (Bom)]; the decision of this Court Commissioner of C. Ex., Puducherry vs. CESTAT, Chennai [2018 (363) E.L.T. 110 (Mad)]. To support the proposition, that show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest, reliance was placed on the decision of the Hon'ble Supreme Court in Commissioner of C. Ex., Nagpur vs. Ballarpur Industries Ltd., [2007 (215) E.L.T. 489 (SC)]. With the above submissions, the learned counsel prayed for setting aside the order passed by the Tribunal and answering the substantial questions of law in favour of the assessee.

13.Mr.J.Vasu, learned Junior Standing Counsel appearing for the respondent/Revenue submitted that during the course of investigation, the appellant was very evasive and he did not cooperate with the DRI officers, when they recorded his statement. The unretracted statement dated 10.04.2015 of Mr.K.Chandrasekar of M/s.Win Shipping & Logistics, engaged by Mr.Khaja through Mr.K.Francis for customs clearance of the impugned imported consignment of biscuits by M/s.Solai Exports & Importers and Forensic Data Extraction reports in respect of the mobile number of Mr.K.Francis under Mahazar proceedings dated 20.05.2015, indicate that Mr.Khaja has not one number, but has two other numbers and the mobile number used by Mr.Khaja was not on Khaja's name and this cannot be fictional, as the mobile number of the appellant herein was also taken by one Mr.S.Prem Kumar and the CDR extracts prove that the appellant was hand in glove with a gang and indirect touch with Mr.Khaja on three mobile numbers and thus, considering the CDRs in conjunction with recordings in Mahazar dated 10.04.2015 and the statements dated 10.04.2015 of Mr.K.Francis, Mr.Shahul Hameed and Mr.P.Karunanithi, the appellant and Mr.Khaja were in frequent touch and rests were involved in smuggling of gold with active collusion and assistance of the staff of the appellant-Security Agency.

14.Further, it is submitted that the Tribunal has clearly recorded a finding that on a closure look on the call records inter se the appellant, Mr.Khaja and Mr.V.S.Mathi Arasu reveal that right from the beginning of March, 2015, all these persons were in touch. Further, after referring to the other findings recorded by the Tribunal, it is submitted that considering these call details, the appellant cannot wash off his responsibility with a total denial that he did not know Mr.Khaja at all and there was only a wrong call for about six seconds etc. Further, there were some calls between Mr.Khaja and the appellant and the appellant and Mr.V.S.Mathi Arasu and again the appellant and Mr.Khaja, which was noted by the Tribunal.

15.With regard to the plea that opportunity for cross examination was not granted, it is submitted that the appellant appeared for a personal hearing before the Adjudicating Authority on 28.09.2016 for the second time and did not seek for cross examination of the witnesses and even in his subsequent letter dated 07.04.2017, he only requested for passing orders at the earliest and did not seek cross examination.

16.With regard to the allegation that Mahazar witnesses were not present throughout the Mahazar proceedings, it is submitted that this aspect has been elaborately discussed by the Adjudicating Authority and it has been pointed out that the

Mahazar was signed not only by two witnesses, but by ten other persons in whose presence, the same was drawn to vouch for its truthfulness. Further, it is not in dispute that 6kgs of gold was concealed in the consignment of biscuits in 4 cartons, the two panchanama witnesses were continuously present at the spot of seizure for several hours without responding to call of nature. In any event, discovery of gold from the consignment has never been disputed by the appellant, nor any other person.

17. Further, the plea raised by the appellant that he should have been permitted to cross examine the panchanama witnesses is not a plea for delaying the disposal of the case and not genuine. In support of his submission, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in State of Kerala vs. K.T. Sudhul [AIR 1997 (SC) 162]. Further, it is submitted that in the statement given by Mr. K. Francis under Section 108 of the Act on 10.04.2015, Mr. K. Francis, who is the Field Officer of the company owned by the appellant, categorically confirmed that he knew the appellant for 15 years and he used to work as a driver for him and used to do all his personal and family works and the appellant, who was the owner of the Security Agency, which was deployed as Security Contractors in Air Cargo Complex and in the mean time, Mr. Khaja again approached Mr. K. Francis and asked his help in smuggling gold and in this regard, Mr. K. Francis informed the appellant that he also accepted for that and according to the request of Mr. Khaja, Mr. K. Francis obtained the IECs of M/s. Solai Exports & Importers with the help of Mr. P. Karunanithi, who would clear the concealed smuggled golds from the import consignment and Mr. K. Francis used to get Rs. 50,000/- per kg of smuggled gold cleared by him out of which, Mr. P. Karunanithi would get Rs. 10,000/- and the remaining Rs. 30,000/- would go to the appellant. Further, it has been stated that gold smugglings, duly concealed in the consignments, were done by Mr. Khaja, Mr. Shahul Hameed with the help of Mr. K. Francis and the help of the appellant and he used to inform the appellant about these consignments and clear the smuggled concealed gold with the help of Mr. P. Karunanithi. The said P. Karunanithi in his statement under Section 108 of the Act dated 10.04.2015, confirmed the modus operandi of smuggling of gold and also confirmed that he would inform the appellant about the number of gold bars retrieved from the cold storage. Mr. V. S. Mathi Arasu, Proprietor of M/s. Solai Exports & Importers in his statement given under Section 108 of the Act dated 23.04.2015, confirmed and categorically stated that as per the appellant's instruction, he (Mr. V. S. Mathi Arasu) applied for IEC and with his influence and contacts, the appellant got him IEC in the name of M/s. Solai Exports and Importers in February, 2015 for which the appellant himself has paid all the expenses. He had further stated that the appellant also informed him (Mr. V. S. Mathi Arasu) that the

DRI has recovered the gold from the consignment of biscuits imported from Singapore in the name of M/s.Solai Exports and Importers. Further, it is submitted that the call record details of mobile no.8098988000 used by the appellant corroborates that the appellant is the master mind behind the smuggling of gold by concealing in the consignments of M/s.Solai Exports and Importers.

18.It is further submitted that the Tribunal has in depth considered the entire mater, apart from the documents, which were placed on record as also the decisions relied on during the course of argument and has dismissed the appeal filed by the appellant and in this regard, referred to paragraphs 8 and 9 of the order. Further, it is submitted that though the Judicial Magistrate has recorded the statements of A1 to A4 that their statements were obtained by threat and coercion, there was no specific denial of their involvement in the activity and nothing was stated before the Judicial Magistrate.

19.Further, it is submitted that the Adjudicating Authority explained very succinctly the modus operandi of the main accused and the involvement of Mr.K.Francis and Mr.P.Karunanithi from where, the role of the appellant starts and their statements would show that the appellant was aware of the smuggling of gold. It is further submitted that it is incorrect to state that the impugned order is a non-speaking order and a reading of the impugned order would show that the Tribunal has gone through the chain of events, which led to the illegal transactions coupled with the numerous phone calls inter se between the parties and has rightly concluded that the appellant is not over board.

20.Further, it is submitted that admittedly, the gold was liable to be confiscated in terms of Section 111(d) of the Act, as the same was sought to be imported or attempted to be imported and in terms of Section 111(i), it was found concealed and therefore, penalty in terms of Section 112(a) stands attracted. The said provision is widely couched to cover any contingency that is any person in relation to the goods does or omits to do any act which renders the goods liable for confiscation or abets the doing or omission of such act is open to the imposition of penalty prescribed. It is further submitted that a perusal of the chain of events as set forth by the Adjudicating Authority, which was confirmed by the Tribunal leaves no doubt that the action of the appellant does not inspire confidence. Further, it is submitted that the fact finding authorities have duly applied their mind to the gravity of the offence/omission and abetment involved in the case and therefore, the order passed by the Tribunal is legal and sustainable. Further, it is submitted that the appeal does not

raise any question of law, much less a substantial question of law and therefore, the appeal is liable to be dismissed.

21.The learned Junior Standing Counsel placed reliance on the decision of this Court in the case of K.Rahuman Sait vs. Commissioner of Customs [C.M.A.No.752 of 2010, dated 25.01.2021].

22.Heard Mr.Hari Radhakrishnan, learned counsel for the appellant/assessee and Mr.J.Vasu, learned Junior Standing Counsel for the respondent/Revenue.

23.The main contention raised by the learned counsel for the appellant is that the order passed by the Tribunal is a non-speaking order and that the Tribunal, being the final fact finding authority, should give considered finding, after delving into the evidences on record. To support such contention, the learned counsel placed reliance on the decisions in Unimac India Ltd. (supra), Siddhartha Polymers Ltd. (supra), Metroark Ltd. (supra), Nandhi Spinning Mills (P) Ltd. (supra), Alkraft Thermotechnologies (P) Ltd. (supra), Chennai Petroleum Corpn. Ltd. (supra), and Mahindra Cie Automotive Ltd. (supra).

24.In our considered view, there can be no quarrel over this settled position of law. If an order passed by an appellate Tribunal is a perfunctory order, if the Tribunal fails to consider the evidence being the final fact finding authority, if it has not discussed or analysed the moot point before it, then such order would call for interference.

25.To apply the legal principles laid down in the aforementioned decisions, we need to examine the order passed by the Tribunal, as to whether the order is a perfunctory order, devoid of reasons, outcome of non-application of mind. Bearing this legal principle in mind, we have carefully gone through the order passed by the first appellate authority. The Commissioner (Appeals) from paragraphs 1 to 15, has set out the factual position as was placed before it by either side. In paragraph 16, the Commissioner (Appeals) discussed about the grounds raised by the appellant, viz., that he has been denied the right of cross examination, imposition of penalty is not legal, the order passed by the Adjudicating Authority is based on assumptions and presumptions and the retracted statements of Mr.K.Francis and Mr.P.Karunanithi have no evidence. The Commissioner (Appeals) also notes that the appellant had relied on judgments in support of the aforementioned four grounds.

26.The appellant was represented by his counsel, who appears to have reiterated the grounds and his request for giving written submissions was accepted and in paragraph 17, the Commissioner (Appeals) records the receipt of the written

submissions on 04.08.2017 and states that it is essentially a compilation of documents referred to in the grounds of appeal.

27. From paragraph 18, the Commissioner (Appeals) proceeds to examine the various contentions, which were raised before him. Firstly, the Commissioner (Appeals) discussed about the modus operandi adopted in the transaction. After noting the facts as recorded by the Adjudicating Authority, which was available on record, the Commissioner (Appeals) concludes that the case on hand is a well planned racket of smuggling gold through the Air Cargo Complex, Chennai, which was busted by the DRI. The Commissioner (Appeals) records that the gold concealed in the consignment was removed by the personnel of the Security Agency (owned by the appellant), which had been engaged by the Airport Authority of India for guarding the cargo. The statement recorded by the investigating authorities were referred to, the seized material objects were taken note of, the call records, forensic analysis report of the mobile phones having report on WhatsApp messages and photos and videos shared with each other and held that this have intertwined in the framework of facts emerging from the statements and liberally discussed in the impugned order to reach the conclusion that the appellant, who is the Proprietor of the Security Agency, was actively involved in the smuggling racket.

28. In paragraph 18.1, the Commissioner (Appeals) has considered the contentions raised by the appellant that he was not permitted to cross examine the panchanama witnesses. After going through the contentions raised, the Commissioner (Appeals) has recorded that the Adjudicating Authority has discussed this aspect and has pointed out that the appellant, at no point of time, sought for an opportunity of cross examination even during the personal hearing on 28.09.2016, which was the second date of personal hearing. Further, the Commissioner (Appeals) notes that in the letter dated 07.04.2017, written by the appellant to the Department, there was no request for cross examination and the only request was to pass orders at the earliest. Further, the Commissioner (Appeals) has held that the aspect with regard to the cross examination of Mahazar witness has been elaborately dealt with by the Adjudicating Authority from pages 73 to 76 of the order, wherein it has been noted that the Mahazar was not signed by two persons alone, but by ten persons in whose presence, the same was drawn to vouch for its truthfulness.

29. Further, the Commissioner (Appeals) notes that it is not in dispute that 6kgs of gold was concealed in the consignment of biscuits in four cartons. Further, the Tribunal notes that the facts recorded in the panchanama were corroborated by the statement of persons recorded under Section 108 of the Act, who were present during drawal of the panchanama. Further, after

discussing about the entire factual matrix, the first appellate authority agreed with the Adjudicating Authority that the contention of the appellant that he was not permitted to cross examine the witnesses was not tenable. Thereafter, the Commissioner (Appeals) had considered the contention that the statements of the other witnesses were retracted. While dealing with the said issue, it has noted that there are extensive corroborative evidences, which clearly point towards the appellant.

30. The next point, which was considered, was with regard to the favouritism shown to the IEC holder, since the appellant contended that penalty should have been imposed on him also and after taking note of the facts and in the absence of a bill of entry being filed using the lent IEC, it held that there is no infirmity in the order of the Adjudicating Authority in not imposing penalty on Mr.V.S.Mathi Arasu. In fact, the Commissioner (Appeals) had granted partial relief to the appellant and deleted the penalty imposed under Section 112(a) of the Act. The Revenue did not prefer any appeal against the said finding. Thus, the Adjudicating Authority has discussed the factual position and arrived at a conclusion and imposed penalty. The findings recorded by the Adjudicating Authority especially with regard to the modus operandi were reconsidered by the first appellate authority and the findings were confirmed, but partial relief was granted to the appellant by deleting the penalty under Section 114AA of the Act. The concurrent finding of facts were tested by its correctness by the Tribunal.

31. Mr. Hari Radhakrishnan, is right in his submission that the Tribunal is the final fact finding authority. The final fact finding authority is bound to consider as to whether the facts have been properly appreciated by the lower authorities and if it comes to the conclusion that there is no error in the findings, it would be well open to the appellate Tribunal to concur with the findings of fact as recorded by the lower authorities. The Tribunal proceeds to discuss the contentions placed before it from paragraph 8 of the order. It notes that there is no retracted statements placed on record except the two witnesses, who stated before the Judicial Magistrate that the statements were recorded under coercion. The witnesses did not retract their statements, which were given under Section 108 of the Act. It may be true that the learned Judicial Magistrate has recorded that the statements were obtained under coercion, yet it would have been well open to the other witnesses to subsequently to give a retracted statement at the time of personal hearing. However, this was not done. Therefore, we find no error in the order of the Tribunal proceeding to hold that the statements remained unassailed.

32.Next, the Tribunal proceed to take a closure look on the call records and holds that they speak otherwise and require lot of explanation by the appellant. Further, the Tribunal also notes the finding recorded by the Adjudicating Authority with regard to the modus operandi, the statements of Mr.K.Francis and Mr.P.Karunanithi and that they are the employees of the Security Agency owned by the appellant, which fact has not been denied by the appellant. Further, the Tribunal has also taken a look on the call records between Mr.Khaja and Mr.V.S.Mathi Arasu and holds that from the beginning of March, 2015 all the three persons (including the appellant) were in touch.

33.The learned counsel for the appellant would argue that this was not part of the Order-in-Original. However, we find this appears to be incorrect because the Order-in-Original more particularly, from page no.50 onwards discusses about the call details and there is a pictorial matrix of the mobile phone contacts of the persons involved and in the pictorial matrix, the appellant was referred as Security Guard and there is elaborate discussion on the call details. The Tribunal after taking note of the facts recorded by the Adjudicating Authority has held that the appellant cannot wash off his responsibility with a total denial that he did not know Mr.Khaja at all and there was only a wrong call for about six seconds. Thus, after analysis of the entire factual position, the Tribunal concluded that the Revenue has made out a case by linking chain of events, phone calls etc., towards the scheme planned well in advance for executing anti-national activity by defrauding the Revenue, which was succinctly brought on record by the Adjudicating Authority in the form of unchallenged statements and the call records and therefore, holds that there is no reason to interfere with the orders passed by the lower authorities.

34.Considering the manner in which the Tribunal has proceeded, it can hardly be said that the order is a non-speaking order. The Tribunal has re-appreciated the evidence and agreed with the finding of the Adjudicating Authority, which was confirmed by the first appellate authority. Therefore, we do not agree with the submissions made on behalf of the appellant that the order is a perfunctory order and it did not consider the evidence placed before it. Therefore, the decisions relied on by the learned counsel would not render any assistance to the case of the appellant.

35.As pointed out earlier, though before the Judicial Magistrate the co-accused have stated that statement has been obtained under coercion, there was no retraction at any point of time. Therefore, the Adjudicating Authority was right in holding that the statements are unretracted statements. This

finding was considered for its correctness by the Tribunal and after examining the facts, it found that the statements remained unretracted and if that is so, then there is no bar for the authority to rely on and refer to the said statement.

36.Thus, we are of the clear view that this appeal does not raise any question of law, much less substantial question of law for consideration, as the entire matter is fully on facts and the order passed by the Tribunal would not require any interference in exercise of the power under Section 130G of the Customs Act.

37.For all the above reasons, the appeal stands dismissed, as there is no substantial question of law arising for consideration. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

abr
To

1.The Commissioner of Customs,
Chennai VII Commissionerate Air Cargo,
New Custom House, Meenambakkam,
Chennai-600 027.

2.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

+1 CC to Mr. Hari Radhakrishnan, Advocate sr 17518

+2 Ccs to Mr.J. Vasu, Advocate sr 17530.

+1 CC to Mr.V. Sundareswaran, Advocate sr 17470.

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