

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.12103 of 2018

(Arising out of OIO-AHM-CUSTOM-000-COM-004-18-19 dated 25/04/2018 passed by Principle Commissioner Customs, Excise and Service Tax-AHMEDABAD)

Shri Jorabhai Valabhai Rabari Desai

.....Appellant

3/F, Crystal Rough Diamonds Apartment, Ashapuri Road, Vijapore,
Navsari, Gujarat

VERSUS

C.C.-Ahmedabad

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

WITH

Customs Appeal No.12104 of 2018

(Arising out of OIO-AHM-CUSTOM-000-COM-004-18-19 dated 25/04/2018 passed by Principle Commissioner Customs, Excise and Service Tax-AHMEDABAD)

Prem Abhai Jethabhai Attya Patel

.....Appellant

B/41, City Garden Society, Ashapuri Road, Vijapore,
Navsari, Gujarat

VERSUS

C.C.-Ahmedabad

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

APPEARANCE:

Shri. P P Jadeja, Advocate for the Appellant

Shri Sanjiv Kinker, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 12289-12290 /2021

DATE OF HEARING: 15.04.2021

DATE OF DECISION: 29.07.2021

RAMESH NAIR

Shri Jorabhai Valabhai Rabari @ Desai and Shri Premabhai Jethabhai Attya @ Patel (hereinafter referred to as 'the Appellants') have filed Appeals against the impugned O-I-O NO. AHM-CUSTOM-000-COM-004-2018-19 dated 25-04-2018 issued by the Principal Commissioner of Customs, Ahmedabad wherein a Penalty u/s 112(b) of Customs Act 1962 of Rs. 17,01,313/- [each] is imposed on Appellants Shri Jorabhai and Shri Premabhai.

2. Brief facts of the case of Revenue are that the officers of DRI acting on a specific information, intercepted Appellants Shri Jorabhai and Shri Premabhai on 22.4.2011 at Surat and recovered 48637.525 carats of Rough Diamonds of Zimbabwe origin valued at Rs. 10,16,68,077/- (market value). There was no duty on Import of Rough Diamonds. However, import of Rough Diamonds were restricted and its import should be accompanied by Kimberley Process Certificate. The Kimberley Process Certificate identifies a shipment of Rough Diamonds in compliance with requirements of the law. Since Appellants were not having KPCs, Rough Diamonds were seized by DRI officers. After investigation, SCN dated 10.10.2011 was issued proposing confiscation of the seized Rough Diamonds and proposing imposition of penalties u/s 112(b) of Customs Act 1962 on Appellants Jorabhai, Premabhai and others including shri Narendra Raval, owner-cum-supplier of seized Rough Diamonds. Vide O-I-O No. 18/COMMR/2012 dt. 02-11-2012 by Commissioner of Customs, Ahmedabad had ordered absolute confiscation of the seized Diamonds wt. 48,637.525 carats valued at Rs. 10,16,68,077/-, u/s 111(d), 111(l) and 111(m) of Customs Act, 1962 and had imposed Penalty of Rs. 1,00,00,000/- (each) on S/shri Jorabhai, Premabhai and Narendra Raval for offence in connection with diamonds seized on 22-04-2011. Aggrieved by penalty imposed, These appellants had filed Appeal Nos No. C/10191/2013 AND 10192/2013-DB, wherein as directed in Stay Order No. M/10979 & 19780/WZB/AHD/2013 dt. 25-02-2013, these appellants deposited Rs 7,50,000/- [each] and compliance to Stay Order was submitted. This Tribunal vide Order No. A/10497-10498/2016 dated 17-05-2016 have ordered that "on the basis of the value fixed by the experts, and the role of the appellants, the quantum of penalty should be re-quantified". In fresh proceedings, seized rough diamonds were revalued at Rs. 1,70,01,313/- and vide O-I-O NO. AHM-CUSTOM-000-COM-004-2018-19 dated 25-04-2018 issued by the Principal Commissioner of Customs, Ahmedabad, the seized rough diamonds are confiscated absolutely and a Penalty u/s 112(b) of Customs Act 1962 of Rs. 17,01,313/- each has been imposed on these 2 Appellants. Hence, Appellants are before this Tribunal against penalty. Appeal Nos C/12103/2018-SM and C/12104/2018-SM were taken up for regular virtual hearing on 15-04-2021 for final disposal of the Appeals.

3. Shri P. P. Jadeja, Learned Counsel appearing on behalf of Appellants, while reiterating grounds of Appeal and submissions in synopsis and made during PH argued that the Hon'ble Tribunal had directed to

quantify penalty, on two factors (1) Revaluation of seized diamonds (2) Re-quantify penalty considering "Role of the Appellants". He argued that the Penalty of Rs. 17,01,313/- imposed on Appellants is not Re-quantified as directed by Hon'ble Tribunal. Such penalty deserves to be set aside or Re-quantified for reasonable, just and fair reduction on these 2 Appellants. He argued that such heavy penalty of Rs. 17,01,313/- imposed on individual Appellant is not commensurate with role in this case. He argued that there is no case for imposing penalty on Appellants, who have not smuggled rough diamonds and the same were not recovered from them. Appellants have no criminal background and except this case, they are not found involved in criminal activity including the case under Customs Act 1962. Appellants have not smuggled seized diamonds in India and they have no connection with confiscated diamonds and therefore penalty imposed upon Appellants is very harsh. Appellant has not challenged valuation of goods or claimed ownership or possession of the seized & confiscated Rough Diamonds. The penalty imposed on Appellants deserves to be set aside or reduced leniently. He submitted that since Penalty was to be re-quantified on the basis of "Role of the Appellants", he requested to look at the factual details of case from beginning of case i.e. from 22-04-2011.

4. Shri Sanjiv Kinker, Superintendent(AR), Authorized Representative, appearing on behalf of the Revenue reiterated findings of the adjudicating authority and has submitted that arguments by Appellants are untenable and accordingly their Appeals may be rejected. He has also filed written submission in order to object the Appeals filed by Appellants and has contended that since Tribunal's Order dt. 17-05-2016 has attained finality, it is not open for Appellants to argue on facts of case and against penalty. Statements of Appellant though retracted are valid and supported by other evidences referred to in Para 7 of Tribunal's order dated 17-05-2016 and entire penalty imposed on Appellants cannot be set aside.

5. Heard both the sides and perused records. I find that seized rough diamonds weighing 48,637.525 carats were valued at Rs 10,16,68,077/- at the time of seizure on 22-04-2011. Inculpatory statements of Appellants were recorded on 22-04-2011, which were retracted on 23-04-2011, when Appellants were produced before judicial Magistrate after their arrest. SCN was issued on 10.10.2011 to Appellants Mr Jorabhai and Mr Premabhai as well as to Mr Narendra Raval, proposing confiscation of Rough Diamonds and imposition of penalties. Appellants have

pleaded that they are falsely implicated; that their statements recorded were not voluntary and were recorded under the threat & force. Cross examination of one of the Panch was allowed who clarified that he had not seen any recovery of diamonds from Appellants and bag from which diamonds were recovered was lying in DRI Office. Cross examination of one of the officers was allowed, who has deposed that Appellants had themselves slept in DRI office in the night of 22-04-2011. SCN was decided by O-I-O No. 18/Commr/DRI/2012 dated 31.10.2012 by Commissioner of Customs, Ahmedabad with the following Orders :-

- Absolute confiscation of the seized rough diamonds weighing 48,637.525 carats valued at Rs 10,16,68,077/-under the provisions of Sections 111(d), (I) and (m) of the Customs Act, 1962('Act');
- Imposed penalty of Rs 1 crore on Mr Narendrabhai Raval of Nairobi under Section 112(a) of the Act.
- Imposed penalty of Rs 1 crore on Mr Premabhai Attya and Rs 1 crore on Mr Jorabhai Rabari, under Section 112(b) of the Act;
- Confiscation of Santro Car bearing registration No GJ-21-M-1516 valued at Rs 2,01,2621- under Section 115(2) of the Act and imposition of redemption fine of Rs 40,000, under Section 125 of the Act;

6. In CA-3 Appeal proceedings, Penalty on shri Narendra Raval in his Appeal has been set aside by Tribunal's Order No. A/10455/2016 dated 17.05.2016. However, Appeal Nos. C/10191/2013 and No. C/10192/2013 filed by these Appellants, matter was remanded by this Tribunal vide Order No. A/10497-10498/2016 dated 17-05-2016 upholding confiscation of diamonds with directions that "subject Rough Diamonds should be valued by two experts, one chosen by the appellants and one by the Revenue from a panel of experts nominated by Gem and Jewellery Export Promotion Council and these experts should value the subject Rough Diamonds as per the value prevalent at the time of seizure of the subject rough diamonds. On the basis of the said value fixed by the experts, and the role of the appellants, the quantum of penalty should be re-quantified." Accordingly, seized Rough Diamonds were examined by appointed panel of Experts and seized diamonds were valued at Rs. 1,70,13,125/-by the said panel of experts. Then, by O-I-O NO. AHM-CUSTM-000-COM-004-2018-19 dated 25-04-2018 issued by Principal Commissioner of Customs, Ahmedabad seized Rough Diamonds totally valued at Rs. 1,70,13,125/-have been confiscated absolutely and also a Penalty of Rs. 17,01,313/- [each] is imposed on Shri Jorabhai and Shri Premabhai u/s 112(b) of Customs Act 1962. Hence,

Appellants are before this Tribunal again. Re-determined value Rs. 1,70,13,125/- is not disputed by Appellants. Since no one has claimed the seized Rough Diamonds, order of "absolute confiscation" of Rough Diamonds has also undisputedly attained its finality. However, both these Appellants are contesting only penalty imposed on them u/s 112(b) of Customs Act 1962. Penalty u/s 112(a) under Customs Act 1962 is for any "act, omission or abetment" in improper import of goods and does not require mensrea, whereas penalty u/s 112(b) ibid operates for smuggled goods after its improper import and requires mensrea.

7. I find that this Tribunal had directed to re-quantify penalty, after considering "Role of the Appellants". Appellants argued that they have not smuggled diamonds in India, had it been so, penalty u/s 112(a) of Customs Act 1962 would have been imposed as it was imposed on co-noticee Shri Narendra Raval. Appellants have submitted that penalty imposed on both Appellants is very harsh and the quantum of penalty on Appellants is arbitrary, illogical, very high, very harsh for appellants and disproportionate to alleged offence. Appellants pray to drop penalty imposed on them. When this Tribunal has directed to "Re-determine the quantum of penalty" on Appellants considering "Role of the Appellants", it means that for ascertaining actual "Role", one has to necessarily examine facts indicating actual role. It is inevitable to look at the facts before coming to any conclusions. I find that when DRI had a specific information about these two appellants, they should have drawn "Running Panchnama" from the place of interception of persons, keeping Panch witnesses present at spot of interception of these persons, which is a known normal practice in field. Instead of going at the spot with Panchas, DRI officers had chosen to work out information without presence of Panch witnesses and recording version of the officers in Panchnama. This lacuna in Panchnama dt. 22-04-2011 has given rise to benefit of doubt to Appellants. I also find that one of the Panch, whose cross examination was allowed has also deposed that he had not seen recovery of Bag from Appellants and has stated that bag containing seized diamonds was lying in DRI office. Both Appellants have retracted from inculpatory statements on the first available opportunity on 23-04-2011 after their arrest and they have relied upon decision of the Hon'ble Supreme Court in case of VINOD SOLANKI v/s UOI -2009 (233) E.L.T. 157 (S.C.), wherein the Apex Court has held that Evidence by confession, if retracted, must be corroborated by some other independent and the cogent evidences. Revenue's case is that Appellants had gone to Nairobi(Kenya) in 2011 and

had smuggled diamonds in their personal baggage, cleared the same without declaring the same at Mumbai Airport in night of 12/13-04-2011 and they were also apprehended, while they had come to Surat on 22-04-2011. With reference to Arrival/departure stamps in Passports, Appellants contended that they had gone to Nairobi(Kenya) in March/April 2011 and had returned to India in night of 12/13-04-2011. But, it is not correct that they had smuggled the diamonds in baggage which were seized on 22-04-2011. There is nothing on record to corroborate that Appellants have smuggled seized rough diamonds in personal baggage, except their statements, which are retracted on 23-04-2011 at first available opportunity after their interception and arrest. Authorized Representative of the revenue has argued with regard to para 7 of Tribunal's Order dated 17-05-2016 indicates other corroborative evidences. I note that the said para 7 refers to the Statements of Shri Chetan B. Shah, proprietor of Neel Gems, Shri Ajaybhai M. Khambadiya and Shri Dharnendra Rasiklal alias Monu, proprietor of M/s. Mili Gems. However, these statements do not show that these Appellants have smuggled rough diamonds in from Kenya to India. These statements merely show that Appellants were dealing in rough diamonds and had been moving in the market with some sample of diamonds for sale. These statements do not connect Appellants with seized diamonds in any other manner. There is no other independent corroborative evidence to show that seized diamonds were smuggled into India by the Appellants in their baggage, while returning to India from Kenya in the night of 12/13-04-2011. If DRI investigation was so sure about smuggling seized diamonds in baggage by Appellants only, Show Cause Notice should have proposed penalty u/s 112(a) of Customs Act 1962 and O-I-O would have confirmed penalty u/s 112(a) of Customs Act, which provides for imposition of penalty without mensrea for "Act, Omission or Abetment" by Appellants which has rendered the seized goods liable to confiscation. When smuggling of seized rough diamond into India by Appellants is not proved on record, the investigation has also not adduced any other evidence to show how the smuggled rough diamonds seized on 22-04-2011 have come into hands of these Appellants and how appellants have dealt with seized diamonds fully knowing that the same were smuggled and liable to confiscation under section 111 of Customs Act 1962. These factors are not proved. These are mandatory ingredients for imposing penalty u/s 112(b) of the Customs Act 1962.

8. I also note that in this very case, statement of Appellant shri Premabhai is not treated as reliable evidence against Owner-Cum-Supplier of

diamonds Shri Narendra Raval, whose entire penalty of Rs. 1,00,00,000/- [Rs. One Crore] was set aside by this Tribunal vide the Final Order No. A/10455/2016 dated 17.05.2016. Appellants have also argued/prayed to adopt for a similar view to drop the entire penalty.

9. It is also an important fact for consideration that COFEPOSA preventive detention Orders dated 17-10-2011 against these two Appellants were revoked by the Central Government, considering representation dated 25-04-2012. COFEPOSA revocation Orders placed on record by the Appellants shows that on the basis of representation dated 25-04-2012, submitted by Appellant Shri Jorabhai, Central Government was pleased to revoke COFEPOSA order No. 673/26/2011-Cus.VIII dated 17-10-2011 u/s 11 of COFEPOSA Act 1974 vide the Order issued from F.No. 686/301/2012.Cus.VIII on 27.06.2012 against Shri Jorabhai, even before execution of COFEPOSA detention Order. Central Government was pleased to revoke COFEPOSA order No. 673/25/2011-Cus.VIII dated 17-10-2011, which was confirmed u/s 8(f) for one year from 12-11-2011 u/s 11 of COFEPOSA Act 1974 vide Order from Government's F.No. 686/25/2011.Cus.VIII on 27.06.2012 against the Appellant Shri Premabhai.

10. I also find force in arguments of Appellants that this is a town seizure case and the diamonds in question were not seized at the point of Entry in India. It is argued that Section 123 of Customs Act 1962 are not made applicable in cases of Rough Diamonds. Hence, it is obligatory for Revenue to prove that rough diamonds, seized & confiscated are smuggled into India by Appellants Shri Jorabhai and Shri Premabhai, whether claimed or not by these Appellants or any other persons. Except retracted statement of both Appellants, there is no other evidence to show that Appellants have smuggled said seized diamonds from Nairobi[Kenya] to India. Appellants have also submitted that there are no markings on such seized diamonds to show that they are of foreign origin and in absence of any Notification under Section 123 of Customs Act 1962, burden is on the revenue to prove that the seized diamonds are smuggled into India. Thus, the Revenue has not proved smuggling of diamonds into India by these Appellants.

11. In view of the above, I am of the view that it is difficult to conclude that these 2 Appellants have smuggled seized & confiscated rough diamonds into India. The benefit as given to Appellants while revoking COFEPOSA orders by Central Government and also to shri Narendra Raval

who was allegedly Owner-Cum-Supplier of the seized diamonds in this very case for dropping penalty deserves to be given to these Appellants. But, this Tribunal vide order dated 17-05-2016, has directed to re-quantify penalty considering their role. Therefore, it is not open to drop entire penalty. Appellants' connection with seized diamonds cannot be ruled out absolutely, considering their interception on 22-04-2011 with car and seizure of diamonds, general statements of others etc, it would be appropriate to impose some penalty on these Appellants. Penalty under section 112(b) of Customs Act 1962 shows maximum limit of penalty and it requires Mens rea. In this case, penalty has been imposed under Section 112(b) of Customs Act 1962. Perusal of the said provisions clearly reveals that the penalty under the said provisions can be imposed wherever there is an element of *mensrea* or conscious knowledge, which is a *sine qua non* for imposition of penalty. This is evident from a plain reading of Sections 112(b) of Customs Act, 1962 which uses the expressions "which he knows or has reason to believe are liable to confiscation under Section 111". The facts of the case in hand do not reveal any such element of *mensrea* or conscious knowledge *qua* these appellants. The active role of these Appellant, do not justify imposition of heavy penalty under Section 112(b) of Customs Act 1962. The DRI investigation has not brought any such evidence except retracted confessional statements to show that Appellants have smuggled rough diamonds into India in the night of 12/13-04-2011. In these circumstances, imposition of penalty on the appellants under Section 112(b) is not fully justified. Further looking at the involvement it is felt that penalties imposed on these Appellants is excessive and it is reduced to Rs. 1,00,000/- (Rupees one lakh) each. Thus, in peculiar facts and circumstances of this case including this Tribunal's order dt. 17-05-2016, which has upheld the impugned O-I-O No. 18/Commr/DRI/2012 dated 31.10.2012, except for quantum of penalty on appellants and since the goods have been absolutely confiscated, I feel that there is no need to impose very heavy penalty upon the appellants under Section 112(b) of Customs Act, 1962, which is reduced to amounts of Rs. 1,00,000/- upon each Appellant in order to meet the ends of justice and the remaining penalty imposed on the Appellants Shri Jorabhai and Shri Premabhai is set aside in the interest of justice, though Appellants are pleading to drop the entire penalty. The order for absolute confiscation of seized rough diamonds in question is also upheld, as ordered in O-I-O dated 25-04-2018. The impugned order is modified to the above extent. Appeals are partly allowed.

12. Appeal No. **C/12103/2018-SM AND No.C/12104/2018-SM** filed by the Appellants Shri Jorabhai and Shri Premabhai are partially allowed in the above terms, with consequential reliefs, if any, in accordance with law.

(Pronounced in the open court on 29.07.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi