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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/114-115/B/2022-RA

/803

Date of Issue : 01.02.2024

01.02.2024

ORDER No. 116-117 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant No. 1 : Mr. Mohammed Bendichal  
Applicant No.2 : Mr. Abdulrahiman Bendichal  
Respondent : Pr. Commissioner of Customs, C.S.I Airport, Mumbai

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No.MUM-CUSTM-PAX-APP-1032/2021-22 dated 18.11.2021 [Date of issue: 23.11.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

The combined Revision Application has been filed by Mr. Mohammed Bendichal and Mr. Abdulrahiman Bendichal (herein referred to as 'Applicant No. 1 and Applicant No.2 respectively and as 'Applicants' when referred collectively]' against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1032/2021-22 dated 18.11.2021 [Date of issue. 23.11.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that on 28.09.2018, on the basis of specific information, the officers of the AIU, Customs, CSI Airport intercepted Applicant No. 1 and Applicant No. 2, both Indian passport holders, who were scheduled to depart to Sharjah by Air India Express Flight No IX251, after they had cleared immigration. On being asked whether they were carrying any contraband, foreign or Indian currency either on their person or in their baggage, they replied in the negative. Not being satisfied with the replies, the officers conducted personal search and examination of their baggage.

2.1. The examination of the black colour bag pack of Applicant No. 1, having the marking of "Qobans" resulted in the recovery of assorted foreign currency concealed in packets of colour pencils and sketch pens and kept in a blue coloured polythene bag, as under:

S.No	Description of currency	Denomination	Total amount
1	US Dollar	100 x 1098	USD 1,09,800
2	Omani Riyal	50 x 21	OMR 1,050
3	Saudi Riyal	500 x 17	SAR 8,500

The total value of the foreign currency as above, recovered from the baggage of Applicant No. 1 was found to be Rs. 85,57,573/-.

2.2. The examination of the brown coloured bag pack of Applicant No. 2, having marking as 'N.S' resulted in the recovery of assorted foreign currency concealed in some

cotton fabrics, sketch pens and other stationary items and kept in a blue coloured polythene bag. The details of the foreign currency are as under

S.No	Description of currency	Denomination	Total amount
1	US Dollar	100 x 850	USD 85,000
2	Omani Riyal	Assorted	OMR 1,240
3	Kirwathi Dinar	Assorted	KWD 750
4	Bahrain Dinar	Assorted	BHD 310
5	Qatari Riyal	Assorted	QAR 3,100

The total value of the foreign currency as above, recovered from the baggage of Applicant No. 2 was found to be Rs. 66,41,612/-

2.3. The assorted foreign currency as mentioned at Para 2.1. and 2.2. above, equivalent to Rs. 1,48,99,185/- were seized under the reasonable belief that the same were attempted to be smuggled out of India and hence liable to confiscation for contraventions of the provisions of the Customs Act, 1962 read with FEMA, 2000 and regulations made thereunder.

3.1. In his statements, Applicant No. 1 admitted knowledge, possession, carriage, non-declaration, concealment and recovery of the assorted foreign currency; that he was in the garment business; that he and his brother (Applicant No. 2) were involved in the smuggling of the foreign currencies; that he did not have any legal purchase documents for the seized currency; that the foreign currency was handed over to him by one Mr. Gofur for delivery to a person at Sharjah; that he carried the foreign currency for monetary considerations, that he concealed the foreign in his baggage to avoid detection and that the seized currency did not belong to him, that he did not have any permission or licence to conduct the business of foreign exchange.

3.2. In his statement, Applicant No. 2 admitted knowledge, possession, carriage, non-declaration, concealment and recovery of the assorted foreign currency; that he was in the garment business; that he and his brother (Applicant No. 1) were involved in the smuggling of the foreign currencies by using the same modus operandi; that he did not

have any legal purchase documents for the seized currency; that the brown coloured back pack was handed over to him at the departure gate by one Mr Issac, whom he had met for the first time and was asked to give it to Applicant No. 1 who was scheduled to be on the same flight; that he carried the foreign currency for monetary considerations; that he did not know about the concealment of foreign currency in the bag pack; that he was aware that the huge amount of foreign currency found on his possession was an offence under the Customs Act; that the seized currency did not belong to him; that he did not have any permission or licence to conduct the business of foreign exchange.

3.3. Investigations showed that Applicant No. 1 had made 152 foreign visits and Applicant No. 2 had made 205 foreign visits of very short duration in the last 5 years through various airports in India and both the Applicants had made 60 common foreign visits i.e to and fro in the same flight. Also Applicant No. 1 was a repeated offender and was booked in a case of smuggling of 1160 grams of gold earlier.

4. After due process of the law, the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, Chhatrapati Shivaji International (C S.I) Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/82/2020-21 dated 06.08.2020 [Date of issue: 10.08.2020] issued through F.No. [S/14-6-70/2018-19 Adjn SD/INT/AIU/422/2018 AP 'B'] ordered the absolute confiscation of the assorted foreign currency totally equivalent to Rs. 1,49,99,185/- under Section 113 (d) (e) & (h) of the Customs Act, 1962 read with relevant provisions of FEMA, 1999 and Foreign Exchange Management (Export and Import of Currency) Regulations, 2015. Penalty of Rs. 15,00,000/- each was imposed on Applicant No.1 and Applicant No. 2 under Section 114(j) of the Customs Act, 1962. The one black colour bag having marking as "Qobans", four cotton fabrics, blue colour polythene bag and one brown colour bag pack having marking "N.S", blue colour polythene bag, some cotton fabrics, sketch pens and other stationery which were used for concealing the foreign currency were confiscated under Section 119 of the Customs Act, 1962.

5 Aggrieved by this order, the Applicants filed an appeals with the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide his order Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1032/2021-22 dated 18.11.2021 [Date of issue: 23.11.2021] upheld in toto, the order of the Original Adjudicating Authority.

6 Aggrieved with the aforesaid Order passed by the AA, the Applicants have preferred combined revision application inter alia on the grounds that:

6.01. That a panchnama is a record of the things visually perceived or actually experienced by the panchas in the course of investigation. If it is a search, the panchnama should record everything that takes place in the course of search. True observation of panch witnesses and what is heard by them, those things incorporated in the panchnama at the first person as if it were written by the panchas. Needless to say that due diligence has to be maintained in its preparation. While drawing the panchnama, sticking to the legal procedures and guidelines envisaged for the raiding parties should be scrupulously followed as this will, in all circumstances, help the department an upper hand vis-à-vis accused person.

6.02. That In the facts and circumstances of the present case, the lapse and failure in the panchnama affect the validity of the search and the reliability of the panchnama.

6.03. That the panchas who are working as ordinary loaders at the airport were called by an officer and were briefed that on the basis of input received from CISF Personnel that the said passengers were intercepted by an Intelligence Officer after they got cleared themselves from the security and immigration in the Departure Hall of CSME Airport, Mumbai; That when the Officer requested them to witness the proceeding they both agreed and the panchnama was drawn in a computer and the proceeding was recorded in English in the said computer.

6.04. That there was no request from the panchas to record the panchnama proceedings in English in a Computer.

6.05. That a panchnama proceeding is nothing but narration of the proceedings i.e. searches, movements of officers and the panchas in the words of panchas and it cannot

be drawn on a computer by sitting at one corner of the airport when the proceedings are carried out at many other places. Any panchnama drawn on a computer can never reflect correct position of search proceedings and therefore, the panchnama cannot be considered to have completely and truthfully reflected the record of all the proceedings in the true version of the panchas and thus becomes invalid

6.06. That it is not known whether the two panchas are well conversant with English and unless the panchas insist for drawing the panchanama in English by showing the cause that they do not know any language other than English, panchanama is not to be drawn in English.

The Applicant has relied on the decision of Bombay High Court in the case of Hasan Imam Inamdarys The State Of Maharashtra on 6th June, 2002, to support his contention.

6.07. That when a search and seizure proceedings are recorded by a Customs Officer in a panchnama, the entire panchnama should be read over to the panchas and the concerned party in vernacular and the same should be recorded in the panchnama which has not been done in the instant case and thus the Officers did not follow the provisions of law at all and that resulted in serious miscarriage of justice.

6.08. That the failure of compliance of important provisions of law if taken together wholly, has resulted in failure of justice in this case and therefore it cannot be said to have been proved that the petitioner was found involved in a case of smuggling.

6.09. That in view of the above, the panchnama dated 28/29.09.2018 cannot be relied upon in the case against the Applicants and if the Adjudicating Authority still desires to proceed against the petitioners on the basis of the said panchnama and statement, it would be against principles of natural justice.

6.10. That the Investigating Officers as well as the authority who issued the SCN based on the panchnama failed to follow the said legal procedure and the Applicant was not aware what was recorded in the panchnama and therefore the said panchnama cannot be relied upon in the case against them and no further proceedings can be initiated against them on the basis of the seizure panchnama and SCN dated 26-3-2019.

6.12. That the seizure panchnama dated 28/29-9-18 was fabricated as the proceedings were not recorded as it happened and the Applicants were not allowed to declare the currencies to Customs.

6.13. That no valid seizure was made and there was no seizure order issued by the Officer. Therefore, confiscation of the goods is not sustainable and no penalty can be imposed:

6.14. That no seizure memo/order was prepared and issued by the Investigating Officer till the date of issuance of SCN, and this has caused serious prejudice to the petitioners and would vitiate the conviction;

6.15. That instruction no 01/2017 issued by the Board under F.No. 591/04/2016-Cus (AS) dated 8-2-2017 clear instruction has been given that whenever goods are being seized, the proper officer must pass an appropriate order (seizure memo/order/etc.) clearly mentioning the reasons to believe that the goods are liable for confiscation which was not done in the present case;

6.16. The Applicant has relied on the following case laws in support of their contention

- (i) Patna High Court in the case of Union of India & ors vs Md.Mazid @ Md.Tufani on 20.07.2011
- (ii) Bombay High Court case of Arvind Trading Co. vs State of Maharashtra on 05.08.1991
- (iii) Dina Baldev Pathak vs. Collector of Customs and Ors. [AIR 1962 Bom 290]
- (iv) Manilal Bhanabhai Patel vs Kaul And Ors. [1974: AIR 1976 Guj 134]
- (v) L. Kashi Nath Seth vs Collector, Central Excise, [AIR 1979 All 128]
- (vi) The decision of the Bombay High Court in the Dhiraj Pal Amrit Lal Mehta case and the single Judge decision of the Delhi High Court in the Shanti Lal Mehta case

6.17. That upon a proper interpretation of Section 110, the Applicant submit that seizure of goods which are liable to confiscation is a condition precedent to initiation of any proceedings for confiscation thereof and if such goods are not either validly seized or are not continued under seizure before issue of a show cause notice under Section 124 or before issue of adjudication order, then it is not open to the Authority to initiate adjudication proceedings.

6.18. That unless goods are validly seized, they cannot be confiscated under Section 111 or 113 of Customs Act, 1962, it is only currency seized under Section 110 of the Act which is subjected to the liability to confiscation and what is required to satisfy the condition of the Act is, the physical act of seizure by issuing a seizure memo/order. It therefore becomes necessary to consider whether the currency allegedly undeclared was seized by the Officer was validly seized as per the instruction no 01/2017 issued by the Board under F.NO. 591/04/2016-cus (AS) dated 8-2-2017.

The Applicant has relied on the following case laws in support of his contention

- (b) the case of Asst. Collector of Customs v. Mukbulhussein Ibrahim-10 GLR 66

6.19. That the Applicant sought for cross-examination of the two CISF personnel, the panchas and the Officers to prove the individual role played by each one of them in the falsification of the case but the same was denied and such Denial to give the opportunity to cross-examine the Officers and witnesses is violative of principles of natural justice.

6.20. That provisions of Section 122 A of Customs Act, 1962, which mandate a grant of reasonable opportunity of being heard before adjudicating a case, encapsulate within it, the right to cross-examine any person on whose testimony/statement reliance is sought to be placed by the department/ complainant. Further, the provisions of the Indian Evidence Act, 1872 are also applicable to the adjudication proceedings and therefore the right to cross-examination also stands included in the adjudication proceeding. The Applicants have relied on the following case laws in support of their contention

- (i) Ayaubkhan Noorkhan Pathan vs The State of Maharashtra & Ors., Civil Appeal No.7728/2012 decided on 08.11.2012 by the Supreme Court  
(ii) Mehar Singh vs. Appellate Board Foreign Exchange, [Cri. A. 109/1975]  
(iii) Director, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi vs. Fr. Alfred James Fernandez, [AIR 1987 Kerala 179]  
(iv) Natwar Singh vs. Director of Enforcement, [2010 (13) SCC 255]  
(v) State of Kerala vs. K.T. Shaduh Grocery Dealer etc. [(1977) 2 SCC 777]  
(vi) S.C. Girotra vs. United Commercial Bank (UCO Bank) and ors, [1995 Supp (3) SCC 212.



6.21. The enforceability of such a right to cross examine, if demanded, would depend upon the facts and circumstances of the case, the nature of enquiry, the provisions of the statute and the rules as also the regulations governing the enquiry, the conduct of the person seeking to enforce the right of cross-examination i.e., as to whether such a right was demanded in the very first instance or not, and the prejudice, if any, caused to such a party by being denied the right of cross-examination on assessment of the entire material, which is placed before the authority conducting the enquiry. In the present case, it has been clearly established that the case against the petitioners was falsified and fabricated by the Officers and therefore they should be afforded the opportunity for cross-examination.

6.22. That the main submission of the Applicants for praying for an opportunity for cross-examination of the officers and panchas is to establish the vital fact that the case against them was falsified and fabricated. Non-examination of the said Officers and witnesses will be fatal to this case. It is a well settled position that when a crucial witness has not been produced for cross-examination, then that portion of the evidence is required to be discarded.

6.23. The Applicant has cited the following cases wherein the Honorable Supreme Court of India has held that denial of an opportunity for cross-examination is against principles of natural justice

- (i) State of M.P. v. Chintaman Sadashiva Vaishampayan, [AIR 1961 SC 1623]
- (ii) Union of India vs. T.R. Varma, AIR 1957 SC 882
- (iii) Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719
- (iv) M/s. Kesoram Cotton Mills Ltd. vs. Gangadhar & Ors., AIR 1964 SC 708
- (v) New India Assurance Company Ltd vs. Nushi Neville Wadia and Anr., AIR 2008 SC 876
- (vi) Rachpal Singh & Ors. v. Gurmit Singh & Ors., AIR 2009 SC 2448
- (vii) Biecco Lawrie & Anr. vs. State of West Bengal & Anr., AIR 2010 SC 142
- (viii) State of Uttar Pradesh vs. Saroj Kumar Sinha, AIR 2010 SC 3131
- (ix) New India Assurance Company Ltd., v. Nushi Neville Wadia & Anr., AIR 2008 SC 876
- (x) K.L. Tripathi v. State Bank of India & Ors., AIR 1984 SC 273

- (xi) Union of India v. P.K. Roy, AIR 1968 SC 850
- (xii) Chennabasappa Basappa Happa v. State of Mysore, AIR 1972 SC 32
- (xiii) Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill, AIR 2006 SC 1445
- (xiv) Rajiv Arora v. Union of India & Ors., AIR 2009 SC 1100
- (xv) Commissioner of Central Excise, Allahabad V. Govind Mills Limited - 2013 (8) TMI 649-

6.24. That the aforesaid submission makes it reasonable that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.

6.25. That statements of Applicant No. 1 and Applicant No. 2 were against truth and should not have been relied upon. The confessional statements of the petitioners in the present case are inconsistent and involuntary. The circumstance that led to the recovery of the currencies from their baggage may have created suspicion but did not constitute proof to establish the guilt of the accused as far as the offence alleged to have been committed in violation of the provisions the Customs Act was concerned. In the circumstances, the Applicant should be granted benefit of doubt and acquitted.

6.26. That the right against self-incrimination is an essential safeguard, both under the Constitution of India and Cr P.C. The underline rationale behind it corresponds with two objectives - firstly that of ensuring that the statements made by the accused are reliable and secondly ensuring that such statements are voluntarily made. The Applicants have relied on the following case laws in support of their contention

- (i) Smt. Selvi and ors. Vs. State of Karnataka [2010 (3) Supreme 558]
- (ii) Balwinder Singh v. State of Punjab
- (iii) Thulasiammal and others vs. Joint Secretary to the GOI [1987 (30) ELT 415 (Mad)]

6.27. The currencies carried by the petitioners were their own legal money imported by them on their various return trips from abroad in the past:

6.28. That the foreign currencies under seizure consisted of various currency notes of different denominations of different countries and were all recovered under the panchnama dated 28/29-9-18 which was fabricated. The Applicants were not allowed to declare the currencies to Customs and Involuntary confessional statements of the Applicants were recorded admitting the alleged offence committed by them as carriers for monetary consideration, against the truth.

6.29. That the Applicants claim ownership of the currency and that it is an admitted fact that they are frequent travellers and that in the last 5 years Mr. Mohammed Bendichal and Mr Abdul Rahiman Bendichal had made 152 and 205 visits abroad respectively and the said visits were for genuine business purpose; that during every visit abroad, they had brought/imported foreign currency the aggregate value of which did not exceed US\$ 5,000 and had kept all the said currency, which accumulated to Rs 82,57,573/- in the hands of Applicant No. 1 and Rs. 66,41,612/- in the hands of Applicant No. 2; That they were on a bonafide belief that since they had legally brought all the currencies from abroad during their earlier visits there was no need to take permission from RBI for carrying the same to Sharjah.

6.30. That the show cause notice dated 26.03.2019 prejudged the entire issue and thus prejudged the petitioner. In a Show Cause Notice, the allegations and charges have to be made in a tentative manner (e.g. it appears that....). However, in the present case the petitioner avers that the impugned show cause notice is bad in law on the ground that the show cause notice has pre-judged and pre-determined the entire issue and left nothing for the Adjudicating Authority to enquire into. In the present case, the opportunity of submitting defence reply to the Show Cause Notice and hearing has become an idle formality and farce. The Show Cause Notice is therefore liable to be set aside.

6.31. That the Applicant submits that the authority who issued the SCN has already made up his mind that the gold under seizure is liable for absolute confiscation for the alleged acts of omission and commission.

6.32. That it is incumbent on the part of the enquiry officer/Adjudicating Authority to keep an open mind till it comes to a decision regarding the involvement of the Applicant in the illicit importation of gold into India.

6.33. That if it is found that they have already closed their minds in respect thereto the quasi-judicial proceeding it cannot be held to be in accordance with law or in compliance with the principles of natural justice.

6.34. That a show cause notice is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice; that the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. That if the authority issuing the charge sheet/show cause notice instead of telling him the charges, confront him with definite conclusions of his alleged guilt, as has been done in the present case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias. Reliance is placed on the following case laws

- (i) Raghunandan Jalan vs Collector of C.Ex [1972: 1981 (8) ELT 476 Cal]
- (ii) V.C., Banaras Hindu University v. Shrikant [(2006) 11 SCC 42]
- (iii) K.I. Shephard v. Union of India [1987 (4) SCC 431]
- (iv) Decision in the case of High Court of Andhra Pradesh in SBQ Steels Ltd vs. Commr. of Customs, Central Excise & Service Tax.
- (v) Poona Bottling Co Ltd. & Anr v. Union of India and Others
- (vi) UOI and Ors. v. I.T C. Limited and Another [ 1985 (21) E.L.T 655 (Kar.)]
- (vii) Mysore Acetate and Chemicals Co. Ltd. v. A.C, Central Excise, Mysore).
- (viii) Madras Rubber Factory Ltd. vs. A.C. C.Ex, Madras [1981 (8) E.L.T. 565 (Mad.)]
- (ix) Alembic Glass Industries Limited v. UOI [1989 (24) E.L.T. 23 (Kar.)]
- (x) Calcutta Discount Co. Ltd vs. Income Tax Officer, Companies District I, Cal..

6.35. That the Applicant avers that the impugned show cause notice is bad in law on the ground that the show cause notice has pre-judged and pre-determined the entire issue by indirectly proposing for absolute confiscation of the seized gold under the provisions of Customs Act, 1962. Neither Section 111 nor section 125 of the Act provides for absolute confiscation of goods which are not contrabands, and since gold is not a

contraband or a prohibited item the owner or person from whom it is seized is entitled to have the goods released on payment of redemption fine and duty.

6.36. That under Section 125 of Customs Act, 1962 a discretion has been conferred on the Adjudicating Authority to give an option to the importer/owner of the goods to pay fine in lieu of confiscation in cases of goods, the importation or exportation whereof is prohibited under the Act or under any other law for the time being in force but in respect of other goods the officer is obliged to give such an option.

- (i) Decision of the High Court of Calcutta in CC (Prev) vs Uma Shankar Verma.
- (ii) Gauri Enterprises Vs. Commissioner of Customs, Pune [2002 (145) E.L.T. 706 (Tri. Bang.)]
- (iii) Decision of the Hon'ble Supreme Court in the cases of Oryx Fisheries Private Limited and Siemens Ltd.
- (iv) Mohit Thakor vs. Collector [1994 (72) ELT 865]
- (v) Decision of the High Court of Calcutta in CC (Prev) vs Uma Shankar Verma

6.37. That it is the discretion of the authority to impose either the minimum or maximum penalty under the penal provision of the Act. Discretion is inevitable both in civil and criminal proceedings and the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that it serves as a deterrent for the individual and the society should not also suffer from the commission of crime time and again.

6.38. That in matter of sentencing though the court/Adjudicating Authority has a conferred wide discretion but the courts has to follow a pragmatic sentencing policy. So the various factors which plays the important role in determine the awarding of sentence are the personality of the offender as revealed by his age, character, antecedents and other circumstances of tractability of the offender to reform, the nature of the offence and the manner in which offence was committed and a Judge has to balance the personality of the offender with the circumstances in which the offence has been committed and the gravity of the crime and choose the appropriate sentence to be imposed while exercising such discretion. The Applicant has relied on the following case laws in support of his contention:

- (i) Decision of the Hon'ble Supreme Court in Modiram Vs State

- (ii) Decision of the Hon'ble Goa and Rajasthan High Court in Raghunath vs Paria, Gopishankar vs State respectively
- (iii) In Partap Singh v. State of Punjab.

6.39. That it is the discretionary power of the adjudicating authority either to absolutely confiscate the seized goods or redeem the goods on payment of fine and the prosecution cannot interfere with such a discretionary power by proposing or suggesting absolute confiscation of the goods; that the authority who issued the impugned SCN interfered in the discretionary power of the adjudicating authority by proposing exemplary punishment on the Applicant

6.40. That though power under Sections 111 and 112 of confiscation and penalty are available, under Section 125 of the Customs Act. Authority also enjoys discretionary power to impose fine in lieu of confiscation. Therefore, the proposal made in the SCN for absolute confiscation under Section 111(d), 111(l) and 111(m) of the Act is interference of the said discretionary power and therefore the SCN dated 31-12-18 is bad in law and not sustainable.

6.41. That the applicant submits that since the authority who issued the SCN has pre-judged the entire issue and the impugned proceedings, it is not a show cause notice, but in effect it is an order of adjudication except, it has been termed as a show cause notice.

6.42. That to support his contention that the authority has pre-judged and pre-determined the issue and the petitioner would not have reasonable opportunity in defending himself. The Applicant has relied on the following case laws

- (i) Oryx Fisheries Private Limited vs. UOI [(2010) 13 SCC 427]
- (ii) (Siemens Ltd., vs. State of Maharashtra & Ors., [(2006) 12 SCC 33]
- (iii) K.I.Shephard vs. Union of India [(1987) 4 SCC 431]
- (iv) SBQ Steels Ltd. v Commr.of Cus, C.Ex and ST, Guntur [2013 (1) TMI 359]

6.45. That the financial capacity of the Applicants cannot be a factor to prove allegations that the petitioners are carriers are based on assumption and presumptions and the investigating agency failed to consider the fact that the Applicants had made

152 and 205 trips abroad and carried small amounts of foreign currencies on their return which were accumulated by them. That 'Presumption of Innocence' serves to emphasize that a prosecution has the obligation to prove each element of the offence beyond a reasonable doubt and that the accused bears no burden of proof. The Applicant has placed reliance on the following case

(i) **Sodhi Transport vs State of UP**

6.46. That foreign currency is not prohibited goods and the order of absolute confiscation of the currency is not sustainable without realizing the fundamental distinction between what is prohibited and what is restricted;

6.47. That as per Regulation 1 of Foreign Exchange Management (Export and Import of Currency) Regulations 2015, foreign currency as such is not prohibited goods and its import or export is subject to the permission given by RBI and further as per Regulation 7(2) of the Said Regulations any person may take or send out of India foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or rules of Regulations or directions made or issued thereunder;

6.48. That as the intention behind the provision of Section 125 of the Customs Act, 1962 is that as import of goods such as arms, ammunition, drugs etc under any circumstances would cause danger to the health, welfare or morals of people as a whole, prohibition relates to these goods;

6.49. That 'prohibition' would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reasons that the conditions has not been complied with;

6.50. That foreign currency attempted to be exported by them are not to be treated as 'prohibited goods' and therefore the goods are not liable for confiscation under the provisions of Section 113 of the Customs Act, 1962.

The Applicant has relied upon the decision in the case of Commr. of Customs (Prev), West Bengal vs. India Sales International [2009(241)ELT 182(Cal)]

6.51. That after extolling and analyzing the meanings, principles and differences between 'prohibition' and 'restriction', the Applicant has veered to the conclusion that foreign currency is not prohibited for import/export and therefore an option should be given to the importer/exporter for redemption of the goods, even if the importer/exporter fails to fulfil the conditions for export of currency;

6.52. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and the adjudicating authority has the discretion to give an option of redemption fine in case of prohibited goods but for other goods, it is mandatory to give the option of redemption of goods on payment of fine. The Applicant has placed reliance on the following cases in support of their contention:

- (i) In RE: Chellam Mukesh [2012(276) ELT 129(GOI)]
- (ii) Suresh Kumar Agarwal vs. Collector of Customs, Madras [1998 (103)ELT 18(AP)]
- (iii) Bhargav Patel [Appeal No C/381/10-Mum] [2015-TIOL-1951-CESTAT-Mum] and cases relied upon in the order
- (iv) Sujahi vs. Commr. of Customs, Chennai

6.53. That in principle, the adjudicating authority has the power to absolutely confiscate or allow redemption of the goods and the power is vested in the Customs Act, 1962 and as there are no specific guidelines demarcating the cases where the absolute confiscations should be ordered, judicial precedence alongwith overall circumstances of the case are taken into account for adjudging the matter and in the instant case there are not enough grounds for absolute confiscation.

6.54. That the OAA relied on the case of Om Prakash Bhatia vs. UOI [2003(155) ELT 423(SC)] for ordering the absolute confiscation of foreign currency. In the said case the Hon'ble Supreme Court has held that prohibition of importation or exportation can be subject to certain prescribed condition to be fulfilled before or after clearance of goods and if conditions are not fulfilled it may render the goods as prohibited goods;

6.55. That the judgement of Om Prakash Bhatia has been over ruled by the larger bench of the Supreme Court in the case of Commissioner of Customs vs M/s Anul Automation Pvt Ltd;



6.56. That a lower court should honour findings of law made by the higher court that is within the appeals path of case the court bears and precedent is a legal principle or rule that is created by a court decision. This decision becomes an example, or authority for judges deciding similar issues later. 'Stare decisis' is a legal doctrine that obligates courts to follow historical cases when making ruling on a similar current or future case.

The Applicant has relied on the following case laws in support of their contention:

- (i) CCE, Calcutta vs. Alnoori Tobacco Products [2004(170) ELT 135 (SC)]
- (ii) Escorts Ltd vs. CCE, Delhi [2004 (173) ELT 113 (SC)]
- (iii) CC (Port), Chennai vs. Toyota Kirloskar [2007 (213) ELT 4 (SC)]
- (iv) Sri Kumar Agency vs. CCE, Bangalore [2008 (232) E.L.T. 577 (S.C.)]
- (v) Escorts Ltd vs. CCE, Delhi-II [2004 (173) E.L.T. 113 (S.C.)]
- (vi) CC, Customs vs. M/s Atul Automations Pvt Ltd

6.57. That if the goods are not expressly 'prohibited' for importation, the owner as well as the importer would be entitled to an option to redeem the goods even upon adjudication and in the case of prohibited goods there is a discretion in the officer to release the confiscated goods in terms as set in and in the case of other goods, the officer is bound to release the goods on redemption. The Applicant has relied upon the following case laws in support of their contention:

- (i) Horizon Ferro Alloys Pvt Ltd vs. UOI -judgement by the Division Bench of Punjab and Haryana High Court.
- (ii) CC (Airport), Mumbai vs. Alfred Menezes [2009 (242) ELT 334 (Bom)]
- (iii) Dhanak M. Ramji vs. Union of India [2009 (237) E.L.T. 280 (Tri-Bom.)]
- (iv) A Rajkumari vs. Commr. of Customs (Airport-Air cargo) Chennai [2015(321) E.L.T. 540].
- (v) Mohd Zia Ul Haque vs. Addl. Commissioner of Customs, Hyderabad [2014(214) E.L.T 849 (GOI)]
- (vi) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri. Mumbai)]
- (vii) In Neyveli Lignite Cor Ltd vs. UOI [2009 (242) E.L.T. 487 (Mad.)]
- (viii) Shaik Jamal Basha vs. Government of India [1992 (91) ELT 227(AP)]
- (ix) Mohamed Ahmed Manu vs. CC, Chennai [2006(205) E.L.T 383(Tri-Chennai)].
- (x) Rajaram Bohr vs. UOI [2015(322) E.L.T 337 (Cal)]

6.58. That foreign currency is not prohibited and its import for export is subject to laws and rules and regulations issued by a competent authority and foreign currency is not notified as 'prohibited' under the Customs Act, 1962 and FEMA and in view of this, the foreign currencies carried by the Applicant cannot be considered as prohibited goods;

6.59. That the Order in Appeal suffers from the vice of excessive use of powers and jurisdiction vested with the Appellate Authority, which did not take into consideration all the aspects of the case and thus the impugned order is arbitrary and unilateral and is liable to be set aside;

6.60. That the reasons are the life and blood of any quasi-judicial Order including an OIA and in both the orders passed by the lower authority there are no proper reasoning given by both the lower authorities on vital submissions made by the Applicant before them;

6.61. That the findings does not exhibit as to how and in what manner the imposition of such heavy and harsh penalty on him has been justified;

6.62. Whenever a case of smuggling is adjudicated or decided in Appeal, the decisions of the Authority should include his findings and conclusions and the reasons underlying those findings and conclusions on all material issues of fact, law or discretion presented in the record. The finding requirement are a critical statutory requirement element of the adjudicating authority's decision in an adjudication proceedings which has not been done in the instant case. The Adjudicating Authority has raised wrong presumptions and assumptions against the petitioner and, therefore, cannot stand the test of law.

6.63. That errors in legal documents, even trivial ones, can have grave consequences and not catching these minor mistakes send out a wrong message to the colleagues, clients, the judge, and most important, the opponents and errors in documentation can prolong litigation,

6.64. That the 'principles of natural justice' are based on justice, equity, common sense, fair play and rule of law and the adjudicating/appellate authority should act without bias and should be impartial. The adjudicating order should comply with the principles of natural justice but the the order passed by the adjudicating/ appellate

authority in the instant case was not on merits and not a speaking order and failed to take cognizance of the submissions made by the Applicant without giving any reason and that the AA cannot shut out or reject a defense merely by observing that the defense submissions are weak and do not provide any relief to the Applicants;

6.65. That the Appellate Authority has not followed the principles of natural justice as laid in the following decisions;

- (i) Liberty Oil Mills vs. UOI
- (ii) C.L. Tripathi vs. SBI
- (iii) Pitchaiah vs. Andhra University
- (iv) A.K. Kraipak vs. UOI
- (v) State of Punjab vs. K.R. Erry

6.66. That in the impugned OIA, the AA made simple observations and passed the order without countering the entire defense submission, contention of the petitioner placed before him and therefore the impugned OIA cannot be branded as an order on the merits of the case and is therefore not sustainable. Reliance is placed on the Orissa High Court's judgment in the case of Chantamoni Padhan v. Paika Samal

6.67. That the Appellate Authority failed to examine any evidence nor also tested the facts by evidence on the touchstone of law and did not determine the issue involved or tested the material evidence, did not examine the pleadings of the Applicant and then reach a conclusion.

6.68. That there is no obligation on a quasi-judicial body to give reasons in support of the decision arrived at by it so long as the decision is reached after observing the principles of natural justice and in this case the principles of natural justice were not followed. Reliance has been placed on the following decisions

- (i) M/s Sahara India TV Network vs CCE, Noida by CESTAT, N Delhi
- (ii) Joint Commissioner of Income Tax, Surat vs. Sahell Leasing and Industries Ltd [2010 (205) E.L.T. 705 (SC)]
- (iii) Vikas Enterprises vs. CCE, Allahabad by CESTAT, N. Delhi
- (iv) Sharp Carbon India vs. CCE Kanpur
- (v) UOI vs. Sri Kumar Agencies -Gujarat High Court
- (vi) International Woollen Mills Ltd vs. Standard Wool (UK) Ltd
- (vii) Kranti Associates Pvt Ltd vs. Masood Ahmed Khan [2011(273) E.L.T 345(SC)]

- (viii) Mahabir Prasad Santosh Kumar vs. State of UP and others [1970 SC 1302 AIR]
- (ix) Travancore Rayons Ltd vs UOI [AIR 1971SC 862]
- (x) Woolcombers of India Ltd vs. Woolcombers Workers Union and anr [AIR 1973SC 2758]
- (xi) Siemens Engineering and Mfg Co India Ltd vs. UOI [AIR 1976 SC 1785]
- (xii) Testeel Ltd vs. Desai (NM) -Gujarat High Court.
- (xiii) SSE Hari Nagar Sugar Mills Ltd vs. Shyam Sundar Jhunjhunwala [AIR 1961 SC 1569]
- (xiv) Bhagat Raja Case [AIR 1957 SC 1606]

6.69. That all the abovesaid cases are applicable to the present case and a judicial or quasi judicial authority giving its decision must give reasons in support of the decision and the only qualification to this rule is where an adjudication is provided against the decision of the quasi judicial authority;

6.70. That the right to know the reasons for a decision which adversely affects ones person or property is a basic right of every litigant and giving of reasons serves both to convince those subject to the decisions that they are not arbitrary;

6.71. That if no reasons are given in the order, it would not be possible for the High Court or the Supreme Court exercising the power of judicial review whether the administrative officer has made any error of law in making the order and the power of judicial review would be stultified;

6.72. That penalty imposed on the Applicant was disproportionate and imposition of heavy penalty on the Applicant is not sustainable.

6.73. That without prejudice to the submissions already made, the Applicant further submits that the quantum of penalty leviable under different sections will have to be considered on the nature of violation alleged in the light of the relevant provision of law; that the Applicant did not import the small quantity of gold for making any profit from the transaction and there is a very significant distinction between a man who is importing gold in commercial quantity for making huge profit and a man who is importing gold for making a small profit to meet his family expenses. There is a distinction between the commercial smuggler and a person importing gold under a

circumstance where there is an intention to make a small profit to meet his travel expenses and meet his family expenses. Where the importation is not for the purpose of making a profit, the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', the value of the goods the degree of hardship that will be caused to the person on account of absolute confiscation and imposition of heavy penalty.

6.74. That the course of action taken by the OAA must depend on the gravity and nature of the infraction by the individual Applicant and thus punishment must be proportional to the violation. The Applicants' has relied upon the following cases in respect of the above contention and also where redemption fine and penalty was reduced:

- (i) UOI vs. Mustafa & Najibhai Trading [1998(6 SCC 79)
- (ii) Management of Coimbatore DCC Bank vs. Secretary Coimbatore District Co-op Bank Employees Association [(2007) 4 SCC 669]
- (iii) Commissioner of Customs, Tuticorin vs. Sai Copiers [2008(226) ELT 485(Mad)]
- (iv) Commissioner of Customs(Import) vs. Shankar Trading Co [2008(224) ELT 206(Bom)]
- (v) CC, Tuticorin vs. Shri Kanakshi Enterprises [2009(238) ELT 242(Mad)]
- (vi) Maa Tara Enterprises vs. CC Cochin [2009(243) ELT 730 Tri-Bang]
- (vii) Commr. of Customs, Cochin vs. Dilip Ghelam [2009(248) ELT (Tri-LB)]
- (viii) New Copier Syndicate vs. Commr. of Customs [2015(232) ELT 620(Tri-Bang)]
- (ix) Omex International vs. Commr. of Customs, new Delhi [2015(228) ELT (Tri-Del)]
- (x) Office Devices vs. Commr. of Customs, Cochin [2016-TIOL-2557-CESTAT-BANG]
- (xi) Sai International and ors vs. CC, Cochin.

6.75. That the Applicant No. 1 and Applicant No. 2 were the owners of the seized assorted foreign currencies equivalent to Rs. 82,57,573/- and Rs. 66,41,612/- and were carrying the currency to Sharjah for genuine business purpose and they were not allowed to declare the currencies to Customs and it was not their intention not to declare the currencies to Customs;

6.76. That foreign currency is not prohibited goods and the order of absolute confiscation of the currency is not sustainable without realizing the fundamental distinction between what is prohibited and what is restricted;

6.77. That as per Regulations of Foreign Exchange Management (Export and Import of Currency) Regulations 2015, foreign currency as such is not prohibited goods and its import or export is subject to the permission given by RBI and further as per Regulation 7(2) of the Said Regulations any person may take or send out of India foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or rules of Regulations or directions made or issued thereunder;

6.78. That as the intention behind the provision of Section 125 of the Customs Act, 1962 is that as import of goods such as arms, ammunition, drugs etc under any circumstances would cause danger to the health, welfare or morals of people as a whole, prohibition relates to these goods;

6.79. That 'prohibition' would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reasons that the conditions has not been complied with;

6.80. That foreign currency attempted to be exported by them are not to be treated as 'prohibited goods' and therefore the goods are not liable for confiscation under the provisions of Section 113 of the Customs Act, 1962;

The Applicant has relied upon the decision in the case of Commr. of Customs (Prev), West Bengal vs. India Sales International [2009(241)ELT 182(Cal)]

6.81. That after extolling and analyzing the meanings, principles and differences between 'prohibition' and 'restriction', the Applicant has veered to the conclusion that foreign currency is not prohibited for import/export and therefore an option should be given to the importer/exporter for redemption of the goods, even if the importer/exporter fails to fulfil the conditions for export of currency;

6.82. That Section 125 of the Customs Act, 1962 vests the power to grant redemption of confiscated goods and the adjudicating authority has the discretion to give an option of redemption fine in case of prohibited goods but for other goods, it is mandatory to

give the option of redemption of goods on payment of fine. The Applicant has placed reliance on the following cases in support of their contention:

In RE: Chellani Mukesh [2012(276) ELT 129(GOI)]

6.83. That the Applicant submit that a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case as carefully scanned and the contentions of the Applicants may be taken into consideration while adjudicating the case and in view of all the above said submissions, allegations made against the Applicants are not proved and considering the infirmities brought forth by the Applicants, the SCN cannot be free from elements of malice and incorrect portrayal of facts and the contradictions in the panchanama need to be addressed following principles of natural justice.

The Applicants have relied on the following case laws in support of their contention:

- (i) Shivaji Sahabrao Bobade vs State of Maharashtra
- (ii) Kali Ram vs. State of Himachal Pradesh [1974 SCR (1) 722]
- (iii) Felix Dores Fernandes vs. CC [2000 (118) E.L.T 639]
- (iv) UOI vs. Harish Muljmal Gandhi [2016(340) E.L.T 93( Bom)]
- (v) Rajinder Nirula and Tilak Raj vs. Commissioner of Customs

6.84. The Applicants did not commit any act of omission or commission which can be termed as a crime or manifesting of an organized smuggling activity and the test in such a case is to see whether the act is such that it gives rise to an inference that the Applicants were offenders and the case against them fails this test;

6.85. That the Applicants were never concerned with acquiring, possession or in any way concerned in carrying, removing, depositing, harbouring, keeping concealing or in any other manner dealing with prohibited goods which they knew or had reason to believe were liable to confiscation under Section 111 of the Customs Act, 1962 and hence were not liable for penal action under Section 112 of the Customs Act, 1962

6.86. That habitual offenders are usually hardened criminals whose major part of life has been spent in jails and thus the Applicants cannot be considered as habitual offenders;

6.87. That the Applicant is from a respectable family and law abiding citizen/businessman and has never come under adverse remarks

Under the circumstances the Applicants prayed for the release of the Foreign currency valued at Rs. 1,49,99,185/- on reasonable fine, penalty and applicable duty(?) and further proceedings be dropped.

7. Personal hearing in the case was scheduled for 31.10.2023 or 16.11.2023. Shri Prakash Shingrani, Advocate for the Applicant appeared for the personal hearing on 31.10.2023 and submitted that the Applicants wer carrying some foreign currency for business purpose. He further stated that there are several judgements which allowed redemption of foreign currency on redemption fine and penalty He further submitted that Applicants are not habitual offenders and requested to allow redemption on reasonable fine and penalty. No one appeared for the personal hearing on behalf of the Respondent.

8. Government has gone through the records and facts of the case and the submissions in the combined Revision Application and the personal hearing. Government finds that there is no dispute that the seized foreign currency was not declared by the Apphcants to the Customs at the point of departure. The seized assorted foreign currency totally equivalent to Rs. 1,49,99,185/- was concealed in packets of colour pencils and sketch pens and kept in a blue coloured polythene bag in the baggage carried by Applicant No. 1 and some cotton fabrics, sketch pens and other stationary items and kept in a blue coloured polythene bag in the baggage carried by Applicant No. 2 respectively with the express intention of hoodwinking the Customs. Both the Applicants in their statements had admitted the knowledge, possession, carriage, concealment, non-declaration and recovery of the foreign currency. Both the Apphcants, in their statements, admitted that were not the owners of the foreign currency and Applicant No.1 stated that the foreign currency was given to him by one Mr. Gafar and was instructed to give it to his representative at Sharjah and Apphcant No. 2 stated that he was handed over the foreign currency by one Mr. Issac outside the departure gate at the airport with instructions to give the bag to Applicant No.1. Both



the Applicants admitted that they had resorted to attempt to smuggle for monetary considerations and admitted that they were aware that carrying such currency and not declaring the same was an offence under the Indian law. Therefore, the confiscation of the foreign currency was justified as the Applicants could not account for the legal procurement of the substantial quantum of foreign currency, the manner in which it was concealed and that no declaration as required under section 77 of the Customs Act, 1962 was filed by them.

9. The Government finds that the Applicants had not taken any general or special permission of the RBI to carry the foreign currency and had attempted to take it out of the country without declaring the same to Customs at the point of departure. Hence, the Government finds that the conclusions arrived at by the lower adjudicating authority that the said provisions of the Foreign Exchange Management (Export & Import of Currency) Regulations, 2000 and Customs Act, 1962 have been violated by the Applicant is correct and therefore, the confiscation of the foreign currency ordered, is justified.

10. Further the Madras High Court in the case of Commissioner of Customs, Chennai v/s. Xavier Poonolly [2014(310 E.L.T. 231 (Mad)] at Para 13 has held as under;

*"..... We find, in the present case, the passenger has concealed the currency of 55,500 US dollars and other currencies, attempted to be taken out of India without a special or general permission of the Reserve Bank of India and this is in violation of the Rules. The fact that it was procured from persons other than authorized person as specified under the FEMA, makes the goods liable for confiscation in view of the above-said prohibition. Therefore, the Original Authority was justified in ordering absolute confiscation of the currency. The key word in Regulation 5 is prohibition of import and export of foreign currency. The exception is that special or general permission should be obtained from the Reserve Bank of India, which the passenger has not obtained and therefore, the order of absolute confiscation is justified in respect of goods prohibited for export, namely, foreign currency....."*

11. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Ray Grow Impex has laid down the conditions and circumstances under which such discretion can be used. The same are reproduced below.

*"71. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.*

*71.1. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken."*

12. In the Revision Application, request for release of the foreign currencies has been made, relying on cases and extolling the argument that as far as Section 125 of the Customs Act, 1962 is concerned, unless the importation or exportation of goods are expressly prohibited, redemption has to be granted and that foreign currency is not a prohibited goods. In this regard, the Government finds that the Original Adjudicating Authority has passed a cogent and judicious Order wherein contentions raised by the Applicants in the Revision Application have been dealt with in great detail at the first stage itself. The case of the Applicants has been thoroughly examined against the relevant provisions of the Customs Act, 1962, Foreign Trade (Development and Regulation) Act, 1992, Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, FEM (Possession and Retention of Foreign Currency) Regulations, 2015 etc. It has been rightly held by the Original Adjudicating Authority that a passenger can carry Indian / foreign currency provided he fulfils the conditions specified in the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 and that any currency carried in violation of the restrictions imposed and non-declaration or mis-declaration thereof would render such currency liable to confiscation and the passenger would render himself liable to penalty for his / her act or omission and commission. Further, the Original Adjudicating Authority has held that the Applicants had not complied with the conditions as laid down under Regulation 5 and 7(2)(b) of the

Foreign Exchange Management (Export and Import of Currency) Regulation, 2015 and thus, had violated the restrictions imposed under the said Regulations, and by concealing the foreign currency in packets of colour pencils and sketch pens and kept in a blue coloured polythene bag in the baggage (Applicant No. 1) and concealed in cotton fabrics, sketch pens and other stationary items and kept in a blue coloured polythene bag in the baggage (Applicant No. 2) and not declaring the same, not obtaining permission from RFI and not drawing the foreign currency from an authorized dealer, the seized foreign currency was rendered as 'prohibited goods' and liable for confiscation under Section 113(d), (e) and (h) of the Customs Act, 1962 and for this act of omission and commission, the Applicants had rendered themselves liable to penalty under Section 114(i) of the Customs Act, 1962.

13. Government finds that every aspect of the averments made by the Applicants have already been dealt with cogently by the Original Adjudicating Authority and have been deliberated upon and negated, point-wise. The Original Adjudicating Authority and the Appellate Authority have discussed various contentions of the Applicants in the Orders-in-Original and the Orders-in-Appeal.

14. The Appellate Authority at Para No.10 to 14 of the OIA has stated as follows

*\* 10. The expression Prohibited Goods" is defined in Section 2(13) of the Customs Act, 1962 mean "any goods, the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force, but it does not include any such goods in respect of which, the conditions subject to which the goods are permitted to be imported or exported have been complied with."*

*11. Accordingly taking out foreign currency is regulated on two fronts ie, source of acquisition and the maximum amount which can be taken out by any person in the present case at hand the Appellant has not declared the impugned foreign currency truthfully to the Customs it's contravention of Section 77 of the Customs Act, 1962 and had intentionally attempted to export the same illegally. As regards the source from which foreign currency being taken out should be acquired, Regulation 7(2) (b) of the Foreign Exchange Management (Export & Import of Currency) Regulation, 2015 lays down, inter-alia, that any person may take or send out of India foreign exchange obtained by him by drawal from an authorized person in accordance with the provisions of the Act or the rules or regulations or directions made or issued there under. As per Section 2 (c) of the FEMA 1999, "authorized person" means an*

*authorized dealer, money exchanger, off-shore banking unit or any other person for the time being authorized under sub-section (1) of Section 10 of Act to deal in foreign exchange or foreign securities. In the case in hand, the Appellant has failed to prove the licit possession of the impugned foreign currency by non production of any documentary evidence.*

12. *I find that in terms of Section 125 of the Customs Act, 1962, it is not mandatory for redemption to be given for goods, if such goods are foreign currency which is confiscated under Section 113(d), (e) and (h) of the Customs Act, 1962 read with the FEMA, 1999 and regulations made thereunder and such currency are prohibited goods. I find that it has been decided by the Apex Court in the case Om Prakash Bhatia vs. CC Delhi (2003) 6 SCC 161 that if importation or exportation is subject to any prescribed conditions to be fulfilled, then, such goods shall be 'prohibited goods' as per Section 2(33) read with Section 113(d) thereof. Further, in case of Suresh Gangaram Hole Vs CC (Airport), Mumbai 2015 (327) ELT 555 (Tri Mum), tribunal observed that 'illicit nature of transactions is manifested and amounts to "smuggling" in and out foreign currency. Thus the tainted nature of seized foreign currency and the transaction is established beyond doubt' accordingly the court held absolute confiscation of the seized foreign currency under section 113 (d) and (h) of the Customs Act, 1962 which is beyond any legal challenge". I also find that in case of Baburaya Narayan Nayak Vs Commissioner of Customs, Bangalore wherein the CESTAT Bangalore 2018 (364) ELT 811 (Tri Bang) upheld the order of the adjudicating authority wherein the adjudicating authority had absolutely confiscated the silver bars since the Appellant had not produced any evidence regarding the licit possession of the goods.*

13. *I find that the advocate of the appellant had submitted the same submission made by them before the Adjudicating Authority in their Grounds of Appeals on record. The adjudicating authority has rightly countered the same in the Order-in-Original dated 06.08.2020 at para 22.5. I do not find any new merit or substantiated ground to add in this Order-in-Appeal as the advocate of the appellant had not added any new and substantial evidence or material. I do not find that appellants have at any time produced the evidence for licit possession of foreign currency in huge quantity while departing the country.*

14. *Under these circumstances, I find that the adjudicating authority has rightly confiscated the impugned foreign currency absolutely and redemption in such circumstances cannot be claimed as a right."*

15. *Government notes that the quantity of the foreign currency is huge and the same was concealed in packets of colour pencils and sketch pens and kept in a blue coloured polythene bag in the baggage (Applicant No. 1) and concealed in cotton fabrics, sketch pens and other stationary items and kept in a blue coloured polythene bag in the*

baggage (Applicant No. 2). Government also notes that both the Applicants are persons of limited means and were in no position to procure the impugned foreign currency on their own accord and had admittedly been handed over the impugned foreign currency by others for being handed over at the destination. The Applicants admittedly were frequent travellers and were attempting to carry the currency at the behest of their handler and were not the owner of the currency but carriers for an organised smuggling syndicate. During investigations, it also came to light that Applicant No. 1 was a repeat offender. Both the Applicants were unable to produce the evidence that the impugned foreign currency had been sourced by them from licit channels and had not complied with the statutory provisions of the law. Had the Applicants not been intercepted, they would have gotten away with the foreign currency. Government finds that considering that a large amount of foreign currency was being concealed in the baggage and recovered therefrom, currency remained unaccountable. Both the Applicants, being frequent travellers, admittedly the foreign currency was not belonging to them and thus discretion used by OAA to absolutely confiscate the currencies is appropriate and judicious. Government finds that in this case, the discretion not to release the foreign currency under the provisions of Section 125 of the Customs Act, 1962 has been applied appropriately by the Original Adjudicating Authority and has been rightly upheld by the Appellate Authority.

16. Government finds that the Appellate order rejecting the appeal and upholding the confiscation of the foreign currency by the Original Adjudicating Authority is legal and judicious and the Government is not inclined to interfere in the same.

17. The Applicants have also prayed for reduction in the penalty imposed. The foreign currency carried by Applicant No. 1 and 2 is equivalent to Rs. 85,57,573/- and Rs. 66,41,612/- respectively. The Government finds that the personal penalty of Rs. 15,00,000/- each imposed on the Applicants under Section 114g) of the Customs Act, 1962 is excessive and is not commensurate with the omissions and commissions committed by them and needs to be revised.

18. In view of the above, the Government upholds the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1032/2021-22 dated 18.11.2021 [Date of issue: 23.11.2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-II, to the extent of the absolute confiscation of the foreign currency from the Applicants. The penalty of Rs. 15,00,000/- each imposed on Applicant No. 1 and 2, being excessive, is revised to Rs. 10,00,000/- (Rupees Ten Lakhs only) and Rs. 7,50,000/- (Rupees Seven Lakhs Fifty Thousand only) respectively.

19. The combined Revision Application is disposed on the above terms.

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

ORDER No 116-117 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024.

To,

1. Mr. Mohammed Bendichal, 23/295, Bendichal Thettyail House, Bendichal, Via Chengala, PO Thakkil, Kasargod, Kerala 671 541
2. Mr Abdulrahiman Bendichal, 23/295, Bendichal Thettyail House, Bendichal, Via Chengala, PO Thakkil, Kasargod, Kerala 671 541
3. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai -III, Awas Corporate Point, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 069.
2. Shri Prakash K. Shingran, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai-400 051
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.