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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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

Date of Issue 1/2/21

Order No. 19-23/21-Cus dated 29-01-2021 of the Government of India passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

Subject : Revision Application filed under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 14/CUS(A)/GHY/17 dated 31/10/2017 passed by the Commissioner of Central Tax (Appeals), GST, Central Excise and Customs, Guwahati.

Applicants : Mr. Sheetal Bharadwaj, Delhi.  
Mr. Ritenjeet Sahariah, Guwahati.  
Commissioner of Customs (Preventive), Shillong

Respondents : Commissioner of Customs (Preventive), Shillong.  
Mr. Sheetal Bharadwaj, Delhi.  
Mr. Ritenjeet Sahariah, Guwahati  
Mr. Uzzal Sarma, Guwahati

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**ORDER**

Two Revision Applications Nos. 372/31/B/2018-RA and 372/32/B/2018-RA both dated 21.05.18 are filed by Shri Sheetal Bharadwaj, Delhi (hereinafter referred to as the Applicant 1) and Shri Ritenjeet Sahariah, Guwahati (hereinafter referred to as the Applicant 2), respectively, against the Order in Appeal No. 14/CUS(A)/GHY/17 dated 31/10/2017 passed by the Commissioner (Appeals), GST, Central Excise and Customs, Guwahati whereby their appeals against Order-in-Original dated 10/02/2017 have been rejected.

2. Three Revision Applications Nos. 380/23/B/2018-RA, 380/24/B/2018-RA and 380/25/B/2018-RA dated 16/10/2018 have been filed by the Commissioner of Customs (Prev.), Shillong, against the same Order-in-Appeal. Cross objections have been filed by the opposite parties.

3. Applicant 1 had received the Order-in-Appeal on 26/12/2017 and applicant 2 received it on 15/11/2017. Both the applicants have filed the instant revision applications on 21/05/2018. They have filed applications for condonation of delay along with their revision applications stating that they had earlier filed appeals before CESTAT against the impugned Order-in-Appeal but later realized that the appeal against the said Order-in-Appeal lied before Government of India and withdrew them. CESTAT passed Order No. FO/75986-75988/2018 dated 04/05/2018 dismissing the appeals as withdrawn. Instant revision applications have been filed within 3 months from the date of Order of CESTAT. Taking these facts into consideration, the Government condones the delay in filing the revision applications.

4. Commissioner of Customs (Preventive), Shillong received the impugned Order-in-Appeal on 01/12/2017 and filed three separate revision applications on 16/10/2018. The revision applications have been filed after a period of more than 10 months.

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Applications for condonation of delay have been filed stating that appeals had been earlier filed before CESTAT against the impugned Order-in-Appeal but later it was noticed that the appeal against the said order-in-appeal lied before Government of India and subsequently they were withdrawn. CESTAT passed Order No. MO/75762-75767/2018 & FO/76486-76488/2018 dated 06/08/2018 dismissing the appeals as withdrawn. Instant revision applications have been filed within 3 months from the date of Order of CESTAT. Taking these facts into consideration, the Government condones the delay in filing the revision applications

5. Brief facts leading to the present case are that Applicant 2 was apprehended, on 08.02.2016, by DRI officers at the Guwahati airport while returning from Bangkok as he was coming out of the Customs area. He was found to be carrying Silver items collectively valued at Rs. 21,21,930/- which were not declared to the Customs authorities. In his voluntary statement, he stated that he was to hand over the goods to one Sh. Uzzal Sarma who acted as a link man between him and Applicant 1, the actual owner of the goods. The said goods were confiscated absolutely by the original adjudicating authority. Penalty of Rs. 10 lakhs under Sections 112(a) (i) and Section 112(b) (i) on each of the applicants and Sh. Uzzal Sarma was also imposed. Also, a penalty of Rs. 1 lakh was imposed on Applicant 2 under Section 114AA of the customs Act, 1962. Aggrieved, the applicants filed appeals before Commissioner (Appeals) who vide the impugned Order-in-Appeal, allowed the goods to be redeemed on payment of Rs. 10 lakhs as redemption fine and applicable duty. However, the penalties on both the applicants were upheld by the Commissioner (Appeals).

6. Applicant 1 has filed the revision application mainly on the grounds that CIF value should be accepted for valuation purpose; penalty under Section 112(a) should be reduced; and penalty under Section 112(b) be waived. Applicant 2 has filed the revision application on the ground that the penalty imposed on him should be reduced in proportion to his monetary gain as a carrier of the offending goods. The department

has filed revision applications on the ground that the Commissioner (Appeals) has erred in not only allowing the redemption of the offending goods but also in reducing the penalty on Mr. Uzzal Sarma. Restoration of the Order-in-Original has been sought by the revenue in their applications.

7.1 Personal hearing was held on 04.01.2021, in virtual mode in respect of RA Nos. 372/31/2018-RA and 372/32/2018-RA. Sh. Barinder Singh, Consultant, representing both the applicants, attended the hearing. He reiterated the submissions made in the revision applications and the written submissions dated 04/01/2021. In the case of Applicant 1, he specifically stated that imposition of penalty under Section 112(b) is untenable as the goods are not available for confiscation. Further, the goods have been valued as per market value, which is not acceptable. There is no market enquiry as mandated in Section 125 and margin of profit not having been determined, RF and PP are arbitrary. As regards Applicant 2, he stated that it is a case of wrong shipment wherein the silver jewellery was handed over to him instead of imitation jewellery. He also stated that the applicant was apprehended after Customs clearance but no investigation has been made with the Customs officer concerned, which is in violation of principles of natural justice; that the applicant is merely a carrier and penalty is harsh. No one appeared for the department but a letter dated 07/08/2018 has been submitted vide which the department has objected to the release of the offending goods by the Commissioner (Appeals) on redemption fine.

7.2 Sh. Tarun Reddy G., Deputy Commissioner, appeared for personal hearing, in virtual mode, on 21.02.2021, and reiterated the contents of revision applications filed by the department. He highlighted that it was a case of outright smuggling and submitted that the Commissioner (Appeals) ought not to have interfered with the discretion exercised by the original authority in absolutely confiscating the goods in view of Hon'ble Madras High Court's judgment in the case of P. Sinnasamy in CMA No. 1631 of 2008. The reduction of penalty is also not justified in the facts and

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circumstances of the case. Since none appeared for personal hearing for the respondents in respect of the RAs filed by the department, another opportunity was granted on 28.01.2021. In response, Shri Uzzal Sarma vide letter dated 27.01.2021 and Shri Barinder Singh, Consultant (representing Shri Sheetal Bhardwaj and Shri Ritenjeet Sahariah) vide email dated 27.01.2021 filed written submissions.

7.3 Since the instant RAs are in respect of same OIA, these are being taken up for disposal together.

8.1 On examination of the revision applications, Commissioner (Appeals)'s order and the submissions of the applicants and the department, it is observed that the applicants had admitted to their roles in the smuggling activity, in their voluntary statements recorded under Section 108 of the Customs Act, 1962. The goods had not been declared to the Customs authorities, as required, as per law.

8.2 It is a common case of Applicant 1 & Applicant 2 that wrong goods were handed over to Sh. Ritenjeet Sahariah (Applicant 2) by the Bangkok supplier; that their statement admitting to smuggling of goods are not admissible as these are not corroborated by any other evidence; that, therefore, these statements cannot be relied upon against them. The Government observes that the Applicants have on one hand claimed that the wrong goods were handed over by the supplier to Applicant 2 yet in the same breath Applicant 1 has claimed the very same goods for redemption. Further, there is no explanation forthcoming as to why no declaration was made to the Customs officers in respect of the offending goods even if the Applicant 2 had been presumably handed over silver jewellery instead of imitation jewellery. No declaration was also made in respect of 55 wrist watches that were recovered from the checked-in baggage of Applicant 2. It is also on record that several statements spread over a number of days have been recorded, which are consistent with each other thereby clearly indicating that the statements were voluntary. Further, the investigating agency has,

with reference to the records of Jet Airways and the statement of Sh. Uzzal Sarma, identified the consignment earlier smuggled in. Therefore, it is incorrect to state that the statements of the applicants are not corroborated by other independent evidence. In this background, the subject averments made on behalf of the applicants are not acceptable. It is also clear from the records of the case that the applicants were repeatedly and consciously involved in smuggling of goods such as jewellery, readymade garments etc. over several months.

8.3.1 The department has assailed the impugned OIA for allowing the redemption of seized goods to Sh. Sheetal Bhardwaj (Applicant 1) on imposition of fine and payment of duty on market value of the goods (i.e. cum duty price). On the other hand, it is contended on behalf of Applicant 1 that the CIF price should be taken as market value and the redemption fine should be imposed accordingly. The Government observes that the original authority has held the goods liable to confiscation under section 111(d) & (l) of the Customs Act, 1962 as these were imported in contravention of section 77 ibid read with Rule 3 of the Baggage Rules, 1998 and ordered their absolute confiscation. The Commissioner (Appeals) has, while upholding liability to confiscation, extended the option to redeem the goods to the Applicant 1 since he has claimed ownership of the goods. As brought out hereinabove, it is the claim of the applicants in revision that wrong goods were handed over to Applicant 2 by the supplier at Bangkok. This claim removes the very basis on which the Commissioner (Appeals) permitted the option to redeem the goods to the Applicant 1, i.e., the Applicant 1 claimed ownership of the goods- Applicants cannot claim that wrong goods were handed over by the supplier and in the same breath claim ownership of the very same goods.

8.3.2 Further, in the case of Commissioner of Customs (Air), Chennai-I vs. P. Sinnasamy {2016 (334) ELT 1154 (Madras)}, Hon'ble Madras High Court has held that *"At the time, when discretion is exercised under Section 125 and if any challenge is*

*made....., the twin test, to be satisfied is "relevance and reason".* In the present case, the Commissioner (Appeals) has neither found the order of original authority based on irrelevant considerations nor has it been found to be unreasonable. Thus, following the ratio of P. Sinnasamy (supra), it was not open to the Commissioner (Appeals) to interfere with the order of the original authority.

8.3.3 Accordingly, the Government holds that the impugned OIA permitting redemption of seized goods to Applicant 1 is liable to be set aside.

8.4 As regards the valuation of the offending goods, it is observed that the passenger i.e. Applicant 2, has made no declaration in this regard. No documents of customs clearance have been produced by the applicants to prove that the Applicant 2 reported at red channel even on one occasion and was cleared by the Customs after paying appropriate duty on the goods imported. Thus, appraisal made by the expert has to be accepted. Further, the contention that the CIF price should be taken as the market value is incorrect in as much as the domestic price of imported goods would not be less than the cum-duty price of such goods.

8.5.1 Another contention is that imposition of penalty is not justified and may be reduced or waived.

8.5.2 It is also contended that since the goods smuggled in the past are not available for confiscation, no penalty can be imposed under Section 112 with reference to such goods. The decisions in the cases of Raja Impex (P) Ltd. {2008 (229) ELT 185 (P&H)} and in Shiv Kripa Ispat Pvt. Ltd. {2009 (235) ELT 623 (Tri-LB)} as affirmed by Hon'ble Bombay High Court {2015 (318)-ELT A259 (Bom)} have been cited in support of this contention. However, the Government observes that the issue decided in all these case was that fine cannot be imposed under Section 125 of the Customs Act when the goods are physically not available for confiscation. In none of these cases it has been

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held that penalty cannot be imposed under Section 112 if the goods are not available for confiscation. In fact, while affirming the Tribunal's decision in Shiv Kripa Ispat (supra), the Hon'ble Bombay High Court has specifically clarified that "*We further make it clear that we are not concerned whether in such circumstances penalty could be imposed when the redemption fine for the same can not be imposed.*" It is further observed by the Government that the Hon'ble Madras High Court has, in the case of Visteon Automotive Systems India Limited {2018 (9) GSTL 142 (Mad.)}, held that prerequisite for imposition of fine under Section 125 is liability of goods for confiscation under Section 111 and availability of goods is not necessary for imposition of fine. Hon'ble Madras High Court has further held that "*for improper importation of dutiable goods or prohibited goods, the importer is liable to be proceeded against under Section 112 of the Act by subjecting him to the penalty. Therefore, the fine proposed to be imposed under Section 125 of the Act is directed against the goods, in addition to the one that is already provided for under Section 112 of the Act. The fine contemplated is for redeeming the goods, whereas the importer is sought to be penalised under Section 112 for doing or omitting to do any act which rendered such goods imported by him, liable to be confiscated under Section 111 of the Act and for that act or omission, the appellant is liable to be penalised.*" Thus, the ratio of the judgment in the case of Visteon Automotive (supra) is that if the goods are liable to confiscation under Section 111 of the Act, the fine and penalty are imposable under Section 125 and Section 112, respectively, even if such goods are not available for confiscation. As such, the present contention of the Applicants is bereft of any merits.

8.5.3 Further, both the applicants were engaged in smuggling activities repeatedly and wilfully deluded the authorities by not declaring the goods and clearing them as such.



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8.5.4 In view of the above, the Government considers that the penalties imposed by the lower authorities on Applicant 1 & 2 are just and proper so as to create a strong deterrent for them to not resort to such activities in future.

8.6 As regards the reduction of penalty on Sh. Uzzal Sarma from Rs. 10 lakhs to Rs. 1 lakh, it is observed that Sh. Sarma was working as Junior Manager-Sales with Jet- Air. Keeping in view his role, the order of Commissioner (Appeals) reducing the penalty, in his case, to Rs. 1 lakh appears to be fair. Sh. Uzzal Sarma had filed a revision application no. 372/29/B/2018-RA dated 21/05/2018 praying for the penalty imposed by the Commissioner (Appeals) to be waived. The Government has already passed Revision Order No. 18/20-Cus dated 18/12/2020 upholding the Commissioner (Appeals)'s order in his case.

9. In view of the above discussion, the revision applications filed by Sh. Sheetal Bharadwaj and Sh. Ritenjeet Sahariah are rejected. The revision applications filed by the Department are allowed, except in the case of Sh. Uzzal Sarma where Commissioner (Appeals)'s order reducing penalty from Rs. 10 lakhs to Rs. 1 lakh is upheld.



(Sandeep Prakash)

Additional Secretary to the Government of India

Sh. Sheetal Bharadwaj alias Rahul,  
S/o Late Sh. Satish Bharadwaj,  
KU-163, Pitampura, New Delhi-110 034.

Sh, Ritenjeet Sahariah,  
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Shri Uzzal Sarma, s/o Sh. Khagen Sarma,  
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Commissioner of Customs (Preventive), Shillong  
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Order No. 19 - 23 /21-Cus dated 29-01-2021

Copy to:

1. Commissioner of Customs, CGST & Central Excise (Appeals), Guwahati.
2. Shri Barinder Singh, Consultant, 14, Hare Street, 1st Floor, Room No. 9, Kolkata-700001.
3. PA to AS(RA)
4. Guard File.

5. Spare Copy.

ATTESTED



(ASHISH TIWARI)  
ASSISTANT COMMISSIONER(RA)