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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/249-A,B,C,D & E/B/WZ/2018-RA/1532 : Date of Issue 15.02.2023

ORDER NO. <sup>228-232</sup> /2023-CUS (WZ)/ASRA/MUMBAI DATED 13.02.2023 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.

F.No. 371/249-A,B,C,D & E/B/WZ/2018-RA

Applicant No. 1. : Shri. Waqaas Abdul Hamid Shaikh,  
Applicant No. 2. : Shri. James Jesson John,  
Applicant No. 3. : Shri. Mukesh G. Pahuja, } **APPLICANTS**  
Applicant No. 4. : Shri. Sahebzade N. Khanand  
Applicant No. 5. : Shri. Naresh G. Pahuja.

**Respondent** : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

**Subject** : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal No.  
MUM-CUSTM-PAX-APP-43-47/18-19 dated 26.04.2018  
issued on 26.04.2018 through F.No. S/49-310 &/2017-AP  
passed by Commissioner of Customs (Appeals), Mumbai  
– III.

**ORDER**

These revision applications have been filed by S/Shri. (i). Waqaas Abdul Hamid Shaikh, (ii). James Jesson John, (iii). Mukesh G. Pahuja, (iv). Sahebzade N. Khanand (v). Naresh G. Pahuja (hereinafter referred to as the Applicants or alternately, more specifically as Applicants no. 1 (A1), Applicants no. 2 (A2) to .... Applicant No. 5 (A5) resp, or A1... A5 resp.) against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-43-47/18-19 dated 26.04.2018 issued on 26.04.2018 through F.No. S/49-310 &/2017-AP passed by Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 04.05.2015, the Customs Officers at CSMI Airport, Mumbai on the basis of specific information had intercepted Applicant No. 1 near the exit door of the Aircraft as soon as he had handed over a suspicious plastic packet to Applicant No. 2 who was an Airline Ground Staffer i.e. an employee of CelebiNAS having designation of Passenger Services Agent (PSA). A1 had arrived from Dubai via Doha onboard Qatar Airways Flight no. QR 556 /04.05.2015. A1 admitted that the plastic packet contained 36 gold bars of 10 tolas each and that the same had been given to him by applicant no. 3 at Doha with instruction to hand over the same to A2. A1 informed that A3 too was in the same flight from Dubai and accordingly, A3 was intercepted at the exit gate of the arrival hall. A3 had cleared himself through the green channel and it was ascertained that he had not declared anything in the Customs Declaration Form (CDF) filed by him. A3 identified the plastic packet and revealed that he had handed over the same to A1 at Doha and had told him to hand over the packet to A2 who was a staffer and would in turn smuggle the same out of the arrival hall and evade detection by Customs authorities.

2(b). The detailed examination of the plastic packet was carried out. 3 packets were found inside which had been wrapped with adhesive tapes. 12 FM gold bars of 10 tolas (i.e. 116 grams) each were recovered from each of the 3 packets. Thus,

36 FM gold bars of 116 grams each, totally weighing 4197 grams, and valued at Rs. 1,03,83,105/- were recovered and seized. The mobile phones of A1,A2 and A3 too were seized.

2(c). The search of the residence of A2 led to the recovery of cash amounting to Rs. 2,85,000/- which was seized under the reasonable belief that the same was amassed through smuggling of gold.

2(d). Investigations carried out had arrived at the undermentioned conclusion;

- (i) A3 had brought the 36 gold bars of 10 tolas each, totally weighing 4197 grams from Dubai. He had handed over the same to A1, at Doha Airport. A1 was also a passenger on the same flight i.e. Qatar Airways Flight No. QR556/04.05.2015 and in turn had handed over the gold to A2, a staffer of M/s. CELEBI NAS at the CSMI Airport, Mumbai.
- (ii) A2 was supposed to clear the gold without payment of Customs duty and deliver the same outside the CSMI Airport to A4.
- (iii) A4 had contacted and arranged A1 to travel from India to Dubai to collect the gold from A3 at Doha Airport and deliver the same to A2 at the aerobridge of CSMIA, Mumbai.
- (iv) A4 had arranged the services of A2 also, who would take the gold from A1 at the aerobridge and being an employee of the ground handling facility he i.e. A2 would be able to clear the gold bars from the airport by evading detection by Customs and then would handover the packet to him (i.e. A4) outside the CSMIA, Mumbai. A4 had sent photograph of A2 to A1 for easy identification and recognition.
- (v) CDR indicates that prior to the seizure of the gold, A4 was in contact with A1, A2, A3 and A5.
- (vi) A3 had admitted that his brother viz, A5 had told him about A4 who would guide him to bring the gold from Dubai and would also make arrangements. A5 had given the contact details of A4 to A3.

3. After due process of investigations and the law, the Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/17/2017-18 dated 13.04.2017 issued on 13.04.2017 under F.No. S/14-5-303/2015-16 Adjn [SD/INT/AIU/196/2015.AP'A'] ordered for (i). the absolute confiscation of the impugned gold bars i.e. 36 nos of FM gold bars of 116 grams (10 tolas) each, totally weighing 4197 grams, valued at Rs. 1,03,83,105/- under Section 111(d), (l) and (m) of the Customs Act, 1962; (ii). the absolute confiscation of Rs. 2,85,000/- cash amount under Section 121 of the Customs Act, 1962 recovered from the residence of A2; (iii). Imposed a penalty of Rs. 10,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 on A3; (iv). imposed a penalty of Rs. 10,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 on A1; (v). imposed a penalty of Rs. 5,00,000/- under Section 112(a) of the Customs Act, 1962 on A2; (vi). imposed a penalty of Rs. 5,00,000/- under Section 112(a) of the Customs Act, 1962 on A5; and (vii). imposed a penalty of Rs. 5,00,000/- under Section 112(a) and (b) of the Customs Act, 1962 on A4.

4. Aggrieved by the said order, the applicants had filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-43-47/18-19 dated 26.04.2018 issued on 26.04.2018 through F.No. S/49-310 &/2017-AP did not find it necessary to interfere in the OIO passed by the AA and upheld it as legal and proper.

5. Aggrieved with the above order, the Applicants have filed this revision application on the undermentioned grounds;

5.01. that their reply to the SCN have been reproduced here with a prayer to take it as the main grounds of this revision application; that A1 admitted that he had received the packet containing the gold bars from A3 but denied the allegation that he had handed over this

packet to A2 near the exit of the aircraft; that the panchanama was not true; that A2 was at the exit gate of aircraft for some other work; the events in the panchanama were fabricated;

5.02. that A3 was running a jewellery making company at Zaveri Bazar, Mumbai manufacturing gold bangles; that he has an IEC no.; that his contact at Dubai viz, Harshad M Patel had helped him (A3) to buy 36 gold bars of 10 tolas each totally weighing 4197 gms in his name from M/s Atlantis Exim FZE; that A3 had requested A1 to keep the plastic packet containing gold with him for some time to enable him to go outside Mumbai Airport on arrival and fetch IEC from his wife who would be waiting outside; that A1, A2, A3 and A4 were victims of fabricated story of Customs and they had retracted their statements, immediately; their confessions did not have any evidentiary value since no corroborative evidence had been placed by Customs; that the burden to prove retractions was on the department; in this regard they have relied upon the following cases laws;

- (a). In the case of K.I. Paunny Vs. Asstt. Collector of CE Cochin, 1997 (3) SCC 721, the Apex Court had held that that courts should examine whether the statement was voluntary.
- (b). In the case of Shrishail Nageshi Pare Vs. State of Maharashtra, AIR 1985 SC 866, the Apex Court had held that there should be corroboration from other independent sources;
- (c). that in the case of Premchand Vs. Central Bureau of Investigation, 1997 (1) EFR 374, Madhya Pradesh High Court that statement recorded has been done for gathering information or was meant for the purpose of recording the confession of the accused.
- (d). that the law concerning retraction was well settled by the Supreme Court in Sri Krishna V Kurukshetra University, AIR 1976 SC 376, wherein it is held that if the original statement suffers from any defects. the person is entitled to go back on the statement already made by making correct statement.
- (e). that the Supreme Court in *Basant Singh v. Janki Singh* AIR 1967 SC 341
- (f). *Pullangode Rubber Produce Co. Ltd. v. State of Kera/a* [1973] 91 ITR 18 (SC)
- (g). *Narayan Bhagwantrao Gosavi, Ba/ajiwale v. Gopal Vinayak Gosavi* AIR 1960 SC 100
- (f), *Satinder Kumar (HUF) v. CIT* [1977/ 106 ITR 64 (HP) d. Avadh

*Kishore Das v. Ram Gopa/ AIR 1979 SC 861*

*(g). Asst. CIT v. Jorawar Singh M. Rathod [2005] 148 Taxman 35 (Ahd. - Trib.) (Mag.)*

*(h). Surinder Pal Verma v. Asstt. CIT 12004] 89 ITD 129 (Chd.) (TM)*

*(i). Asstt. CIT v. Rameshchandra R. Patel [2004] 89 ITD 203 (Ahd.) (TM),*

*(j). Pangambam Kalanjoy Singh v. State of Manipur AIR 1956 SC 9. .*

*(k). Gyan Chand Jain v. ITO [2001] 73 TTJ (Jodh.) 859*

*(l). Hotel Kiran v. Asstt CIT [2002] 82 ITD 453 (Pune)*

- 5.03. that the pancha no 2 was not independent as he was the colleague of A2 and hence, panchnama dated 4-5-2015 should not be relied upon. Relying upon the landmark judgment of the Supreme Court in the case of State of Punjab v. Balbir Singh, A2 has contended that violation of mandatory provisions went against the very root of the merits of the case and vitiated the case. A2 has also relied upon the Supreme Court decision in the case of Kanu Ambu Vish v. State of Maharashtra AIR 1971 SC 2256, 1971 CriLJ 1547, (1971) 1 SCC 503 and a decision of the Division Bench of the said Court in the matter of Navinchandra Dungarshi Doshi vs. The State of Gujarat; that in view of the above, the entire investigation was unreliable and untrustworthy and, therefore, should not be relied upon.
- 5.04. that a comparative chart has been mentioned by the applicants highlighting perceived contradictions between the facts recorded in the panchanama and the statement, etc.
- 5.05. Call data records collected from the Service Providers could be relied upon as no details of its custody with the department had been provided; these devices could have been manipulated; the provisions of the Evidence Act had not been complied with; that a certificate by a senior person who was responsible for the computer on which the electronic record had been created, or was stored had not furnished to the applicants. Reliance was placed on the decision in the case of Delhi High Court in the case of Vikas Shukla vs Central Bureau Of Investigation
- 5.06. that the role of A5 had not been proved in the case by the department; except for the call records there was no other evidence against him; that department had relied upon the retracted statements of A1, A2, A3 and A4 against A5.; that A5 relied upon the case of Haricharan Kurmi v. State of Bihar [1964 (6) SCR 623] of the Apex Court where it

had been held that statement of the co-accused could not be used against an accused person.; reliance was also placed on the decision in the case of Supreme Court of India-Mohar Rai & Bharath Rai vs The State Of Bihar on 22 March, 1968 – [1968 AIR 1281, 1968 SCR (3) 525];

- 5.07. A3 was ignorant of the law and no penal action can be initiated against him; Reliance has been placed on the judgment of Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.
- 5.08. Role of A4 had not been proved. He had not implicated himself in his statement; there was no evidence against A4; that no offence had been made out against A4; Reliance was placed on Haricharan Kurmi v. State of Bihar [1964 (6) SCR 623]; Supreme Court of India case in r/o. Mohar Rai & Bharath Rai vs The State of Bihar on 22 March, 1968 - 1968 AIR 1281, 1968 SCR (3) 525
- 5.09. Addendum to Show Cause Notice dated 9-2-16 was not maintainable; that in the SCN dated 3-11-15 there was no proposal for confiscation of Rs 2,85,000/-. However, in the addendum it had been proposed to confiscate the said amount under Section 121 of Customs Act, 1962 as same was sale proceeds received for the smuggled gold effected at CSI Airport, Mumbai for earlier occasions; Reliance is placed on the decision of the Calcutta High Court in 1982 E.L.T. 902 (Cal.) in Kantilal Somchand Shah and Anr ; Delhi High Court in the case of Shanti Lal Mehta reported in 1983 E.L.T.
- 5.11. Adjudicating authority had not given an opportunity to crossexamine the panchas and Officers which was against the principles of natural justice; To buttress their contention, they have relied on case of Rajendra Bajaj Versus Commr of Customs (C.S.I. Airport), Mumbai Gunwantra Harivallabha Jani, ... vs Collector Of Central Excise on 20 February, 1987
- 5.12. A3 had claimed ownership of the gold under confiscation; that nobody else claimed ownership of the gold bars. Section 125 of Customs Act provides that option of redemption can be given in case the seized goods are not prohibited. Gold as such was not a prohibited item and could be imported. Such import was subject to certain conditions and restrictions including the necessity to declare the goods on arrival at the Customs Station and make payment of duty at the rate prescribed; they have relied on Andhra Pradesh High Court

in the case of Shaikh Jamal Basha vs Government of India -- 1992 (91) EL T 227(AP) has held that option to pay fine in lieu of confiscation has to be given to imported gold as the same is otherwise entitled to be imported on payment of duty; further reliance is placed on the following judgments wherein seized goods were released to the persons on payment of redemption fine;

(a). Halithu Ibrahim Vs Commissioner of Customs [2002 -TIOL 195-CESTAT-MAD]

(b) Felix DorexFernnees vs Commissioner of Customs [2002 TIOL-194- CESTAT-MUM]

(c) Yakub Ibrahim Yusuf Vs CC, Mumbai 201 (263) ELT 685 (Tri-Mumbai)

(d) RejiCheriyam Vs CC, Kochi

(e) P.Sinnasamy Vs CC, Chennai 2007 (220) ELT 308 (Tri-Chennai)

(f) Krishnakumari Vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai)

(g) S.Rajagopal Vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai)

(h) M Arumugam Vs CC, Tiruchirapalli, 2007 (220) ELT 311 (Tri-Chennai)

(i) Commissioner of Customs (Preventive) Vs. Uma Shankar Verma (2000 (120) E.L.T. 322 Cal.)

(j) T.Elavarasan vs The Commissioner of Customs,

(k) VP Hameed Vs Collector of Customs, Bombay {1994 (73) ELT 425}

(l) Kader Mydin vs Commissioner of Customs (Preventive), West Bengal {200 I (136) EL T 758}

(m) Sapna Sanjeev Kohli Vs Commissioner of Customs, Airport, Mumbai {2008(230) ELT 305}

(n) Vattakkal Moosa Vs Collector of Customs, Cochin {1994 (72) ELT 473 (GOI)}

(o) Order no 426/04 issued vide file no 380/57/8/2004-RA-Cus dated 21-9-2004 (p) In the case of K. Kuttiyandi v. Commissioner of Customs, Chennai (Appeal No. C/29/2000),

5.13. that the OIO and OIA were not on merits and not a speaking order; adequate findings have not been given; principles of natural justice have not been followed; that in Adjudicating order, the principles of natural justice as per case law of Meenakshi Associates Pvt. Ltd. v. CCE, Noida 2009 (1) TMI 552 - CESTAT, NEW DELHI and Afloat Textiles Pvt. Ltd. v. CCE, Vapi 2007 (7) TMI 444 - CESTAT, AHMED



ABAD have not been followed;

Reliance is placed on the following decisions;

(a).CESTAT, New Delhi in *Mis Sahara India TV Network Vs CCE, Noida.*

(b). Apex Court in the case of Joint Commissioner of Income Tax, Surat vs. Saheli Leasing & Industries Ltd., reported in 2010 (253) EL T 705 (S.C.) and in the case reported in 2010 (254) EL T 6 (S.C.)

(c).Supreme Court of India in the case of M/s. International Woolen Mills Ltd Vs. *Mis. Standard Wool (UK) Ltd,*

(d). In *Mis. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302,*

(e).In the case of *M/s. Travancore Rayons Ltd. vs. The Union of India and others, AIR 1971 SC 862,*

(f). In *M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758,*

(g).In *Siemens Engineering and Manufacturing Co. of India Ltd. vs. The Union of India and another, AIR 1976 SC 1785,*

5.14. Order of absolute confiscation of gold bars is not suatainable:

5.15. The Adjudicating Authority failed to follow the binding precedents:

5.16. The AA had failed to take into consideration the entire submission of the applicants;

Under the circumstances, (i). A3 has prayed that the absolute confiscation of the gold bars and the penalty of Rs. 10,00,000/- imposed on him under Section 112(a) and (b) of Customs Act, 1962 may be set aside. The gold bars may be ordered to be released on payment of applicable duty and further proceedings be dropped; (ii). A2 has prayed that the order of absolute confiscation of Rs 2,85,000/- u/s 121 of Customs Act, 1962 and imposition of penalty of Rs 5,00,000/- on him u/s 112(a) and (b) of Customs Act, 1962 may be set aside and that further proceedings may be dropped; (iii). A1, A4 and A5 have prayed that the imposition of penalty of Rs 5,00,000/- each on them u/s 112(a) and (b) of Customs Act, 1962 may be set aside and further proceedings may be dropped.

6. The applicants have filed an application for condonation of delay stating that there was a delay of 10 days in filing the revision application.

7. Personal hearing in the case was scheduled for 05.12.2022. Shri. Prakash Shingrani, Advocate, appeared for personal hearing on 05.12.2022 and reiterated earlier submissions. He further submitted that the gold was owned by the applicant and applicant is not a habitual offender. He requested to allow the release of the gold on reasonable fine and penalty.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 10.08.2018. The applicant has claimed that the OIA which is dated 26.04.2018 was issued by them on 26.04.2018, itself. Accordingly, the applicant was required to file the revision application within 3 months i.e. by 25.07.2018. Government notes that an extension period of 3 months was available to the applicant which would have expired on 23.10.2018. Government notes that the revision application was filed on 10.08.2018 which is well within the extension / condonable period i.e. 3 months + 3 months. Therefore, prayer for condonation of delay is accepted and Government condones the delay.

9. The Government has gone through the facts of the case, written submissions made by the applicant etc. A1 was intercepted as soon as he had deboarded the aircraft and had handed over the gold to A2 who was waiting for him near the deplaning area of the aircraft. A2 was an employee of the ground handling facility at the airport viz CelebiNAS and had access to the aircraft at the airport. Quantity of gold recovered from the packet was large and it was in primary form. The applicants together had devised an innovative modus operandi to smuggle gold by requisitioning the services of a person / employee i.e. A2 having access to the aircraft who would then take the gold from the passenger i.e. A1 and clear the gold without payment of Customs duty. By this act, it was clear that the applicants did not have an intention to declare the gold and pay Customs duty thereon. During the investigations, they had admitted to carrying the gold and that they had devised this plan to clear gold without

payment of duty. An ingenious method was adopted by them to smuggle the gold by transferring the gold from passenger i.e. A1 to ground staff i.e. A2. The applicants had no intention to declare the gold and pay Customs Duty. The large quantity of the gold bars was discovered only due to the information received and alertness shown by the Customs Officers. A3 had later claimed ownership of the gold bars. The applicants especially, A1 and A3 had not declared the gold bars as required under section 77 of the Customs Act, 1962. The quantity of gold recovered is quite large, of commercial quantity and in the form of bars / biscuits (of 1 tola each) and a clever, innovative method of transferring the gold was attempted to avoid detection and evade payment of duty. The confiscation of the gold is therefore, justified and the Applicants have rendered themselves liable for penal action.

10. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Sinnasamy reported in 2016 (344) E.L.T. 1154 (Mad.), relying on the judgment of the Apex Court in the case of Om Prakash Bhatia v. Commissioner of Customs, Delhi reported in 2003 (155) E.L.T. 423 (S.C.), has held that "*if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. .... Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.*" It is thus clear that gold, may not be one of the enumerated goods, as prohibited goods, still, if the conditions for such import are not complied with, then import of gold, would squarely fall under the definition, "prohibited goods".

11. Further, in para 47 of the said case the Hon'ble High Court has observed *"Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation....."*. Thus failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold "prohibited" and therefore liable for confiscation and the 'Applicants' thus liable for penalty.

12. 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. Raj Grow Impex [CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021]* 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.*

13. The main issue in the case is the quantum and manner in which the impugned gold was being brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever and innovative, quantity being large and commercial, there being clear attempt to smuggle gold bars i.e. gold in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. A1 in collusion with A3 had used an innovative plan to smuggle gold bars by transferring the same to a ground handling staff viz A2 who had undeterred access to the airport and could clear the gold without raising suspicion and thereby evade Customs duty. Had it not been for the alertness of the Officers, the applicants would have very well succeeded in their plans. Thus, considering the facts on record and the gravity of offence, the adjudicating authority had rightly ordered for the absolute confiscation of gold. The same was upheld by the appellate authority. In the instant case, an attempt to smuggle the gold bars was made using an innovative method. This clearly indicates that the applicants had no intention to declare the gold in their possession to Customs. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked.

14. The gold bars were found in the possession of A1 and he was about to hand it over to A2. Initially, A1 had claimed ownership of the gold and later A3 who had been travelling in the same flight as A1 had claimed ownership of the gold. The innovative plan to smuggle the gold bars had been hatched by A3 and the services of A1, A3, A4 and A5 had been taken by him. Investigations have revealed that all the 5 applicants were involved in this smuggling sortie. A1 had

carried the gold bars from Doha which had been handed over to him by A3 who too was in the flight from Doha to Mumbai. Thereafter, at the airport A2 was supposed to collect the gold bars and take it outside and hand it over to A4 who was waiting there. A5 who was the brother of A3 had introduced him to A4. A4 had contacts with A2 and had made him part of the plan, luring him with monetary consideration. A3 had contact with A1 who had agreed to carry the gold from Doha.

15. The applicants have raised that there were certain discrepancies in the drawal of the panchanama, that the pancha witness was not independent etc; that they had not been allowed to declare the gold bars; that they would have collected the money from outside the airport and then would have paid the duty, etc. All these were an afterthought to somehow obtain a favourable order. The fact remains that a large quantity of gold was recovered from the applicants. They had not declared the same and had used an ingenious method. In the OIO at paras 17,18 & 19, these discrepancies pointed out by the applicants have been discussed and dealt with. The AA too had dealt with this issue. This attempt of the applicants to take shelter of these discrepancies has been rightly negated by the OIO & OAA and Government observes that the same were minor and clerical in nature and that these do not alter the material fact that huge quantity of gold was recovered. Government is not inclined to give credence to this claim made by the applicants.

16. For the reasons cited above, Government finds that the OIO passed by the OAA is legal and proper and considering the gravity of the offence i.e. ingenuity, involvement of a ground handling staff which portends a grave danger to the security at the airport, the quantity of gold and type of gold i.e. seizure of gold bars in primary form, the OAA had used his discretion in absolutely confiscating the gold bars. The same has been rightly upheld by the AA. Government does not find it necessary to interfere in the same.

17. The Government notes that the appellate authority has upheld the penalty imposed by the adjudicating authority under Section 112 (a) and (b) of the Customs Act, 1962. The Government is in agreement with the penal action, however, finds that the quantum of penalty imposed on each of the applicants is harsh and excessive and not commensurate with the omissions and commissions committed and is inclined to reduce the same.

18. On the issue of the absolute confiscation of the cash amount of Rs. 2,85,000/- recovered from the residence of A2 as part of proceeds received from smuggled gold and ordered to be absolutely confiscated under Section 121 of the Customs Act, 1962, Government notes that investigations carried out did not come out with any evidence that the same had been generated from the previous smuggling activity. Government is inclined to set aside the absolute confiscation of the cash amount of Rs. 2,85,000/-

19. The order of the Appellate authority is therefore modified as under;

- (a). the absolute confiscation of the 36 gold bars of 10 tolas each (i.e. 116 grams each), totally weighing 4197 grams, and valued at Rs. 1,03,83,105/- is upheld. i.e. Government is not inclined to interfere in the absolute confiscation of the said 36 gold bars as ordered by the OAA and upheld by the AA.
- (b). the cash amount of Rs. 2,85,000/- recovered from the residence of A2 and ordered to be absolutely confiscated by OAA under Section 121 of the Customs Act, 1962 as proceeds from smuggling of gold, and upheld by AA, is set aside.
- (c). penalty of Rs. 10,00,000/- imposed by OAA under Section 112(a) and (b) of the Customs Act, 1962 imposed on A1 and upheld by AA, is reduced to Rs. 5,00,000/- (Rupees Five Lakhs Only);
- (d). penalty of Rs. 10,00,000/- imposed by OAA under Section 112(a) and (b) of the Customs Act, 1962 impose on A3 and upheld by AA, is reduced to Rs. 5,00,000/- (Rupees Five Lakhs Only);
- (e). penalty of Rs. 5,00,000/- imposed by OAA under Section 112(a) of the Customs Act, 1962 impose on A2 and upheld by AA, is reduced to Rs. 2,00,000/- (Rupees Two Lakhs Only);

- (f). penalty of Rs. 5,00,000/- imposed by OAA under Section 112(a) and (b) of the Customs Act, 1962 impose on A4 and upheld by AA, is reduced to Rs. 2,00,000/- (Rupees Two Lakhs Only);
- (g). penalty of Rs. 5,00,000/- imposed by OAA under Section 112(a) of the Customs Act, 1962 impose on A5 and upheld by AA, is reduced to Rs. 2,00,000/- (Rupees Two Lakhs Only);

20. Accordingly, the five Revision Applications are partly allowed on the above terms.

  
( SHRAWAN KUMAR)

Principal Commissioner & ex-officio  
Additional Secretary to Government of India

ORDER No. <sup>228-232</sup> /2023-CUS (WZ) /ASRA/MUMBAI DATED 02.02.2023.

To,

1. **Shri. Waqaas Abdul Hamid Shaikh**, S/o. Shri. Shaikh Abdul Hamid Shaikh, 79/81, 24 floor, R.No.7, TANTANPUA St., Kadak Rd, MUMBAI - 400 009.,
2. **Shri. James Jesson John**, S/o. Shri. John Chacko, Bldg.no.12, R.No.419, Wadi Estate, Bail Bazar, Kurla (W) MUMBAI - 400 070.,
3. **Shri. Mukesh G. Pahuja**, S/o. Shri. Girdharilal Pahiljimal Pahuja, 388, Virgo Heights, Flat no. 1001, 10 fl.,16h RD, Bandra(W) MUMBAI - 400 050.,
4. **Shri. Sahebzade N. Khan**, S/o. Nissar Khan, Flat no,1007, 104 floor, Zainab Tower, Maulana Azad rd, Nagpada, MUMBAI 400 008.,
5. **Shri. Naresh G. Pahuja**, S/o. Shri. Girdharilal Pahiljimal Pahuja, 388, Virgo Heights, Flat no. 1001, 10 fl.,16h RD, Bandra(W) MUMBAI - 400 050.
6. **Pr. Commissioner of Customs**, Terminal - 2, Level-2, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

1. Shri. Prakash K. Shingrani, 12/334, Vivek, New MIG Colony, Bandra West, Mumbai : 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.