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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/114/B/2019-RA / 1038 : Date of Issue 15.02.2023

ORDER NO. 236 /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.

Applicant : Shri. Wasim Rafiq Lakdawala

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal Nos.
MUM-CUSTOM-PAX-APP-1027/2018-19 dated 23.01.2019
Issued on 28.01.2019 through F.No. (S/49-313/2017/AP)
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Wasim Rafiq Lakdawala (herein referred to as Applicant) against the Order-in-Appeal Nos. MUM-CUSTOM-PAX-APP-1027/2018-19 dated 23.01.2019 issued on 28.01.2019 through F.No. (S/49-313/2017/AP) passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Briefly stated the facts of the case are that the Applicant a domestic passenger, was intercepted when he disembarked from the aircraft at the Chhatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai on 11.02.2016 which had arrived from Delhi. The applicant was in possession of a black coloured trolley bag and had no checked-in baggage. The applicant arrived from Delhi as a domestic passenger onboard Air India Flight No. AI-865 / 11.02.2016. Applicant was asked whether he was carrying any prohibited, restricted or dutiable goods like gold, silver etc, to which he had replied in the negative. Nothing incriminating was found during the search of the applicant. The applicant was asked to remove his shoes. The shoes were found to be unusually heavy. Thereafter, 12 packets were recovered from under the flap of the sole of each shoe i.e. 24 packets were recovered. Initial examination of the applicant had been carried out at the point of disembarkation, itself and thereafter, the applicant was taken to the office. Nothing incriminating was found in the trolley bag of the applicant. The 24 packets were cut open and 24 cut pieces of gold bars of various shapes and sizes were recovered. Each of the cut pieces were weighed and numbered. From the left shoe worn by the applicant, a total of 12 cut pieces of gold bars of various sizes, shapes and weights, collectively weighing 1601 grams of gold were recovered. Similarly, from the right shoe worn by the applicant, another 12 cut pieces of gold bars of various sizes, shapes and weights, collectively weighing 1515 grams were recovered. Thus, in all, 24 cut pieces of gold bars, totally weighing 3116 grams, provisionally valued at Rs. 82,75,660/- were recovered from both the shoes worn by the applicant.

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant revealed that the gold did not belong to him and he had been instructed to fly to Delhi immediately and at Delhi he had been instructed to board Air India Flight No. AI-865 departing at 10:00 Hrs on 11.02.2016 to Mumbai. He was also instructed to reserve seat no. 26D in the said flight AI-865 and that below the seat no. 26D, a life jacket had been kept and that there he would find two packets containing gold bars. He was instructed to take these two packets and keep the gold bars inside his shoes. At Mumbai he was directed to hand over the packets containing the gold bars to a person who would contact him; that he booked an air ticket from Mumbai to Delhi by GoAir departing to Delhi on 11.02.2016 at 06:00 hrs and had also booked an air ticket from Delhi to Mumbai by Air India Flight AI-865 / 11.02.2016 departing at 10:00 hrs on 11.02.2016 itself, from Delhi; that he had reserved seat no. 26D on the said flight; that he had booked tickets online and had used his ICICI Credit card; that while at Delhi, he had received further instructions that the alphabet 'G' would be painted on the tail of the Air India aircraft which he was required to board; that he had done exactly as told; that before boarding the flight, he had noticed alphabet 'G' was written on the tail of the aircraft; that he occupied seat no. 26D; that when the flight was mid-air, he checked below the seat and found that the life jacket was kept which had two packets wrapped in black cellophane tapes; that he took these packets inside the toilet of the aircraft and on opening it found 24 pieces of gold bars wrapped with cellophane tapes; that he cleverly concealed these gold bars inside his sports shoes; that the gold bars does not belong to him and that he had agreed to carry the same for a monetary consideration.

2(c). The gold bars were assayed by a Government Approved Valuer who certified that out of the 24 cut pieces of gold bars, 4 pieces of gold bars weighing 233.3 grams were of 999% (24 karats) purity and the remaining 20 pieces, totally weighing 2882.7 grams were of 995% purity i.e 23.86 karats and the same collectively, were valued at Rs. 82,37,381/-.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/566/2016-17 dated 24.03.2017 through F.No. S/14-5-71/2016-17 ADJN [SD/INT/AIU/26/2016-AP'A] ordered for the absolute confiscation of the 24 cut pieces of gold bars having foreign markings, collectively weighing 3116 grams, valued at Rs. 82,37,381/- under Section 111(d), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 8,00,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4(a). Aggrieved by the said order, the applicant filed appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide his Order-in-Appeal Nos. MUM-CUSTM-PAX-APP-1027/2018-19 dated 23.01.2019 issued on 28.01.2019 through F.No. (S/49-313/2017/AP) rejected the appeal holding it to be devoid of any merits.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.01. that the applicant was engaged in the business of selling computers and laptops through online portals like e-bay and earned around Rs 20,000/- to Rs 25,000/- per month approximately; that he was in need of money for the treatment of his son; that his acquaintance a person named Mr Lovely Singh Budwaj suggested to buy and sell gold and precious stones on commission basis and could earn a good income; that he offered to supply gold on 15 days credit and on a commission of Rs 10 per gram; that he agreed to the same; that this person called him and told him to meet him in the morning at Delhi Airport on 11-2-2016 to take delivery of the gold and to return back to Mumbai on the same day; that on 10-2-16, he booked his ticket by Go Air flight G8 329 from Mumbai-Delhi on 11-2-16 which was to leave from Mumbai at 6.00 AM; that he also booked his return ticket by Air India flight AI-865 on 11-2-2016 which was to depart from Delhi at 10.00 AM; that he reserved seat no 26D; that on 11.02.2016, Shri. Lovely Singh Budwaj was already waiting outside the terminal 1C and handed over a plastic bag and told him that it

contained 24 cut pieces of gold packed in 24 packets totally weighing 3116 grams and valued at Rs 82.75 lakhs; that a kachcha bill for the gold was given to him; that he told him to carry the gold safely to Mumbai and to sell the gold at the market rate in Mumbai and to deliver him the sale proceeds; that after security check he went to the rest room and kept 12 packets each under the flaps of the PUMA brand shoes he was wearing; that upon arrival at Mumbai he was intercepted by Customs Officers; that to query whether he was carrying any gold, he had replied in the negative as he was afraid to tell them; that no panchas witnessed the proceedings; that the panchnama dated 11-2-2016 cannot be considered as a valid document; that his statement dated 11.02.2016 was involuntary and should not have been relied upon; that he had been intercepted from a domestic flight; that his statement was not voluntary; that involuntary statement cannot be used as evidence; that Flight AI-865 was only a domestic flight and not an international; that the seized gold was not foreign gold; that Air India also operated domestic flights from T-3 Terminal, IGI Airport, New Delhi; that there was no proof that the flight AI-865 had operated as an international flight before the domestic flight from New Delhi to Mumbai on 11-2-2016; that the inference that gold had been concealed by an International passenger had not been drawn by the investigating agency; that the international passenger had not been investigate by department; that the Government Approved Valuer who had assayed and valued the cut pieces of gold had not certified the gold pieces as of foreign origin; that no investigation had been conducted to prove that such kind of bars are not available for sale in the open market in Delhi or in any other place in India; that the goods under seizure were not foreign goods; that no evidence had been provided by investigating agency that the applicant had arrived at New Delhi from a foreign location; that the onus to prove the goods were smuggled goods shifted to revenue;

5.02. that on the issue off burden of proof of foreign goods and mere marking of foreign goods did not render the goods to be smuggled, the applicant has placed reliance on the following cases.

- (a) Aslam Noor Mohammed v. CCs - 2004 (169) E.L.T. 243 (Mumbai),
- (b) V. Muniyandi v. CCs, Chennai - 2004 (167) E.L.T. 215 (Chennai),
- (c) Commissioner of Customs v. J.T. Parekh 2004 (167) E.L.T. 77 (Mumbai),
- (d) Ravinder Khurana v. CCs, Delhi - 2003 (161) E.L.T. 360,
- (e) Sadbhavana v. Commissioner of Customs - 2003 (158) E.L.T. 652 New Delhi,

- (f) Commissioner of Customs v. National Radio Products 2003 (156) E.L.T. 908,
- (g) Commissioner of Customs v. Monoranjan Bainik - 2004 (165) E.L.T. 237,
- (h) Godari Rai v. Commissioner of Customs - 2003 (160) E.L.T. 1027,
- (i) Dipak Deb - 2003 (157) E.L.T. 237,
- (j) Laxmi Narayana Somani v. Commissioner of Customs 2003 (156) E.L.T. 131,
- (k) Jitendra Pawar v. Commissioner of Customs - 2003 (156) E.L.T. 622,
- (l) M/s AG International Vs CC, Allahabad (Dated: September 19, 2011) Customs - Smuggled Goods -

5.03. that the applicant had not committed any offence and had been falsely implicated of smuggling on basis of suspicion, presumption and assumption and hence, impugned OIO was unsustainable in law,

5.04. that the seizure of the gold bars was illegal; that applicant was not involved in any smuggling activity; that the gold was not liable for confiscation; that applicant was only a domestic passenger and therefore there was no need for him to declare the gold to Customs as under Section 77 of Customs Act, 1962; that In the present case, the gold pieces cannot be considered as 'imported goods' since they had already been cleared for home consumption and were collected by the applicant; that the gold pieces carried by the applicant could not be considered as 'prohibited goods' since the Department failed to bring on record any proof that the gold pieces were imported in violation of the conditions of such importation; that Section 2(33) of Customs Act, 1962 was not applicable in this case.; that Section 77 of Customs Act, 1962 applies only to an international passenger; that the applicant in this case was a domestic passenger; that a domestic passenger was not required to file any declaration under Section 77 of Customs Act, 1962; that since the gold pieces were locally purchased and there is no proof that they were smuggled goods therefore, they are not liable for confiscation; that since the gold is not liable for confiscation, the applicant was not liable for any penal action under section 112(a) and (b) of Customs Act, 1962; that Tribunal's decision in the case of S.K Chains reported in 2000 (09) LCX0202 Eg 2001 (127) ELT 415 (T) was applicable to them;

5.05. that since the repeal of the Gold (Control) Act in 1968, there was no legal requirement for the buyers and sellers of gold to maintain any registers nor is there any requirement to issue invoices under any Central Act. Reliance is placed on the decisions in the following cases.

- (i) Samir Kumar Roy v. CC (Prev.), Calcutta - 2001 (135) E.L.T. 1036 (T)
- (ii) Rup Chand Jain v. CC (Prev.), Calcutta 1996 (88) E.L.T. 335 (Cal.)

- (iii) DhunDarbashawRanderiav. CC (Prev.), Mumbai - 2001 (136) E.L.T. 1136 (T)
- 5.06. that all the allegations against the applicant had not been proved; Reliance was placed on the judgment of Bombay High Court in the case of the State of Maharashtra vs Laxmichand Varhomal Chugani on 31 August, 1977 on the issue of carrier who was not in the nefarious trade of smuggling.
- 5.07. The applicant has relied on the following case laws on the issue of foreign markings on the gold was alone not enough to show that the applicant had indulged in smuggling;
- (a) Hon'ble Calcutta High Court in the case reported in AIR 1952 (Cal.) p. 789,
 - (b) Hon'ble A.P. High Court in the case of M/s. Innovation Secunderabad & Another v. Central Board of Customs and Excise.
 - (c) The Tribunal in the case of Harvinder Singh Katra (sic) v. Collector Customs, Bombay, reported in 1986 (26) E.L.T. 792,
 - (d) The Tribunal in the case of Collector of Customs v. Jagdish Chandra Laxidas Sharma, reported in 1988 (37) E.L.T. 358,
 - (e) The Tribunal in the case of Hindustan Bearing Corporation v. Collector Customs, reported in 1990 (50) E.L.T. 91
 - (f) Bachcha Prasad v. Collector of Customs, reported in 1988 (37) E.L.T. 269.
 - (g) The Tribunal in the case of C.C.E., Allahabad v. Anoop Kumar Agarwal, reported in 1997 (91) E.L.T. 63,
- 5.08. that the case was made only on presumption; that the applicant's guilt was not proved in this case; that the allegations made in the SCN were based merely on assumption and presumption and uncorroborated and unsupported statements of the noticee, which cannot be any basis to sustain such grave allegations; that there was no ingenious concealment; that they have relied on the following case laws;
- (a) Topandas Vs. State of Bombay A.I.R. 1956 SC 33,
 - (b) Vinayak Vs. State of Maharashtra (1984) 4 SCC
 - (c) The King v. Plummer ([1902] 2 K.B. 339)
 - (d) In Gulab Singh v. The Emperor (A.I.R. 1916 All. 141)
 - (e) In King-Emperor v Osman Sardar (A.I.R. 1924 Cal. 809),
 - (f) The Apex Court in Girija Shankar Misra v, State of U. P. AIR 1993 SC 2618,
 - (g) The Apex Court in Fakhruddin v The State of Madhya Pradesh AIR 1967 SC 1326: (1967 Cri LJ 1197).
 - (h) In the case of Orissa High Court, Ghanashyam Jena vs State Of Orissa on 22 August, 2003 Equivalent citations: 2003 CriLJ 4794

- 5.09. that OIA was not an order on merits and not a speaking order; that an OIA should be in accordance with judicial discipline; that they have also relied upon on the following case laws;
- (a) CESTAT, New Delhi in M/Sahara India TV Network Vs CCE, Noida,
 - (b) Apex Court in the case of Joint Commissioner of Income Tax, Surat vs. Saheli Leasin & Industries Ltd., reported in 2010 (253) ELT 705 (S.C.) and in the case reported in 2010 (254) ELT 6 (S.C.);
 - (c) CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad.
 - (d) M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur,
 - (e) Gujarat High Court -Union of India vs Sri Kumar Agencies reported on 1 December, 2010,
 - (f) The judgment of the Supreme Court of India in the case of M/s. International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd,
 - (g) Supreme Court's direction in the case of Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan(Citation:- 2011 (273) ELT 345 (SC)),
 - (h) The Supreme Court in the case of SSE Hari Nagar Sugar Mills Ltd.,
 - (i) Shyam Sundar Jhunjhunwala (A.I.R. 1961 S.C. 1669) ,
 - (j) Supreme Court in Bhagat Raja case [A.I.R. 1957 S.C. 1606
- 5.10. that opportunity of cross examination was not given to them; that OIA was not maintainable; that neither in the seizure panchnama dated 11-2-2016 nor in the Show Cause Notice dated 9-8-2016 there was a mention about flight no AI-383 from Singapore to Delhi.; that it was not known how the learned Commissioner of Customs (Appeals) got the flight no AI-383 from Singapore to Delhi?; that how a definitive conclusion that the said Air India flight AI-383 which arrived Delhi from Singapore on 11-2-16 was then operated as a domestic flight from New Delhi to Mumbai as flight no AI-865 on the same day, was arrived at; that the vital point in the present case for consideration is that Flight no AI-383 is Boeing 787-8 788 (a Dreamliner)- wide body with a seating capacity of 256 passengers whereas, flight no AI-865 is Airbus A320 neo- narrow body flight with a seating capacity of 180 passengers.
- 5.11. that the investigation had not brought any evidence that the domestic flight AI 865 dated 11-2-2016 from Delhi to Mumbai had earlier arrived from any international origin or Singapore. The observation of the Commissioner of Customs (Appeals) that the gold was smuggled from Singapore via international leg of the flight is without any proof. It is only the assumption and presumption of the Commissioner of Customs (Appeals); that passenger who had occupied the seat no 26D had not been traced out and questioned; that the Investigation had failed to bring out any evidence that Mr Lovely Singh Budwaj travelled by the said flight

in its international leg (from Singapore to New Delhi) and was allotted seat no 26D.

5.12. Reliance is placed on the following decisions:

- (a) Aslam Noor Mohammed v. CCs - 2004 (169) E.L.T. 243 (Mumbai)
- (b) V. Muniyandi v. CCs, Chennai - 2004 (167) E.L.T. 215 (Chennai)
- (c) Commissioner of Customs v. J.T. Parekh 2004 (167) E.L.T. 77 (Mumbai)
- (d) Ravinder Khurana v. CCs, Delhi - 2003 (161) E.L.T. 360
- (e) Sadbhavana v. Commissioner of Customs - 2003 (158) E.L.T. 652 New Delhi
- (f) Commissioner of Customs v. National Radio Products - 2003 (156) E.L.T. 908
- (g) The Tribunal in the case of S.K. Chains v. Commissioner of Customs (Prev), Mumbai reported in 2001 (127) E.L.T 415 (Tri. Mum.)

5.13. Reliance is also placed on the following decisions:

- (a) RAJENDRA BAJAJ Versus COMMR. OF CUS. (C.S.I. AIRPORT),
- (b) Gunwantra Harivallabha Jani, ... vs Collector Of Central Excise

5.14. that even in the following cases where the allegation of smuggling had been proved, the owners of the gold were given the opportunity for redemption of the gold.

- 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 2011 (263) ELT 685 (Tri-Mumbai),
- d). Reji Cheriyan 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). Shaik Jamal Basha V. Government of India (1997(91) E.L.T. 277 (A.P.),
- 10. 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 12001 (136) ELT 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 21.09.2004,

p). In the case of K. Kuttiyandi v. Commissioner of Customs, Chennai (Appeal No. C/29/2000), CESTAT Bench

- 5.16. that the applicant is a law-abiding citizen / businessman and he has never come under any adverse remarks; that he has been falsely implicated in the case of smuggling; that the case under the panchnama was falsified against him; that the case of smuggling was not proved against him; that his statements with incorrect facts had been recorded; that applicant was the owner of the gold.

Applicant has prayed to the revision authority to set aside the impugned Order-In-Appeal Original and to release the gold unconditionally and penalty imposed on him may be set aside.

6. Personal hearings in the case through the video conferencing mode was scheduled for 23.08.2022. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 23.08.2022 on behalf of the applicant. He submitted that gold is not prohibited goods, that concealment was for security and applicant is not habitual offender; He requested to release the goods on nominal RF and penalty.

7.1. The relevant sections of the Customs Act are reproduced below :

Section 2(33)

"prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but 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"

Section 123. Burden of proof in certain cases. -

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person,

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

Section 125

Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it *may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :*

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, the provisions of this section shall not apply :

Provided further that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

(3) Where the fine imposed under sub-section (1) is not paid within a period of one hundred and twenty days from the date of option given thereunder, such option shall become void, unless an appeal against such order is pending.

7.2. It is undisputed that as per the Foreign Trade Policy applicable during the period, gold was not freely importable and it could be imported only by the banks authorized by the RBI or by others authorized by DGFT and to some

extent by passengers. Therefore, gold which is a restricted item for import but which was imported without fulfilling the conditions for import becomes a prohibited goods in terms of Section 2(33) and hence it was liable for confiscation under Section 111(d) of the Customs Act. Section 123 places burden of proof on the person from whom gold is seized. Investigation revealed that the applicant could not discharge that burden. Therefore, the gold was liable for confiscation under these Sections.

8.1. 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".

8.2. 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.

9. A plain reading of the section 125 shows that the Adjudicating Authority is bound to give an option of redemption when goods are not subjected to any prohibition. In case of prohibited goods, such as, the gold, the Adjudicating Authority may allow redemption. There is no bar on the Adjudicating Authority allowing redemption of prohibited goods. This exercise of discretion will depend on the nature of the goods and the nature of the prohibition. For instance, spurious drugs, arms, ammunition, hazardous goods, contaminated flora or fauna, food which does not meet the food safety standards, etc. are harmful to the society if allowed to find their way into the domestic market. On the other hand, release of certain goods on redemption fine, even though the same becomes prohibited as conditions of import have not been satisfied, may not be harmful to the society at large. Thus, adjudicating authority can allow redemption under Section 125 of any goods which are prohibited either under the Customs Act or any other law on payment of fine but he is not bound to so release the goods.

10. 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.

11. Government has gone through the facts of the case, written submissions made by the applicant, etc. Government notes that the applicant was travelling in the domestic sector and had not come to India from abroad.

12. Case of the respondent is that gold had been concealed under the seat of the aircraft, that the applicant had removed the same and was attempting to take it outside without filing a declaration, that the quantity of gold was large and was in primary form of high purity, in the shape of cut pieces of the gold bars, that the applicant who had carried the gold in the domestic sector had no intention to declare the gold in his possession and had used the concealment and the domestic sector in a pre-planned and deliberate manner to hoodwink the law implementing authorities. Gold recovered did not bear foreign markings and it was not of uniform shape and size. Investigation could not establish any link with an international passenger. However, fact remains that applicant could not discharge the burden of presumption of being smuggled goods under Section 123 of the Customs Act, 1962.

13. The Government notes that the applicant has refuted the afore-stated contentions raised by the respondent; primarily stating that the statements given by him had been retracted; that he was travelling in the domestic sector; that the gold were local purchases and not imported from abroad; that the same were

concealed only for the purpose of security; that he had been intercepted when he had just deboarded from the aircraft and as a domestic passenger he was not required to file a declaration as the gold was not imported; that an element that the domestic flight AI 865 was earlier an international flight AI 383 in the Singapore to Mumbai sector had been brought in suo moto by the AA in the OIA; that this new grounds / element brought by the AA was false; that the applicant has claimed that the aircraft operated in the said two flights i.e. AI-865 in domestic sector and AI 383 in the international sector were different; in the domestic sector the aircraft was an Airbus A320 neo- narrow body flight with a seating capacity of 180 passengers while in the international sector it was a was a Boeing 787-8 788 (a Dreamliner)- wide body with a seating capacity of 256 passengers; that prior to the domestic leg of AI 865 it was an international flight had not been investigated by the the respondent.

14(a). The details of the seized gold bars are reproduced below;

TABLE NO. 01.

Sl. No.	DESCRIPTION OF THE GOLD RECOVERED FROM THE LEFT SHOE	WEIGHT (in grams).
1.	01 Cut piece of gold bar with mark '1KILO 995.0' embossed on it.	239
2.	01 Cut piece of gold bar with mark '995 MELTER ASSAYER' embossed on it.	255
3.	01 Cut piece of gold bar with mark '1KILO 995.0' embossed on it.	240
4.	01 Cut piece of gold bar with mark 'D 11' embossed on it.	141
5.	01 Cut piece of gold bar with mark '1K' embossed on it.	134
6.	01 Cut piece of gold bar with mark 'O' embossed on it.	114
7.	01 Cut piece of gold bar with mark 'O' embossed on it.	129
8.	01 Cut piece of gold bar with mark 'AL ETI' embossed on it.	93
9.	01 Cut piece of gold bar with mark '10' embossed on it.	68
10.	01 Cut piece of gold bar.	68
11.	01 Cut piece of gold bar with mark 'UAE Tola 9.0' embossed on it.	62
12.	01 Cut piece of gold bar with mark 'OLAS.0' embossed on it.	58
TOTAL WEIGHT		1601
Sl. No.	DESCRIPTION OF THE GOLD RECOVERED FROM THE RIGHT SHOE	WEIGHT (in grams).
13.	01 Cut piece of gold bar with mark 'EMIRATES' embossed on it.	270

14.	01 Cut piece of gold bar with mark 'Gold 995.0 MELTER' embossed on it.	260
15.	01 Cut piece of gold bar with mark 'ASSAYER D 161310' embossed on it.	237
16.	01 Cut piece of gold bar with mark 'YSS E04' embossed on it.	116
17.	01 Cut piece of gold bar with mark '1K GO' embossed on it.	103
18.	01 Cut piece of gold bar with mark 'LO LD' embossed on it.	96
19.	01 Cut piece of gold bar with mark 'LO LD' embossed on it.	95
20.	01 Cut piece of gold bar with mark 'AD GOLD' embossed on it.	103
21.	01 Cut piece of gold bar with mark 'ai' embossed on it.	55
22.	01 Cut piece of gold bar with mark 'RG LAS.0 LETR SAYER' embossed on it.	57
23.	01 Cut piece of gold bar with mark 'A 10 T 99 ARG' embossed on it.	58
24.	01 Cut piece of gold bar with mark '1 DU' embossed on it.	65
TOTAL WEIGHT		1515
Thus, the gross total weight of 24 cu pieces of gold bars recovered from left and right shoe has come to 3116 grams.		

14(b). From the above Table No. 01, Government notes that substantial quantity of the gold do not have any marking which would be alluded to be foreign marking. Though words such as 'UAE', 'Emirates' etc were found on small quantity of the gold, the investigating agency have not established that these marks such as 'UAE', 'Emirates' etc are a standard marks of foreign gold. In the absence of a standard foreign marks on the gold, Government notes that merely based on markings, these gold bars cannot be stated with certainty to be foreign gold bars.

15. Government notes that in the OIO passed by the OAA, the fact that the gold bars had been imported have not been discussed conclusively. Also, the new element about the flight no of the international flight prior to the domestic flight was brought in by the AA in the OIA. The applicant in his averments has refuted this observation made suo moto by the AA in the OIA and has stated that aircrafts used in both these flights were different i.e. AI Flight no. 383 which had operated on the Singapore to Mumbai sector, prior to being re-designated as AI flight no. 865 in the domestic sector was a Boeing 787-8 788 (a Dreamliner) whereas the aircraft used in the domestic leg on which the applicant had travelled was an Airbus A320 Neo. The same have not been refuted by the respondent before the Revisionary Authority.

16. Government notes that the investigating agency had not produced any evidence conclusively establishing that the seized gold had been smuggled into India. Investigations had not brought out that the aircraft used in the domestic flight had earlier operated as an International flight. This was crucial since the case was that applicant had picked up the gold bars from underneath seat no. 26D of the domestic flight where the same had been kept concealed. It was essential to prove that the flight prior to its changeover to the domestic sector had operated on an International sector or there was some earlier link of this domestic flight to an International sector.

17. As discussed above, both on the issue of the gold having foreign marks and origin of the flight from abroad, Government finds that there is lack of evidence to clearly conclude that the gold bars were indeed smuggled into the country. In these circumstances, absolute confiscation of gold leading to dispossession of the applicant is harsh and excessive.

18. Government notes that the fact remains that a considerable quantity of gold was recovered from the possession of the applicant. As discussed in the preceding paras, as required under Section 123 of the Customs Act, 1962, the onus to prove that the gold was not smuggled was on the applicant. During the investigation stage, the applicant had failed to produce any document or any credible evidence to show that he had made local purchases of the gold. In absence of any such evidence by the applicant, gold is presumed to be smuggled as per Section 123 of Customs Act, 1962. Thus, applicant had made himself liable for penalty under Section 112(a) & (b) of the Customs Act, 1962. Considering above factual matrix, Government is inclined to set aside the absolute confiscation and grant an option to the applicant to redeem the gold bars as mentioned at Table No. 1 above, valued at Rs. 82,37,381/- on payment of a redemption fine, penalty and applicable duty. Government notes that the quantum of penalty of Rs. 8,00,000/- imposed on the applicant is slightly harsh and is inclined to marginally reduce the same.

19. For the aforesaid reasons, Government modifies the impugned Order-In-Appeal No. MUM-CUSTM-PAX-APP-1027/2018-19 dated 23.01.2019 as under;

- (i). Government sets aside the absolute confiscation of 24 cut pieces of gold bars as mentioned at Table no. 01 above, totally weighing 3116 grams and valued at Rs. 82,37,381/- and the same is allowed to be redeemed on payment of a redemption fine of Rs. 13,50,000/- (Rupees Thirteen Lakhs Fifty Thousand only),
- (ii). The penalty of Rs. 8,00,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is reduced to Rs. 6,00,000/- (Rupees Six Lakhs only).

20. The Revision Application is decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 236 /2023-CUS (WZ)/ASRA/MUMBAI DATED 13 .02.2023

To,

1. Shri. Wasim Rafiq Lakdawala, Flat No. 2502, 25th Floor, Klassic Tower, Anand Rao Naik Road, Mumbai Central (East), Mumbai - 400 011.
2. Principal Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal-2, Level-II, Sahar, Andheri, East, Mumbai - 400 099.

Copy to:

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