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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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(i). F.No. 371/46/B/2014-RA : Date of Issue : 05.09.2022  
(ii). F.No. 371/45/B/2014-RA / 2909

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ORDER No. <sup>246-</sup>247 /2022-CUS (WZ/SZ)/ASRA/ DATED. 30.08.2022. 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.

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(i). F.No. 371/46/B/2014-RA

Applicant : Shri. Viraj P. Shah,

(ii). F.No. 371/45/B/2014-RA

Applicant : Shri. Jayesh B. Patel.

Respondent : Pr. Commissioner of Customs, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. 145-  
146/2009/ Cus/Commr(A)/Ahd dated 30.06.2009 issued  
through F.No. S/49-144/Cus/ Ahd/2008 and S/49-  
145/Cus/Ahd passed by the ommissioner of Customs  
(Appeals), Ahmedabad.

ORDER

These two revision applications have been filed by (i). Shri. Viraj P. Shah and (ii). Shri. Jayesh B. Patel (herein referred to as the Applicants or alternately as Applicant No. 1 and Applicant No. 2 resp.) against the Order-in-Appeal No. 145-146/2009/ Cus/Commr(A)/Ahd dated 30.06.2009 issued through F.No. S/49-144/Cus/ Ahd/2008 and S/49-145/Cus/Ahd passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that on 01.07.2003, DRI, Ahmedabad intercepted the applicant no. 1 (Viraj Shah) alongwith Shri. Shaikh Mohammed Shafi and Miss. Shafrin Shaikh at the Customs gate, after they had arrived at SVP International Airport, Ahmedabad from Dubai by Air India Flight No. AI-144/01.07.2003. They had not declared any dutiable goods in their declaration form filed before the Customs authorities under the provisions of Section 77 of the Customs Act, 1962. On inquiry, they informed that except for their cabin baggage they did not have any checked in baggage. On search of their person, baggage tags were found with both the applicant no. 1 and Shri. Shaikh Mohammed Shafi. Nothing incriminating was found on Miss Shafrin Shaikh. On the basis of the baggage tags found on the applicant no 1 and the other person, the baggages were identified and examined. Restricted pharmaceutical medicines as listed at para 2.1 {[A] and [B]} below, in commercial quantity valued at Rs. 4,74,750/- and Rs. 14,75,000/- resp. were found in the baggage of applicant no. 1 and Shri. Shaikh Mohammed Shafi resp. On being asked, the applicant no. 1 and the other person were unable to produce any licit document/import license in respect of the recovered medicines, and therefore, the same were seized. On interrogation, both the persons i.e applicant no. 1 and Shri. Shaikh Mohammed Shafi revealed that the applicant no. 2 i.e. Shri. Jayant Patel, was the main financier and organizer who had attempted to smuggle the restricted pharmaceutical medicines from

Dubai with the assistance of one Shri Ashfaq (mamu). Applicant no. 1 had been introduced to Mamu by Applicant no. 2 while Mamu had arranged for the one-way ticket of Shaikh Mohammed Shafi and Miss Shafrin Shaikh to Ahmedabad.

2.1. Details of goods, seized.

DESCRIPTION, QUANTITY, MARKET VALUE OF THE GOODS VIZ.  
PHARMACEUTICAL MEDICINES SEIZED ON 01.07.2003 AT SVP  
INTERNATIONAL AIRPORT BY THE OFFICERS OF DRI, AHMEDABAD.

[A]. Details showing the description, quantity, market value of pharmaceutical medicines seized from the baggage of Shri. Viraj P. Shah.

Sr. no.	Description of medicines	Quantity	Market value per unit (Rs.)	Total Market value (Rs.)
1.	Human Albumin 20% low salt content	15 packs of 100 ml each.	1500.00	22,500.00
2.	Truspot, 2% Sterile Ophthalmic Solution	670 packs of 5ml each.	675.00	4,52,250.00
			TOTAL :	4,74,750.00

[B]. Details showing the description, quantity, market value of pharmaceutical medicines seized from the baggage of Shri. Mohammed Shafi Shaikh.

Sr. no.	Description of medicines	Quantity	Market value per unit (Rs.)	Total Market value (Rs.)
1.	Human Albumin 20% low salt content	100 packs of 100 ml each.	1500.00	1,50,000.00
2.	Dermovate Ointment Clobetsol.	19 packs containing 150 tubes each.	30.00	85,500.00
3.	Sandimmum Neoral Ciclosporin	11 packs containing 10 strips of 5 tablets each of 50 gm.	60.00	33,00.00
4.	Sandimmum Neoral Ciclosporin	23 packs containing 10 strips of 5 tablets each of 100 gm.	110.00	1,26,500.00
5.	Anexate Flumazenil.	100 packs of 5 ampules of 5 ml each.	800.00	4,00,000.00

6.	Injection Tienam-500, Imipenem/ Cilastatin Sodium (MAD)	29 packs containing 10 vials each and 2 packs containing 5 vials each.	1100.00	3,19,000.00 11,000.00
7.	Sabrilix, Vigabatrina	100 boxes each containing 10 strips of 10 tablets of 500 mg.	350.00 per 10 tablets.	3,50,000.00
			TOTAL :	14,75,000.00

3. The Original Adjudicating Authority (OAA) viz, Jt. Commissioner of Customs, Ahmedabad, Near Aakashvani, Navrangura, Ahmedabad – 380009 vide Order-In-Original No. 13/Jt. Commissioner /2005 dated 18.11.2005 issued through F.No. VIII/10-3/JC/2004 [F.No. DRI/AZU/INV-13/2003], absolutely confiscated the pharmaceutical medicines mentioned at para 2.1 {A} & {B} above, found in the possession of applicant no. 1 and Shri. Shaikh Mohammed Shafi, resp., under Section 111(d), 111(l) and 111(m) of the Customs Act, 1962 read with Section 77 of the Customs Act, 1962, Section 10 of the Drugs and Cosmetics Act, 1940 and Rule 23 of the Drugs and Cosmetics Rules, 1945. A penalty of Rs. 4,74,750 and Rs. 14,75,000/- under Section 112(a) of the Customs Act, 1962 were also imposed on the applicant no. 1 and Shri. Shaikh Mohammed Shafi respectively. Further, a penalty of Rs. 19,49,750/- under Section 112(b) of the Customs Act, 1962 was imposed on applicant no. 2. The OAA had held that the seized pharmaceutical medicines were restricted for import and could be imported only on the strength of a license as per the provisions of the Drugs and Cosmetic Act, 1940 read with the Foreign Trade (Development and Regulation) Act.

4. Aggrieved with the above Order-in-Original dated 18.11.2005, the applicant nos. 1 and 2 both filed appeals before the Appellate Authority (AA) i.e. Commissioner of Customs (Appeals), Ahmedabad who vide Order-in-Appeal

No. 145-146/2009/ Cus/Commr(A)/Ahd dated 30.06.2009 issued through F.No. S/49-144/Cus/ Ahd/2008 and S/49-145/Cus/Ahd while rejecting the appeals only modified and reduced the penalty imposed on applicant no. 1 under Section 112(a) of the Customs Act, 1962 to Rs. 1,00,000/-. In other words, the remaining part of the Original Order passed by the OAA was upheld by the Appellate Authority. [In the intervening time prior to the final order of the appellate authority, both the applicants had engaged in a protracted litigation, primarily on the issue of waiver of pre-deposit. As the same is not relevant to the case, it has not be delved upon here].

5. Aggrieved with the appellate order, applicants no. 1 and 2 filed appeals before CESTAT, Ahmedabad which vide Order No. A/10966-10967/2014 dated 09.05.2014 disposed of the appeals as not maintainable for lack of jurisdiction.

6. Thereafter, both the applicants have filed these two revision applications before the revisionary authority which was received on 07.07.2014. It is noticed that grounds of appeal have not been submitted. However, an application for condonation of delay (COD) has been appended by both the applicants. Also, exhaustive documents such as show cause notice, OIO, OIAs, Order of CESTAT, litigation before various forums etc have been submitted.

7. In the COD application the applicants have averred the following;

7.01. Consequent to the appellate order (Final) viz Order-in-Appeal No. 145-146/2009/ Cus/Commr(A)/Ahd dated 30.06.2009, the applicants had again preferred appeal and stay application within the prescribed statutory time limit before the Hon'ble Tribunal. Thereafter, they (i.e the applicants had got the stay extended by the Hon'ble Tribunal. The appeal was pending before the Hon'ble Tribunal, since 2009, and was finally heard on 09.04.2014, when it was dismissed for want of jurisdiction and to pursue before the competent authority.

7.02. The applicants have submitted that the issue of condoning the delay came up before the Hon'ble High Court , Guwahati in the case of Hindustan Unilever Ltd. Vs Commissioner of Central Excise reported at (2014) 45 G.S.T. 667 wherein, it was held by the Hon'ble Court that condoning delay always advances cause of justice and affords opportunity to the parties to contest the case on merits, whereas, not condoning the delay results in denial of justice and deprives the opportunity. The Hon'ble Court further observed that there should be sufficient cause for condoning the delay. In the present case, the applicants had been pursuing the case vigorously and diligently at all levels and therefore dismissal of the appeal for want of jurisdiction, at belated stage construes a sufficient cause for condoning the delay.

7.03. The applicants have submitted that the Hon'ble High Court of Allahabad in the case of Margra Industries Ltd. Vs Commissioner, reported at 2013 (293) ELT 24 (ALL) has held that while condoning the delay, a liberal approach is to be adopted as the appellant does not gain anything by not filing the appeal. In the present case, the applicants have been filing all the appeals well in time and it was only under a bona fide belief that the appeal was filed before a wrong forum, which entertained the appeal. As such, the entire period for which the appeal was pursued before the wrong forum is required to be excluded.

7.04. The applicants have stated that they have a strong case and the balance of convenience was in their favour.

7.05. The applicants have stated that they have filed the revision application immediately after receiving the CESTAT's Order dated 09.05.2014.

8.01. Personal hearing in r/o revision application filed by applicant no. 1 was scheduled on 04.1.2017, 31.05.2018 and in r/o applicant no. 2 was scheduled for 09.04.2018, 24.05.2018, 23.08.2018, 28.08.2019. Thereafter, upon the change in the revisionary authority, simultaneous personal hearing for both the applicants through the online video conferencing mode was scheduled for 22.10.2021 / 29.10.2021, 02.12.2021 / 08.12.2021, 11.01.2022 / 03.02.2022, 23.02.2022 / 02.03.2022. Shri. N.K Tiwari, Consultant for both the applicants appeared online on 02.03.2022 and reiterated his earlier submissions. He submitted that penalty of Viraj Shah be reduced. He further submitted that second applicant viz, Jayesh Patel has been incorrectly penalized very heavily. He requested to drop the penalty. He requested one-week time to make additional submissions.

8.02. No one appeared for personal hearing on behalf of the respondent.

8.03. In his written submissions during the personal hearing, Shri. N.K Tiwari, Consultant submitted as under;

8.04. The applicant submits that in the extant case, the department had filed Complaint No. 200847/2005 before Hon'ble Additional Metropolitan Magistrate (Economic Offenses) Ahmedabad. The said complaint was decided by the Hon'ble Court and after examining the accused and witnesses, an order was passed on 22.12.2018, wherein, the applicants were acquitted of the offenses under Section 135 of the Customs Act, 1962. (a copy of the order dated 22.12.2018 was attached). The applicants submitted that the oral as well as the documentary evidence in the case before the Hon'ble Court and in the proceedings for the department were the same. The Hon'ble Court after examination of various witnesses and considering the documentary evidence held that it was not established that the seized medicines were prohibited medicines, further the medicines seized from the baggage of the applicant no. 1 were not seized along with him, which meant that the applicant had not been carrying the said baggage with him and the said baggage was carried by the DRI Officers on the basis of baggage tag. On the above basis the Hon'ble Court held that the link connecting the applicant was not established beyond doubt.

8.05. The applicant no. 2 also submitted that it was trite law that a co-accused cannot be subjected to a harsher and stringent punishment than the accused. In the present proceedings, Mohammad Shafi had nowhere directly or indirectly implicated him (i.e. applicant no. 2). In fact he had nowhere even stated that he knew the applicant no. 2. As regards Viraj P. Shah (i.e. applicant no. 1), the applicant no. 2 acknowledged knowing him only as a friend but had never advised him to bring any pharmaceutical products. Therefore, the imposition of penalty on the applicant no. 2 under section 112 (b) was not justified.

8.06. The entire case was devoid of any positive and concrete evidence against the applicants and therefore the present revision application imposing penalty on the appellant may be allowed in the interest of justice.

In view of above facts and evidence, the applicants prayed that the present revision application may be allowed with consequential relief.

9. The Government has gone through facts of the case and the submissions made by the applicants.

10. On the issue of condonation of delay, the Government notes that the applicants had filed an appeal before CESTAT which had been admitted and thereafter, on 09.5.2014, CESTAT had passed an order on the issue of

jurisdiction. Thereafter, the applicants had filed an application before the Revisionary Authority on 07.07.2014 which is within the stipulated time period. Since, the CESTAT had initially admitted the case, the Government is inclined to accept the averments made by the applicants for condonation of delay and accordingly, condones the delay.

11. At the outset, it has been pointed out to the Government that the Hon'ble Additional Chief Metropolitan Magistrate (Economic Offences) of Ahmedabad in his Order dated 22.12.2018 in Criminal Case No. 200847/2005 has acquitted Shri. Shaikh Mohammed Shafi Ishak, Shri. Viraj Pramodbhai Shah (i.e. Applicant No. 1), Jayendrabhai Bhogilal @ Jayesh Patel (Applicant No. 2), primarily on the grounds that (i). it was not established that the seized medicines were prohibited medicines and (ii). no offence was established that the seized medicines were carried by the applicant no. 1 and the other person i.e. Shri. Shaikh Mohammed Shafi.

12. Government notes that the acquittal is based on insufficiency of evidence during the prosecution of the case and on the grounds that it was not established that the medicines were prohibited from import. However, Government notes that the applicant no. 1 and other person had carried commercial quantity of medicines. The list of these seized medicines had been sent to the Additional Drug Controller, Air Cargo Complex, Ahmedabad which informed that the same were restricted items for import into India as per the rules of Drugs and Cosmetics Act, 1940 and that all these products required an import licence. The applicant no. 1 and Shri. Shaikh Mohammed Shafi did not possess any licence of the licit import of the goods and were unable to produce any invoice etc for the purchase of the said medicines.

13. Government notes that in their statements recorded under Section 108 of the Customs Act, 1962, the applicant no. 1 and Shri. Shaikh Mohammed Shafi had both admitted their roles in bringing the medicines into India. Also, they had divulged about the detailed role played by applicant no. 2.



14. The Government notes that the applicant no. 1 and Shri. Shaikh Mohammed Shafi had not declared the medicines at the time of its importation into India. The goods by virtue of it not being declared to Customs and the proper procedure for importation of restricted goods into the country not having been followed, the goods had become prohibited goods.

15. On the issue of the goods being prohibited, 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".

16. 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.

17. Government notes that the AA considered all the aspects of the case and had gone through the facts / evidence and thereafter had sustained the charges of non-declaration / mis-declaration and had upheld the confiscation of the restricted goods passed by the OAA in the OIO. The AA had reduced the penalty imposed on applicant no. 1 to Rs. 1,00,000/- Government finds the same to be proper and judicious. The penalty imposed on applicant no. 2 who is the co-accused in the case is Rs. 19,49,750/- which Government finds is harsh and unjustified. Moreover, considering the extant facts of the case as held in the prosecution order passed by the Hon’ble ACM (Economic Offences) of Ahmedabad, Government is inclined to reduce the same to Rs. 2,50,000/- (Rupees Two Lakhs Fifty Thousand only).

18. The Revision Applications are allowed on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER No. <sup>246-247</sup> /2022-CUS (WZ/SZ)/ASRA/ DATED 30.08.2022.

To,

1. Shri. Viraj P. Shah, 14, Shah Colony, Opp. Best High School, Bhairavnath Road, Maninagar, Ahmedabad - Mr. Jesuraj, S/o. Shri. Savarinathan, No. 10/77-1, Chetti Street North, Velankanni - Post, Kilvelur TK, Nagapattinam, Tamil Nadu.
2. Shri. Jayesh B. Patel, 6, Gujarat Co-op. Hsg Society, Near Kankaria Football Ground, Maninagar, Ahmedabad - 380 008.
3. Pr. COMMISSIONER OF CUSTOMS (CUSTOMS AHMEDABAD) 1ST FLOOR, CUSTOM HOUSE, NEAR ALL INDIA RADIO, INCOME TAX CIRCLE, NAVRANGPURA, AHMEDABAD-380009.

Copy to:

4. Shri. N.K Tiwari, 21, Surdhara Bungalows, Drive-in Road, Thaltej, Ahmedabad - 380 054.
5. Sr. P.S. to AS (RA), Mumbai.
- ~~6.~~ File Copy.
7. Noticeboard.