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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. 371/120A, B & C/B/WZ/2019-RA | 1095 Date of Issue 21.02.23

ORDER NO. ²⁹⁶₂₉₈ /2023-CUS (WZ)/ASRA/MUMBAI DATED 20.02.2023 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. 371/120A, B & C/B/WZ/2019-RA

Applicants : (a). Shri. Kanumetta Jagdeesh Babu,A1.
(b). Shri. Shahbaaz Mohammed Sadiq Khan,A2.
(c). Shri. Mohsin Ahmed ShaikhA3.

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-1093 to 1095/2018-19 dated 31.01.2019
issued on 12.02.2019 through S/49-123/2017 passed by
the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

These revision applications have been filed by (a). Shri. Kanumetta Jagdeesh Babu, (b). Shri. Shahbaaz Mohammed Sadiq Khan & (3). Shri. Mohsin Ahmed Shaikh (herein referred to as Applicants or alternately and more specifically as referred to as Applicant No. 1,2,3 respectively.) against the Orders-In-Appeal No. MUM-CUSTOM-PAX-APP-1093 to 1095/2018-19 dated 31.01.2019 issued on 12.02.2019 through S/49-123/2017 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). The brief facts of the case are that on 05.12.2014, the Customs Officers at CSMIA received a telephonic message from CISF personnel that A1, a GVK staff member, had been intercepted by them on account of his suspicious movement. Personal search of A1 led to the recovery of two heavy packets from the pocket of the suit worn by him and on examination of the packets, 14 gold bars of 10 tolas each, having foreign markings, totally weighing 1632.4 grams, valued at Rs. 39,58,570/- were recovered.

2(b). A1 revealed that these two packets were given by A2 on his arrival from Sharjah onboard Air Arabia Flight No. G9-406 and accordingly, A1 was taken to the arrival hall i.e. T2 Terminal, CSIA where he had identified A2.

2(c). A2 admitted to having handed over two packets containing 14 gold bars of 10 tolas each to A1. A search of the baggage of A2 led to the recovery of 91 bottles of assorted perfumes.

2(d). A1 had also informed that he was supposed to deliver the gold to A3 who would be waiting outside the domestic airport. Accordingly, A3 was apprehended outside Terminal T1. A3 admitted that he was supposed to receive gold from A1 and in the past had received gold from A1 in similar manner.

2(e). A1 revealed that he knew the father of A3 who introduced him to his son viz, A3; that A3 had given him an offer of smuggling gold for a consideration of Rs. 3000/- per 10 gms of gold; that A3 brought gold and A1 collected it at the Aerobridge and hand over the same to A1 outside the domestic airport; that A2 was cousin of A3 and sometimes he (A1) had collected gold from A2; that he had collected gold from A2 or A3 on seven occasions in the past;

3. After due investigations, the applicants were issued with a show cause notice which was adjudicated by the Original Adjudicating Authority (OAA) viz, Additional Commissioner of Customs, CSMIA, Mumbai vide Order-in-Original No. ADC/RR/ADJN/397/2016-17 dated 09.12.2016 who ordered for the absolute confiscation of the 14 gold bars, totally weighing 1632.4 grams valued at Rs. 39,58,570/- and dutiable goods valued at Rs. 1,00,000/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a penalty of Rs. 4,00,000/- each on A1, A2 and A3 under Section 112(a) & (b) of the Customs Act, 1962.

4. Aggrieved with this Order, the applicants preferred an appeal with the Appellate Authority (AA) i.e Commissioner of Customs (Appeals), Mumbai – III who vide his Orders-in-Appeals No. MUM-CUSTM-PAX-APP-1093 to 1095/2018-19 dated 31.01.2019 issued on 12.02.2019 through S/49-123/2017 did not find any reason to interfere with the order passed by the original adjudicating authority and upheld the penalty imposed on the applicants.

5. The applicants have filed revision applications against the Orders-in-Appeal no. No. MUM-CUSTM-PAX-APP-1093 to 1095/2018-19 dated 31.01.2019 issued on 12.02.2019 through S/49-123/2017 passed by the appellate authority on the undermentioned grounds of revision;

5.01. that A1 was on duty as Facility Manager at domestic IB Terminal on 5-12-14, and together with A3 had requested A2 to get perfume

bottles for them from Dubai. Later, A2 had given A1 the details of his flight i.e. Air Arabia flight G9-406 / 5-12-14 which would land at Mumbai at 4.15 hrs. After, the flight had arrived on 8.12.2014, A1 went to the international terminal through the tarmac and met A2 on the aerobridge and had collected 4 perfume bottles and kept them in his suit pockets; that A2 told A1 that he was carrying some gold bars and wanted to clear the said gold bars through Customs and since he was not carrying enough money for payment of customs duty; that A1 informed A2 to declare it in the red channel and seek time to pay the duty; that after collecting the perfume bottles, A1 was intercepted by CISF Officers and was handed over to the Customs; he told them that A3 was waiting outside to collect the 2 bottles of perfumes; that thereafter a fabricated story was made against him (A1) and recorded in the panchanama; that the recovery of gold was from A2; that many of the facts had not been recorded in the panchanama; that the various activities carried out in the panchanama would take more 1 ½ hrs which is the time period mentioned in the panchanama.; that it was not the case of the department that A2 had cleared the green channel; that A2 had been intercepted in the arrival hall; that no prescribed procedure for seizing electronic devices was followed and no chain of custody had been made; that in the SCN no reliance was placed on the data in the their phones and call records and also, the phones had not been returned back; that the verality of the panchanam has been challenged; that cross examination of witnesses had not been allowed; they have relied upon the case of Collector of Central Excise, Madras V. Mr M. Nemi Chand Jain, 1985 ECR 1-940 (CEGAT Madras) wherein the Tribunal held that 'interests of justice requires that the respondent should be afforded an opportunity of cross-examination.....'; case of Rajendra Bajaj Versus Commissioner of Customs (C.S.I. Airport), Mumbai -2010 (252) E.L.T. 529 (Tri. - Mumbai); that the applicants had retracted the panchnama dated 5-2-14 and also the statements given by them before the Investigating Agency on 5-12-14 and hence the same should not have been relied upon; that

- 5.02. that the statements of all the three applicants dated 5-12-14 had been retracted and hence, these statements did not have evidentiary value; that confession when retracted has to be tested under Sections 24 to 30 of Evidence Act. They have relied upon case laws in the case of K.I. Paunny Vs. Asstt. Collector of CE Cochin, 1997 (3) SCC 721,

of Apex Court; case of Shail Nageshi Pare Vs. State of Maharashtra, AIR 1985 SC 866 of Apex Court; Madhya Pradesh High Court in the case of Premchand Vs. Central Bureau of Investigation, 1997 (1) EFR 374; that rebuttal had been drafted in casual manner; no evidence had been collected; that the panchnama dated 5-12-14 and statements of the applicants are not valid; that CESTAT, New Delhi the case of J.Singh Vs Commissioner of Customs, New Delhi and Vikram Singh Dahiya Vs C.C. (Export), New Delhi reported in 2008 (223) E.L.T.619 (Tri. Del) had held that "*Statement of co-noticee without any independent corroboration cannot form the basis of formation of a charge of involvement in smuggling activities*"

5.03. that further statements of the applicants should not have been relied upon; that investigations had failed to bring out any proof on record against A1; that there was no record of seizure of Samsung mobile; that based on CCTV footage it was alleged that on 05.12.2014, at Bay 65, A2 is seen handing over two packets to A1; that the department's case was that the two packets containing gold bars had been received whereas during examination it was stated that A1 had received one packet containing gold and other packet containing Samsung mobile phone. That the applicants had not been provided with the copy of the DVD; that the Adjudicating Authority had failed to counter the argument of the applicants and record his findings; that Sameer Ali had not been an accused in the present case. That reliance is placed in the case of CESTAT, New Delhi in M/s Sahara India TV Network Vs CCE, Noida; Apex Court Order in the case of Jt. Commr. of Income Tax, Surat vs. Saheli Leasing & Industries Ltd., 2010 (253) ELT 705 (S.C.); CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad; M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur; Gujarat High Court -Union of India vs Sri Kumar Agencies reported on 01.12.2010; etc

5.04. that A1 had nothing to do with the gold or act of dealing with the gold; that there was no evidence that A2 had indulged in smuggling of gold in the past; it and therefore no charge can be made against him on this count; that no evidence had been brought on record that A2 was involved in smuggling gold in the past in connivance with A1 and A3; that in panchanama it was mentioned that the same had lasted for 1 hour to 50 minutes while it took nearly 45 minutes to 1 hr to reach domestic airport and return to the international airport; that panchanama was defective; that cross examination of PW1 had supported the view of the applicants suggesting falsehood was

- sufficient to hold that enquiry officer was biased and had made up his mind that applicant was guilty; that reliance has been placed in the Apex Court's Order in *Tomaso Bruno & Anr. v. State of U.P.* [Criminal Appeal No. 142/2015] the acquittal of the appellants on the basis of the prosecution failing to adduce CCTV footage;
- 5.05. that order of absolute confiscation of gold and dutiable goods was not sustainable; that A2 had not claimed ownership of the gold as no one claimed ownership of the good; that he had not handed over the gold to A1 and had handed over only two packets containing 4 bottles of perfume.; that gold was not a prohibited item and was only a restricted item; that prohibition relates to goods which cannot be imported by any one, such as arms, ammunition, drugs etc; that redemption of goods was available under Section 125; that they rely on Tribunal's case of *Gauri Enterprises Vs. Commissioner of Customs, Pune* [2002 (145) E.L.T. 706 (Tri. Bang.)]; that gold had been removed from the negative list and could be imported in terms of notification No.171/94-Cus dated 30.9.94. Tribunals have been consistently taking the view that even in extreme circumstances of attempting to smuggle foreign branded gold biscuits the authorities are required to release the gold biscuit on payment of redemption fine as held in *V.P.HAMEED Vs CC, BOMBAY* reported in 1994 (73) ELT 425(T); *KAMLESH KUMAR VS CC* reported in 1993 (67) ELT 1000 (G.O.I.); *S.S.KHOSLA, JT.SECRETARY In re: JASPAL SINGH BANTY* reported in 1994 (73) ELT 240 (GOI); Apex Court judgement rendered in the case of *HARGOVID DAS K.JOSHI & OTHERS Vs CC 7 OTHERS* reported in AIR 1987 SC 1982; etc; that since A2 had not crossed the green channel and had not been given an opportunity to declare the gold, release was due; that the applicants have relied on an exhaustive list of cases to buttress their contention on the issues of retraction of statement, cross examination, release of goods on redemption etc.
- 5.06. that penalty of Rs 4,00,000/- A1 and A3 was not sustainable and penalty of Rs. 4,00,000/ was harsh; they have relied on a few case laws on the subject.

Under the circumstances, A1 and A3 have prayed to the revision authority to set aside the penalty imposed on them and A2 has claimed ownership of the gold bars and prays for redemption of the gold on payment of applicable duty. Also, they have prayed to release the mobile phones seized from them.

6. Accordingly, personal hearings in the case was scheduled on 06.12.2022. Shri. Prakash Shingrani, Advocate appeared on 06.12.2023 and submitted that gold is not prohibited item. He further submitted that restricted item is require to be released on redemption under Section 125 of the Customs Act, 1962. He reiterated his submissions.

7. The Government has gone through the facts of the case. A1 was found in possession of the 14 FM gold bars of 10 tolas each, weighing 1632.4 grams, valued at Rs. 39,58,570/-. A1 being an employee of the company operating the airport i.e. GVK and holding a responsible post i.e. Deputy Manager, and having access to the both the domestic as well as international terminals, had misused his position and was found in possession of the gold bars. He had been stopped by the CISF personnel and search of his person by the Customs Officers led to the recovery of the said gold bars. A1 had picked up the gold bars at the Aerobridge from A2 who had arrived from an international flight. The FM gold bars were found in the Customs Area from the possession of A1 who did not provide valid reasons for the possession of the same. A2 who had arrived from Sharjah had admitted that the gold bars had been brought by him and he had handed over the same to A2 as he did intended to evade payment of Customs duty. Had it not been for the alertness of the CISF personnel and the Customs staff, they would cleared the same without payment of Customs duty. The applicants have aided and abetted in the act to smuggle the gold bars without declaring to Customs. A2 did not intend to declare the gold as required under Section 77 of the Customs Act, 1962 and hence, had handed over the gold bars to A1 to bring it out of the airport, undetected. The quantity of gold recovered is quite substantial, in primary form, for commercial use and the applicants had meticulously and systematically planned an ingenious method to avoid detection in which the services of an airport staff was roped in so checking gets avoided. This was a pre-planned and conscious act. The

confiscation of the FM gold bars is therefore, justified and the Applicants have rendered themselves liable for penal action.

8. 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”.

9. 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.

10. 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.

11. Government also observes that the manner in which the FM gold ornaments were attempted to be smuggled wherein an international passenger transfers the gold to a staff of the airport reveals the intention of the Applicants viz, A2 and A1 to avoid detection and not pay any Customs duty. Using this intricate and planned method reveals that A2 and A1 were part of a group which harboured a clear intention to evade duty and smuggle the FM gold bars into India. A member of the airport staff was involved in the smuggling plan which portends great danger to the security system of the airports. Such acts should not be encouraged and the strict provisions of the law must come down heavily on such activity, which would act as a deterrent to others who may harbour such plans. All these have been properly considered by the OAA who

has ordered for the absolute confiscation of the gold bars and the same has been rightly upheld by Appellate Authority.

12. 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 smuggling being clever and ingenious, quantity being substantial, gold in primary form for commercial purpose, clear attempt to smuggle the gold, involvement of an airport staff, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered for the absolute confiscation of the gold. In the instant case, applicants had used an ingenious method to smuggle the gold bars and that they did not have any intention to declare the same. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold bars will encourage such smugglers who use ingenious methods to evade Customs duty and bring economic harm to the country. If the gold had not been detected by the Customs authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. 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. The order of the Appellate authority to the extent of upholding the absolute confiscation of the gold bars as held by the OAA is legal and proper and therefore, Government is inclined to uphold the same.

13. Government notes that the applicants especially, A1 and A2 have raised many issues such as, that A2 had not handed over the gold to A1 and had only handed over 4 bottles of perfumes; that a false panchanama was made to fabricate a case of gold seizure from A1; the time taken to record the panchanama was 1 hr & 50 min which would not be sufficient considering the distance between the domestic terminal and international terminal and hence panchanama was incorrect; that A2 had not cleared the green channel and hence he was not allowed to declare the gold bars; etc. Government notes that all these issues have been dealt with in great detail by the OAA. Each of these issues have been discussed by the OAA while arriving at a decision. The facts of the case are that A1 who was an employee was apprehended and gold bars had been recovered from his possession. From the information provided by him, A2 who was an international passenger had been intercepted and also A1 who was waiting outside the domestic airport was also apprehended; that A2 and A3 are relatives; that gold bars had been found. All these indicate that the averments made by the applicants were an and to somehow, get hold of the gold bars. Government is inclined to disregard the contentions raised by the applicants especially since they have been dealt with at length by the OAA.

14. With regard to the request by the applicants for reduction of the penalty amounts, the Governments finds that the penalty of Rs. 4,00,000/- each imposed on the applicants under Section 112 (a) and (b) of the Customs Act, 1962 which collectively, is nearly 30% of the seizure value, is harsh and unreasonable and Government is inclined to reduce the same.

15. In view of the above, the Government only to the extent of the penalties imposed on the applicants, modifies the same as under;

(a). the penalty of Rs. 4,00,000/- imposed on A1 under Section 112(a) and (b) of the Customs Act, 1962 is reduced to 2,00,000/- (Rupees Two Lakhs only),

(b). the penalty of Rs. 4,00,000/- imposed on A2 under Section 112(a) and (b) of the Customs Act, 1962 is reduced to Rs. 2,00,000/- (Rupees Two Lakhs only),

(c). the penalty of Rs. 4,00,000/- imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962 is reduced to (Rupees Two Lakhs only).

In other words, the absolute confiscation of the 14 gold bars of 10 tolas each, collectively weighing 1632.4 grams and valued at Rs. 39,58,570/- passed by the OAA under Section 111(d), (l) and (m) of the Customs Act, 1962 and upheld by the AA, is sustained.

16. The 3 revision applications are decided on the above terms.


(SHRAWAN KUMAR)

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

ORDER No *246-298* /2023-CUS (WZ) /ASRA/MUMBAI DATED *20*.02.2023

To,

1. Shri. Kanumetta Jagdeesh Babu, Dhanashree CHS, Flat No. 13, 2nd Floor, Tilak Nagar, Chembur, Mumbai – 400 089.
2. Shri. Shahbaaz Mohammed Sadiq Khan, Room No. 15, H-1 Ward, Nehru Nagar, Dindoshi BMC Colony, Santosh Nagar, Goregaon East, Mumbai – 400 065,
3. Shri. Mohsin Ahmed Shaikh, Ground Floor, Patra Chawl, Gafoor Nagar, 52A, Room No. 22, Byculla Hans Road, Mumbai – 400 011.
4. Pr. Commissioner of Customs, CSMI Airport, Mumbai, Level – 2, T2, Sahar, Andheri West, Mumbai – 400 099.

Copy to:

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