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GOVERNMENT OF INDIA
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F.No. 371/345 to 349/B/2019-RA & : Date of Issue 17.01.2024
F.No. 371/183/B/2022 1322

ORDER NO. 71-17/2024-CUS (WZ)/ASRA/MUMBAI DATED 17.01.2024 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. 371/345 to 349/B/2019-RA

- (i). Applicant No. 1. (A1). : Shri. Pyush Jasraj Soni,
(ii). Applicant No. 2. (A2). : Mrs. Sakina Barafwala,
Applicant No. 3. (A3). : Shri. Siddhesh Mohan Patil, [withdrawn],
(iii). Applicant No. 4. (A4). : Shri. Burhan Fakhruddin Khatumdi
(iv). Applicant No. 5. (A5). : Mrs. Maryam Fakhruddin Khatumdi.

APPLICANTS

F.No. 371/183/B/2022

- (v). Applicant No. 3. (A3). : Shri. Siddhesh Mohan Patil

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-CUSTOMS-PAX-APP-299 - 303/2019-20 dated 25.07.2019
issued on 31.07.2019 through F.No. S/49-425, 450, 451, 452
& 476/2018-AP passed by Commissioner of Customs
(Appeals), Mumbai - III.

ORDER

These revision applications have been filed by (i). Shri. Piyush Jasraj Soni, (ii). Mrs. Sakina Barafwala, (iii). Shri. Siddhesh Mohan Patil, (iv). Shri. Burhan Fakhruddin Khatumdi (v). Mrs. Mariyam Fakhruddin Khatumdi (hereinafter referred to as the Applicants or alternately, more specifically as Applicants no. 1, Applicants no. 2 to — Applicant No. 5 resp. or A1, A2 .. A5 resp.) against the Orders-in-Appeal No. MUM-CUSTOM-PAX-APP-299 - 303/2019-20 dated 25.07.2019 issued on 31.07.2019 through P.No. S/49-425, 450, 451, 452 & 478/2018-AP passed by Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 22.01.2015, the Officers of DRI, Mumbai Zonal Unit had intercepted Applicant No. 1 and 2 who were travelling together and had arrived from Muscat at Chhatrapati Shivaji Maharaj International Airport (CSMI) by Oman air Flight No. WY-201. A1 and A2 were intercepted outside Customs arrival hall of Terminal-2 of the CSI Airport, Mumbai. The personal search of A1 and A2 and detailed examination of their baggage, led to the recovery of 6 foreign marked gold bars of 1 kg each from baggage of A1 and 435 gms of gold jewellery worn by him on his person, while 235 gms of gold jewellery was recovered from A2 which had been worn by her. The gold jewellery recovered from A1 consisted of two silver coloured kadas and one silver coloured heavy chain while that recovered from A2 consisted of two silver coloured kadas.

2(b). Investigation revealed that A1 and A2 were carriers for A4 and indulged in smuggling of gold for monetary consideration and that A4 was running a travel agency with his wife via, A5. It was also alleged that A1 and A2 were being assisted by A3 who was working as a cabin crew in Air India and his role was to take gold from A1 and A2 onboard the plane and clearing it from the

airport and thereafter, hand it over back to them i.e. A1 and A2 outside the airport.

2(c). During investigations, A1 had revealed that he had carried the 6 gold bars from Dubai and intended to clear the same out of the airport without payment of duty and to hand over the same to A4 who would be waiting outside the airport. A1 had also revealed that after landing at Mumbai he was to hand over the gold bars to A3 who was working as a cabin crew with Air India. A1 revealed that as per their arrangement he was to travel from Muscat to Mumbai by Air India Flight no. AI-986 and hand over the gold bars to A3 during the flight on which he was on duty i.e. A3 was a member of the crew. Thereafter, outside the airport in Mumbai, he would have collected the gold bars from A3 and hand it over to A4; that on that day, A1 however, missed the flight and travelled to Mumbai by Oman Air and was then told to hand over the gold bars to A3 inside the washroom / toilet located before the Customs Arrival hall. However, A3 suspected that he was being monitored by the Customs and refused to accept the gold bars from A1. At this point A1 decided to pass through the green channel without declaring the gold and thereupon, had been intercepted.

2(d). A3 was located inside the airport and when confronted, A1 had identified him. Also, on the basis of details provided by A1, A4 who was waiting outside CSMI airport was also picked up for questioning.

2(e). During the investigations, statements of A1 were recorded under Section 108 of the Customs Act, 1962 wherein he had inter-alia admitted that he had met A4 when he was working with a jewellery manufacturer; that A4 had a travel agency named M/s. Concord Tours located at Daboo Street, Mumbai; that he used to meet A4 regularly pertaining to delivery of tickets of his earlier employer; that in 2014 for going to Dubai to meet his sister he had also booked

his ticket along with tourist visa through A4; that in January, 2015, A4 had asked him whether he was interested to earn extra cash of nearly Rs. 20,000/- per day; that since he was in need of money, he had agreed; that A4 told him to smuggle gold from Dubai through Mumbai airport; that A4 told him about knowing A3 who was working as a flight purser with Air India who would clear the gold from the airport; that A4 had shown him a photograph of A3; that he agreed to do the smuggling of the gold; that as instructed by A4, he had travelled to Dubai on 21.01.2015 alongwith A2 who was carrying the foreign currency to purchase the gold at Dubai; that A4 had told him the modus; that the gold would be purchased in the name of A2 that they both i.e. himself and A2 would travel from Dubai to Muscat and that thereafter, A3 would hand over the gold to him at Muscat and then they would take the Air India flight from Muscat to Mumbai; that during the flight he would hand over the gold to A3 who would clear it from Mumbai Airport and handover to A4; that A4 had told him to smuggle 6 kgs of gold bars alongwith some silver plated gold jewellery; that A4 had given him the return tickets of Air India as well as Oman Air; that while going to Dubai they had missed their scheduled flight and had taken the 03:40 pm flight of Jet Airways, that the bag containing the foreign currency was with A2; that while at Dubai as instructed, they gave the currency to a particular person and collected two bags which contained 3 kgs of gold bars each along with 4 silver coated kadas and one chain alongwith invoices which were in the name of A2; that from Dubai to Muscat, the gold bars had been carried by A2; that at Muscat they had missed the Air India flight to Mumbai as they were late; that he along with A2 took the Oman Air Flight WY0201 from Muscat to Dubai; that when he informed A4 about them missing the flight, he had got very angry and gave him the contact no. of A3 and was told to talk to him; that on the flight, the gold had been carried by A2; that upon alighting at Mumbai Airport he had immediately tried calling A3 but his mobile was switched off; that he contacted A4, that at the airport, A2 had handed over the

two bags containing the gold bars to him alongwith one invoice for 3 kgs of gold bars; that he received a call from A3 who instructed him to wait for him; that he followed A3 to the washroom; that A3 did not take delivery of the 5 gold bars; that thereafter, he decided to try his luck by attempting to smuggle the gold without declaring it to the Customs and walked through the green channel; that A2 too cleared the green channel; that outside the Customs they were intercepted by DRJ Officers; the search of the baggage resulted in the recovery of 6 kilos of gold bars and gold jewellery; that he had disclosed about the flight purser and had identified A3; that he had given the description of A4 and went outside alongwith the officers, from where A4 had been intercepted;

2(f). During the investigations, the statements of A4 were recorded under Section 108 of the Customs Act, 1962 wherein he interalia confirmed all the facts and details revealed by A1 (narrated above) and stated that the 6 gold bars weighing 6 kgs had been purchased in Dubai from M/s. Motiwala & Son by his brother-in-law viz, Mr. Fakrudin Golwala for around USD 2,38,000/-; that his brother-in-law was based in Dubai and worked as an engineer, that the funds were of the family members including sister-in-law viz, Tasneem; In his statement, A4 revealed the details of how he had got into smuggling of gold, the names of the persons including A3 and other staff of Air India who would assist in smuggling the gold from the airport; the quantum of payment for each Kg of the gold cleared and smuggled; the arrangement and contribution of the finance required to purchase the gold and smuggle it to India; that he had contributed Rs. 20 lakhs towards purchase of the 2 kgs of gold smuggled in the past and that the remaining money was of A1 and his sisters; the gold was sold to Normada Jewellers, Mumbai owned by Ujjwal who was known to A1; that the gold seized at Mumbai was his second consignment, that his niece viz Fatima Patanwal had been caught by Customs at Mumbai Airport for carrying 2 kgs of gold bars and that he had financed Rs. 7 lakhs for this gold; that when

he was shown an invoice dated 12.02.2014 pertaining to 15 nos of gold bars of 10 tola each which had been recovered from his residence during the search. A4 had replied that he had not paid any Customs duty on the same; that, he had identified A1, A2, and A3, when confronted with them

2(g). During the investigations, the statements of A2 were recorded under Section 108 of the Customs Act, 1962 wherein she inter alia confirmed all the facts and details revealed by A1 and A4 (as narrated above) and stated that a friend of her cousin sister had introduced her to A4; that A4 had offered to pay Rs. 10,000/- per trip for bringing gold bars from Dubai to India; that the foreign currency taken by her to Dubai belonged to A4 and had been handed over to her by Mustafa Taulique Faruqwalu; that she had carried the gold from Dubai to Muscat; that after alighting at Muscat, A1 had taken the bag; that the bill for 2 kgs of gold bars was taken by A1 and the bill for the remaining 4 kgs remained in her bag by mistake; that the kadas worn by her were given by A1 who had instructed her to return it; that on being asked about the cash declaration dated 05.12.2014 of Dubai Customs for AED 5,53,950/- in the name of Khatunadi Burhan Mariyam found in her purse, she had replied that the same did not belong to her and she had been told to carry the same during her journey on 21.01.2015; that the payment voucher found on her had been handed to her by A1 at Dubai Airport; that the invoice for 6 kgs gold which was in her name for an amount of AED 6,10,400/- had been handed over to her by the person who had handed over the gold bars to A1 at Dubai; that she had visited Dubai on two occasions in the past; that before going to Dubai, A4 used to tell her the details of the flight, provide her the tickets; that the payment of the tickets were done by A4;

2(h). During the investigations, the statements of A3 were recorded under Section 108 of the Customs Act, 1962 wherein he inter alia, stated that he had

joined Air India in 2012; that initially he was assigned domestic route; that after 8-9 months of experience, he was allotted duty in International routes via Mumbai-Dubai-Mumbai, Mumbai-Muscat-Mumbai and Mumbai-Abu Dhabi-Mumbai; that on being asked, he stated that he knew A4 since October 2014 and he was introduced to him by Nehal Prajapati, who was his fellow cabin member in Air India; that earlier, Nehal had asked him whether he was interested in making extra money by way of helping Air India passengers in clearing gold bars at Mumbai airport on their return from Dubai and other places; that Nehal had said that he could accept the gold bars from such passengers while he performed his duties as a cabin crew and then carry the same with him outside the Mumbai airport on completion of his duty and hand over the gold bars to its recipient in Mumbai outside the airport; that he gave his consent; that thereafter, Nehal had introduced him to one Ali Kamthiwalla, who was brother in law of A4 and was sending passengers abroad especially to the Middle East and these passengers would bring back foreign marked gold bars on their return to India; that Murtaza Ali informed him about Nehal and some other persons were working for A4; that in the month of October 2014, Murtaza Ali had taken him to meet A4 where he had met A4 in the presence of Nehal; that he agreed for smuggling the gold and told him that he would receive Rs. 35,000/- per trip; that it was not clarified whether the amount was per consignment or per piece; that his friend, Nehal Prajapati had been caught by Customs in August, 2014; that at the time of meeting with A4, Nehal was jobless; that in the first week of November, 2014, he had smuggled 5PM gold bars of 1 kg each for the first time; that he did not remember the exact date however, A4 too had travelled from Dubai in AI-984 on Dubai-Mumbai-Goa sector; [that A3 has explained the flight details alongwith the handing over of the gold and Nehal had given him Rs. 35,000/- for this job]; that for the second time somewhere in the second week of November, 2014, he had attempted to smuggle gold for A4 in the same sector i.e. Dubai-Mumbai-Goa; that since he

had learnt that Customs were detaining passengers on suspicion of smuggling and the flight had got delayed, he had got scared and had left the 3 gold bars which he had taken from A4 in the seat pocket of Seat No. 3C in the Business class; that Seat No. 3A and 3C were not occupied at that time; that when the flight had reached Goa, Customs officers in plain clothes had searched the entire flight and the 3 foreign marked gold bars of 1 kg each, which he had kept in the seat pocket of seat No. 3C, had been seized by them; that A4 had got down at Goa and later on reaching Mumbai, he had informed A4 that the gold bars had been seized by Customs; that A4 had accused him of stealing the gold bars and he was threatened with dire consequences and was told to continue with the smuggling; that in December 2014, he had done smuggling of gold three times and had smuggled 5 FM gold bars of 1 kg each, 9 FM gold bars of 1 kg each and 6 FM gold bars of 1 kg each, respectively; that in December, 2014 when he had smuggled 3 FM gold bars of 1 kg each, Murtaza Ali was the passenger who had given him the gold bars inside the Aircraft which he had kept in his bag during the duration of travel; that Murtaza Ali got down at Goa Airport; that at the time of smuggling of 9 FM gold bars of 1 kg each, Murtaza Ali was the passenger who gave him the gold bars inside the aircraft, which had he kept in his bag during the duration of travel; that he smuggled out the gold bars outside the airport and handed over to A4, that on the night of 20.01.2015 he had informed A4 about his duty on that day; that on 21.01.2015 in the morning, A4 had informed him that on flight No. AI-985, his person would be travelling with the 6 FM gold bars of 1 kg each; that the description of the person had been given to him by A4, however, he had not found any such person in his flight i.e. Mumbai-Muscat-Mumbai which departed from Muscat at 3.00 IST; that after alighting at Mumbai Airport when he had switched on his mobile, he had found messages of A4 informing him that his person had missed the flight and was travelling on another flight to Mumbai and had already reached Mumbai Airport; that A4 telephonically

informed him that his person was waiting near Customs counter/Ebola check-up counter; that in the meantime he had got a missed call from this person (i.e. A1) who had asked him to come to the toilet; that inside the hall, he had decided not to receive the gold bars due to heavy presence of Customs personnel and possibility of arousing suspicion; that thereafter, at the airport, he had been intercepted by DRI officers;

25i. A1, A3 and A4 were arrested on 22.01.2015 for their involvement in smuggling of 6 FM Kilo Gold Bars alongwith other gold articles / jewellery, totally weighing 6.67 kgs. valued at Rs. 1,66,53,194/-. On 23.01.2015, A1, A3 and A4 had filed retraction of their statements before the Explanade Court, Mumbai. The same was rebutted by DRI on 05.02.2015.

25j. The seized gold bars and the jewellery were assayed by India Government Mint which certified that the gold samples were of 997.7 to 995.00 PPT (purity).

25k. During investigations, statements of others named by A1 and A4 were also recorded viz, (i) Shri. Ali Azgar Komitwala working in the travel agency of A4, that on the instructions of A4 he had carried a packet containing gold and had handed over the same to A1 onboard the Dubai-Mumbai-Goa Sector of Air India flight; (ii) Shri. Mustafa Taufique Fatuswala working for A4 in his travel agency, that on one occasion as per the instructions of A4, he had handed over a packet containing gold bars to A1 on board a flight to Mumbai from Dubai; that once earlier he had travelled to Dubai alongwith A1 and had handed over a black coloured bag; that he had travelled with A1 from Dubai to Muscat by Oman Air; that thereafter, they had travelled from Muscat to Mumbai on Air India flight; that on the flight, A1 had handed over the gold bars to A3; that thereafter, A3 had handed over the gold bars to A4 outside the airport; that on another occasion he had travelled to Dubai alongwith A4 and on this occasion

too, on their return flight back to India by an Air India flight, he had disembarked at Mumbai while A4 proceeded to Goa; that he learnt later that A4 had handed over gold bars to A3 who had boarded the flight at Mumbai on the flight; on the return flight the (ii) Shri. Mustafa M.F. Khatundi, working in the travel agency of A4; that on 21.01.2015 he had handed over a bag to A1 and dropped him at CSMIA; that here he had introduced A2 to A1; that there was no person by name Murtaza Ali; that he had identified the photographs of A1, A2 & A4.

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/AK/AD,IN/125/2018-9 dated 28.06.2018 issued on same day i.e. 28.06.2018, under F.No. S/14-5-172/2015-16 Adjn [DRI/MZU/C/INT-08/2015/6126] had held as under:

(i). (i). the absolute confiscation of the impugned 06 PM gold bars of 01 kg each collectively valued at Rs. 1,49,89,380/- and 435 gms of gold jewellery valued at Rs. 10,86,730/- recovered from A1 under Section 111 (d), (l) & (m) of Customs Act, 1962; and (ii). the absolute confiscation of the impugned 235 gms of gold jewellery collectively valued at Rs. 5,87,084/- recovered from A2 under Section 111 (d), (l) & (m) of Customs Act, 1962;

(iii). imposed personal penalty under Section 112 (a) & (b) of Customs Act, 1962 of (i). Rs. 15,00,000/- on A1, (ii). Rs. 15,00,000/- on A2, (iii). Rs. 15,00,000/- on A3 in r/o the seized gold bars and gold jewellery, and (iv). Rs. 20,00,000/- on A4 in r/o the seized gold bars and gold jewellery.

(iii). imposed personal penalty under Section 112(a) and (b) of the Customs Act, 1962 for the admitted post clearance of gold, the quantum of penalty being (i). Rs. 10,00,000/- on Shri. Mustafa Taufiq Faruswala, (ii). Rs. 10,00,000/- on Shri. Ali Asgar Komrawala;

(IV). imposed personal penalty of Rs. 10,00,000/- on A5 under Section 114(i) of the Customs Act, 1962 for the admitted past smuggling of foreign currency;
(V). imposed personal penalty of Rs. 50,00,000/- on A4 under Section 112 (a) & (b) for the admitted past clearance of gold and under Section 114(i) of Customs Act, 1962 for the admitted past clearance of foreign currency.

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-CUSTOMS-PAX-APP-299 - 303/2019-20 dated 25.07.2019 issued on 31.07.2019 through P.No. S/49-425, 450, 451, 452 & 478/2018-AP modified the impugned OIO only to the extent of reducing the penalty imposed on A3 from Rs. 15 lakhs to Rs. 10 lakhs and did not find it necessary to interfere in the remaining part of the OIO passed by the AA which was upheld as legal and proper.

5. Aggrieved with the above order, the 4 Applicants viz, A1, A2, A4 and A5 have filed this revision application on the undermentioned grounds: (Though initially A3 too was found to be a part of this revision application, later he requested for a change of Advocate and filed a separate revision application).

5.01. that the entire case was fabricated against them by DRI and they had submitted their replies in detail challenging the entire investigation and also that the Show Cause Notice was issued on them; that submissions made by them in their replies to the SCN, may be taken as the main grounds of this Revision Application; that these submissions had not been considered by the QAA as well as the AA;

5.02. that the SCN dated 16-7-15 was invalid; that in the SCN the goods allegedly imported by them during the period 12-2-14 to 22-12-14 (as detailed under para 26.3 of SCN and under para 33 E(ii) of SCN) has been held as liable for confiscation and for penal action; that this was beyond the normal period of limitation of 6 months; that the basic allegations were that the petitioners had failed to declare the imported goods during the relevant period from 12-2-14 to 22-12-14, thereby violating the provisions of Section 77 of the Customs Act, 1962; that

duty should have been demanded under Section 28 of the Act *ibid*; that also no interest has been demanded on these goods;

5.03. that the panchas were not independent and hence, the Panchnama dated 22-1-15 was invalid; that the intelligence was specific including passport nos even before the arrival of the flight and that one of the passengers was a female, then a female pancha should have been included; that they have relied on a few case laws on the subject of independence of panchas;

5.04. that the personal searches carried out on A1, A2 were illegal; that option to be searched in the presence of a gazetted officer was not given to them as per the statutory provision under section 102 of Customs Act, 1962; that non-compliance of the said statutory provision u/s 102 of Customs Act, 1962 had resulted in prejudice and failure of justice to the petitioners; that they have relied on a few case laws on the issue of non-compliance of provisions of the Act;

5.05. that the retracted panchnama and statements of petitioners should not have been relied upon; that A1, A2 had retracted their statements at the earliest opportunity; that other applicants too had retracted their statements given before the Investigating Officer; that the Investigating Agency had failed to successfully rebut the retraction and had failed to prove the case against them with independent corroborative evidence; that hence the retracted panchnama and their statements dated 22-1-15 should not have been relied upon against them; that corroboration of the evidence had not been carried out; that it was a settled rule of evidence that unless a retracted confession was corroborated in material particulars, it was not prudent to pass a conviction on its strength alone; that corroboration should not be dispensed with merely because the confession contained a wealth of detail; that the court would not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused; that value of statement would weaken when the statement of a co-accused was considered without corroboration; that conviction cannot be based solely on such confession, unless it is voluntary, truthful and is corroborated by independent and cogent evidence; that they have relied upon an exhaustive list of case laws on the subject;

(a). Apex Court in the matter of *Mohd. Ismail* [2007 (220) ELT 3 (S.C.)];

(b). Apex Court in *The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd.* - JT 2000 (8) SC 530;

- (c). Apex court in Vinod Solanki Vs. U.L.O. 2009 (233) ELT 157 (S.C.);
- (d). Hon'ble High Court of Delhi in the matter of DRI vs. Mahendra Kumar Singhal 2016 (333) ELT (250) (Del);
- (e). Hon'ble Gujarat High Court in Commissioner of C.Ex, Ahmedabad-III vs Deora Wires N Machines Pvt Ltd 2016 (332) ELT 393 (Guj);
- (f). Hon'ble High court of Delhi again in the matter of CCE, Delhi-I Vs. Vishnu & Co PVL Ltd., 2016 (332) ELT 793 (Del) and Rakesh Kumar Garg Vs. CCE, 2016 (331) ELT 321 (Del);
- (g). Apex Court in Ravindran and Peter John v. The Superintendent of Customs - 2007-TIOL-89-SC-CUS;
- (h). Hon'ble Bombay High Court in V. Ananthraman v. Union of India - 2003 (151) E.L.T. 278 (Bom.) and
- (i). Hon'ble Calcutta High Court in Nicco Corporation Ltd. v. Commissioner of Service Tax - 2014 (307) E.L.T. 228 (Cal.) - 2014 (35) S.T.R. 727 (Cal.);
- (j). etc;

5.06. that the statements of A1 and A4 after their arrest, incriminating themselves in the offence of smuggling should not have been relied upon; that the Investigating Agency had filed rebuttal to the retractions on 5-2-15 after recording their involuntary further statements on 30-1-15; that the said further statements should not have been relied upon in the case against them for the following reasons; that they had been arrested on 22.01.2015; that when their statements were recorded on 22-1-15 recorded u/s 108 of Customs Act, 1962, their position were that of witnesses; that after they were arrested on 22-1-15 their statements were as accused in the case; that the subsequent statements were given by them incriminating themselves as accused in this case under fear of cancellation of their bail and re-arrest and hence, their further statements dated 30-1-15 u/s 108 of Customs Act, 1962 should not have been relied upon against them; that they have placed reliance on the following decisions;

- (a). A.T.Mahleem vs The Senior Intelligence Officer on 9 February, 2012 of Madras High Court;
- (b). Apex Court in SELVI Vs. STATE OF KARNATAKA (2010) 7 SCC 263;
- (c). Apex Court in State of Gujarat v. Mohd. Atik [(198) 4 SCC 35];
- (d). Hon'ble Delhi High Court in Customs vs Dina Aruna Gupta on 22 July, 2011;

- 5.07. that the confession of co-accused cannot be relied upon against other accused; that Section 30 of Evidence Act, if the statement of a co-accused tried to exculpate any accused, the same was not relevant as per the provisions of the Evidence Act; they have placed reliance on
- (a). Apex Court in the case of State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Gura [(2005) 11 SCC 600];
 - (b). Apex Court in the case of Ravindran Alias John v. Superintendent of Customs [(2007) 6 SCC 410];
 - (c). Apex Court in Francis Stanley Alias Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram [(2006) 13 SCC 210];
 - (d). Apex Court in Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another [(2007) 8 SCC 254];
 - (e). Apex Court in Haricharan Kurmi v. State of Bihar AIR 1964 SC 1184;
 - (f). Hon'ble CESTAT, New Delhi (Tribunal) in the case of J.Singh Vs Commissioner of Customs, New Delhi, 1996 (83) E.L.T. 175 and Vikram Singh Dahiya Vs Commissioner of Customs (Export), New Delhi, 2008 (223) E.L.T.619 (Tri. Del).
 - (g). Apex Court decision in the case of U.O.I. Versus Bal Mukund & Ors.
- 5.08. that the valuation of gold allegedly smuggled into India had been made wrongly; they have submitted a table showing that the gold had been over-valued by investigating agency;
- 5.09. that the seizure of gold bars and jewellery was illegal; that seizure was not under any reasonable belief, which is essential to effect seizure under Section 110 of the Customs Act, and any seizure under mere suspicion was not justified, and the same is required to be released; Reliance is placed on Punjab and Haryana High Court in Gurumukh Singh v. Union of India -1948 [48] E.L.T. 274 (P & H);
- 5.10. that the gold jewellery was only from the handbag of A2 and not from the persons of the passengers;
- 5.11. that the recovery of the gold bars was not from the handbag of A1 but from the bag belonging to A2;
- 5.12. that no physical search of A2 had been carried out; that female pancha was not present during the search of A2;
- 5.13. that improper procedure had been followed while drawing sample from gold bars; that the custody of the gold was taken by the officers without the permission of the court; that the the drawal of sample was invalid and illegal.

- 5.14 that the sample of gold bar drawn on 23-1-15 was suspected to have been substituted/tampered; that the Bullion Officer who acknowledged the receipt of samples after due weighment had simply mentioned only as GOLD SAMPLE, BM No 9632 and 1000.000 Gram without mentioning the marking and serial number which confirmed that the gold bar received by him was without any marking and serial number;
- 5.15. that the panchama drawn in English on a computer was invalid; that the panchas were janitors and it was not known whether the two panchas were conversant in English;
- 5.16. that in the SCN, the case had been pre-judged and the Adjudicating Authority had succumbed to the prejudged SCN; that the SCN had pre-judged and pre-determined the entire issue by proposing for absolute confiscation of the seized gold bars and gold jewellery under sections 111(d), 111(j), 111(l) and 111(m) of Customs Act, 1962 and OAA had succumbed to it by confirming the proposal for absolute confiscation of the gold and gold jewellery; that neither Section 111 nor section 125 of the Act provided for absolute confiscation of goods which are not contrabands since gold was not a contraband or a prohibited item; that the owner or person from whom it was seized was entitled to have the goods released on payment of redemption fine and duty; that reliance has placed on the following decisions:
- (i) Poona Bottling Co. Ltd. & Anr. v. Union of India and Others
 - (ii) 1981 (8) E.L.T. 476 (Cal.) (Raghunandan Jalan v. Collector of Central Excise, West Bengal and Ors.)
 - (iii) 1985 (21) E.L.T. 655 (Kar.) (Union of India and Ors. v. I.T.C. Limited and Another)
 - (iv) Mysore Acetate and Chemicals Co. Ltd. v. Assistant Collector, Central Excise, Mysore).
 - (v) 1981 (8) E.L.T. 365 (Mad.) (Madras Rubber Factory Ltd. v. Assistant Collector of Central Excise, Madras and Another).
 - (vi) 1989 (24) E.L.T. 23 (Kar.) (Alembic Glass Industries Limited v. Union of India and Others).
 - (vii) Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District I, Cal.
 - (viii). Etc. An Exhaustive list of case laws have been referred.
- 5.17. that crew members were subject to screening by Customs; that the SCN had falsely highlighted that crew members were not subject to Customs screening;

- 5.18. that the search warrant dated 22-1-15 authorising the search of the residence of A4 was illegal; that in the so called specific intelligence as recorded in the panchnama nothing about A4 was mentioned; that therefore it was clear that the Investigating Agency did not have any intelligence or information of any kind about any connection or involvement A4 with A1 and A2 in the alleged smuggling of gold; that they were at his Sumer Park-3 house at 06:40 itself.
- 5.19. that the panchnas who had witnessed the search of A4's were not from the vicinity and were not independent; that both the witnesses were from a distance of 2 kms; that when the witnesses are not from same vicinity, then the only requirement to be satisfied is that the presence of such persons at the time and place of selection/summoning should be natural;
- 5.20. that the interception of A4 at the airport was false; that as alleged in the airport, A1 and A2 had reached Mumbai at around 6.00 and 6.30 a.m; that A1 was taken out of the airport only after 14.30 hrs on 22-1-15 after completion of the panchnama proceeding; that no wise man would wait outside the airport for 8 hours (from 6.30 hrs to 14.30 hrs) expecting someone who arrived at the airport at 5.30 hrs to come out with the smuggled gold and then to get caught by the Officers; therefore the interception of A4 at the airport was false.
- 5.21. Statement of A4 dated 22-1-15 u/s 108 was invalid; that officers had typed some papers in English in the Office computer and asked him to sign the printout;
- 5.22. that evidence allegedly retrieved from the mobile phones cannot be relied upon; that no proper legal procedure was followed in the seizure and forensic analysis of the mobile phones; that improper handling of mobile devices by the Investigating Agency suggest rule out manipulation of evidence;
- 5.23. that the CDRs cannot be relied upon; that the SCN was silent about there being any certificate under Section 65B of the Indian Evidence Act, 1872 and such a certificate had not been filed alongwith the report of the service providers; that therefore, the CDRs relied upon in this case were invalid.
- 5.24. that the entire case was based only on presumption; that no case can be substantiated based on mere statement and without cogent corroborative evidence, that the entire SCN was just a compilation of

- statements of various persons recorded obviously under duress;
- 5.25. that A4 and others were never involved in any criminal activity; that there were many infirmities in the investigation and SCN which made the entire SCN was not sustainable, that all the applicants and others have retracted their statements; that no enquiry was made with the Dutai based jewellers;
- 5.26. that CCTV footage was not produced thereby, prejudicing the case of the applicants; that the CCTV footage of the arrival hall was being concealed by the prosecution for the reasons best known to the prosecution; that it was a fit case to draw an adverse inference against the prosecution under Section 114 (g) of the Evidence Act;
- 5.27. that the allegation of smuggling of 1,50,000 USD equivalent to INR Rs 93,75,000/- on 5-12-14 by A5 for buying gold had not been proved; that the foreign currencies carried by A5; that the official receipts were issued by M/s Alvi Forex Pvt Ltd, Mumbai on 19-1-15, as they had to reconcile the account of M/s Concord Travels for more than 2½ months; that M/s Alvi Forex Pvt Ltd had issued a temporary receipt in the name of M/s Concord Travels which A5 had been carrying with her on 5-12-14 at the time of travel; that A5 had carried the currency on 5-12-14 as the Foreign Travel quota for the 40 passengers; that the statement of A5 incriminating her husband was not voluntary as she was under the fear and threat of denial of release of her husband who was under detention under COFEPOSA.
- 5.28. that A4 and A1 had disowned the gold seized on 22-1-15; that they were in no way concerned with the seizure of gold at the airport on 22-1-15 and they did not have any claim over the gold seized on 22-1-15; that A2 had claimed ownership of the gold bars and gold jewellery; that A2 had produced documentary proof for it; that the Investigating Agency had falsified the case and had implicated A4 in the case of smuggling of 6 kgs of gold bars and 670 grams gold jewellery on 22-1-15;
- 5.29. that the OIO and OIA are orders on merits and not speaking orders;
- Reliance has been placed on the following decisions
- (a). Case of CESTAT, New Delhi in M/s 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) ELT 705 (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). Apex Court of India in the case of M/s. International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd.,
 - (g). Apex Court in the case of Kranti Associates Pvt. Ltd. Vs. Masoud Ahmed Khan (Citation:- 2011 (273) ELT 345 (SC))
 - (h). Apex Court in N/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302;
 - (i). Apex Court in M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758,
 - (j). etc.
- 5.29. that submissions of applicants as above were neither discussed nor argued nor countered in the impugned Order-in-Original and Orders-in-Appeal;
- 5.30. that the OAA had not allowed the cross-examination of panchas and Officers; that the defence had to give up their valuable right since the adjudication of the case was unduly delayed; that reliance has been placed on the following judgments:
- (a) Aynaubkhan Noorkhan Pathan Vs. The State of Maharashtra & Ors., Civil Appeal NO.7728/2012 decided on 08.11.2012 by the Supreme Court;
 - (b). Mehar Singh Vs. Appellate Board Foreign Exchange, CrI A 109/1975;
 - (c). Central Govt. represented by the Director, Enforcement Directorate, Foreign Exchange Regulation Act, New Delhi Vs. Pr. Alfred James Fernandez, AIR 1987 Kerala 179;
 - (d). Natwar Singh Vs. Director of Enforcement, 2010 (13) SCC 255;
 - (e). State of Kerala Vs. K.T. Shashub Grocery Dealer etc. (1977) 2 SCC 777;
 - (f). S.C. Girotra Vs. United Commercial Bank (UCO Bank) and Others, 1995 Supp (3) SCC 212.;
- 5.31. that the guilt of all the applicants in the case had not been proved; that the standard of proof in criminal cases was about proof beyond reasonable doubt which had not been proved in this case;

- 5.32. that the lower authorities had rejected the case laws relied upon by the applicants without assigning any reason;
- 5.33. that the order of absolute confiscation was not sustainable; that gold was not a prohibited item and was only a restricted item; that prohibition was in relation to goods which cannot be imported by any one, such as arms, ammunition, drugs etc; that this would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with; that in such a situation, the release of such goods confiscated would not cause any danger or detriment to public health; The above view was also supported by the decision of Honble High Court of Calcutta in the case of Commissioner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that gold was now removed from the negative list and can be imported in terms of notification No.171/94-Cus dated 30.9.94; that 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); Judgement of KAMLESH KUMAR Vs CC reported in 1993 (67) ELT 1000 (G.O.L); in the case of HARGOVID DAS K.JOSHIA & OTHERS Vs CC 7 OTHERS reported in AIR 1987 SC 1982, in the case of SHAIK JAMAL BASHA Vs GOI & OTHERS; Etc.
- 5.34. that the allegation of smuggling of 1,50,000 USD equivalent to INR Rs 93,75,000/- on 5-12-14 by A5 for buying gold had not proved; that the allegation that Sturi Ali Anwar Komtrwala imported gold purchased out of the said currency was false; SCN was full of such false allegations only.
- 5.35. that the penalty imposed on the applicants on the alleged past imports are not sustainable; that SCN was not issued under Section 28 of the Customs Act, 1962;

Under the circumstances, the applicants viz, A1, A2, A4 and A5 have prayed to the revisionary authority to set aside the impugned order; also, they have prayed to the revisionary authority that the records seized from their home during the search on 22.01.2015 alongwith the mobile phone may be returned to them and proceedings against them may be dropped as they were in no way concerned with the smuggling; Further, A2 has prayed that the gold and gold

jewellery under absolute confiscation may be released to her on payment of reasonable fine and applicable duty.;

6. Aggrieved with the above appellate order, A3 has filed a revision application on the undermentioned grounds,

6.01. that the OIA was bad in law and was liable to be set aside for various grounds; that he has been charged for offences under Section 112(a) and Sec. 112 (b) of the Customs Act, 1962; that Sec. 112 (a), (b) of the Customs Act clearly states that penalty as should be awarded to any person involved in the act of importation/ the bringing of goods or services into a country from abroad for sale, that no goods had been recovered from him; that there was no cogent or reliable evidence against him; that he was never found with any corpus-delicti i.e. (Latin for "body of the crime"), in Western law, is the principle that a crime must be proved to have occurred before a person can be convicted of committing that crime;at the time when the said alleged offence was supposed to have been committed by other co-accused in the said case.; that the applicability of Sec. 112(b) required an act of possession or carrying, removing, depositing, harboring, keeping, concealing, selling or purchasing, none of the above mentioned acts as alleged have been shown against him; that it was improper to penalize him only on the statements of the other co-accused which were later on retracted by them; that clearly there was no recovery of the Gold bars from him; that in the scn there was no material to connect him even remotely to the said offence committed by him as alleged on 21/22 January, 2015, that in the OIO it was alleged that he had committed the offence on the earlier occasion too whereas there are no details, proof or evidence to arrive at this conclusion that he was involved in similar activities earlier, that the allegations as alleged against him was purely based on surmises and conjectures which was illegal and bad in law; that the OIO was not based on any cogent material by virtue of which he can be prosecuted and penalized for offences of Section 112(a) & (b) of the Customs Act 1962; that the OAA had mainly relied upon the confessional statement of the co-accused and also a retracted confession of himself; that the electronic evidences on which the Department had relied upon was absolutely incomplete and also there were no scientific evidence attached for the same; that in the entire SCN, impugned OIO and OIA there was no whisper about time at which he was found involved in the case; that there was nothing in found against him which was seen in the OIO and OIA; that there nothing to suggest that he was instrumental in abating the smuggling of the gold bars as alleged; that facts in the SCN, and impugned OIO and OIA were

figments of imagination of the OAA; that the department had failed miserably to show his movement on the CCTV camera or in the CDR Report; that his presence at the Airport was natural as during the said period he had been working as a crew member with Air India; that the authenticity of the messages were also doubtful as there is no cross examination carried out on the said Cyber Forensic Lab of DRI; that retracted confessions of the co-accused would not fasten a criminal liability on him as the same needs to be examined in the Court of law; that the department by narrating such evidences in the SCN without giving an opportunity to cross examine was nothing but an act of denial of natural justice; that the evidence on which the OAA had relied upon to impose penalty on him was nothing but secondary evidence which had not been supported by any concrete material evidence in order to connect him to the said offence; that the AA after hearing the matter at full length had also taken on record the admitted fact that there was no recovery whatsoever from him, considering the circumstances that the appellant was working as a crew member of Air India, and the exact location and the call records had not established any ground to show he was involved in the act of smuggling gold bars, that cross-examination had not been allowed which was denial of natural justice; that there was nothing to prove that he was in any way involved in the act of smuggling of gold bars; that the only thread on which he has been held as accused was on the basis of statements of co-accused which were retracted later on; that after this incident, he was removed from his employment as a crew member of Air India merely on suspicion; that his entire career was on stake and till now he has not been able to apply for any job due to this criminal case lodged against him; that taking into consideration all these facts, the AA had reduced the penalty to Rs. 10,00,000/- from the original penalty of Rs. 15 Lakhs which was unjustified/ erroneous and bad in law; that the penalty imposed by the AA was too harsh and penalising; that he has no source of income as he has lost his employment with Air India due to the present case and that at present he was not gainfully employed; that he had lost his father in the year 2016 and his financial position was getting worst since there is no source of income, that it was impossible for him to pay the said amount as penalty.

Under the circumstances, A3 has prayed to the Revisionary Authority to exonerate him from the case and to revoke the penalty imposed upon him and to set aside the unpugned CIA and any other relief as deemed fit and proper;

7. A3 has filed an application for condonation of delay stating that inadvertently, on 29.10.2019, they had filed an appeal before CESTAT, Mumbai.

Thereafter, having realized their mistake, on 23.11.2021, they had moved an application before CESTAT for withdrawal of their appeal. On 11.01.2022, CESTAT was pleased to allow the withdrawal of the appeal.

8.01. Personal hearing in the case was scheduled for 27.10.2021, 02.11.2021, 03.12.2021, 09.12.2021.

8.02. Shri. Prakash Shingrani, Advocate, appeared for personal hearing on 14.12.2021 alongwith S. Babu Gowtham, Advocate and Applicant no. 5. They submitted a written submission and pleaded that in view of Canon India decision passed by the Apex Court, the Show Cause Notice does not survive and the case be decided in their favour.

9.01. Thereafter, a Revision Application which was assigned F. no. 371/183/B/2022 was filed by applicant no. 3 against the same Order-in-Appeal dated 25.07.2019. Since, A3 had already filed a RA application against the said Order-in-Appeal dated 25.07.2019 through Shri. Prakash K. Shingrani, Advocate, a clarification was sought from them i.e. both A3 and the Advocate.

9.02. Applicant no. 3 submitted that he had not authorized Shri. Prakash Shingrani, Advocate to file any revision application on his behalf. Shri. Prakash Shingrani explained that he had been representing all the applicants from the investigation stage itself and in good faith he had filed a single application representing all the applicants. Shri. Prakash Shingrani expressed regret for the mistake committed and withdrew the RA filed by him on behalf of A3.

10. Since, Shri. Prakash Shingrani, Advocate has informed that the Revision Application filed by him on behalf of A3 may be treated as withdrawn, Government allows the withdrawal of this RA. Also, the revision application filed

by A3, subsequently and assigned F.No. 371/183/B/WZ/2022 is taken up for a decision alongwith the other revisions applications filed by A1, A2, A4 and A5 which have been assigned F. Nos. (i). 371/345/B/WZ/2019, (ii). 371/346/B/WZ/2019, (iii). 371/348/B/WZ/2019 and (iv). 371/349/B/WZ/2019, resp. The other RA i.e. F.No. 371/347/B/WZ/2019 is held as withdrawn and reference is mentioned in this order only for the purpose of administrative / office records.

11.01. After legislative changes in the Customs Act, 1962, personal hearing in respect of RA's filed by A1, A2, A4 and A5 was again scheduled for 14.09.2023, 21.09.2023, 30.10.2023, 16.11.2023. Shri. Prakash Shingrao, Advocate alongwith A4 appeared on 31.10.2023 and submitted an additional written submission. They further submitted that there are several discrepancies in panchanama. They represented Applicants 1,2,4 (self) & 5. They further submitted that applicants 1 & 5 have been penalized based on retracted statements of applicant 2 & 4. They requested to allow redemption of gold on reasonable RF and penalty on applicant 2 & 4. They requested to set aside the penalty on applicants 1 & 5.

11.02. In their additional written submissions which were submitted during the personal hearing, the applicants i.e. A1, A2, A4 & A5 have reiterated the contentions raised by them in their submissions which are part of the revision application. They have emphasized that the penalty imposed on the past imports were not sustainable as no proof of smuggling in the past had been found against them.

12. Personal hearing in respect of the RA filed by A3 was scheduled for 05.09.2023, 12.09.2023. Ms. Jayshree Tripathi, Advocate appeared on 05.09.2023 and reiterated earlier submissions. She submitted that no gold was recovered from the applicant and no other concrete evidence was found against

him. She requested to set aside the penalty against the applicant as applicant lost his job and had already suffered.

13. Since, all these revision applications pertain to the same Orders-in-Appeal i.e. MUM-CUSTOM-PAX-APP-299 - 303/2019-20 dated 25.07.2019 issued on 31.07.2019 through F.No. S/49-425, 450, 451, 452 & 478/2018-AP passed by the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai - III, the same are taken up together for a decision under a common order.

14. Government notes that the applicant no. 3 in RA no. 371/183/B/WZ/2022 has filed for condonation of delay as initially, he had approached CESTAT and admitted that the same happened inadvertently. Government has examined the facts and it is seen that A3 had approached CESTAT on 29.10.2019 which was within the appealable period of 3 months from the date of receipt i.e. 02.08.2019 of the O-I-A. Subsequently, on 11.01.2022, CESTAT had allowed him to withdraw his appeal. Thereafter, A3 had filed revision application on 01.04.2022. Taking into consideration the order passed by CESTAT Government finds that the RA no. 371/183/B/WZ/2022 filed by A3 is within time.

1. ON THE ISSUE OF ABSOLUTE CONFISCATION OF THE SEIZED GOLD:

15.01. The Government has gone through the facts of the case, written submissions made by the applicants, documents, etc. Undisputed facts are that A1 and A2 had crossed the green channel and thereafter, they were intercepted. A1 was found carrying 6 gold bars of 1 kgs each, two gold kadas and a gold chain while A2 was found wearing two kadas. A1 and A2 had not declared the gold found in their possession. During the spot inquiries, A1 revealed that he was scheduled to hand over the gold onboard the flight / aircraft to A3 who was an airline staff. However, since A1 and A2 had missed their flight and upon alighting

at CSMIA, they had instructed to hand over the gold to A3 at the airport, having taken another flight to reach CSMIA. However, A3 had refused to carry the gold. Also, A1 had revealed that the gold belonged to A4 and he was scheduled to hand over the gold to A4 who was waiting outside the airport. Based on the information provided by A1, A3 was intercepted at the airport and A4 was intercepted outside the airport. A1 had revealed that he was travelling alongwith A2 and that both were instructed by A4. The quantity of gold recovered was large and a bulk of the same were in primary form. The quantity and primary form of the gold indicate that the same were for commercial use. Since, A1 and A2 were intercepted after they had crossed the green channel without declaring the gold, it is clear that they had no intention to pay Customs duty on the gold. The applicants i.e. A1, A2 and A4 together had devised an innovative modus operandi to smuggle gold by requisitioning the services of a person / employee of an airline i.e. A3 having access to the airport and aircraft and who would then take the gold outside the airport. During the investigations, A1 and A2 had admitted to carrying the gold and they had done so for a monetary benefit and that they were part of a syndicate engaged in the smuggling of gold. As narrated above, they had devised an innovative and ingenious method to smuggle the gold. The large quantity of the gold bars were discovered only due to the information received and alertness shown by the Customs Officers. A1 and A2 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 of 1 kg each and a clever, innovative, ingenious method was planned to avoid detection and evade payment of duty. The confiscation of the gold is therefore, justified applicants had rendered themselves liable for penal action.

15.02. The Hon'ble High Court Of Madras, in the case of Commissioner Of Customs (Air), Chennai-I V/s P. Srinivasan 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. 421 (S.C.), has held that “(a) 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”.

15.03. 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.

15.04. 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.

15.05. The main issue in the case is the quantum, type of gold and manner in which the impugned gold was attempted to be 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, besides the quantum of the gold which was large and the primary nature of the gold, modus operandi adopted makes it a fit case for absolute confiscation as a deterrent to such offenders. A1, A2 in collusion with A4 had used an innovative plan to smuggle gold bars. Had it not been for the alertness of the Officers, A1, A2 and A4 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. A1 and A2, clearly 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.

15.06. A1 was found in the possession of the gold bars. Initially, A1 and A2 had not claimed the ownership of the gold and had stated that the gold belongs to A4. Later in their submissions, A1 and A2 have stated that the gold does not belong to them. A2 in her submissions has requested for the release of the entire impugned gold. The innovative plan to smuggle the gold bars had been hatched by A4 and the services of A1, A2 and A3 had been taken by him. Investigations have revealed that A1, A2 and A4 were involved in this smuggling venture. A1 & A2 had carried the gold bars from Muscat at the instructions of A4. During the investigations, some of the documents recovered from the residence of A4 indicates that he was found involved in earlier cases, also and thus, it is clear that he is a habitual offender. He had admitted to part financing the gold in the past. A4 had taken the services of A1, A2 and A3 luring them with monetary benefits. A1 and A2 had admitted their roles. Though, they have retracted their statements, it is clear that they have done so on advice and the same have been dealt with in detail by the lower authorities.

15.07. The applicants have raised issues that there were certain discrepancies in the drawal of the panchanama, that the pancha witnesses were not independent etc; that A2 had the invoice, that sample of gold bars were not drawn legally, etc. Government's notes that in the OIO, the OAA has given his findings para-wise, on each and every issue raised by the applicants. In fact, each issue has been taken up pointwise in the OIO and the 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 is just a pretense and has been rightly negated by the OIO & OAA. Government notes that all these issues raised by the applicants were an afterthought to somehow obtain a favourable order and that these do not alter the material fact

that huge quantity of gold was recovered. The fact remains that a large quantity of gold was recovered from the applicants. They belong to a syndicate involved in smuggling of gold. Government is not inclined to give credence to these claims made by the applicants.

15.08. The plea taken by A1, A2 and A4 that they had retracted their statements does not come to their rescue. The fact remains that a substantial quantity of gold had been recovered from them (i.e. A1 and A2). The lower authorities have dealt with the retractions and had discussed the same in their orders. Under the said circumstances, Government finds that the issue of retraction raised by the applicants as far as it relates to A1 & A2 does not alter the factual matrix. Government does not find any substance in this averment.

15.09. For the reasons cited above, Government finds that the impugned OIO passed by the OAA in so far as the absolute confiscation of the gold is concerned is legal and proper and considering the gravity of the offence i.e. ingenuity, plan to use a cabin 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 correctly 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 absolute confiscation of the gold and upholds the impugned OIA.

II. ON THE ISSUE OF PENALTY IMPOSED ON A1, A2, A3 and A4 FOR THEIR ROLE IN ATTEMPT TO SMUGGLE 6.67 KGS GOLD SEIZED AT CBMIA ON 23.01.2018.

16.01. The Government notes that except for reducing the penalty imposed on A3, the appellate authority has upheld the penalty imposed by the adjudicating authority under Section 112 (a) and (b) of the Customs Act, 1962 on A1, A2 and A4 for the role played by them in the smuggling of 6.67 Kgs of

gold seized on 22.01.2015. The Government notes that A1 and A2 were found in possession of the gold. They had been instructed by A4 to carry the foreign currency to Dubai, procure the gold and to clear the same from CSMIA without filing a declaration and thereby evading Customs duty. They had planned to take the services of A3 who was a cabin staff having access to the airport and would be found least suspicious. A4 is the mastermind of the case and was involved in the entire planning of the smuggling operation including financing, getting passengers to carry the gold and the foreign currency, clearance etc. A1 and A2 had provided the details of the smuggling operation and with the inputs provided by them, A4 was immediately picked up from outside the CSMIA. From the documents recovered during the investigations, it is clear that A4 was a habitual offender as evidence of involvement in past were also found against him. The Government is in agreement with the penal action against A1, A2 and A4, however, finds that the quantum of penalty imposed on each of the applicants is excessive and is not commensurate with the omissions and commissions committed, therefore, same deserves to be revised.

16.02. On the issue of the penalty imposed on A3, it has been pleaded that penalty has been imposed on him only on the basis of statements which had been retracted. No other evidence has been brought against him; that merely, on hearsay of other co-accused, penalty was imposed on him; that as per the statements of A1, and A4 and himself, it was alleged that in the past too, he had assisted A1 and A4 in smuggling. Government notes that A4 and also A3 himself had divulged details. Government notes that the GAA had not penalised A3 for past clearance. Further, the AA had reduced the penalty imposed on A3 on the specific grounds that gold had not been recovered from him.

16.03. Government observes from the OIO placed in the Revision Applications that (i). no penalty has been imposed on A3 by the GAA for his

involvement in past clearances though this has been alleged by the investigating agency and (iii) a penalty of Rs. 15,00,000/- has been imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962 by the OAA. This penalty of Rs. 15,00,000/- was later reduced to Rs. 10,00,000/- by the AA in the impugned OIA under revision.

16.04. Government finds that A3 was in constant touch with the applicants, he was on duty on the day of the operation, all applicants have clearly and specifically named him and his role. General retraction of a statement given under Section 108 of the Customs Act does not alter specific facts brought out in the statements. Therefore, A3 can not get away from the consequences of his actions. However, quantum of penalty is harsh and the same deserves to be reduced.

16.05. In view of the aforesaid, Government finds that the penalty of ₹ 10,00,000/- imposed on A3 by Appellate Authority under Section 112(a) and (b) of the Customs Act, 1962 is required to be revised so as to make it commensurate to omissions and commissions attributed to A3.

16.06. On the issue of penalty of Rs. 20,00,000/- imposed on A4 in respect of the seized gold weighing 6.67 kgs, Government notes that he had been picked up from outside the airport on the basis of details provided by A1. Government observes that the investigating agency based on the investigations carried out by them had made out a case that A4 was the mastermind of the entire smuggling operation. He had requisitioned the services of A1 and A2 to carry out the smuggling operations. The foreign currency required to purchase the gold abroad was arranged by A4 and played a role in sending it abroad. A4 had admitted to his role. A1 and A2 had identified him. As alleged, A4 had come to the airport to receive the smuggled gold. By his actions, A4 had made himself liable to penal action and Government finds that the penalty imposed

on him is legal and proper. However, Government finds that the quantum of penalty imposed on A4 is also required to be revised.

III. ON THE ISSUE OF PENALTY IMPOSED ON A4 AND A5 FOR PAST SMUGGLING OF GOLD AND FOREIGN CURRENCY RESPECTIVELY.

17.01. Investigations carried out have brought forth that A4 was the mastermind behind the entire smuggling operation. He was the beneficiary of the smuggling operation. He had requisitioned the services of A1, A2, A3, A5 and others and was instrumental in arranging the finance, sending the foreign currency abroad, purchase of gold abroad and smuggling the same to India without payment of Customs duty. He had even used the staff of his travel agency in the smuggling of gold. Documents recovered from his premises indicate that he was involved in smuggling in the past. He had admitted this fact in his statement also. Details of the smuggling operation has been explained by A4, that some of the aides in the smuggling were his relatives or relatives of his wife, viz A5. By his actions, it is clear that A4 had made himself liable for penal action. Government finds that the penalty of Rs. 50,00,000/- imposed on A4 under Section 112(a) and (b) and Section 114(i) of the Customs Act, 1962 is commensurate with his actions of omission and commissions.

17.02. On the issue of penalty of Rs. 10,00,000/- imposed on A5 under Section 112(a) and (b) of the Customs Act, 1962 for past clearances, Government finds there is a specific allegation of USD 1,50,000/- equivalent to INR 93,95,000/- smuggled out by A5. A reference of Cash Declaration for AED 553,950/- in the name of A5 recovered from the possession of A2 on 22.01.2015 is available in the O-I-O. A4 in his statement has stated that this money was carried by his wife, viz A5 to Dubai on 05.12.2014. Government observes that this AED amount may have been referred to as USD and the equivalent taken in the SCN / O-I-O. Government finds that the Customs Declaration pertains to have been filed at Dubai. A4 /A5 have not furnished any document that they had any evidence

that the same had been declared to Indian Customs prior to taking it abroad. Neither have they produced the necessary permission which was obtained from competent authority for taking the money abroad. Therefore, Government is not inclined to reduce the quantum of penalty on A5.

18. From the facts discussed in the fore-going paras, Government modifies the impugned order passed by Appellate Authority as under:

- (a) the absolute confiscation of the gold bars and jewellery, totally weighing 6.67 Kgs, valued at Rs. 1,66,53,164/- is upheld. I.e. Government is not inclined to interfere in the absolute confiscation of the same as ordered by the OAA and upheld by the AA.
- (b) the penalty of Rs. 15,00,000/- 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. 10,00,000/- (Rupees Ten Lakhs Only);
- (c) the penalty of Rs. 15,00,000/- imposed by OAA under Section 112(a) and (b) of the Customs Act, 1962 imposed on A2 and upheld by AA, is reduced to Rs. 10,00,000/- (Rupees Ten Lakhs Only);
- (d) the penalty of Rs. 10,00,000/- imposed by AA under Section 112(a) and (b) of the Customs Act, 1962 on A3 is reduced to Rs. 5,00,000/- (Rupees Five Lakhs only);
- (e) the penalty of Rs. 20,00,000/- imposed by OAA under Section 112(a) of the Customs Act, 1962 on A4 in respect of the seized gold bars weighing 5 kgs and jewellery weighing 0.670 kgs and upheld by AA, is reduced to Rs. 12,00,000/- (Rupees Twelve Lakhs Only);
- (f) the penalty of Rs. 10,00,000/- imposed by OAA under Section 114(b) of the Customs Act, 1962 on A5 for past smuggling of foreign currency and upheld by AA, is upheld.
- (g) the penalty of Rs. 50,00,000/- imposed by OAA under Section 112(a) of the Customs Act, 1962 and Section 114(i) of the Customs Act, 1962 for the admitted past clearance of gold and for the admitted past smuggling of foreign currency, resp., which was upheld by AA, is also upheld.

19. Accordingly, the five Revision Applications i.e. F.No. (i) 371/345/B/WZ/2019-RA, (ii) 371/346/B/WZ/2019-RA, (iii) 371/348/B/WZ/2019-RA, (iv) 371/349/B/WZ/2019-RA, filed by A1, A2, A4 & A5 and (v) RA F.No. 371/183/B/WZ/2022-RA, are disposed of on the above terms. RA assigned F.No. (vi) 371/347/B/WZ/2019-RA is allowed to be withdrawn.

(SHRAWAN KUMAR)

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

ORDER No. 71-32/2024-CUS (WZ) /ASRA/MUMBAI DATED 17.01.2024.

To:

1. **Shri. Piyush Jaaraj Soni**, 526, Maulana Azad Road, Near Gulabwadi Circle, 3rd Floor, Room No. 37, Mumbai - 400 004.
2. **Mrs. Sakina Barafwala**, Room No. 1, Ground Floor, Achole Road, Nallasopara (E), Palghar - 401 209.
3. **Shri. Siddhesh Mohan Patil**, Room No. 13/A, Laxmibai Patil Wadi, Gokhale Road, North Anant Patel Marg, Dadar (West), MUMBAI - 400 028.
4. **Shri. Burhan Fakhruddin Khatumdi**, Flat No. 1404, 14th Floor, Sumer Park, 3, Sethi Moti Shah X Road, Near Burhani College, Byculla (E), MUMBAI 400 010.
5. **Mrs. Mariyam Fakhruddin Khatumdi**, Flat No. 1404, 14th Floor, Sumer Park, 3, Sethi Moti Shah X Road, Near Burhani College, Byculla (E), MUMBAI 400 010.
6. **Pr. Commissioner of Customs**, Chhatrapati Shivaji Maharaj International Airport, Terminal - 2, Level-II, 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. **Ms. Jayashree Tripathi**, Advocate, Room No. 15, 1st Floor, Oriental Business Centre, Raja Bahadur Mansoon, Fort, Mumbai - 400 001.
3. **Sr P.S. to AS (RA)**, Mumbai.
4. **File Copy.**
5. **Notice Board.**