

(i).F.No. 371/514/B/WZ/2019-RA

(ii).F.No. 371/76/B/WZ/2020-RA

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre – I, Cuffe Parade,
Mumbai-400 005

(i). F.No. 371/514/B/WZ/2019-RA & : Date of Issue : 09.03.2023
(ii). F.No. 371/76/B/WZ/2020-RA. 1363

ORDER NO. 393-394 /2023-CUS (WZ)/ASRA/MUMBAI DATED 28.02.2023
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.

(i) F.No. 371/514/B/WZ/2019-RA

Applicant No. 1. : Shri. Sunil Kishorlal Jagwani.

(ii). F.No. 371/76/B/WZ/2020-RA

Applicant No. 2. : Shri. Deepak Thakurdas Golani

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal Nos.
MUM-CUSTM-PAX-APP-514 & 513/19-20 dated
23.09.2019 issued on 23.09.2019 through F.No. S/49-
150 & 143/2018 passed by the Commissioner of Customs
(Appeals), Mumbai – III.

ORDER

These revision applications have been filed by Shri. Sunil Kishorlal Jagwani and (ii). Shri. Deepak Thakurdas Golani (hereinafter referred to as the applicants, alternately and more specifically as Applicant no. 1 (A1) and Applicant No. 2 (A2) resp.) against the Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-514 & 513/19-20 dated 23.09.2019 issued on 23.09.2019 through F.No. S/49-150 & 143/2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 14.07.2015, the Customs Officers at CSMI Airport, Mumbai had followed A1 as soon as he had alighted at Aerobridge no. 69 and proceeded to the arrival hall. A1 had arrived from Abu Dhabi onboard Etihad Flight No. EY-212 / 17.07.2015. A1 was intercepted after he had dropped a white coloured package at the Etihad Airways Arrival Counter.

2(b). A1 in his statement informed that the said package was supposed to be picked up by A2 who was an employee of Etihad Airways. A1 identified A2 at the counter of Etihad Airways within the CSMIA, who too was immediately intercepted.

2(c). The said package having markings of 'Gold Marlboro ORIGINAL' was examined which led to the recovery of 2 cut pieces of FM gold bars and 3 nos of FM gold bars of 10 tolas each. Total weight of the gold recovered was 1348 grams and was valued at Rs. 33,08,464/-.

2(d). A1 admitted that during the past, on 4 occasions, in similar manner, he had handed over packages containing gold to A2; that he had carried the gold for monetary consideration; that he had received the gold at Dubai from

one Sanjay Keswani to be handed over to A2 at CSMIA; that he had deleted the whatsapp messages and his entire conversation with said Sanjay Keswani.

2(e). A2 in his statements recorded under Section 108 of the Customs Act, 1962 stated that though his duty timing on 13.07.2015 was from 16:00 Hrs to midnight and was over at midnight, he had stayed back for clearance of rush baggage; that he admitted to knowing Sanjay Keswani who used to move around in a wheel chair; that he admitted to have had whatsapp conversations with Sanjay Keswani on 14.07.2015;

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/204/2018-19 dated 30.03.2018 issued through S/14-5-376/2015-16 Adjn (SD/INT/AIU/292/2015 AP-B) ordered for the absolute confiscation of the 2 cut pieces of gold bars and 3 gold bars of 10 tolas each totally weighing 1348 grams, valued at Rs. 33,08,464/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 4,00,000/- on the applicant no. 1 under Section 112(a) and (b) of the Customs Act, 1962 and imposed a penalty of Rs. 3,00,000/- on A2 under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide his Orders-In-Appeal Nos. MUM-CUSTM-PAX-APP-514 & 513/19-20 dated 23.09.2019 issued on 23.09.2019 through F.No. S/49-150 & 143/2018, did not find any reason to interfere with the impugned the OIO.

5. Aggrieved with the above order, A1 has filed this revision application and the grounds of appeal are as under;

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- 5.01. that the order passed by the lower authorities was not in conformity with the spirit of the Baggage Rules, 1998 and deserves to be quashed.
- 5.02. that A1 had no concern with the gold under seizure and no business or professional connection with A2; SCN was wrongly issued to A1; that A1 denies all charges levelled against him in the SCN and the Orders; that the charges were based on presumptions and surmises and have no relevance in law and the order deserves to be set aside in the interest of justice.
- 5.03. that though A1 had initially stated on 14/07/2015 that the said packet weighing approx. 1300 grams was dropped by him at the Etihad Airways Counter situated behind belt no. 10 and A2 was supposed to pick it, but infact he had found the said package near his seat in the plane and was to hand over the same to the "Lost & found" Counter; that in-between he had kept the said package at the Etihad Airways arrival counter; that he had not contravened any provisions of the Customs Act 1962; that from the CCTV footage it could not be proved that he had any connection with A2
- 5.04. that he had clearly retracted his original statement dt. 14/07/2015; that his statement had been recorded under force and duress; that he was a singer and travels frequently to Dubai and ought not to have been branded as a smuggler
- 5.05. that reliance is placed on the Hon'ble Supreme Court's decision in the case of State of Gujarat & others v/s Ganeshbhai, Jakshibhai, Bharwad & others and Manusharma v/s State (NCT of Delhi): (2010) 6 SCC as even the legal procedure had not been followed in the panchnama proceedings; that panchanama was fabricated and has infirmities; A1 also relies upon the Order passed by the S.C. in case of HaricharanKurmi v/s State of Bihar- AIR 1964(2) S.C.- 1184 wherein it was stated "*Statement of Co-accused was not relevant in law unless corroborated by any other independent evidence*".
- 5.06. that A1 was not liable to any penal action u/s 112(a) & (b) of C.A. 1962 as he had no connection with the Gold under seizure & he had been falsely implicated in the case without any fault on his part.

Under the circumstances, A1 has prayed to the revision authority to waive off the penalty of Rs. 4,00,000/-.

6. Aggrieved with the above order, A2 has filed this revision application and the grounds of appeal are as under;

- 6.01. that A2 was a Security Controller, Etihad Airways and had an unblemished clean record of 15 years in Security at CSIA, Mumbai; that he was framed in a false case by Customs on 14.07.2015.
- 6.02. that the Adjudicating Authority had passed order without concluding the personal hearing,
- 6.03. that Appellate Authority too had passed order without concluding the personal hearing,
- 6.04. that principles of natural justice had been violated.
- 6.05. that they have relied upon the case law of Umanath Pandey vs. State of UP reported in 2010 (20) STR 268 (SC)} and have prayed that the impugned order which was passed in gross violation of principles of natural justice, needs to be quashed and set aside on this count alone.
- 6.06. that the lower authorities had not conducted the cross-examination of the desired witnesses,
- 6.07. that the Order-In-Original as well as Order-In-Appeal were passed mechanically and without application of mind and none of the important, legal and valid submissions made by A2 were discussed and considered in the said orders.
- 6.08. that the Order of the Appellate Authority was bad and had travelled beyond the show cause notice and had wrongly held that the credit of Rs. 4 lakhs in the account of A2 was done by Sanjay Keswani whereas, the investigations found that the same was a loan from Kirit Kantilal Doshi.
- 6.09. that the packet had not been picked up by A2 but the same had been picked up by the Officer which could be confirmed from the CCTV footage; that this vital fact was missed by the lower authorities.
- 6.10. that he was not aware about the antecedents of Sanjay Keswani and had merely known him as a wheel chair bound passenger; that by merely knowing him, A2 cannot be connected to illegal activities of Mr. Keswani. Applicant has relied upon the case law of 2012 (284) E.L.T.321 (Del.) passed by Hon'ble Delhi High Court.
- 6.11. that the AA holding that A2 was in regular contact and touch with Mr. Sanjay Keswani based in Dubai who was passing instructions

- to both the applicants to facilitate the removal of the impugned gold in a clandestine manner, was false, vague and unsupported by evidence; that department had not produced any incriminating text messages from the call records of Sanjay Keswani's phone.
- 6.12. that on the fateful day the applicant admitted that he had chatted with Sanjay Keswani but it was not about any illegal activity.
 - 6.13. that the screenshot of the whatsapp messages cannot be relied upon as the same appears to have been doctored or created for the purpose of evidence.
 - 6.14. that the lower authorities had based their findings on the unsupported statement of Mr. Dijesh Gohil, Contractual Passenger Service Agent of CelebiNAS and Ms. Jayalaxmi Pulikool (Guest Service Agent) who were subordinate to him and were not aware of his timings.
 - 6.15. that this case has been planted on the applicant;
 - 6.16. that the CCTV reveals that the applicant had not picked up the packet from the counter; that the Customs Officer had picked up the packet immediately after A1 had placed it there; that the CCTV reveals that Officer was with A1 before he had placed the packet containing the impugned gold bars at the airline counter,
 - 6.17. that no incriminating evidence is available in the CCTV against A2.
 - 6.18. that facts other than that seen in the CCTV footage have been taken in the SCN,
 - 6.19. that contradictory versions of place of interception of the passenger raises serious doubts about the correctness of interception, timing and place of interception; that the panchas had been called later after interception of A1; that in the remand application dated 15.07.2015 and in the reply to the bail application of A2 filed on 17.07.2015 by the investigating agency before the learned Addl Chief Metropolitan Magistrate, Esplanade Court, Mumbai, it was informed that A1 had been intercepted while he was passing through Aerobridge No. 69 after his arrival from Abu Dhabi, whereas in the alleged seizure panchnama dated 14.07.2015, it was claimed that A1 had been intercepted after retrieval of the packet dropped by him at Etihad Airlines Counter; that all these contradictions was ignored by the lower authorities.
 - 6.20. that the OAA had ignored the fact of the seizing officers having interacted with A1 till just before he had placed the packet at the

airline counter.

- 6.21. Adjudicating Authority has ignored. the fact of seizing officers interacting with the passenger till just before placing the subject packet on the airline counter by the passenger; the seizing officer had interacted more than once just before the incident of placing the packet by A1 on the airline counter and thereafter the same seizing officer had come running within 3 seconds and picked up the packet himself as wasevident from CCTV footage on record.
- 6.22. that A2 had been performing his lawful duty on the date of the incident,
- 6.23. that A2 did not know A1,
- 6.24. that the impugned order was a non-speaking one; that specific findings had not been given;
- 6.25. that A2 relied on the case of Cyril Lasrado (Dead) by Lrs and Others V/s Juliana Maria Lasrado and Another reported in 2004 (7) SCC 431 on the issue of giving finds and reasons in an order.
- 6.26. that A2 also relied on the judgement of Hon'ble High Court of Bombay in the case of Velcord Textiles v. Union of India reported in 1999 (111) ELT 351 (Bom) on the issue of findings, reasons to be elaborated in an order,
- 6.27. that the other cases relied upon are the Order of the Hon'ble Supreme Court in the case of Prince Khadiollan Handloom Prod Coop Ind/ Society vs. CCE - 1996 (88) ELT 637 (SC) on the grounds that grounds not taken in charge was not permissible; Supreme Court in Reckitt & Colman of India Ltd vs. Collector of Central Excise -1996 (88) ELT 641 (S.C),
- (a). Manikya Plasticchem Pvt. Ltd vs. CCE - 2003 (160) ELT 273
 - (b). Kores (I) Limited vs. CCE - 2004 (169) ELT 117
 - (c). Philips India Ltd vs. CCE - 2005 (191) ELT 1028
 - (d). Metal Press India vs. CCE - 2005 (192) ELT 564
 - (e). Bharat Aluminium Co Ltd vs. CCE - 2006 (195) ELT 275
 - (f). CCE vs. Toyo Engineering India Limited - 2006 (201) ELT 513 (SC)
 - (g). Board vide Circular No:1053/02/2017-CX issued in F.No; 96/1/2017-CX-I dated 10,03.2017,
- 6.28. that the department did not have any evidence at all to implicate A2; seizure document was a concocted document as evident from the fact that same set of officers were present in the Panchnama

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that had commenced at 9 .30 am and ended at 1.30 pm and house search panchnama that had commenced at 1.00 pm and ended at 3.00 pm at A2's residence, hence the same should not be relied upon.

- 6.29. that A2 was not in any way concerned with the said seized Gold and should not be held liable for its confiscation under any of the sections of the Customs Law; that to impose any penalty, the department was required to prove that A2 was involved in the act of smuggling; that recovery of the gold had been made from the airline counter and not from A2; that in his statement A2 had denied his involvement; that the lower authorities have passed orders contrary to the evidence available;

Under the circumstances, A2 has prayed that the impugned Order-in-Appeal No. MUM-CUSTOM-PAX-APP-513/19-20 dated 23.09.2019 passed by AA and the OIO be set aside with consequential relief or to grant any other relief as deemed fit.

7. A2 has filed an application for condonation of delay and has attributed the delay of 73 days to him having approached CESTAT for an early hearing in the matter. Hon'ble CESTAT had thereafter, passed an order on 11.02.2020 holding that the appeal filed by A2 was not maintainable as the issue related to import of goods as baggage. However, Hon'ble CESTAT had held that A2 was at liberty to file revision application and that said authority may consider their application, if any filed for condonation of delay of the period lost in pursuing before this forum.

8.1. Personal hearings in the case of A1 were scheduled for 12.08.2022, 25.08.2022. Shri. O. P. Rohira, Advocate for A1 appeared and submitted that gold did not belong to A1 therefore, requested to reduce the penalty.

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8.2. Personal hearings in the case of A2 were scheduled for 08.12.2022, 22.12.2022, 04.01.2023 and 18.01.2023. A2 alongwith his Advocate, viz Shri. K.T Golani appeared on 18.01.2023 and stated that A2 has nothing to do with subject gold. They submitted that A2 has suffered unnecessarily for no fault of his. They reiterated the earlier submissions. They requested to allow their application.

9. On the issue of condonation of delay, Government notes that the revision application has been filed by A2 on 09.03.2020. The OIA dated 23.09.2019 was issued on 23.09.2019. Applicant has claimed that the OIA was received on 28.09.2019. This has not been refuted by the respondent. Accordingly, the applicant was required to file the revision application within 3 months i.e. by 27.12.2019. Government notes that an extension period of 3 months was available to the applicant which would have expired on 26.03.2020. Government notes that the revision application was filed on 09.03.2020 which is well within the extension / condonable period i.e. 3 months + 3 months. Also, as discussed above, A2 had been given liberty by Hon'ble CESTAT, which in view of the fact that revision application has been filed within the condonable period, need not be referred to. Therefore, prayer for condonation of delay is accepted and Government condones the delay.

10.1 The Government has gone through the facts of the case, written submissions, oral submissions etc. At the outset, Government notes that both the applicants i.e. A1 and A2 have claimed that they have nothing to do with the gold seizure. In the written as well as oral averments made by A1, he has stated that the gold under seizure did not belong to him. A2 too, in his written as well as oral averments has stated that he had nothing to do with the gold under seizure. In the circumstance, Government notes that the Revision Applications have been filed by the applicants i.e. A1 and A2 only on the limited issue of imposition of penalty on them.

10.2. The fact remains that gold had been seized. A1 had admitted that the packet containing the gold bars, totally weighing 1348 grams had been kept by A1 at the counter of Etihad Airways located within the arrival area at CSMI airport. The case of the respondent was that A2 was supposed to collect the same. It was also alleged that A2 based on the location of the officers at the Aerobridge, got wind of the plans of the department and did not collect the said packet. Based on whatsapp messages found on the mobile of A2, it was alleged that he had an apprehension that the officers were waiting at the Aerobridge for A1 and so changed his plan.

10.3. Government notes that though A2, had not touched the packet, Investigating agency had made an attempt to gather circumstantial evidence based on the statements of the co-staff of A2 and the staff of CelebiNAS, alleging that though the duty of A2 was over, he still was found at the airport.

10.4. On the issue of 3 previous trips of A1 and involvement of A2, Government notes that in the SCN, based on the CCTV footage of the respective days, only allegations of A1 conversing with A2 have been made and at no point has any pointed reference been made that A2 had collected any package from A1.

10.5. An attempt has been made by the investigation to get the details of the duty roster of A2 and make a case that on each of the previous 19 occasions when A1 had come from Abu Dhabi, A2 was on duty. However, Government notes that from this observation, a corroboration of exchange of gold or any contraband cannot be credibly substantiated.

10.6. The CCTV footages too corroborate the claims made by A2. It is undisputed that he had not touched the packet. Even for the 3 previous occasions where it was stated in initial statement by A1 that he had handed over the packet to A2, the CCTV footages indicate the presence of A1 and A2

in the same frame, but lacks any evidence of something having been exchanged. This initial statement has been later retracted and it was submitted that packet was being deposited as a lost and found article.

10.7. The financial investigations of A1 and A2 have not come out with any credible evidence indicating more income was being earned by them than the income from known sources which has been reasonably accounted for.

11.1. It has been alleged by A2 that his request for cross-examination of witnesses had been only allowed partially i.e. some of the desired witnesses proposed by him [i.e. A2] had not been examined. Further, it has been alleged by A2 that the OIO had been passed without concluding the personal hearing. A2 has also alleged that the timings of the two panchanamas i.e seizure panchanama and house search panchanama, clearly shows that officers could not be present simultaneously at the two different places. With all these discrepancies, Government notes that A2 had made out a case that certain procedural infractions exist as far as his role is concerned. Also, Government notes that A2 had made out a case that he had an unblemished record of nearly 15 years where not even once his involvement in any smuggling activity or adverse behavior had been found.

11.2. A2 has pointed out that his acquaintance with A1 and Sanjay Keswani was limited to knowing them as airline passengers. Illegal acts, if any, of passengers cannot be foisted on A2.

11.3. It has been repeatedly averred that the CCTV footage clearly showed that A2 had not picked up the packet containing the gold. It was alleged that the same had been handled by the officers. Government notes that in such cases, where allegation of involvement in a smuggling activity is made, it is imperative that a direct, clear and undisputed evidence is available rather than basing the case on implied conclusions and conjectures.

11.4. In RE K. ANBALAGAN, the GOI in a similar case vide Order no. 97/2020-CUS(SZ)/ASRA/Mumbai dated 21.07.2020 [2020(374) ELT 285 (GOI)] had held as under;

8. Further, the seizure of the gold took place at the aerobridge and according to the mahazar, the Respondent has not received the gold from the passenger nor has he come into contact with him or the gold. The entire case on the respondent has originated from the statement given by Shri Sahubar Sathik Hithayadullah in which he has stated that he was to proceed to lift to handover the gold to the Respondent. To put it shortly, there is no tangible involvement of the Respondent leading to seizure of gold. The passenger with gold was intercepted at the aerobridge itself, before the entire conspiracy took place. The officers along with the passenger contacted the respondent and intercepted him at the lift. However, by then the gold was already taken into possession by the officers, the intended plan of smuggling the gold out of Airport as a part of conspiracy did not take place, as the plan has not been executed. As the gold was seized before the respondent came in the picture, the offence associated with the mens rea was not allowed to happen. The investigations revealed the conspiracy, but the conspiracy never attained fruition. The gold was seized/recovered before this conspiracy could play out. Therefore, the offence of the Respondent remained unfulfilled and therefore in the area of speculation, and hence penalty cannot be imposed on an offence yet to be committed.

9. Government further observes for penalty under Section 112(a) of the Customs Act, 1962, the offence should have taken place. If the entire conspiracy was allowed to take place and the Respondent was caught with the gold or had he taken out the gold out of the Airport, penalty would have become applicable. The Adjudicating Authority has imposed penalty under Section 112(a) on the Applicant. The Section 112(a) is reiterated below;

112. Penalty for improper importation of goods, etc. - Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to

confiscation under section 111, or abets the doing or omission of such an act,

The Respondent never came in contact with the gold. It is thus evident that the Respondent has not done anything in relation to the gold that was seized. The Respondent never came in touch with the gold at all, as it was seized before he came into the conspiracy, and therefore there was no cogent act of commission or omission by the Respondent, which rendered the goods liable for confiscation. The subsequent actions of unravelling the conspiracy and implicating the applicant did not take place and therefore there is no reason for invoking Section 112(a) of the Customs Act, 1962. In view of the above the Government holds that Section 112(a) cannot be invoked in the case and penalty is not imposable. The penalty imposed is therefore rightly set aside in the Appellate order. The impugned Appellate order is therefore to be upheld and the Revision Application is liable to be dismissed.

10. Accordingly, the Revision application is dismissed.

11.5 Government notes that a case that A2 was involved in smuggling of gold has not been substantiated beyond reasonable doubt. Government finds that the circumstantial evidence relied by the investigating agency was not enough to prove the involvement of A2. The final clinching evidence which is required in such cases, somehow eluded the investigating agency. There were gaps in the evidences, such as the financial link, call data, telephonic messages, etc. Therefore, Government finds that the allegations against A2 lacks substantiation by credible evidence. From all the facts available, Government finds that charge against A2 has not been substantiated.

12. The facts and evidence indicates clearly that gold bars had been brought by A1. The blank CDF recovered from A1 indicates that he had no intention to declare the gold bars and pay duty. Hence, Government finds that confiscation of the impugned gold bars was justified. By his actions, A1 has rendered himself liable to penal action.

13. 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".

14. 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 Applicant thus liable for penalty.

15. 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.

16. Government observes that the gold was in primary form. A1 had committed a premeditated act. Applicant was acting for monetary benefit. It revealed his clear intention to evade duty and smuggle the gold into India. A1 or anyone else has not claimed ownership of gold. The circumstances of the case especially, quantum of gold, act of leaving the gold at the counter, primary form of gold, blank CDF found on him, clearly brings out that A1 had no intention of declaring the gold to the Customs at the airport. All these facts have been properly considered by the Original Adjudicating Authority while

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absolutely confiscating the gold bars, weighing 1348 grams, valued at Rs. 33,08,464/-.

17. Insofar as the absolute confiscation of the gold bars is concerned, the Appellate Authority has rightly upheld the order passed by the OAA as legal and proper. In this case, the option to allow redemption of the seized goods has been rendered infructuous, as both the applicants viz, A1 and A2, in their written as well as oral averments have categorically expressed that they have nothing to do with the gold under seizure and have disassociated themselves from it. In this given situation, i.e. the seized gold becoming 'unclaimed' in nature, Government does not find it necessary to interfere in the absolute confiscation of the gold held by the lower authorities.

18. Penalty of Rs. 3,00,000/- was imposed on A2 under Section 112(a) and (b) of the Customs Act, 1962 by the OAA which has been upheld by the AA. For the reasons discussed above, especially the lack of evidence, no electronic or documentary evidence could establish the allegation made, Government finds that the evidence is not sufficient to conclude that A2 had connived with A1 or anybody else in order to smuggle the gold under seizure. Government does not find any ground to impose penalty on A2 under Section 112(A) and (b) of the Customs Act, 1962. Hence, Government is inclined to waive off the penalty imposed on A2.

19. Government from the facts of the case finds that the action of A1 had rendered himself liable for penal action. However, Government finds that the penalty of Rs. 4,00,000/- imposed on A1 under Section 112(a) and (b) of the Customs Act, 1962 is harsh, especially in light of the fact that A1 has disclaimed the gold bars.

20. For the aforesaid reasons, Government modifies the impugned Orders-In-Appeal F.Nos MUM-CUSTOM-PAX-APP-514 & 513/19-20 dated 23.09.2019

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issued on 23.09.2019 through F.No. S/49-150 & 143/2018 passed by the AA as under;

(i). Government maintains the absolute confiscation of the gold bars, totally weighing 1348 grams and valued at Rs. 33,08,464/- under Section 111(d), (l) and (m) of the Customs Act, 1962 as ordered by the OAA and upheld by the AA.

(ii). The penalty of Rs. 4,00,000/- imposed on applicant 1 under Section 112(a) and (b) of the Customs Act, 1962 is reduced to Rs. 3,00,000/- (Rupees Three Lakhs only),

(iii). The penalty of Rs. 3,00,000/- imposed on applicant 2 under Section 112(a) and (b) of the Customs Act, 1962 is quashed.

22. The two Revision Applications are decided on the above terms.

*

:

Shrawan Kumar
28/2/23
(SHRAWAN KUMAR)

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

ORDER NO. *343-394* /2023-CUS (WZ)/ASRA/MUMBAI DATED *28*.02.2023

To,

1. Shri. Sunil Kishorelal Jagwani, Krishna Tower, Flat No. C/303, 3rd Floor, Plot No. 17, Sector-14, Koparkhairane, Navi Mumbai – 400 709.
2. Shri. Deepak Thakurda Golani, **Address No. 1.** B-704, Sagar Shrot Society, Near Rajiv Gandhi Engineering College, Juhu Versova Link Road, Andheri West, Mumbai – 400 053.; **Address No. 2.** A/18, Maharaja Surajmal Society, Near Rajiv Gandhi College Signal Junction, Juhu Versova Link Road, Four Bungalows, Andheri West, Mumbai – 400 053.
3. Principal Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal – 2, Level – II, Sahar, Andheri (East), Mumbai – 400 099.

(i).F.No. 371/514/B/WZ/2019-RA
(ii).F.No. 371/76/B/WZ/2020-RA

Copy to:

1. Shri. O.M Rohira, Advocate, 148/301, Uphaar, 10th Road, Khar West, Mumbai – 400 052.
2. Shri. K.T Golani, Advocate, 703, Ratnagar CHS, Four Bungalows, Opp. Kandhenu Mall, Jai Prakash Road, Andheri West, Mumbai : 400 053.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.