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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 380/09/WZ/2018-RA (MUM) / 2095 : Date of Issue : 12.04.2013

ORDER NO. 421 /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.03.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

F.No. 380/09/B/WZ/2018-RA (MUM)

Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Smt. Nitaben Jatinkumar Desai

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-635/17-18 dated 17.10.2017 issued on 23.10.2017 through F.No. S/49-306/2017 passed by the Commissioner of Customs (Appeals), Mumbai -III.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, CSI Airport, Mumbai (hereinafter referred to as the Applicant) against the Order-In-Appeal No. MUM-CUSTM-PAX-APP-635/17-18 dated 17.10.2017 issued on 23.10.2017 through F.No. S/49-306/2017 passed by the Commissioner of Customs (Appeals), Mumbai - III in respect of Mrs. Nitaben Jatinkumar Desai (hereinafter referred to as the Respondent).

2(a). Brief facts of the case are that on 01.03.2015, Customs Officers at CSMI Airport, Mumbai had intercepted the respondent after she had cleared herself through the green channel alongwith her baggage. The Respondent had arrived from Abu Dhabi onboard Etihad Airways Flight No. EY 206/01.03.2015. It was ascertained that the respondent had filed a NIL Customs declaration form for possession of any dutiable items. To the query whether she was carrying any dutiable goods in her baggage or person, the respondent had replied in the negative. A personal search of the respondent led to the recovery of 33 FM gold bars of 10 tolas each concealed in specifically made cavities on the waist belt worn by the respondent. The total weight of the 33 FM gold bars was 3847 grams valued at Rs. 94,94,550/-.

2(b). Statement of the respondent was recorded on 01.03.2015 under Section 108 of the Customs Act, 1962 wherein she interalia stated that she was a widow, that she neither had any immovable property in her name nor any bank account; that the gold bars did not belong to her and belonged to Mr. Hashmukhbhai Ishwarlal Patel who had given it to her at Abu Dhabi airport with instructions to sell it in the open market and return the money with profit; that she would be paid Rs. 1,00,000/- for the same; that she had concealed the gold bars to avoid detection by Customs and save the duty amount; that she was aware that import of gold without declaration and without payment of duty was an offence; that she had travelled to

Dubai nearly 7 to 8 times during the last 8 months; that she admitted to the possession, carriage, non-declaration, concealment and recovery of the gold bars.

2(c). The Respondent was arrested on 01.03.2015 and was released on personal bail and surety bond. Investigations carried out revealed that the respondent had already sold her apartment on 17.02.2014 and she was not found on the follow up address received during the said search. Numerous, summons had been issued to the respondent. However, she did not turn up for the investigations. The respondent filed a retraction on 29.04.2015 to her statement dated 01.03.2015 which was duly rebutted by the investigating agency.

2(d). The assay of the 33 gold bars was conducted through a Government Approved Valuer who certified that the same were of 24 Kts purity (i.e. 99.9%) and confirmed the total weight and value as 3847 grams and Rs. 94,94,550/-.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. ADC/RR/ADJN/76/2017-18 dated 29.05.2017 [S/14-5-225/2015-16ADJN - SD/INT/AIU/100/2015 AP'B] ordered the absolute confiscation of the 33 gold bars, totally weighing 3847 grams and valued at Rs. 94,94,550/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 10,00,000/ was also imposed on the respondent under section of 112 (a) and (b) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai -III who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-635/17-18 dated 17.10.2017 issued on 23.10.2017 through F.No. S/49-306/2017 allowed to redeem the 33 gold bars, totally weighing 3847 grams and valued at Rs. 94,94,550/- on payment of a redemption fine of Rs. 17,00,000/- [Rupees Seventeen Lakhs only]. The appellate

authority did not interfere in the quantum of penalty of Rs. 10 Lakhs imposed on the respondent by the original adjudicating authority.

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

5.01. that the Order-in-Appeal is not legal and proper, mainly for the following reasons;

5.02. that the respondent was carrying 33 gold bars of 10 tolas each, collectively weighing 3847 grams, concealed in specifically made cavities of the waist belt worn by the her; that the respondent had declared / left the Total value of Dutiable goods being imported' at column 9 of the Customs Declaration form as "blank"; that she had admitted to the possession, carriage, non-declaration, concealment and recovery of gold seized; that the respondent had failed to make a true declaration in the Customs Declaration Form of the contents of her baggage to Customs as required under Section 77 of the Customs Act, 1962; that the respondent in her statement recorded on 01.03.2015 under Section 108 of the Customs Act, 1962 interalia had stated that she neither had any immovable property in her name nor have any bank account; that she can read, write, speak and understand Hindi and Gujarati; that she did not know English and had requested the officers to translate and make her understand the statement in simple Hindi; that the seized gold bars did not belong to her; that one person in Abu Dhabi named Mr. Hasmukhbhai Ishwarlal Patel had given her the gold at Abu Dhabi Airport with instructions to sell it in the open market and return the money with profit to him and that in return, she would get Rs.1,00,000/- for this work; that she had concealed the gold to avoid detection by Customs and to save the duty amount; that she had travelled to Dubai nearly 7 to 8 times and brought readymade garments and perfumes each time to sell in Surat to make profit; that she was aware that non-declaration of gold to Customs was an offence under the provisions of Customs law; that her statement recorded on 01.03.2015 was true and voluntary without any threat, force or coercion, promise and the same was correctly recorded; that she had signed each and every page of the statement in token having seen and understood; a retraction had been filed on 29.04.2015 claiming that the seized gold belonged to her; that she was forced to sign on the bottom of the statement; that department had duly filed a rebuttal whereby the allegations made by

the respondent in her retraction were denied; that during investigations, several summons had been issued to the respondent; that she had not responded to these summons; that her house was found to have been sold and she had moved to an unknown destination; that the claim of ownership of house was a false claim; that retraction had been filed several days after the recording of the statement; that the investigations had established with strong certainty that a syndicate of persons was attempting to smuggle the impugned gold and the respondent was a mere front;

- 5.03. that the OIA allowing the release of gold the impugned 33 gold bars on the grounds that there was not sufficient ground to allege that the respondent was working as carrier for somebody else and was based on a retracted statement was incorrect; that the findings of adjudicating authority that the passenger was part of a syndicate was based on suspicion and presumptive hypothesis was incorrect;
- 5.04. that the applicant has relied on the case law of Abdul Razak v/s UOI passed by Kerala High Court, 2012(275) ELT 300(Ker), wherein it was held that the passenger was merely a carrier of the seized gold and redemption of seized goods is not to be allowed to the carrier and same cannot be claimed as a right; that passenger had confessed she was only a carrier.
- 5.05. that in the present case, the gold was being carried for a monetary consideration and it was a fit case for absolute confiscation of seized gold.
- 5.06. that the manner in which the gold was being brought i.e. by concealing it in specifically made cavities of the waist belt worn by the respondent was ingenious and coupled with the fact that she had opted for the green channel without declaring the gold, indicated her criminal mindset; that the concealment being clever and ingenious, it was a fit case for absolute confiscation of seized gold as a deterrent punishment to passengers misusing the facility of green channel;
- 5.07. that the AA had erred in granting the release of seized gold by imposing redemption fine under Section 125 of the Customs Act, 1962; that the option to redeem the seized goods under Section 125 of the Customs Act, 1962 was the discretionary power of the Adjudicating Authority depending on the facts of each case and after examining the merits; that taking into account the facts on record and the gravity of the offence, OAA had rightly ordered the absolute confiscation of the impugned gold; that the respondent had ingeniously concealed the impugned gold in

specifically made cavities of the waist belt worn by her which clearly showed her intention to evade duty on dutiable goods and smuggle the same into India;

- 5.08. that applicant has relied on the Apex Court case Samynathan Murugesan v/s Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT A15 (SC) where the passenger had attempted to smuggle 7.075 kilogram gold by ingenious concealment in TV. set without making declaration before Customs in violation of provisions under Section 11 & 77 of the Customs Act, 1962 and the adjudicating authority had absolutely confiscated the gold.
- 5.09. that the applicant had relied on the Apex Court's Order in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi (2003(155)ELT 423 (S.C.), wherein it was held that, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods; that if conditions had not been fulfilled, it may amount to prohibited goods.
- 5.10. that while granting redemption of the impugned gold bars, the AA had referred to the order of CESTAT, in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri.-Chennai) 2015 (321) ELT A 207 (SC); that this case was dismissed by the Apex Court on grounds of delay and not on grounds of merits;
- 5.11. that applicant has relied on the case of Jain Exports Vs UOI passed by Delhi High Court {1987(29) ELT 753} where it was held that the redemption fine and penalty shall depend on the facts and circumstances of the case and other cases cannot be binding as a precedent.

Under the circumstances, the applicant has prayed that the OIA dated 17.10.2017 passed by AA be set aside and the OIO be upheld or to pass any other order as deemed fit and proper.

6. The respondent vide their defense submission dated 05.04.2018 have stated the following;

- 6.01. that the respondent admits the fact of possession, carriage, non-declaration, attempt to smuggle the seized gold and her intention to evade customs duty on the gold carried by her; that she denies the allegation that the gold did not belong to her and had carried the same for monetary consideration; that she had been examined on 1-3-15 and that her statement was recorded by force, coercion and threat by the

Officers with incorrect facts so as to suit the story of the officers; that her statement dated 1-3-15 was not true to the extent of her admission about carrying the gold as a carrier for monetary consideration Rs 1,00,000/- and her denial of ownership of the gold; that the respondent had retracted her statement given on 1-3-15; that in her retraction, the respondent had submitted that one of her relatives, viz Mr Hasmukhbhai had assisted her to buy the gold on credit and she that would return the money to him after selling the gold on profit since they are known to each other since last many years; that she was not aware what was written in her statement and was forced to sign the statement; that the gold belongs to her; that just based on her uncorroborated and retracted statement, she cannot be charged for involvement in a smuggling activity as a carrier for monetary consideration. In support of the argument, the respondent has relied upon judgments passed by the CESTAT, New Delhi and reported in 1996 (83) E.L.T. 175 (Tribunal) in the case of J. Singh Vs Commissioner of Customs, New Delhi and Vikram Singh Dahiya Vs Commissioner of Customs (Export), New Delhi reported in 2008 (223) E.L.T.619 (Tri. Del) wherein it was held that "*Statement of co-noticee without any independent corroboration cannot form the basis of formation of a charge of involvement in smuggling activities*".

- 6.02. that the statement of the respondent dated 1-3-15 was not voluntary; that her confession statement dated 1-3-15, which was not voluntary was inadmissible in evidence under section 24 of the Evidence Act.
- 6.03. that they have relied upon the case of State of Rajasthan vs Raja Ram, where the Apex Court had held that "*An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It would depend on the nature of the circumstances, the time when the confession was made. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.*"
- 6.04. that the law was clear that a confession cannot be used against an accused person unless the Court was satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If

the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence.

- 6.05. that the retracted statement dated 1-3-15 cannot be relied upon; that the respondent had been arrested on 1-3-15 and was released on bail on the same day by the Assistant Commissioner of Customs, AIU, CSI Airport on personal cash bail and surety for Rs 2,00,000/-; that on 29.04.2015 the respondent had retracted her statement and had denied her involvement in the case of smuggling as a carrier and had stated that her statement was not true and voluntary; that the Investigating Agency had filed rebuttal stating that as per the letter dated 28-2-15 from "All the Best General Trading FZC" which had had been produced by the respondent, said Mr Hashmukhbhai Ishwarlal Patel had given written undertaking that the respondent was working for his company and the said parcel belonged to his company; that though there was a mention about this letter in the SCN under para 17(iii), this letter had not been made as a relied upon document in the SCN; that on the issue of retracted statement does not have evidentiary value, the respondent has relied upon the undermentioned case laws;
- (a). case of K.I. Paunny Vs. Asstt. Collector of CE Cochin, 1997 (3) SCC 721, passed by the Apex Court;
 - (b). case of Shrishail Nageshi Pare Vs. State of Maharashtra, AIR 1985 SC 866 passed by the Apex Court while considering the probative value of the retracted;
 - (c). case of Premchand Vs. Central Bureau of Investigation, 1997 (1) EFR 374, passed by the Madhya Pradesh High Court;
 - (d). case of Sri Krishna V Kurukshetra University, AIR 1976 SC 376 passed by the Apex Court;
 - (e). case of Kisan Lal Shivchand Rai v CIT (88 ITR 293) passed by the Punjab & Haryana High Court.
 - (f). Basant Singh v. Janki Singh AIR 1967 SC 341 passed by the Apex Court.
 - (g). Kishori Lal v. Mst. Chaltibai AIR 1959 SC 504 passed by the Apex Court.
 - (h). Pullangade Rubber Produce Co. Ltd. Vs State of Kerala [1973] 91 ITR 18 (SC)
 - (i). Narayan Bhagwantrao Gosavi, Balajiwale Vs. Gopal Vinayak Gosavi AIR 1960 SC 100.

- (j). Satinder Kumar (HUF) VS. CIT [1977] 106 ITR 64 (HP).
(k). Avadh Kishore Das Vs Ram Gopal AIR 1979 SC 861
- 6.06. that not an iota of any other corroborative evidence had been brought against the respondent; that they have relied upon the aforesaid case laws pertaining to J. Singh and Vikram Singh
- 6.07. that an admission vis-a-vis retraction in Customs proceedings and burden to disprove such retraction was with the investigatin agency; that burden to prove retraction was incorrect was with the department; that they have relied upon the undermentioned case laws;
- (a). Asstt. CIT Vs. Jorawar Singh M. Rathod [2005] 148 Taxman 35 (Ahd. -Trib) (Mag);
(b). Surinder Pal Verma Vs Asstt. CIT [2004] 89 ITD 129 (Chd.) (TM).
(c). Asstt. CIT Vs. Rameshchandra R. Patel [2004] 89 ITD 203 (Ahd) (TM), (d). (d). Pangambam Kalanjoy Singh Vs. State of Manipur AIR 1956 SC 9.
(e). Gyan Chand Jain Vs. ITO [2001] 73 TTJ (lodh.) 859.
(f). Hotel Kiran Vs. Asstt. CIT [2002]82 ITD 453 (Pune).
- 6.08. that the respondent was not a carrier, that respondent was a widow having a married daughter and son; that that after her husband's friend said Hashmukhbhai who was a resident of Abu Dhabi had given her a job as Multi Tasking Staff in his company; that Mr. Hashmukhbhai had suggested to carry some gold and sell it in Mumbai and make some profit; that he offered her the gold on credit and had instructed her to pay Customs duty; that she could not arrange for the payment of Customs duty at such a short notice; that she concealed the gold and after collecting her checked-in bag, walked through green channel with her child in hand;
- 6.09. that respondent submits that she committed the offence of attempting to smuggle the gold because of her poor financial condition; that she regretted her act; that she was not involved in the past in any case of smuggling of gold;
- 6.10. that no investigations had been done against Mr. Hasmukhbhai and she relied on the undermentioned case laws that persons at whose instance the smuggling act was committed by the carrier are also involved'
- (a). case of the State of Maharashtra vs Laxmichand Varhomal Chugani passed by Bombay High Court in 1997;
(b). case of Topandas Vs. State of Bombay A.L.R. 1956 SC 33, passed by Apex Court;

- (c). case of Vinayak Vs. State of Maharashtra (1984) 4 SCC 441 passed by Apex Court;
 - (d). case of The King v. Plummer ([1902] 2 K.B. 339);
 - (e). case of Girija Shankar Misra v, State of U. P. AIR 1993 SC 2618 passed by Apex Court;
 - (f). Also, Constitution Bench decision of the Apex Court in Fakhruddin v. The State of Madhya Pradesh; AIR 1967 SC 1326: (1967 Cri LJ 1197).
 - (g). case of Ghanashyam Jena vs State Of Orissa passed by Orissa High Court, 2003 CriLJ 4794
- 6.11. that the relationship between Mr Hashmukhbhai Ishwarlal Patel and the respondent was not fiduciary as owner and carrier; that the SCN was issued on presumptions and assumptions; that the respondent was going through hard times and Mr. Hashmukhbhai was helping her; Reliance is placed on Canbank Financial Services Ltd. v. Custodian and also on State of Gujarat v. Jaswanital Nathalal
- 6.12. that non-production of bill or invoice was not a bar for import and claim of ownership; On the issue the respondent has relied on the following cases laws;
- (a). Sadbhavana v. Commissioner of Customs - 2003 (158) E.L.T. 652 New Delhi
 - (b). Commissioner of Customs v. National Radio Products - 2003 (156) E.L.T. 908
- 6.13. that gold was gold was not a prohibited item for import; that as per the exemption notifications no 31/2003 dated 1-3-2003 and 12/2012 dated 17-3-12 issued under section 25 of the Customs Act, 1962, allowed for the import of gold albeit with some conditions; that respondent claims ownership of the gold and prays for redemption; that she purchased the gold on credit; reliance was placed on the undermentioned cases wherein seized goods were released to the persons on payment of redemption fine..
- (a). Halithu Ibrahim Vs Commissioner of Customs [2002 -TIOL CESTAT-MAD]195;
 - (b). Felix Dores Fernandes vs Commissioner of Customs 2000 (118) E.L.T. 639 (Tri.-Bom) [23-03-2000]
 - (d). Yakub Ibrahim Yusuf Vs CC, Mumbai 2011 (263) ELT 685 (Tri-Mumbai)
 - (e). Reji Cheriyan Vs CC, Kochi
 - (f). P.Sinnasamy Vs CC, Chennai 2007 (220) ELT 308 (Tri-Chennai)
 - (g). Krishnakumari Vs CC, Chennai 2008 (229) ELT 222 (Tri-Chennai)

- (h). S.Rajagopal Vs CC, Trichy 2007 (219) ELT 435 (Tri-Chennai)
- (i). M Arumugam Vs CC, Tiruchirapalli, 2007 (220) ELT 311 (Tri-Chennai)
- (j). Shaik Jamal Basha V. Government of India (1997(91) EL.T. 277 (AP)
- (k). Commissioner of Customs (Preventive) Vs. Uma Shankar Verma (200 (120) E.L.T 322 Cal.)
- (l). T Elavarasan vs The Commissioner of Customs
- (m). VP Hameed Vs Collector of Customs, Bombay (1994 (73) ELT 425}
- (n). Kader Mydin vs Commissioner of Customs (Preventive), West Bengal (2001 (136) ELT 758);
- (o). Sapna Sanjeev Kohli Vs Commissioner of Customs, Airport, Mumbai (2008(230) ELT 305);
- (p). Vattakkal Moosa Vs Collector of Customs, Cochin (1994 (72) ELT 473 (GOI)}
- (q). Order no 426/04 issued vide file no 380/57/8/2004-RA-Cus dated 21-9- 2004 passed by the Revision Authority, Government of India
- (r). K. Kuttiyandi v. Commissioner of Customs, Chennai (Appeal No. C/29/2000), CESTAT Bench
- (s). Gauri Enterprises vs Commissioner of Customs, Pune [2002 (145) ELT 705 (Tri Bang).
- (t). Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP)
- (u). Mohamed Ahmed Manu Vs Commissioner of Customs, Chennai - 2006 (205) ELT 383 (Tri-Chennai);
- (v). Mohd Zia Ul Haque V's Addl Commissioner of Customs, Hyderabad vide revision order no 443/12-Cas dated 8-8-12, 2014 (214) ELT 849 (GOI)

6.14. that the respondent was eligible for the redemption of the gold under seizure:

Under the circumstances, the respondent has prayed to maintain the OIA passed by the AA.

7. Personal hearing in the case was scheduled for 14.09.2022, 21.09.2022, 12.12.2022. None appeared for the applicant. Shri. Prakash Shingrani, Advocate appeared in the office on 12.12.2022 for the personal hearing and submitted that

Commissioner (Appeals) has correctly passed the OIA citing correct position of law and several other similar cases. He requested to maintain Commissioner (Appeal's) Order.

8. The Government has gone through the facts of the case and notes that respondent was carrying a large quantity of gold concealed in specially created cavities on the waist belt worn by her and had not declared the same to the Customs. Even after interception, when the Respondent was asked about the possession of any gold or dutiable items, she had denied that she was carrying any gold. The respondent had not declared the dutiable items in her possession in the Customs declaration form submitted by her. The Respondent had not filed a true declaration to the Customs and the respondent had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Quantity of the gold bars is large, of high purity, having foreign markings and in primary form, indicating that the same was for commercial use. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent harboured no intention to declare the gold in her possession to Customs and pay the Customs duty. Had she not been intercepted, the respondent would have gotten away with the large quantity of the gold bars without discharging the duty payment on it. The Government finds that the confiscation of the gold is therefore, justified.

9. 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”.

10. 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 ‘Respondent’ thus liable for penalty.

11. 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.

12. Government observes that the quantum of gold was large, having foreign markings, of maximum purity, in primary form, of commercial quantity and it was consciously and premeditatedly not declared which reveals the intention of the Respondent. Also, the gold bars had been concealed in an ingenious manner. The quantity of gold and the purity indicates that the same was for commercial use. Respondent had not declared the impugned gold to Customs and had furnished a false declaration also. This reveals her clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of commercial quantity and consciously concealed, probates that the Respondent had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while confiscating the 33 gold bars of 10 tolas each, totally weighing 3847 grams.

13. The main issue in the case is the quantum of the impugned gold which was attempted to be brought into the Country. Considering the quantity, purity and primary form and the fact that gold was consciously concealed, the option to allow redemption of seized goods by the Appellate Authority does not appear reasonable. In the present case, the manner of concealment being conscious with clear intent, quantity being large and commercial, this being an ingenious attempt to smuggle gold bars in primary form, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the gold

would have passed undetected. The redemption of the gold in such cases will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities, the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside and the order passed by the original adjudicating authority is liable to be restored.

14. Government notes that the respondent has emphasised that she had retracted her statement and that the burden of proof was on the investigating agency to prove about the ownership of the gold was contrary to her claim of ownership. Government notes that the respondent had not made herself available during the investigations, that the address given by her was false, no invoices for the purchase of the gold had been produced; source of funds for the purchase of gold were not forthcoming. Further, the Government notes that Section 123 of the Customs Act, 1962 cast the burden of proof on the importer of the gold. By simply stating that the investigating agency had not carried out investigations on the financial aspect and on the overseas supplier of the gold does not vitiate the case, especially in view of the fact that such a large quantity of gold, in primary form, concealed in an ingenious manner was found on her person. In any case, this issue is not of much relevance once gold is absolutely confiscated.

15. The Government finds that the penalty of Rs. 10 lakhs imposed under section 112 (a) and (b) is appropriate and commensurate with the omission and commission committed by the Respondent and the appellate authority has upheld the same. The Government does not find it necessary to interfere in the quantum of penalty which has been imposed on the respondent.

16. In view of the above, the Government sets aside the order passed by the appellate authority and restores in to-to, the order-in-original passed by the Original Adjudicating Authority .

17. Revision Application is allowed on above terms.


31/3/23
(SHRAWAN KUMAR)

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

ORDER No. 42\ /2023-CUS (WZ) /ASRA/ MUMBAI DATED 3\ .03.2023

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Mumbai - 400 099.
2. Smt. Nitaben Jatinkumar Desai, *{address mentioned in OIO}*, 701, Sukh Sagar Apartments, Near Shreeji Arcade, Anand Mahal Road, Adajan, Surat - 395 009. *{address mentioned in OIO}*

Copy To,

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