



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

F.No. 371/23 & 24/B/WZ/2020-RA /6554

F.No. 371/332A & 332B/B/WS/2021-RA : Date of Issue :

06.09.2023

ORDER NO. 630-633/2023-CUS (WZ)/ASRA/MUMBAI DATED 31.08.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

F.No. 371/23/B/WZ/2020-RA

Applicant No. 1 / (A1) : Shri. Raj Vasant Jadhav,

F.No. 371/24/B/WZ/2020-RA

Applicant No. 2 / (A2) : Shri. Avdhut Anil Kale

F.No. 371/332A/B/2021-RA

Applicant No. 3 / (A3) : Shri. Gaurav Jain

F.No. 371/332B/B/2021-RA

Applicant No. 4 / (A4) : Shri. Kanakmal Jain

APPLICANTS

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-CUSTOM-PAX-638, 639, 640 & 641/2019-20 dated 31.10.2019 issued through F.Nos. S/49-430, 431, 537 & 538/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

ORDER

These four revision applications have been filed by (i) Shri. Raj Vasant Jadhav (ii). Shri. Avdhut Anil Kale, (iii) Shri. Gaurav Jain and (iv). Shri. Kanakmal Jain [hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 (A1), Applicant no. 2 (A2), Applicant no. 3 (A3) and Applicant no. (A4), resp.] against the Orders-in-Appeal No. MUM-CUSTOM-PAX-638, 639, 640 & 641/2019-20 dated 31.10.2019 issued through F.Nos. S/49-430, 431, 537 & 538/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III. Government notes that though the applicants have filed separate revision applications, they pertain to the same case and the above stated OIAs are common to all the four applicants. Further, in the case of A2, A3 & A4, the appeals are on the limited issue of penalties imposed on them. Therefore, the said 4 Revision Applications having a common OIA are being taken up together.

2(a). Brief facts of the case are that the applicant no. 1 on arrival at CSMI Airport on 07.12.2015 from Paris by Jet Airways Flight 9W-0123 / 06.12.2015 was intercepted by the Customs Officers while he was proceeding towards the exit gate after having crossed / walked through the green channel alongwith his baggage. A1 was carrying a self-signed Customs Declaration Form (CDF) and column 9 therein i.e. total value of the dutiable goods being imported was found to be blank. To the query whether he was carrying any prohibited, restricted or dutiable goods like, foreign currency etc in his baggage, A1 had replied in the negative. A1 was asked to pass through the door frame metal detector (DFMD) which gave positive indications for presence of some metal on his person. Here, once again he was asked about possession of any prohibited, restricted or dutiable goods like gold, silver, foreign currency etc, to which he had again replied in the negative. A search of A1 led to the recovery of 7 gold bars details of which are given in Table - 01, below,

TABLE - 01

Sl. No.	Description	Weight in grams	Recovered from
1	Two gold bars (having mark Kaloti Dubai, 1 KG FINE GOLD, 999.9 KJI melter assayer Kaloti Int'l DMCC) bearing Sl. No. B272298 & B272299.	1000 grams each. Total : 2000 grams	Right pocket of the blue coloured denim underpants worn by A1
2	One gold bars (having mark Kaloti Dubai, 1 KG FINE GOLD, 999.9 KJI melter assayer Kaloti Int'l DMCC) bearing Sl. No. B272293.	1000 grams	Left pocket of the blue coloured denim underpants worn by A1
3	Four gold bars (having mark Kaloti Dubai, 1 KG FINE GOLD, 999.9 KJI melter assayer Kaloti Int'l DMCC) bearing Sl. No. B272294, BB272300, B272301 & B272302.	4000 grams	Under the inner soles of the shoes. Two gold bars from each shoe.
TOTAL : 07 (SEVEN BARS) of 1 Kg each		7000 grams	Total Value : ₹ 1,61,93,800/-

2(b). On the basis of the information provided by A1, he was taken to the pre-paid taxi parking area with an intention of apprehending the person who would come to collect the gold bars. However, nobody turned up inspite of waiting for quite some time.

2(c). During the course of investigations, Statements of A1 were recorded under Section 108 of the Customs Act, 1962 on various dates wherein he inter alia submitted; that he was working as a Radiographer in the National Health Service, London and stayed at London on resident permit of UK; that he was not the owner of the gold bars which belonged to Mr. Atonu Kumar Ghosal who owned a cab company at London; that he was supposed to get ₹300/- per kg of gold carried; that he was supposed to handover the gold to a collection agent who would identify him on the basis of his photograph; that earlier he had carried gold 15-20 times in similar

manner; that Atonu Kumar Ghosal paid for his lodging, boarding, return ticket etc; that he purchased ticket through card payment which was later reimbursed to him by Atonu Kumar Ghosal; that at London the gold used to be handed over to him by Atonu Kumar Ghosal; that this was the first time he had brought gold from Paris and the same had been handed over to him by Mr. Ameeryano Fernandes who also worked for Atonu Kumar Ghosal; that on each trip he used to bring 3-4 Kgs of gold and this time he had been forced by Atonu Kumar Ghosal to carry 7 kgs of gold; that he disclosed that Atonu Kumar Ghosal was scheduled to come to Kolkata Airport on 31.06.2016; that he revealed the name of another person who also carries gold for Atonu Kumar Ghosal; that during his earlier visits he had delivered the gold bars to A3 in the presence of A4 who was father of A3 and was owner of a jewellery shop named M/s. Arihant Jewellers located at Zaveri Bazar, Mumbai; that he had delivered 30-35 kgs of gold to A3; that the money for the gold was paid by A3 to Atonu Kumar Ghosal through hawala; that he knew Apeksha Jain an Advocate who was the sister of A3; that he had identified A4 when he was brought before him; that an individual named Arvind who worked in the shop of A3 knew about the gold which he used to deliver to A3; that he was confronted with Mr. Atonu Kumar Ghosal and admitted knowing him for last 10 years; that they had travelled to India together on a number of times; that the seized gold bars which had been handed over to him by Mr. Ameeryan Fernandes in Paris belonged to Mr. Atonu Kumar Ghosal and had stayed at Hotel Rajhans, Chembur, Mumbai

2(d). The extraction report pertaining to the mobile phone of A1 was retrieved through DRI, Mumbai which revealed numerous conversations and whatsapp messages between A1, A3 and others. The messages / conversations revealed A1 and A3 were indulging in money transactions through hawala pertaining to sale purchase of smuggled gold.

2(e). During scrutiny of the whatsapp messages of A1, details of payment of stamp duty and registration of two flats viz, nos. 605 & 606, "A" Wing, Atlantis Building, Lake View Developers, Powai, Mumbai were found. The same were booked in the names of his mother and wife viz, Mrs. Vandana Jadhav and Mrs. Sonali Shedge resp. Investigations with the builder revealed that Mrs. Sonali Shedge had been allotted a flat worth ₹2.24 crores and Mrs. Vandana Jadhav's flat was of ₹2.21 crores. A total of ₹87.63 lakhs had been paid towards these two flats. Both Mrs. Vandana Jadhav and Mrs. Sonali Shedge revealed that the payment for the flats had been made by A3 and they had only signed on the purchase agreements. When A3 was confronted with the details of these two flats, he refused to make any comments about these two properties.

2(f). After avoiding 2-3 summons, A3 presented himself in the Office of AIU for investigations. In his statement recorded under Section 108 of the Customs Act, 1962, he stated that Arihant Jewellers Shop was owned by his father viz, A4; that he had met A1 about 3-4 months back; that A1 was a walk-in customer and used to inquire about prevailing rate of gold in the Indian market; that he used to whatsapp the gold rate to him; that he was not aware of the whereabouts of his servant, Arvind;

2(g). The whatsapp details recovered from A1 revealed that he was continuously in contact with A2; Statement of A2 was recorded where he stated that he was brother-in-law of A1; that he knew A3 and A4 of M/s. Arihant Jewellers; that he had handed over 6.5 kgs of gold to A3 on one occasion and was accompanied by A1; that on another occasion he had taken delivery of 4 kgs of gold from a foreigner as per instructions from A1 and handed it over to A3; that on the instruction of A1 he had taken delivery of unknown amount of foreign currency from A3 from his shop and had handed it over to Mr. Ameeryan Fernandes; that he had been paid ₹ 3000 – 4000 on each occasion.

2(h). Statement of A4 was recorded under Section 108 of the Customs Act, 1962 and admitted that he owned the shop viz, M/s. Arihant Jewellers; that A3 was his son; that Mr. Arvind Murudkar worked in his shop; that on being shown the photographs of A1, Atonu Kumar Ghosal and Ameeryan Fernandes, he did not recognize them.

2(i). Investigations were carried out wherein the residence of A1 and A3 had been searched; confrontation with each other and others involved in the case were carried out; search of the hotel where A1 had booked himself was carried out; statements of others named during the investigations were also carried out; guest entry register of M/s. Rajhans Hotel, Chembur, Mumbai was examined which indicated that A1, Mr. Atonu Kumar Ghosal and Ameeryano Fernandes were regular visitors and had stayed together in the Hotel; that A1 had travelled around 40 times between March, 2014 till 07.12.2015 and 13 times in the preceding six months; it was seen that A1 was travelling to London about twice a month; A1 used to stay less than 15 hours in India on most occasions; analysis had revealed that A1 and Atonu Kumar Ghosal on 6 occasions had arrived in Mumbai on the same dates but by different flights while on 8 occasions they had travelled together from London to Mumbai on the same flight; A1 had made payments of ₹ 86 lakhs towards purchase of two flats in Hirnandani, Powai, Mumbai booked in the names of his mother and wife and he could not produce any evidence to indicate that payments had been made through legal sources; investigations carried out came to a conclusion that these two flats were in benami names of mother and wife of A1 illegally acquired out of sale proceeds of the gold which A1 had smuggled during his previous visits;

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide common Order-In-Original No. ADC/AK/ADJN/475/2018-19 dated 28.02.2019 issued through S/14-5-39/2016-17/Adjn (SD/INT/AIU/414/2015-AP'D) ordered for (i). the absolute confiscation of the 07 gold bars of 1 kgs each, totally weighing 7000 grams

- each of 999.0 purity, valued at ₹ 1,61,93,800/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962;
- (ii). a penalty of ₹ 20,00,000/- was also imposed on A1 under Section of 112 (a) and (b) of the Customs Act, 1962;
- (iii). proposal for confiscation of 35 kgs of gold smuggled on earlier occasions being not available for confiscation under Section 111 of the Customs Act, 1962, were dropped;
- (iv). a penalty of ₹ 5,00,000/- was imposed on A1 under Section of 112 (a) and (b) of the Customs Act, 1962 for having engaged in the smuggling of 35 kgs of gold on earlier occasions;
- (v). the amount of ₹ 87,63,172/- paid towards the booking of flat nos. 605 and 606, in Atlantis Building, Sector – 5, Hiranandani Gardens, Powai, Mumbai – 400 076 was confiscated under Section 121 of the Customs Act, 1962, as the same were acquired through illegal sale proceeds. Further action in the matter to be taken by competent authority under SAFEMA;
- (vi). a penalty of ₹ 15,00,000/- was imposed on Mr. Atonu Kumar Ghosal under Section 112(a) and (b) of the Customs Act, 1962;
- (vii). a penalty of ₹ 15,00,000/- was imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962;
- (viii). a penalty of ₹ 5,00,000/- was imposed on A4 under Section 112(a) and (b) of the Customs Act, 1962;
- (ix). a penalty of ₹ 2,00,000/- was imposed on Mr. Arvind Madhukar Murudkar under Section 112(a) and (b) of the Customs Act, 1962;
- (x). a penalty of ₹ 50,000/- was imposed on A2 under Section 112(a) and (b) of the Customs Act, 1962; &
- (xi). Proceedings against Ms. Apeksha Jain under Section 112 of the Customs Act, 1962 was dropped.

4. Aggrieved by the said order, the applicants filed appeals before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide common Orders-In-Appeal Nos. MUM-CUSTOM-PAX-638, 639, 640 & 641/2019-20 dated 31.10.2019 issued through F.Nos. S/49-430, 431, 537 & 538/2019 did not find any reason to interfere in the impugned OIO.

5. Aggrieved with the above order, the Applicant No. 1 has filed revision applications and the grounds of revision are as under;

5.01. that the OIA is not on merits and not a speaking order. Principles of natural justice had not been followed. On these issues, to buttress their defense, they have relied upon the undermentioned case laws;

- (a) Apex Court's Order in the case of State of Punjab vs. K.R Erry,
- (b) Liberty Oil Mills vs. Union of India,
- (c) C. L Tripathi vs. State Bank of India
- (d) Pitchaiah vs. Andhra University
- (e) A.K Kraipak vs. UOI
- (f) Chintamoni Pradhan vs. PaikaSamal
- (g) CESTAT, New Delhi's order in Sahara India TV Network vs. CCE, Noida, relying upon the Apex Court's Order in the case of JT. Commr. IT, Surat vs. Saheli Leasing & Industries Ltd [2010-253-ELT-705-SC ; CESTAT, New Delhi order M/s. Vikas Enterprises vs. CCE, Allahabad ; M/s. Sharp Carbon India vs. Commr. Of C.Ex, Kanpur,
- (h) M/s. International Woollen Mills Ltd. Vs. Standard Wool (UK) Ltd
- (i) Master Circular on Show Cause Notice, Adjudication and Recovery' issued by the Board under F.NO 96/1/2017-CX.1 dated 19-1-2017,
- (j) Decision of Cestat, New Delhi in M/s. Sahara India TV Network vs. CCE, Noida,
- (k) Kranti Associates Pvt. Ltd vs. Masood Ahmed Khan {2011-273-ELT-345-SC},
- (l) M/s. Mahabir Prasad Santosh Kumar vs. State of Up and otrs, reported in AIR-1970-SC-1302,
- (m) M/s. Travancore Rayons Ltd vs. UOI and otrs AIR-1971-SC-862,
- (n) Woolcombers of India Ltd. Vs. Woolcombers Workers Union and anr {AIR-1973-SC-2758},
- (o) Siemens Engg. & Mfg. Co. India Ltd vs. UOI and anr {AIR-1976-SC-1785},
- (p) Etc.

- 5.02. that the decision relied upon by the AA were not applicable to the case of the applicant no. 1 & 2; that the AA had failed to discuss as to how the facts of the cases relied upon by him, factually fit the case of the applicant; that the decisions of the Tribunals, High Courts and Supreme Court relied upon by A1 & A2 had been rejected without assigning any reasons and without proper application of mind; that the AA had read the decisions in isolation and had failed to apply the same in the case of A1 & A2; that A1 & A2 have relied upon the Apex Court's Order in the case of CCE, Calcutta Vs Alnoori Tobacco Products 2004 (170) ELT 135 (SC)] where it has been stressed that the facts of decision relied upon should actually fit factual situation of a given case and to exercise caution while applying the ratio of one case to another; this was also reiterated by the Apex Court in the case of Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)], wherein it has been observed that one additional or different fact may make difference between conclusion in two cases; and so, disposal of cases by blindly placing reliance on a decision is not proper; that further in the case of CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)], it has been observed by the Hon'ble Supreme Court that the ratio of a decision has to be understood in factual matrix involved therein and that the ratio of decision has to be culled out from facts of given case; that many other cases have been relied upon by A1 & A2 on this contention.
- 5.03. that the entire case was pre-judged at the SCN stage itself, and the AA had yielded to the pre-judged SCN and had ordered absolute confiscation of the gold; that the proceedings had been vitiated by unfairness and bias; that the SCN should have been set aside; that they have pointed out that paras nos. 13,34.1,36.1.1,36.1.2, 36.1.4, 36.1.5, 36.1.6, 36.1.8, 36.1.9, 36.2,36.5,37.1 of the SCN indicated that the SCN was pre-judged; they have relied upon the undermentioned case laws;
- (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. 565 (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). HIGH COURT OF ANDHRA PRADESH in SBQ Steels Ltd. Versus Commissioner of Customs, Central Excise & Service Tax,
 - (viii). Etc.

- 5.04. that the statement of A1 dated 7-12-2015 was involuntary and against truth and should not have been relied upon; that he had been forced to admit that he was not the owner of the gold and the same belonged to Mr. Atonu Kumar Ghosal; that the investigating agency fabricated the facts to toe their line; that the confession was involuntary and inconsistent; that he has relied upon the undermentioned case laws;
- (a). Smt. Selvi and ors vs. State of Karnataka passed by the Apex Court,
 - (b). Balwinder Singh Vs. State of Punjab
 - (c). Thulasiammal and otrs vs. Jt. Secretary, GOI - 1987-30-ELT-415(Mad).
 - (d). A.T Maideen vs. SIO, passed by Madras High Court
 - (e). etc.
- 5.05. that the retracted statement of A1 dated 7.12.2015 should not have been relied upon in the absence of corroboration in material facts; that the statement recorded under Section 108 of the Customs Act, 1962 requires two facts, (i) that it is true and (ii) it is voluntary; that a retracted statement cannot be used against the maker of the statement; that further statement recorded on 23.12.2015 should not have been relied upon; that he has relied upon the following case laws;
- (i). Mohtesham Mohd. Ismail [2007-220-ELT-SC];
 - (ii). Asstt. Coll. Of C.Ex, Rajamundry vs. Duncan Agro Industries - JT2000-8-SC530.;
 - (iii). Vinod Solanki vs. UIO 2009-233-ELT-157 SC;
 - (iv). DRI vs. Mahendra Kumar Singhal 2016-333-ELT-250-Del.
 - (v). Commissioner of C.Ex, Ahmedabad - III vs. Deora Wires N Machines Pvt. Ltd, 2016-322-ELT-393-Guj
 - (vi). Etc.
- 5.06. that the statement of co-accused should not have been relied upon; that 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.; that he has relied on State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru [2005-11-SCC-600]; Ravinderan @ John vs. Supdt. Of Customs [2007-6-SCC-410 SC] etc;
- 5.07. that the hearsay evidence of co-accused Mr. Arvind Madhukar Murudkar should not have been relied upon; that his statement was vague and inconsistent; that he was working as a peon;
- 5.08. that whatsapp messages and their screenshots allegedly retrieved from mobile phone of A1 should not have been relied upon as evidence; that as per Section 2(1)(t) of the IT Act, it is necessary that message is not hearsay, that it was received by the person to whom it was sent; that the phone had not been tampered with; that message was sent by the person alleged to have sent it.
- 5.09. that the case against A1 had not been proved beyond doubt; that there was no proof that A1 was involved in smuggling in the past; that penalty

- of ₹ 5,00,000/- was not sustainable; that there was no proof that the amount of ₹ 87,63,172/- paid towards the booking of the flats was from sale proceeds of smuggled gold; that Competent Authority SAFEMA had dropped proceedings in the matter; therefore, confiscation of the amount was not sustainable; that there was no proof of any hawala transaction in connection with sale and purchase of any smuggled gold;
- 5.10. that the OAA had travelled beyond the scope of the SCN; that notification no. 12/2012 – Cus dated 17.03.2012 was not applicable to this case; that impugned OIO should be set aside;
- 5.11. that gold was not a prohibited item and hence, the seized gold ought to have been released to A1; that some of the case laws relied upon are as under;
- (a). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even respect of prohibited goods.
- (b). In Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. Mumbai) the Tribunal held that option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had not claimed its ownership.
- (c). etc.
- 5.12. that the financial capacity of A1 cannot be a factor to prove allegation that he was a carrier;
- 5.13. that the OAA had erred in not considering the evidence of co-accused, viz Mr. Arvind Murudkar gathered during cross-examination;
- 5.14. that AA erred in relying on certain irrelevant facts connecting with Apeksha Jain, Advocate who was acquitted in the case;
- 5.15. that principles of natural justice had not been followed; A1 had not been given reasonable opportunity of hearing;
- 5.16. that A1 claimed ownership of the gold and prayed for redemption of the gold on payment of reasonable fine and penalty;

Under the circumstances of the case, A1 has prayed that the gold bars may be released to him on payment of reasonable fine and penalty.

6. Aggrieved with the above order of the AA, the Applicant No. 2 has filed a revision application. The grounds of revision as mentioned at paras 5.01, 5.02, 5.05, 5.06, 5.14 and 5.15 are similar to that filed by A1 and hence are not being repeated here. The other grounds of revision are as under;

- 6.01. that the statement of A1 dated 6-01-2016/12-2015 was involuntary and against truth and should not have been relied upon; that he was forced to admit that he had handed over the gold to A3 on two occasions; that on one occasion he had accompanied A1 to M/s Arihant Jewellers to deliver 6.5 kg of gold and on another occasion he had taken delivery of 4 kgs gold from a foreigner lady in a Powai Hotel (Hotel Ramada) on 4th December as per the instructions of A1 and gave delivery to A3 at his shop in M/s Arihant Jewellers; that he had taken delivery of an unknown amount of currency, both Indian and foreign from A3 at his shop and handed it over to Mr Ameeryano Fernando on the instructions of A1; that he had been paid ₹3000- 4000/- on each occasion; that A2 has relied upon the case laws cited at para 5.04 above.
- 6.02. that the case against A2 was not proved beyond any doubt; that the evidence on record did not establish the charge against him (A2); that not only the prosecution has to prove the charges levelled against the accused, but the said charges are required to be proved beyond reasonable doubt; that viewed with this in mind, the evidence on record did not establish the guilt of the accused beyond reasonable doubt; that the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution as every man is presumed to be innocent.

Under the circumstances, the applicant has stated that since he had never come to adverse notice anytime , he has prayed to drop the further proceedings.

7. Aggrieved with the above order of the AA, the Applicant No. 3 has filed a revision application and the grounds of revision are as under; Government notes that substantial portion of the grounds of revision filed by A3 and A4 are similar and in the interest of brevity, the similar grounds of revision have either been taken up in para 7 or 8 and have not been repeated.

- 7.01. that the impugned order has been passed without application of mind and deserved to be set aside;
- 7.02. that there was no independent corroboration of the retracted statements of the co-noticees by any cogent evidence.
- 7.03. that it was a settled law that a person cannot be penalized only on the basis of statement of co-noticee without any other independent corroborative evidence, especially of a retracted statement.
- 7.04. that the retracted statement of A1 was the sole basis for the case; that the employer of A1 too had denied trading in gold; that the statement of A1 was sought to be validated;
- 7.05. that the reliance on the statement of Arvind Madhukar Murudkar was unfounded and erroneous.

- 7.06. that the demand was based solely on the basis of statements without tangible corroborative evidence and hence, was not sustainable.
- 7.07. that penalty had been imposed on the basis of assumptions and presumptions;
- 7.08. Reliance has been placed on the under mentioned case laws;
- (a). Sri. Pradeep Sah vs. Commr. – 2006-197-ELT-301;
 - (b). Khemani Purshottam vs. CC, CSI Airport, Mumbai – 2017-354-ELT-275;
 - (c). Seshmal M. Jain vs. Collector – 1987-27-ELT-504;
 - (d). A.N Bhat vs. Collector – 1991-55-ELT-580;
 - (e). Mahabir Prasad vs. Commissioner – 2000-126-ELT-8;
 - (f). Punit Kumar Sakhuja vs. Commissioner – 2001-136-ELT-960;
 - (g). Anant Samant vs. Commissioner – 2000-117-ELT-444;
 - (h). Ram Prasad vs. CC, Amritsar – 2003-159-ELT-594;
 - (i). etc.

Under the circumstances of the case, A3 has prayed to the revisionary authority to set aside the OIA and grant consequential reliefs.

8. Aggrieved with the above order of the AA, the Applicant No. 4 has filed a revision application and the grounds of revision are as under; Government notes that substantial portion of the grounds of revision filed by A3 and A4 are similar and in the interest of brevity, the similar grounds of revision have either been taken up in para 7 or 8 and have not been repeated.

- 8.01. that the impugned order has been passed without application of mind and deserved to be set aside;
- 8.02. that the OIO dated 28.02.2019 suffered from delay as a period of 6 months had passed from date of personal hearing which had been held on 04.09.2018;
- 8.03. that the retracted statement of A1 was the sole basis for the case; that the employer of A1 too had denied trading in gold; that the statement of A1 was sought to be validated;
- 8.04. that it was settled law that a person cannot be penalized only on the basis of statement of co-noticee without any other independent and corroborative evidence; that the evidence had been retracted; Reliance was placed on Tribunal's judgement in Continental Warehousing Corpn. Nhava Sheva vs. C.C Tuticoring – 2018-8-GSTL-300

- 8.05. that mere confessional statement of a co-accused from whom contraband had been recovered was not sufficient to impose penalty on A4 under Section 112 of the Customs Act, 1962.;
- 8.06. that there was nothing on record to implicate A4 as no iota of proof is available;
- 8.07. that reliance has been placed in the Tribunals judgement in the case of Manoj Steels vs. CCE, Allahabad – 2013-289-ELT-507 on the issue that the statement of co-accused regarding past transactions cannot be given preference over the statement of A4 in the absence of any other evidence;
- 8.08. that there was nothing on record linking the applicant no. 4 to the seized gold;
- 8.09. that A4 was neither carrying any gold nor any gold had been retrieved from his possession;
- 8.10. that the AA had failed to appreciate the evidence gathered during the cross examination of co-accused;
- 8.11. that penalty had been imposed on the basis of assumptions and presumptions; that penalty cannot be imposed as form of vicarious liability.
- 8.12. Reliance has been placed on the under mentioned case laws;
- (a). Sri. Pradeep Sah vs. Commr. – 2006-197-ELT-301;
 - (b). Khemani Purshottam vs. CC, CSI Airport, Mumbai – 2017-354-ELT-275;
 - (c). Seshmal M. Jain vs. Collector – 1987-27-ELT-504;
 - (d). A.N Bhat vs. Collector – 1991-55-ELT-580;
 - (e). Mahabir Prasad vs. Commissioner – 2000-126-ELT-8;
 - (f). Punit Kumar Sakhuja vs. Commissioner – 2001-136-ELT-960;
 - (g). Anant Samant vs. Commissioner – 2000-117-ELT-444;
 - (h). Ram Prasad vs. CC, Amritsar – 2003-159-ELT-594;
 - (i). etc.

Under the circumstances of the case, A3 has prayed to the revisionary authority to set aside the OIA and grant consequential reliefs.

9. Applicant No. 3 and 4 have filed for condonation of delay attributing that they had first approached Hon'ble Cestat and were then redirected to Revisionary Authority.

10(a). Personal hearings in the matter of Revision Application nos. 371/23 & 24/B/WZ/2020 were scheduled for 06.07.2023. Shri. Prakash Shingrani, Advocate appeared and requested for an adjournment of 15 days. Thereafter, personal

hearing was scheduled on 25.07.2023. Shri. Prakash Shingrani, Advocate appeared before me on behalf of A1 & A2 and submitted that gold is not a prohibited item. He further submitted that applicant is a NRI. He requested for re-export of goods on reasonable fine and penalty. He requested for time of 15 days for making additional submission.

10(b). Personal hearings in the matter of Revision Application nos. 371/332A & 332B/B/WZ/2020 were scheduled for 19.07.2023 / 26.07.2023. Shri. Sushanth Murthy appeared before me on behalf of A3 & A4 and reiterated earlier submissions. He further submitted that entire case against the applicants is based on statements of co-accused. He further submitted that these statements were later withdrawn / retracted, therefore, same can not be relied upon.

11. Post the personal hearing, on 11.08.2023, advocate of A1 & A2 furnished additional submissions in which he reiterated his earlier averments made alongwith the revision application and further submitted as under;

11.01. that in his retraction filed before the Court, A1 had submitted that he was into designing of gold jewellery and had entered into a business contract with N.K.News Pvt Ltd ; that on their advise he had travelled to Dubai and had purchased 7 kgs of gold; that on 6-12-15, he had carried the gold from London-Paris-Mumbai; that on his arrival at Mumbai on 7-12-15, he had reported at red channel for the purpose of declaration; that he had produced the purchase documents and Customs declaration to the Officers.; that he was made to sign papers and had been assaulted for refusing; that he had also filed retraction dated 4.1.2016 through jail authority; that his statement in jail had been recorded in the absence of jail authorities;

11.02. that in the cross-examination of A2 on 11-5-2018 he had disclosed that he retracted his statement when he had been produced before the Magistrate as his statement was recorded under force and threat.

11.03. that in the cross-examination of Arvind Madhukar Murdhukar on 11-5-2018 who is co-accused in the case he had stated that he did not know Mr. Atonu Goshal; that his statement had been recorded under duress and pressure; that it was not his scope of work to oversee or take delivery of gold or onanments; that he had never seen A1 delivering gold or cash or any other such ting to the shop or owners where he was working; :

- 11.04. that in the cross-examination of A1 on 11-5-2018 he had stated that he had submitted a Customs declaration form; that in the Customs declaration he had mentioned 7 kgs of gold; that he had not met Mr. Atonu Gohsal at London or Paris.
- 11.05. that on the issue of the two flats, A1 stated that on the request of Customs, the Competent Authority i.e. SAFEMA had started proceedings; that being satisfied with the proof submitted by Mrs Vanthana Vasant Jadav and Mrs Sonali Shedge with regard to the legal purchase of the flats, the proceedings initiated against them under SAFEMA was closed and the booking amount deposited by M/s HGP Community Pvt Ltd was refunded to them vide letter ref F.No CA/MUM/SAF/15/2016/1457 dated 25-1-2018 of the Joint Commissioner, SAFEMA/NDPSA, Mumbai.
- 11.06. that the detention order No. PSA-1216/CR-6(1)/SPL-3(A) dated 21 st November, 2016 issued against A3 was quashed by the Hon'ble Bombay High Court on 5 May, 2017;
- 11.07. that they have submitted copies of the retractions, Customs declaration form; case law pertaining to Manoj Kumar Sharma passed by Hon'ble Rajasthan High Court in WP no. 12001 of 2021 on which they have placed reliance.

12.1 On the issue of application for condonation of delay filed by A3 and A4, Government notes that not withstanding that they had approached the CESTAT and were directed to file revision applications before the Revision Authority, it is seen that the OIA is dated 31.10.2019 and during the condonation period for filing revision application, moratorium had been granted by the Apex Court. Taking into consideration the said moratorium period, Government observes that there is no delay and takes up the applications for decision on merit.

12.2. The Government has gone through the facts of the case and notes that the applicant no. 1 was carrying a very large quantity of gold which had not been declared to the Customs. On interception, A1 was found carrying a self-signed Customs declaration form which he had not submitted to Customs. However, the part pertaining to declaration of dutiable goods was found blank. When the applicant no. 1 was asked about the possession of any gold or dutiable items, he had denied that he was carrying any gold. The applicant had not declared the huge quantity of gold in

his possession to the Customs. The applicant had not made a true declaration to the Customs and the applicant had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant did not have any intention to declare the gold and pay Customs duty on it. It also reveals that the act of misdeclaration committed by the applicant no. 1 was conscious and pre-meditated. The applicant did not intend to declare the gold in his possession to Customs. Had he not been intercepted, the applicant would have gotten away with such a large quantity of gold. The Government finds that the confiscation of the gold is therefore justified.

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 quantum of gold was large, of high purity, in primary form, of commercial quantity and it was consciously and premeditatedly not declared. A1 was acting for monetary benefit and gold was being smuggled for commercial purpose. A1 was a frequent traveller and had admitted that he had

carried gold in the past. All this clearly reveals his clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially the quantum and primary form indicates that the gold was for commercial purposes and that A1 harboured 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 absolutely confiscating the 7 gold bars, totally weighing 7000 grams, valued at ₹ 1,61,93,800/-.

17. During the investigations, A1 had revealed about the roles of A2 who was his brother-in-law, A3 and A4 and others. Government's notes that the Investigating Agency had summoned all these persons, confrontations were held and all of them had revealed their roles in the entire smuggling activity. A1 alongwith the other co-accused had devised an elaborate and intricate operation where they were bringing gold in primary form from London / Paris which are unsuspecting stations for gold traffic and clearing the same from Mumbai without declaring the same and evading payment of Customs duty. The investigations had examined the immigration records, flight records, APIS, hotel registers, and the whatsapp messages, CDRs etc. Investigations had revealed a clear connection of the applicants, their links and pointed out that they were involved in the smuggling activity. The role of each of the applicants has been well brought out by the Investigating agency and they have been able to link the roles. A3 was involved in the disposal of the gold and transmission of the proceeds of sale. Also, in the OIO, the roles of the applicants have been taken up individually, especially at paras 56, 58, 59, 60, 61, 62 and the OAA had gone into the minute details of the roles played by them. The OAA had allowed the cross-examination of the co-accused / noticees, Customs officer and the details have been recorded in the OIO.

18. In the OIO at para 50, i.e. in the 'findings' section, the OAA has recorded as under;

“52. It is further observed that the advocates, Mr. Ajay Singh and Mr. P.K Shingrani, appearing on behalf of passenger, Mr. Raj Vasant Jadhav (Noticee no. 1) had during hearing held on 12.04.2018 submitted that they did not dispute the allegations levelled against Mr. Raj Jadhav with respect to the seized gold. They requested to release the seized gold on payment of duty, fine and penalty. They submitted that they contested the allegations levelled in respect of flats and related proposal made in the SCN under Section 121 of the Customs Act, 1962. They also submitted that they also contested that their client had engaged in smuggling in past.”

19. Government finds that the retraction of statement is clearly an afterthought and has been dealt with by the OAA in para 53.1 of the OIO. Also, the AA at para 9 of the OIA has taken cognizance of the retractions filed by the applicants and has observed that the statements corroborate the role played by the applicants individually. Instant case is not based on mere statements. There are documentary evidences, electronic evidence, seizure of huge quantity of gold, corroborated with movements of accused. Also, the exhaustive case laws cited by the applicant were submitted by him before the OAA and AA who had considered the same and rejected the same. Government finds the same as repetition. These judgements have either been given in different set of facts or the ratios of the same have been selectively and obliquely applied to. As a result, correct position of law has not been appreciated by the applicant in the given set of facts of instant application. These judgements are not of much help to applicants. On the issue of retraction of statement, the fact remains that a large quantity of gold was recovered from the possession of A1 and based on revelations made by him, the other applicants i.e A2, A3 and A4 had been picked up and were confronted with each other. There was no denying that the names of A2, A3 and A4 had cropped up during the investigations and analysis of data and a distinct and undeniable link was detected and established.

20. On the issue of the Customs declaration form, a copy of which has been supplied by A1 to the revisionary authority in their additional submissions, the Government notes that the OAA in the OAA has given detailed findings on the same

at para 53.2. The relevant portion of the same is reproduced here below; The OAA has held that the document i.e. CDF submitted by A1 is a false document. This is a vital observation made by the OAA and Government also finds this observation as obvious as the CDF furnished by A1 does not bear the signatures of the panchas as this document is part of the panchanama and had been seized. Therefore, Government does not find any merits in interfering in the same.

“53.2. It has already been discussed above that the passenger on his arrival from abroad was intercepted by the AIU officers of Customs at the Green Channel of Customs and the officers also recovered a Customs Declaration Form from his possession where there was no declaration about gold at Sr. no. 10 (ii) or (iii) and total value of dutiable goods being imported at Sr. no. 9 was also blank. The same was seized under the Seizure Panchnama dated 07.12.2015 and is a Relied Upon Document. It also bears his signature on it. The same has never been contested. Hence, he had attempted to mislead the investigation as well as the adjudicating authority by submitting a Declaration before the Magistrate along with his retraction letter dated 09.12.2015. I find that the passenger has submitted false document alongwith his retraction so as to escape from the charges of prosecution, as envisaged under the Customs Act, 1962 as well as to claim ownership over the seized gold which did not belong to him. It is also apparent from the case records that he had no intention to make any declaration to the Customs under Section 77 of the Customs Act, 1962. As regards ownership of the seized gold, I find that he had not submitted any document to finance and acquire licit possession of seized gold. It is pertinent to mention here that the seized gold was having foreign markings and that it is incumbent upon the passenger to discharge the presumption raised against him under Section 123 of the Customs Act, 1962 that the seized gold was not smuggled gold. I find from case records that the passenger in his different versions had given different details of his occupation, but did not give any details about his licit earnings. It is apparent from the documentary evidences available on record to prove that he was working for Mr. Atonu Ghosal for his living. It is observed that Mr. Atonu Ghosal had, while his statement was recorded under Section 108 of the Customs Act, 1962 before the Superintendent of Customs (P), Kolkata on 15.12.2015, submitted a refund application made by Mr. Raj Jadhav for refund of UK Pound 795 paid by him from his Credit Card No.

4659 4650 3702 6797 on account of cancellation of ticket booked for Mr. Ghosal vide PNR No. 4R3EXC. This is consistent with the version of Mr. Raj Jadhav that he used to book ticket for himself for which Mr. Ghosal would reimburse. Further, he has not given any details about his bank account and transactions made through it. He has as per the records obtained from the Bureau of Immigration travelled frequently to India for short duration, in some case for one day only, without any ostensibly justifiable reasons. It is also observed that he had taken different stance on different dates and also, during adjudication proceedings to suit his convenience. ...”

21. Government also finds that the averments made by A1 on (i). the data retrieved from his mobile phone and (ii). claim of ownership of the seized gold, has been dealt with comprehensively by the OAA at para nos. 53.3 and 53.4 of the OIO and needs no further elaboration. Government finds the same to be fair and just.

22. Further, Government after having expansively gone into the details of the case and the records, agrees with the observation made by the OAA at para nos. 53.5 and 53.6 of the OIO that A1 was working as a carrier for the seized gold for a syndicate engaged in organized smuggling and that he was an active participant in it for monetary consideration.

23. In their averments, the applicants have stated that principles of natural justice have not been followed by the lower authorities while dispensing justice i.e. while deciding this case. Government observes that personal hearings have been conducted by the lower authorities. Moreover, Government notes that the OAA had allowed cross-examination of the witnesses etc which has been recorded in the OIO itself. Given these recorded facts in the OIO and OIA, Government finds that the averment of not following the principles of natural justice raised by the applicants is pretentious and therefore, is inclined to reject the same.

24. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the manner of concealment being clever and innovative

with conscious and firm intent to hoodwink the Customs and evade payment of duty, quantity being large and commercial, this being a clear 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 the 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 large quantity of gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such blatant 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 attempts and would deter persons who indulge in such acts with impunity. Therefore, Government finds that the OIO passed by the OAA is proper and legal and the same has been rightly upheld by the AA. In this case, judicious application of discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 15, above is evident.

25. Since, in the foregoing para, Government has upheld the absolute confiscation of the gold, the plea of the A1 to allow re-export of the gold does not merit consideration.

26. On the issue of penalties having been imposed on A2, A3 and A4, as already stated at para 16 above, the OIO has gone into the details of their roles in the smuggling operation. The investigating agency had confronted these applicants with A1 and electronic links of contacts with each other was also found. The role of A3 in the instant case is very significant and he was a vital 'cog' in the entire operation. His role has been intensely discussed by the OAA at para nos 58.2, 60 and 61 of the OIO alongwith transcripts. The role of A4 too has been vividly analysed in para nos. 59 and 61 of the OIO. The role of A2 has been discussed at para 62 of the OIO alongwith the transcripts of whatsapp messages. Considering all these, Government finds that

the quantum of penalty imposed on A2, A3 and A4 is commensurate with the omissions and commissions committed by them and is not inclined to interfere in the same.

27(a). On the issue of confiscation of an amount of ₹ 87,63,172/- under Section 121 of the Customs Act, 1962 paid towards the booking of the two flats bearing no. 605 and 606, A-Wing, Atlantis Building, Sector 5, Hiranandani Gardens, Powai, Mumbai – 76 as illegally acquired from sale of proceeds of smuggled gold, Government finds that on the direction of the OAA, the matter was referred to the Competent Authority, i.e. SAFEMA.

27(b). On this issue, Government notes the following,

(i). that though in the SCN, a proposal had been made for the confiscation of 35 kgs of the gold smuggled on earlier occasions, the same was dropped in the OIO as the gold was not available for confiscation under Section 111 of the Customs Act, 1962.

(ii). that in the SCN there was no proposal for the demand of duty on the 35 Kgs of gold brought into the country. i.e. in other words the quantification of duty had not been made.

(iii). now, the applicant no. 1 has informed that the Competent Authority i.e. SAFEMA has dropped all proceedings against the said two flats.

27(c). Considering the above and the fact that the respondents have not controverted the same, Government finds that since, the proceedings have been dropped by the Competent Authority, the confiscation of the amount of ₹ 87,63,172/- is not justified as it has lost its moorings and Government is inclined to drop the same.

27(d). For the same grounds, Government finds that the penalty of ₹ 5,00,000/- imposed on A1 under Section 112(a) and (b) of the Customs Act, 1962 for engaging

in smuggling of 35 Kgs of gold on earlier occasions, does not hold any water, now, and therefore, the Government is inclined to drop the same.

28. In view of the above, Government finds it necessary to partly modify the OIA passed by the AA only to the extent of only setting aside the (i). penalty of ₹ 5 Lakhs imposed on A1 imposed under Section 112(a) and (b) of the Customs Act, 1962 for purported smuggling of 35 Kgs of gold on earlier occasions and (ii). confiscation of the amount of ₹ 87,63,172/- paid towards booking of the said two flats at Powai, Mumbai. In other words, Government finds that the remaining parts of the Order as proper and legal and is not inclined to interfere in the same and upholds the remaining part of Order (OIA) passed by the Appellate Authority.

29. Revision Applications filed by the 4 applicants is disposed of on the above terms.

Shrawan
31/8/23
(SHRAWAN KUMAR)

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

630 -
ORDER No. 633 /2023-CUS (WZ) /ASRA/MUMBAI DATED 31.08.2023

To,

1. Shri. Raj Vasant Jadhav, Flat No. 507, Laxminagar, Shivprasad CHSL, Near Ghatkopar Police Station, Ghatkopar (East), Mumbai - 400 075.,
2. Shri. Avdhut Anil Kale, 104, New Sonal CHSL, Savarkar Road, Tilak Nagar, Dombivali (East), Thane - 421 201.,
3. Shri. Gaurav Jain, 902, A Wing, Shreepati Tower, Jewels Pimpalwadi, Navakal Lane, Girgaon, Mumbai - 400 004.,
4. Shri. Kanakmal Jain, 902, A Wing, Shreepati Tower, Jewels Pimpalwadi, Navakal Lane, Girgaon, Mumbai - 400 004.,
5. Pr. Commissioner of Customs, Level - II, Terminal - 2, Chhatrapati Shivaji Maharaj Airport, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, MIG Colony, Bandra (E), Mumbai - 400 051.,
2. Shri. Sushanth Murthy, 27, 3rd Floor, Examiner Press Bldg, Dalal Street, Fort, Mumbai - 400 001.,
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.