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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/241-243/B/WZ/2020-RA / 7093 : Date of Issue : 28.09.23

ORDER NO. 690-692/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023
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. 371/241-243/B/WZ/2020-RA

Applicant No. 1 (A1). : (i). Ms. Nur Anis Binti Mohammed Othman,
Applicant No. 2 (A2). : (ii). Ms. Noor Khazwani Binti Ab Rahim,
Applicant No. 3 (A3). : (iii). Shri. Balaji Selvam
.....APPLICANTS

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-1393, 1394 & 1395/2019-20
Dated 19.03.2020 issued on 13.07.2020 through F.No.
S/49-421, 422, & 438/2019 passed by the
Commissioner of Customs (Appeals), Mumbai – III.

ORDER

These three revision applications have been filed by (i). Ms. Nur Anis Binti Mohammed Othman, (ii). Ms. Noor Khazwani Binti AB Rahim and (iii). Shri. Balaji Selvam (hereinafter referred to as the Applicants or alternately and more specifically as Applicant no. 1 [A1], Applicant no. 2 [A2] and Applicant no. 3 [A3] resp.) against the Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-1393, 1394 & 1395/2019-20 dated 19.03.2020 issued on 13.07.2020 through F.No. S/49-421, 422, & 438/2019 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 07/08.11.2017, Applicant No. 1 and 2, both Malaysian nationals, were intercepted by Customs Officers at CSMI Airport, Mumbai upon their arrival from Malaysia by Malindo Air Flight No. OD-215/07.11.2017, after they had cleared Customs through the green channel and were proceeding to the exit gate. Personal search of A1 and A2 led to the recovery of undermentioned gold jewellery.

- (i) From A1; 3 new gold chains, all together weighing 456 grams; 2 old gold chains together weighing 63 grams, 18 gold bangles, all these bangles together weighing 540 grams; 2 gold rings, both these together weighing 11 grams, total weight of the assorted gold jewellery was 1070 grams valued at ₹ 26,21,684/-.
- (ii) From A2; 3 new gold chains, all together weighing 452 grams; 2 old gold chains together weighing 34 grams, 18 gold bangles, all these bangles together weighing 535 grams; 2 gold rings, both these together weighing 05 grams, total weight of all this assorted gold jewellery was 1026 grams valued at ₹ 25,13,879/-.

2(b). The daughter of A1 viz, Ms. Nur Zahara Tihani Binti Yuzairee, aged about 7 years was also traveling with them. However, nothing incriminating was found on her during her personal search.

2(c). During the interrogation of A1 & A2, they revealed that the applicant no. 3 was also travelling with them in the same flight and was waiting for them outside the airport. Accordingly, A3 too was intercepted. Nothing incriminating was found on A3 during his personal search.

2(d). The assorted gold jewellery recovered from A1 & A2 were assayed through a Government Approved Valuer, who certified the correctness of the weight and reported that the gold was of 22 karat purity.

2(e). Statement of A1 was recorded under Section 108 of the Customs Act, 1962, where she admitted to possession, carriage, mis-declaration, concealment and recovery of the assorted gold jewellery made of 22 karats, resp.; that the gold had been carried by her at the request of A2 who had informed that it belonged to her (A2's) friend in India; that gold was worn by her and concealed on her person.

2(f). Statement of A2 was recorded under Section 108 of the Customs Act, 1962, where she admitted to possession, carriage, mis-declaration, concealment and recovery of the assorted gold jewellery made of 22 karats; that she had agreed to carry the jewellery for a monetary consideration; that she had requested A1 to carry the gold also; that she did not know the actual owner of the gold; that she had not declared the gold to Customs; that gold was worn by her and concealed on her person.

2(g). Statement of A3 was recorded under Section 108 of the Customs Act, 1962 and he revealed that he had arrived with A1 and A2; that said gold had been handed over to A1 & A3 by their common friend; that he was tasked with handing over the gold to the receiver at Mumbai and was instructed to proceed to Golden Tulipz Boutique Hotel, Kurla, Mumbai; that he had been paid ₹ 20,000/-; that the gold jewellery did not belong to A1 and A2;

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/AK/ADJN/398/2018-19 dated 28.12.2018 issued on 28.12.2018 through F.No. S/14-5-33/2018-19/Adjn (SD/INT/AIU/311/2017-AP'B'); ordered for the absolute confiscation of the seized assorted jewellery of gold of 22 karats (i). totally weighing 1070 grams, valued at ₹ 26,21,684/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and (ii). totally weighing 1026 grams, valued at ₹ 25,13,876/- under Section 111(d), (l) and (m) of the Customs Act, 1962 recovered from A1 and A2, respectively. Penalties of ₹ 2,50,000/- each was imposed on A1 & A2 and ₹ 2,00,000/- on A3 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-1393, 1394 & 1395/2019-20 dated 19.03.2020 issued on 13.07.2020 through F.No. S/49-421, 422, & 438/2019, did not find any reason to interfere in the impugned OIO passed by the OAA and upheld the same in toto.

5. Aggrieved with the above order, the applicants have filed separate revision applications before the revisionary authority. The revision applications filed by A1 and A2 are similar save on the quantity of assorted

gold jewellery recovered from them the content of their submissions are otherwise similar. The grounds of revision filed by A1 and A2 are as under;

- 5.01. that the orders of the lower authorities was against the law, weight of evidence and probabilities of the case; that the OIO was unjust, unreasonable and arbitrary; that the lower authorities had erred in confiscating the gold jewellery; that they ought to have seen that A1 and A2 had not concealed or mis-declared the gold jewellery; that the same could have been released on payment of duty; that the A1/A2 had produced the gold jewellery for clearing it on payment of appropriate duty; that the gold jewellery had been confiscated and a false case was foisted on them; that the lower authorities had failed to appreciate that the gold jewellery had not been concealed in an ingenious manner; that the same had been worn by A1/A2; that they had come to India as tourist; that the confiscation of the gold jewellery by the lower authorities was unwarranted; that the lower authorities ought to have ordered the release of the gold jewellery without Customs duty; that penalty ought not to have been imposed; that A1/A2 had not crossed the green channel; that the seizure mahazar had not been drawn and prepared before the witnesses; that the alleged statement that gold jewellery were to be handed over to an agent was false and absurd; that the lower authorities had erred in not applying Section 125 of the Customs Act, 1962 and the jewellery ought to have been released on payment of redemption fine; that the jewellery was of 22Karats and was for personal use; that the AA ought to have ordered for the re-export of the gold jewellery as prayed for by them since they had worn it; that in the mahazar it had been mentioned that some of the gold jewellery was new and some were old; that they had retracted their statements; that their statement should have been held as admissible; that corroboration of their statements had not been done and investigations based on their statements too had not been conducted; that CCTV footage had not been provided to them;
- 5.02. that they rely on the case law of DRI vs. Pushpa Lekhaumal Tolani [2017-355-ELT-129(SC)] wherein it was held that whenever a passenger was wearing jewellery and even cross the green channel there was no infraction of the provisions of the Customs Act.

- 5.03. that in the case of Vigneswaran [2014-314-ELT-394(Ker)], it was held that a foreign tourist need not declare if they were wearing the jewellery;
- 5.04. that the release of the gold jewellery on payment of redemption fine had been allowed in the following case laws;
- (a). Sapna Sanjiv Kohli vs. Commr. Of Customs, Airport, Mumbai [2008-230-ELT-305
- (b). UOI vs. Dhanak M. Ramji [2009-248-ELT-127(Bom);
- 5.05. that in many of the undermentioned cases, the Jt. Sec.(Rev. Appl) had allowed the release of the confiscated gold on payment of fine;
- (a). Order no. 159/2013 dated 01.07.2013 passed under Section 129DD of the Customs Act, 1962;
- (b). Order no. 66-70/2013 dated 19.02.2013 passed under Section 129DD of the Customs Act, 1962;
- (c). Order no. 201/2005 dated 30.06.2005 passed under Section 129DD of the Customs Act, 1962;
- (d). Order no. 437-438/2003 dated 25.11.2003 passed under Section 129DD of the Customs Act, 1962;
- 5.06. that re-export of the gold have been permitted in the following cases;
- (a). 2008-230-ELT-305(Tri-Mum);
- (b). 2009-240-ELT-207(Bom);
- (c). 2010-253-ELT-A52(SC);
- (d). 2011-266-ELT-167(Mad);
- (e). 2011-269-ELT-72(Mad);
- (f). 2014-314-ELT-349(GOI)
- 5.07. that they had been apprehended not after passing through the green channel but immediately after entering the arrival hall after they had passed the immigration facilities and had collected their checked-in baggage;
- 5.08. that they had retracted their statements and the lower authorities ought not to have relied upon the same;
- 5.09. that cross-examination of the witnesses had not been allowed and they had been deprived of natural justice; on this issue they have relied upon the following;
- (a). Apex Court judgement in the case of A Tajudeen vs. UOI reported in 2015-4SCC-Pg.435
- (b). Hon'ble Gujarat High Court in Vulcan Industrial Engineering Company Ltd vs. UOI, [2013-297-ELT-190(Guj);

- 5.10. that the gold jewellery had been worn by A1 / A2 which was not a violation; Here they have cited the case of Vigneswaran passed by Hon'ble Kerala High Court and reported in 2014-314-ELT-394(Ker)

Under the circumstances; A1/A2 have prayed to the Revision Authority to set aside the impugned OIA and to allow the re-export of the impugned gold jewellery and to cancel the penalties of ₹ 2,50,000/- imposed on each of them.

6. Aggrieved with the above OIA, A3 has filed a separate revision application before the revisionary authority. The grounds of revision are as under;

- 6.01. that the orders of the lower authorities were against the law, weight of evidence and probabilities of the case; that A1 and A2 had not concealed the gold jewellery and the same ought to have been released to them; that the lower authorities ought to have held that he i.e. A3 did not have any contact with A1 and A2; that he was a reputed singer who visited foreign countries for singing programmes; that he had nothing to do with A1 and A2; that the alleged register of Golden Tulipz Boutique Hotel, Kurla had not been verified by the Customs authorities; that the seizure mahazar had not been prepared before two independent witnesses; that the statement of him helping A1 and A2 was an invented story; that no evidence was made available linking him to A1 and A2; that CCTV footage had not been provided; that penalty ought not to have been imposed on them; Some of the grounds are the same as submitted by A1 and A2 and have not been repeated here;

Under the circumstance; A3 has prayed to the revisionary authority to set aside the impugned OIA and cancel the penalty of ₹ 1,00,000/- imposed on him by the OAA and confirmed by the AA.

7. The respondent vide their three (03) written submission bearing F.Nos. (i). Aircus/Review-377/2020-21 (ii). Aircus/Review-378/2020-21 and (iii). Aircus/Review-380/2020-21 all dated 23.12.2020 have stated that the OIA be maintained. Since, the said three submissions made by the respondent are primarily similar, to avoid repetition and with an eye on brevity; a consolidated submission has been taken. The Respondent have stated that applicant no. 1 &

2 had not declared the goods; that the assorted gold jewellery were of 22 KT and weighed 1070 & 1026 grams resp.; that the gold had been handed over to A1 & A2 by their common friend; that they had admitted to having carried the gold jewellery for a monetary consideration; that had the applicants not been intercepted, they would have gone away without payment of duty; that in the instant case, the offence had been committed in a premeditated and clever manner which indicated mensrea; that the applicant had deliberately not declared the gold to Customs in order to evade Customs duty; that applicant had admitted to possession, non-declaration, carriage and recovery of the seized gold, that Section 123 of the Customs Act, 1962 cast a burden on the applicant to prove that the gold was not smuggled; that they rely on the following case laws;

(i). Surjeet Singh Chhabra vs. UOI – 1997-89-ELT-646-SC, wherein the Apex Court had held that *'the confession, though retracted, is an admission and binds the petitioner'*.

(ii). Apex Court's Order in the case of K.I Pavunny vs. Asstt. Collector (HQ), C.Ex, Cochin [1997-90-ELT-241-SC] on the issue that confessional statement made to Customs officials is admissible evidence

(iii). Abdul Razak vs. UOI – 2012(275)ELT 300(Ker)(DB) passed by the Division Bench of the Hon'ble High Court, Kerala, on the issue that appellant did not have right to get the confiscated gold ;

(iv). Commissioner of Customs (Air) vs. P. Sinnasamy, passed by Hon'ble Madras High Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(v). Om Prakash Bhatia vs. Commissioner of Customs, Delhi – 2003(6) SC 161 of the Apex Court, it is held that non-fulfilment of conditions tantamount to prohibition.;

(vi). CESTAT Order in respect of Baburaya Narayan Nayak vs. Commissioner of Customs, Bangalore – 2018(364) ELT 811 (Tri-Bang), upheld absolute confiscation as evidence of licit purchase had not been provided;

(vii). Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 which specifies that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question.

Therefore, under the circumstance of the case, the respondent has prayed to the Revision Authority to reject the revision application filed by the applicant and to uphold the OIA passed by the AA.

8. Personal hearing of the case was scheduled for 12.05.2023, 19.05.2023, 07.07.2023, 14.07.2023 and 21.09.2023. No one turned up on behalf of the Applicant / Respondent for the personal hearing. Sufficient opportunities have been given to the applicant / respondent. Therefore, the case is being taken up for a decision, on the basis of evidence available on the records.

9. The Government has gone through the facts of the case. A1 and A2 had been intercepted after they had crossed the green channel. Both A1 and A2 had not declared the gold jewellery to Customs as required under Section 77 of the Customs Act, 1962. They both are foreign nationals and quantity of gold jewellery recovered from them is quite substantial and the quantum indicates that the same was for commercial purpose. This, the quantum of gold and the number of chains / bangles indicates that the same was clearly for commercial purpose. They have admitted that they carried the same for

monetary purpose. The confiscation of the gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

10. 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”.

11. Further, in para 47 of the said case the Hon'ble High Court has observed “*Smuggling in relation to any goods is forbidden and totally prohibited. Failure to check the goods on the arrival at the customs station and payment of duty at the rate prescribed, would fall under the second limb of section 112(a) of the Act, which states omission to do any act, which act or omission, would render such goods liable for confiscation.....*”. Thus, failure to declare the goods and failure to comply with the prescribed conditions has made the impugned gold “prohibited” and therefore liable for confiscation and the Applicants thus liable for penalty.

12. 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.

13. Government observes that the quantity of gold was quite substantial. Over 1 kg of gold jewellery was recovered from each of them i.e. from A1 and A2. It is unfathomable that visitors visiting the country would deck themselves with so much of jewellery, especially when they are travelling. This indicates that the same was for commercial purpose. Though they both had worn the jewellery, the quantum of the gold jewellery and numbers of chains, bangles etc, clearly indicates that the same was for commercial consideration. They had admitted that the gold jewellery did not belong to them and that they carried the gold jewellery for monetary consideration which also clearly

indicates that the gold jewellery belong to well entrenched gold smuggler. A1 and A2 had not declared the gold jewellery which indicates that they did not have a mindset to pay the Customs duty. The act of wearing substantial quantity of gold jewellery; non-declaration, being foreign nationals, inability to show any purchase documents etc, all these clearly indicates that this was an proxy attempt to smuggle the gold jewellery without payment of customs duty.

14. The main issue in the case is the manner and the quantum of the impugned gold jewellery which was being attempted to be brought into the Country. The option to allow redemption of seized goods is the discretionary power of the adjudicating authority depending on the facts of each case and after examining the merits. In the present case, the quantum of gold jewellery being substantial, A1 & A2 being foreign nationals, non-production of purchase documents etc, it is clear that they are carriers and ownership of the gold lies with someone else. Thus, this 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 gold jewellery. The redemption of the gold will encourage non-bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Customs authorities the passenger gets away with smuggling and if not, he has the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

15. The plea taken by A1 and A2 that they had retracted their statements does not come to their rescue. The fact remains that a substantial quantity of gold jewellery had been recovered from them (i.e. A1 and A2) and in the OIA it is mentioned that the applicants had never during the course of the investigations retracted from the version they had recorded at the initial stage. Under the said circumstances, Government finds that the issue of retraction raised by the applicants is an afterthought, to somehow get a favourable order. Government does not find any substance in this averment.

16. The Government finds while imposing penalties on A1 and A2 under Section 112(a) and (b) of the ~~Custom Act~~, 1962, the lower authorities have considered the role played by each of them in the smuggling activity and had appropriately imposed a penalty of ₹ 2,50,000/- each. Government finds that the penalty imposed on A1 and A2 is commensurate with the omissions and commissions committed by them and is therefore, not inclined to interfere in the same.

17. On the issue of the penalty imposed on A3, he has pleaded that he is a professional singer and that he had only been assisting A1 and A2 to the hotel as they were foreigners as they were not acquainted with the place. Government finds that no gold or gold jewellery was found on him and that he was not apprehended alongwith A1 and A2, but was picked up from outside the airport. Save for his statement and that of A1 and A2, the investigation have not been able to link him with A1 & A2 or with any others involved in the case. In view of the same, Government finds that the penalty of ₹ 1,00,000/- imposed on him under Section 112(a) and (b) of the Customs Act, 1962 is harsh and excessive and not commensurate with the omissions and commissions committed him. Government is therefore, inclined to reduce the penalty imposed on him.

18. In view of the above, Government modifies the OIA passed by the AA only to the extent of reducing the penalty imposed on A3 under Section 112(a) and (b) of the Customs Act, 1962. The penalty of ₹ 1 lakh imposed on A3 is reduced to ₹ 50,000/- (Rupees Fifty Thousand only). In other words, the absolute confiscation of the gold jewellery alongwith the penalties of ₹ 2,50,000/- imposed on A1 and A2 are upheld.

19. The Revision Application is disposed of in terms of the above.

Shrawan
26/9/23
(SHRAWAN KUMAR)

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

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ORDER NO. 692/2023-CUS (WZ)/ASRA/MUMBAI DATED 26.09.2023

To,

1. Ms. Nur Anis Binti Mohammed Othman, W/o. Wan Adnan, 35, Lingkaradamaicitra, Taman Alam Damai, 56000, Cheras W. Persekutuan, KL, MALAYSIA [since, address is outside India, Service through Counsel on record],
2. Ms. Noor Khazwani Binti Ab Rahim, W/o. Suhaidi Bin Ali, Lot 116, KG Bunuhan, 16200, Tumpat, Kelantan, Malaysia [since, address is outside India, Service through Counsel on record].
3. Shri. Balaji Selvam, S/o. Selvam, 10, B4, Senthooor Flats, Kumaran Colony, 9th Street, Vadapalani, Chennai - 600 010.,
4. Principal Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

1. Shri. M. Abdul Nazeer, Advocate, Varadamma Garden, 3rd Street, Kilpauk, Chennai - 600 010.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.