

SPEED POST

F.No. 380/15-A/B/2015-RA
F.No. 375/37/B/2017-RA
 GOVERNMENT OF INDIA
 MINISTRY OF FINANCE
 (DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
 6th FLOOR, BHIKAJI CAMA PLACE,
 NEW DELHI-110 066

Date of Issue... 30/12/19... *me*

Order No. 71-72/19-Cus dated 30-12-2019 of the Government of India passed by Ms. Mallika Arya, Principal Commissioner & Additional Secretary to the Government of India, under Section 129DD of the Custom Act, 1962.

Subject : Revision Applications under Section 129 DD of the Customs Act 1962 against the Order-in-Appeal No. 05 (SLM)/ Cus/ JPR/ 2015 dated 27.02.2015 passed by the Commissioner of Central Excise (Appeals), Jaipur.

Applicants : **Applicant** Mr. Manoj Kumar Sharma in R.A. F.No. 375/ 37/ B/ 2017-RA dated 03.11.2017 & **Applicant** Commissioner of Customs (Preventive) Jodhpur, Hqrtrs at New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302005 in R.A. F.No. 380/ 15-A/B/ 2015-RA dated 19.05.2015.

Respondents : **Respondent** Commissioner of Customs (Prev) Jodhpur, Hqrtrs at New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302005 in R.A. F.No. 375/37/B/2017-RA dated 03.11.2017 & **Respondent** Mr. Manoj Kumar Sharma in R.A. F.No. 380/15-A/B/2015-RA dated 19.05.2015.

ORDER

This order is being passed in pursuance of the order of Hon'ble High Court of Jaipur dated 01.05.2019 in respect of D.B. Civil Writ Petition No. 12600/ 2018. Vide this writ petition Rajasthan High Court has set aside G.O.I. order no. 65/18-Cus dated 13.04.2018 in respect of Revision Application no. 380/ 15-A/ 2015-RA dated 19.05.2015 filed by the Commissioner of Customs (Preventive), Jodhpur. The Honourable court has directed that "*...without commenting on the merits of the case, we are persuaded to set aside the order passed by the revisional authority dated 13.04.2018 and remit the matter back to the revisional authority for clubbing the revision petition nos. 375/37/B/2017-RA filed by the assessee and 380/ 15-A/ B/ 2015-R.A filed by the Department together and decide both the petitions after due notice to the petitioner on his correct address.*"

A Revision Application no. 380/ 15-A/B/ 2015-R.A dated 19.05.2015 was filed by Commissioner of Customs (Preventive) Jodhpur (**hereinafter referred as customs authorities**) against Order-in-Appeal (O-I-A) No. 05 (SLM)/ Cus/ JPR/ 2015 dated 27.02.2015 passed by the Commissioner of Central Excise (Appeals), Jaipur.

Another Revision Application No. 375/ 37/ B/ 2017-RA dated 03.11.2017 was filed by Sh. Manoj Kumar Sharma (**hereinafter referred as PAX**) against the same Order-in-Appeal No. 05 (SLM)/ Cus/ JPR/ 2015 dated 27.02.2015 passed by the Commissioner of Central Excise (Appeals), Jaipur. The PAX filed an appeal bearing no. C/ 51960/ 2015 CU (DB) alongwith stay application on 25.02.2015 before the Hon'ble CESTAT, New Delhi (Tribunal). As the appeal did not lie before the Hon'ble Tribunal, the PAX applied for its withdrawal on 03.10.2017 when the matter came up for final hearing. The Tribunal vide final order no. 57034/ 2017 dated 03.10.2017 dismissed the appeal of the PAX as withdrawn. Subsequently the PAX filed the above Revision Application which is currently pending with the Government.

In the instant case the Additional Commissioner of Customs, Jodhpur vide adjudication order bearing no. 17/ 2013 dated 11.12.2013 ordered for absolute

confiscation of the seventy gold biscuits weighing 8164.80 grams valued at Rs. 2,51,89,735/-, UAE Dirham AED 1,05,410, INR Rs. 20,000/-, an amount of Rs. 12 lacs received by the PAX in lieu of demand draft issued by Al Fardan Exchange alongwith concealment material valued at Rs.2,200/-. She also imposed a penalty of Rs. 30 lacs (Rupees Thirty Lacs) under Section 112 and Rs. 10 lacs (Rupees Ten Lacs) under Section 114AA of the Customs Act, 1962 on the PAX.

The PAX preferred an appeal against the impugned adjudication order before Commissioner of Central Excise (Appeals), Jaipur. The Commissioner (Appeals) vide the aforesaid O-I-A allowed the release of the DD amounting to Rs. 12 lac meant for deposit in NRE Account of PAX and confiscated Indian currency amounting to Rs. 12,500/- and released the balance currency of Rs. 7,500/-. The appellate authority waived off the penalty under Section 114AA of the Customs Act, 1962 and reduced penalty from Rs. 30 lacs to Rs. 5 lacs under Section 112 of the Customs Act, 1962 on the PAX. The customs authorities challenged this order before the revisionary authority who vide G.O.I. order no. 65/18-Cus dated 13.04.2018 upheld the order of adjudicating authority regarding imposition of penalty of Rs. 30 lacs (Rupees Thirty Lacs) under Section 112 of Customs Act, 1962 and set aside the order of Commissioner (Appeals) on this aspect. However, Government upheld the order of the Commissioner (Appeals) regarding setting aside of penalty under Section 114AA of Customs Act, 1962 on the PAX.

The order of G.O.I. bearing no. 65/18-Cus dated 13.04.2018 against Revision Application no. 380/ 15-A/ B/ 2015-R.A dated 19.05.2015 filed by the Commissioner of Customs (P), Jodhpur was challenged in Writ Petition by Sh. Manoj Kumar Sharma (PAX) before Rajasthan High Court.

The Hon'ble Rajasthan High Court decided the Writ Petition with the direction to "*club the revision petition nos. 375/37/B/2017-RA filed by the assessee and revision petition no. 380/ 15-A/ B/ 2015-R.A filed by the Department together and decide both the petitions*". Accordingly Revision Application no. 380/ 15-A/ B/ 2015-R.A

dated 19.05.2015 filed by the Commissioner of Customs (P), Jodhpur is being decided alongwith Revision Application No. 375/ 37/ B/ 2017-RA dated 03.11.2017 filed by the PAX pending with Government.

2. The brief facts of the case are that the PAX arrived at Jaipur Airport on 23.09.2012 from Dubai. A seizure of seventy gold biscuits weighing 8164.80 grams valued at Rs. 2,51,89,735/-, UAE Dirham AED 1,05,410, INR Rs. 20,000/- was made under Section 110 of Customs Act, 1962 and seizure for an amount of Rs. 12 lacs in lieu of demand draft issued by Al Fardan Exchange alongwith concealment material (six plastic packets and spectacles case) valued at Rs.2200/- was made out under Section 110 of Customs Act 1962. A statement dated 23.09.2012 under Section 108 of Customs Act, 1962 was tendered by the PAX wherein he confessed that he had brought the impugned gold bars to India to earn profit and did not declare the impugned gold bars and other things viz. Forex, Demand draft, Indian currency etc in the customs declaration form submitted to the customs authorities at the airport. The PAX was arrested under Section 104 of the Customs Act, 1962 on 23.09.2012 and subsequently released on bail on 24.09.2012 on furnishing a security of Rs. 84 Lacs by way of fixed deposit and two surety bonds for Rs. 20 lacs each by two guarantors. The PAX sent a retraction letter dated 27.09.2012 to the Commissioner of Customs, Jaipur and retracted from his statement dated 23.09.2012 recorded under Section 108 of the Customs Act, 1962 stating that he was forced to sign the said statement.

Two opportunities were given to the PAX subsequently on 11.10.2012 and 29.01.2013 and statements under Section 108 of the Customs Act, 1962 were duly recorded on both these dates. Another retraction letter dated 30.01.2013 was sent to the Commissioner of Customs, Jaipur by the PAX regarding his statement tendered on 29.01.2013 under Section 108 of Customs Act, 1962. The PAX did not challenge the statement dated 11.10.2012. Regarding the statement recorded under Section 108 of Customs Act, 1962 on 29.01.2013, he submitted that he was forcefully made to sign

his earlier statement recorded on 23.09.2012 by adding the word 'seen'. He sent a retraction letter dated 27.09.2012 to this effect narrating the same.

He wrote a letter dated 05.10.2012 to the Director, Airports Authority of India (AAI), Jaipur requesting for the CCTV footage of the Airport for the period 23.09.2012 04:30 AM to 24.09.2012 04.00 PM. The request was denied under Section 8 (g) & (h) of Right to Information Act, 2005 by the Public Relations Officer, AAI vide his letter no. JP/ AAI/ APD/ RTI/ 17/ 2012/ 18016 dated 16.10.2012 on the grounds of security.

A show cause notice (SCN) dated 18.03.2013 was issued to the PAX by the Additional Commissioner of Customs, Jodhpur. In response to SCN the PAX asked for cross-examination of the witnesses viz. Sh. Balram Tiwari and Sh. Rameshwar Prasad Dubey, Customs Officers on duty at X-ray machine and red channel counter on 23.09.2012. The customs officer on duty on 23.09.2012 manning the x-ray machine, Sh. S.S. Arya, Inspector, was cross examined by the PAX on 12.08.2013. The other customs officer deployed at the red channel on 23.09.2012 and the two witnesses could not be cross-examined since the request for cross-examination was denied by Adjudicating authority vide O-I-O no. 17/ 2013 dated 11.12.2013. The Adjudicating Authority has relied on *the judgment of the Apex Court judgment in the case of Naresh J. Sukhawani Vs. UOI [1996 (83) E.L.T. (258) S.C.] and Surjeet Singh Chhabra Vs. UOI [1997 (89) E.L.T. 646 (SC)] in support of her decision denying the cross-examination of the witnesses and the customs officers.*

3. The Commissioner (Appeals) vide the impugned O-I-A upheld the order of confiscation of the impugned gold bars and cocurred with the adjudicating authority's decision for denial of cross-examination of witnesses and customs officers. He, however, allowed the release of the DD amounting to Rs. 12 lac meant for deposit in NRE Account and confiscated the Indian currency amounting to Rs. 12,500/-. He has waived off the penalty under Section 114AA of the Customs Act, 1962 and reduced penalty from Rs. 30 lacs (Rupees Thirty Lacs) to Rs. 5 lacs (Rupees

Five Lacs) imposed under Section 112 of the Customs Act, 1962 on the PAX. He has upheld the adjudicating authority's order regarding absolute confiscation of the seventy gold biscuits weighing 8164.80 grams valued at Rs. 2,51,89,735/- (Rupees Two Crore Fifty One Lacs Eighty Nine Thousand Seven Hundred and Thirty Five) and UAE Dirham AED 1,05,410 (Dirham One Lac Five Thousand Four Hundred and Ten).

The revision applications have been filed by the Commissioner of Customs (P) Jodhpur (HQ Jaipur) and the PAX on 19.05.2015 and 03.11.2017 respectively with this office. The PAX initially filed an appeal bearing no. C/ 51960/ 2015 CU (DB) along with stay application on 25.02.2015 before the Hon'ble CESTAT, New Delhi against the impugned order-in-appeal. As the appeal did not lie before the Hon'ble Tribunal, the PAX applied for its withdrawal on 03.10.2017 when the matter came up for final hearing. The Tribunal vide final order no. 57034/ 2017 dated 03.10.2017 dismissed the appeal of the PAX as withdrawn. Subsequently the PAX filed the instant Revision Application dated 03.11.2017.

Revision Application has been filed by the Commissioner of Customs (P), Jodhpur (HQ Jaipur) **on two grounds**. He has challenged the reduction in penalty imposed on the PAX under Section 112 of the Customs Act, 1962 as per Order-in-Appeal on the ground that it is not commensurate with the gravity of offence. He has also challenged the waiver of penalty on the PAX under Section 114AA of Customs Act, 1962.

The Pax in Revision Application filed on 03.11.2017 has primarily made following requests:

- (i) Release of confiscated gold bars and permission to re-export the same.
- (ii) Release of absolutely confiscated Forex and Indian currency with permission to re-export them.
- (iii) Release of the absolutely confiscated packaging materials and other miscellaneous goods.

(iv) The orders of the lower authorities regarding imposition of Penalty be set aside.

He reiterated the request for cross-examination of the customs officers manning x-ray machine and red channel counter as well as the witnesses present on the date of seizure in the case.

4. Personal hearing in the matter was fixed on 05.11.2019. Sh. V.K. Sharma, Superintendent, O/o the Commissioner of Customs (P), Jodhpur appeared on behalf of the Customs authorities. Sh. Manoj Kumar Sharma, PAX alongwith his advocate Sh. Bipin Garg appeared on behalf of the PAX on 22.11.2019.

Sh. V.K. Sharma, Superintendent contended that the penalty imposed on the PAX by the adjudicating authority was reduced by Commissioner (Appeals) which is erroneous and the penalty imposed as per O-I-O should be upheld since a huge quantity of gold biscuits (70 nos.) valued at Rs. 2,51,89,735/- (Rupees Two Crore Fifty One Lacs Eighty Nine Thousand Seven Hundred and Thirty Five) alongwith foreign currency valued at UAE Dirham AED 1,05,410 (UAE Dirham One Lac Five Thousand Four Hundred and Ten) and Indian currency valued at Rs. 20,000/- (Rupees Twenty Thousand) was seized from the PAX.

During the course of personal hearing the PAX has contended that he arrived on 23.09.2012 from Dubai and was carrying 70 gold bars weighing 8 kg. Approx valued at Rs. 2.5 crore approx, which were purchased by him in Dubai since he is a permanent resident of UAE. Prior to this he had travelled to India 15 months earlier. Therefore he was eligible to carry 10 kgs of gold bars wherein he was carrying only 8 kgs of gold bars (approx). He is the bonafide owner of the impugned goods and had declared the impugned gold bars in the customs declaration form which was handed over at the Red channel counter and misplaced by the customs officer at the red channel. He subsequently submitted another customs declaration form dated 23.09.2012 which does not mention the impugned goods or their value.

His initial statement under Section 108 of Customs Act, 1962 was recorded on 23.09.2012. However he retracted from this statement on 27.09.2012. Subsequently the customs authorities recorded the second and third statement on 11.10.2012 and 29.01.2013 under Section 108 of Customs Act, 1962 on his request wherein all facts were stated regarding the bonafide purchase of the impugned goods.

It has been contended that since gold is not a 'prohibited item' the same should be released on redemption. In case it is not allowed to be released on redemption, he should be given an option for re-export. The absolutely confiscated foreign currency amounting to UAE Dirham 1, 05,410 should also be released to him.

It is pertinent to mention that the PAX decided to withdraw the request of cross-examination of witnesses and the customs officers at the time of personal hearing before the Government on 22.11.2019. However the PAX vide his subsequent letter dated 26.11.2019 addressed to Government has retracted and requested that *he would want to cross-examine the concerned persons since his advocate, who is dealing with the prosecution case filed by the customs authorities, has asked not to forego the cross-examination as it will weaken the case.*

5. In response to the letter dated 29.11.2019 issued by Revisionary Authority's office to him, he intimated that he is reiterating his request for cross examination of the same persons which he had made to the adjudicating authority on 13.06.2013 and the appellate authority on 05.02.2014 and the same was denied. He was allowed to cross-examine only one person (customs officer at the x-ray machine) and that too partially by the adjudicating authority out of the four persons for whom he had requested for cross-examination.

6. The File nos. VIII (48) 67/ Prev/ 2012 pertaining to the case was called from the Commissioner of Customs Jodhpur, Hqrtrs at New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302005 (erstwhile Commissioner of Customs & Central Excise, Jaipur) and the case records have been perused.

7. It is observed that Sh. Manoj Kumar Sharma (PAX) did not declare the impugned gold bars and forex brought by him from UAE under Section 77 of Customs Act, 1962 to the customs authorities at Jaipur Airport. However on asking again at the red channel he verbally informed the customs authorities that he was carrying 10 gold biscuits. **The PAX has contended before the Government that the customs declaration form was intentionally misplaced by the customs officer at red channel in the airport.**

The contention of the PAX appears doubtful since the resumed customs duty declaration form dated 23.09.2012 duly signed by the PAX (part of relied upon documents) shows 'nil' dutiable goods. Even if it is assumed that the original declaration form under Section 77 of Customs Act, 1962 got misplaced at the red channel counter, no evidence has been put forth justifying his stand as to why did he give a 'nil declaration' for the second time under Section 77 of Customs Act, 1962. It is apparent that the PAX gave the impugned declaration under Section 77 of Customs Act, 1962 without any persuasion or coercion from the customs authorities so as to suppress material information and derive undue advantage.

It is pertinent to mention that the fact of non-declaration under Section 77 of Customs Act, 1962 has been duly recorded in the statement tendered under Section 108 of Customs Act, 1962 signed by the PAX. Hence the allegation of the PAX that the customs authorities had intentionally misplaced the customs declaration form is baseless and remains unsubstantiated. Therefore this contention of the PAX merits no consideration.

8. Section 123 of Customs Act 1962 reads as follows:

"123. Burden of proof in certain cases. —1]

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be —

(a) in a case where such seizure is made from the possession of any person, —
(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold 2[and manufactures thereof] watches, and any other class of goods which the Central Government may by notification in the Official Gazette, specify."

As per Section 123 of Customs Act, 1962 the burden of proof is on the PAX from whom the impugned goods (gold bars) are recovered to substantiate the claim that the impugned goods are not smuggled. It is observed that the PAX retracted from his first statement dated 23.09.2012 tendered under Section 108 of Customs Act, 1962. He again retracted from his subsequent statement tendered on 29.01.2013. It is conferred that these delay tactics have been were adopted with an intention to derail the investigation and malign the customs officers.

Reliance is placed on the judgment of Supreme Court of India in the case of Surjeet Singh Chhabra Vs. U.O.I.[1997 (89) E.L.T. 646 (S.C.)] wherein the Hon'ble court has held as follows:-

"Evidence - Confession statement made before Customs officer though retracted within six days is an admission and binding since Customs Officers are not Police Officers - Section 108 of the Customs Act and FERA."

"Natural Justice - Seized goods - Cross-examination of witnesses regarding the place at which recovery was made to be allowed but where Petitioner has confessed, non allowing of cross examination is not violative of principles of natural justice even if such confession was retracted within six days - Customs Officers are not Police Officers hence confession though retracted is binding - Sections 108 and 111 of the Customs Act, and FERA."

Therefore the statement recorded under under Section 108 of the Customs Act, 1962 is admissible, even when it is retracted as per the aforesaid judgment of

Apex Court. This judgment has been relied upon by the adjudicating authority while denying the request for cross-examination to the PAX.

9. No new facts have been brought forth by the PAX before the Government while reiterating his request for cross-examination of the concerned persons and that too subsequently after the personal hearing was held on 22.11.2019 before this authority.

No useful purpose will be served by allowing cross-examination at this stage when the same has already been considered and denied by both the lower authorities, i.e., adjudicating authority as well as Commissioner (Appeals).

Therefore the Government disallows the request for cross-examination of the concerned persons in light of the aforesaid judgment of the Supreme Court.

10. So far as the PAX's contention regarding his eligibility under Notification no. 12/ 2012- customs dated 17.03.2012 is concerned, a passenger returning to India after six months can bring gold upto 1 kg in the form of bars provided he duly informs the customs authorities at the airport *and pays the duty leviable thereon* under the said notification, which is not the case here. The PAX brought 8 kgs gold, eight times the quantity permitted under Notification no. 12/ 2012- customs dated 17.03.2012.

The plea of the PAX that he was eligible to carry 10 kg of Gold wherein he was carrying only 8 kg gold as per Condition No. 35 of Notification no. 12/ 2012- customs dated 17.03.2012 is incorrect, since the benefit of Notification no. 12/ 2012- customs dated 17.03.2012 is not available to the PAX.

Hon'ble High Court of Calcutta in the case of Provash Kumar Dey Vs Inspector of Central Excise and Others has *held that ignorance of law is no excuse and accordingly the petitioner was rightly found guilty for contravention of Rule 32(2) [1993(64)ELT23(Del.)]*.

It was duty of the PAX to ascertain the correct position of law before smuggling 8 kg of gold in bar form. The PAX is a NRI and residing in Dubai for the last 15 years. He cannot take an *alibi* that he was not aware of provisions regarding import of gold by NRIs under Customs Act, 1962 and other allied Acts.

11. Hon'ble Madras High Court in the case of Commissioner of Customs (AIR) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. 21 (Mad.)] relied on the definition of 'prohibited goods' given by the Apex Court in case of Omprakash Bhatia Vs. Commissioner of Customs, Delhi [2003(155) ELT 423 (SC)] and has also held as under:-

"In view of meaning of the word "prohibition" as construed laid down by the Supreme Court in Om Prakash Bhatia case we have to hold that the imported gold was 'prohibited goods' since the respondent is not an eligible passenger who did not satisfy the conditions".

The Apex Court has upheld the order of Madras High Court and dismissed the special leave to Appeal (Civil) no. 22072 of 2009 filed by Samynathan Murugesan.

Reliance is placed on Madras High Court in the case of Commissioner of Customs (AIR) Chennai-I vs. Samynathan Murugesan [2009 (247) E.L.T. (Mad.)], wherein the Honourable High Court has considered that concealment as a relevant factor meriting absolute confiscation. The Honourable High Court has held as under: *"In the present case too, the concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred."*

The Panchnama dated 23.09.2012 narrates the fact that the impugned gold bars were not declared by PAX on his own and it was only on asking of customs officer at the x-ray machine and at the red channel that the PAX declared 10 gold biscuits weighing 10 tola each, which he took out from his spectacles case containing two plastic packets (one containing 6 pieces and the other containing 4 pieces of gold

bars). No declaration was given by the PAX for the balance 60 biscuits either at the x-ray counter or at the red channel. They were recovered from two cannon camera cases, which were placed inside the hand bag of PAX as per seizure memo dated 23.09.2012. The concealment material has also been seized as per the seizure memo dated 23.09.2012.

12. For the sake of repetition it is mentioned that PAX had submitted a 'nil' declaration form under Section 77 of Customs Act, 1962 on his arrival at the red channel counter in gross violation of provisions of Customs Act, 1962 and he was arrested under Section 104 of Customs Act, 1962 on 23.09.2012 for the same. It is evident that the PAX smuggled the impugned gold bars and did not declare them at red channel counter with an intention to evade customs duty. The PAX's *alibi* that he was carrying 1,05,410 Dirham for payment of duty in convertible foreign currency on the impugned goods is baseless and merits no credence. The PAX had made out a case of ignorance of law and vindication on part of the Customs authorities, Jaipur. **However the facts of the case belie the baseless allegations of the PAX and his innocence.**

It is observed that CBIC had issued instruction vide letter F. No. 495/ 5/ 92-Cus. VI dated 10.05.1993 wherein it has been instructed that "*in respect of 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 adjudication authority is satisfied that there was no concealment of the gold in question*".

Andhra Pradesh High Court in its order in the case of Shaikh Jamal Basha vs. G.O.I. [1997 (91) E.L.T. 277 (A.P.)] has held as follows:

"Attempt to import gold unauthorisedly will thus come under the second part of Section 125 (1) of the Act where the adjudging officer is under mandatory duty to give option to the person found guilty to pay (fine) in lieu of confiscation. Section 125 of the Act leaves option to the officer to grant the benefit or not so far as goods whose import is prohibited but

no such option is available in respect of goods which can be imported, but because of the method of importation adopted, become liable for confiscation."

Therefore the decision of the lower authorities in confiscating the impugned gold bars under Section 111 of Customs Act, 1962 without redemption is legally sustainable and upheld.

13. Section 80 of Customs Act, 1962 reads as follows:

"80. Temporary detention of baggage.—Where the baggage of a passenger contains any article which is dutiable or the import of which is prohibited and in respect of which a true declaration has been made under section 77, the proper officer may, at the request of the passenger, detain such article for the purpose of being returned to him on his leaving India 1[and if for any reason, the passenger is not able to collect the article at the time of his leaving India, the article may be returned to him through any other passenger authorised by him and leaving India or as cargo consigned in his name]."

Section 80 of the Customs Act, 1962 provides that the detained imported goods can be re-exported on the request of the passenger where he/ she is returning from India to a foreign country. Hence apart from declaration of the prohibited goods at the time of arrival of passenger, return of the passenger to the foreign country after a short visit to India as a tourist or otherwise is a crucial condition for re-export of impugned goods. It is observed that the PAX concealed impugned gold bars on his arrival at Jaipur Airport with an intention to evade customs duty. A precondition to allow re-export under Section 80 of Customs Act, 1962 is that *"a true declaration has been made under section 77"*, which is not the case here.

As the conditions stipulated under Section 80 of Customs Act 1962 do not get fulfilled in the subject case re-export of the impugned gold bars cannot be allowed to the PAX under Section 80 of Customs Act, 1962 and is denied.

14. The seizure of forex currency and Indian Currency has also been affected in the present case. Section 2 (22) of Customs Act, 1962 defines Goods as:

"goods" includes -

- (a) vessels, aircrafts and vehicles;*
- (b) stores;*
- (c) baggage;*

- (d) *currency and negotiable instruments; and*
 (e) *any other kind of movable property.*

Rule 7 of the Baggage Rules, 2016 stipulates as under:

"Currency. - The import and export of currency under these rules shall be governed in accordance with the provisions of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, and the notifications issued thereunder."

Section 11 (2) (c) of Customs Act, 1962 prohibits import or export of goods for the purpose of prevention of smuggling.

From the evidence on record it is evident that Indian Currency as well as huge amount of forex Dirham 1,05,410 was recovered from the PAX on 23.09.2012. The impugned currency was also not declared to the customs officers at the red channel under Section 77 of Customs Act, 1962 by the PAX.

15. Regulation 3, 5 and 6 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, states that no foreign currency can be sent out of India or brought into the country without the permission of the Reserve Bank of India. The relevant provisions read as follows:-

"3. Export and Import of Indian currency and currency notes :-

(1) Save as otherwise provided in these regulations, any person resident in India,

a) may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India notes upto an amount not exceeding Rs.5,000/- per person;

b) may take or send outside India (other than to Nepal and Bhutan) commemorative coins not exceeding two coins each.

Explanation :

'Commemorative Coin' includes coin issued by Government of India Mint to commemorate any specific occasion or event and expressed in Indian currency.

c) who had gone out of India on a temporary visit, may bring into India at the time of his return from any place outside India (other than from Nepal and Bhutan), currency notes of Government of India and Reserve Bank of India notes upto an amount not exceeding Rs.5,000/- per person.

5. Prohibition on export and import of foreign currency :-

Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.

6. Import of foreign exchange into India :-

A person may -

a) send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques ;

b) bring into India from any place outside India without limit foreign exchange (other than unissued notes),

provided that bringing of foreign exchange into India under clause (b) shall be subject to the condition that such person makes, on arrival in India, a declaration to the Custom authorities in Currency Declaration Form (CDF) annexed to these Regulations;

provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time does not exceed US\$10,000 (US Dollars ten thousands) or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at any one time does not exceed US\$ 5,000 (US Dollars five thousands) or its equivalent."

It is observed that the PAX did not make the statutory declaration on his arrival to the customs authorities since the Forex (UAE Dirham 1,05410) carried by him was much higher than the prescribed limit under the FEMA 1999 read with Foreign Exchange Management (Export and Import of Currency) Regulations, 2000.

16. The legal provisions of FEMA, 1999, the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, Section 2(33) of the Customs Act, 1962 read with Section 11 clearly stipulate that an attempt to smuggle foreign currency and Indian currency is 'prohibited' and merits confiscation under provisions of Customs Act, 1962.

In the case of Ram Kumar versus Commissioner of Customs [2015 (320) E.L.T. 368 (Del.)] Hon'ble High Court of Delhi while dismissing the writ petition of the petitioner disallowed release of confiscated forex to be redeemed under Section 125 of Customs Act, 1962. The ratio of judgment squarely applies to the present case.

Therefore the impugned Indian and foreign currency seized from the PAX in violation of the provisions of FEMA, 1999, Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 read with Section 2 (33) and 11 of Customs Act, 1962 falling into the category of 'prohibited goods' has been correctly

confiscated under Section 111 (d) (m) & (o) of Customs Act, 1962 by the adjudicating authority which has been upheld by the impugned order-in-appeal.

17. The customs authorities in the Revision Application have requested for setting aside order-in-appeal on grounds of reduction in penalty under Section 112 of Customs Act, 1962 from Rs. 30 lacs (Rupees Thirty lacs) to Rs. 5 lacs (Rupees Five Lacs).

Reliance is placed on the judgment of Hon'ble Bombay High Court in the case of Rajendra G. Bhutada Versus Union of India [2017 (358) E.L.T. 140 (Bom.)] wherein it has been held as follows:-

"Currency brought illegally, finding of fact - Thus, being responsible for bringing in currency and consequent confiscation thereof, accused must suffer penalty."

Keeping in view the gravity of the offence the order of Commissioner (Appeals) in reducing the penalty from Rs. 30 lacs (Rupees Thirty Lacs) to Rs. 5 lacs (Rupees Five lacs) is erroneous and is set aside.

The customs authorities in the Revision Application have also requested for setting aside order-in-appeal regarding waiving of penalty of Rs. 10 lacs (Rupees Ten Lacs) under Section 114AA of Customs Act, 1962.

Section 114AA of the Customs Act, 1962 reads as follows:

"114AA. Penalty for use of false and incorrect material. — If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.]"

It is observed that this is not a case for imposition of penalty under Section 114AA of the Customs Act, 1962. Therefore the order of Commissioner (Appeals) in waiving the penalty under Section 114AA of Customs Act, 1962 is legally sustainable and is upheld.

18. However in view of the seriousness of the offence wherein 70 (Seventy) gold biscuits weighing 8164.80 grams and valued at Rs. 2,51,89, 735/- and forex 1,05,410 UAE Dirham have been smuggled by the PAX, **Government imposes a penalty of Rs. 40 lacs (Rupees Forty Lacs) on the PAX under Section 112 (a) of the Customs Act, 1962.**

19. The Commissioner (Appeals) vide the impugned O-I-A has allowed the release of the DD amounting to Rs. 12 lac meant for deposit in NRE Account and that of confiscated Indian currency amounting to Rs. 12,500/- (out of Rs. 20,000/- beyond Rs. 7,500). The impugned order-in-appeal is **upheld** on this aspect as per law.

20. Accordingly **Government passes the following orders:-**

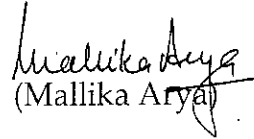
(i) The absolute confiscation of impugned seventy gold biscuits weighing 8164.80 grams valued at Rs. 2,51,89,735/-, Forex (UAE Dirham AED 1,05,410) and concealment material vide Order-in-Original no. 17/ 2013 dated 11.12.2013 and Order-in-Appeal No. 05 (SLM)/ Cus/ JPR/ 2015 dated 27.02.2015 is upheld under Section 111 of Customs Act, 1962.

(ii) A penalty of Rs. 40 lacs (Rupees Forty Lacs) is imposed under Section 112 (a) of Customs Act, 1962.

(iii) Penalty under Section 114AA of Customs Act, 1962 is set aside and the order-in-appeal on this aspect is upheld.

(iii) Order-in-Appeal in releasing DD amounting to Rs. 12 lac (Rupees Twelve Lacs) meant for deposit in NRE Account and Indian currency amounting to Rs. 12,500/- (Rupees Twelve Thousand and Five Hundred) is upheld.

Accordingly both the Revision Applications bearing No. 375/37/B/2017-RA dated 03.11.2017 filed by the PAX and Revision Application no. 380/ 15-A/B/ 2015-RA dated 19.05.2015 filed by the Commissioner of Customs (Preventive), Jodhpur (HQ Jaipur) are disposed off.


(Mallika Arya)

Additional Secretary to the Government of India

1. Manoj Kumar Sharma, S/o Late Shri Bhagirath Sharma, C/o Dr. Rajesh Sharma, Pioneer Hospital, Near Tapariya Bagichi, Station Road, Sikar, Rajasthan.
2. The Commissioner of Customs & Central Excise, now Commissioner of Customs Jodhpur, Hqrtrs at New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302005 alongwith file nos. VIII (48) 67/ Prev/ 2012 pertaining to the case.

Order No. 71-72/19-Cus dated 30-12-2019

Copy to:

1. The Commissioner of Central Excise (Appeals), New Central Revenue Building, Statue Circle, C Scheme, Jaipur-302005.
2. PA to AS(RA)
3. Guard File.
4. spare copy.

ATTESTED

(Nirmala Devi)

S.O (R. A.)