**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,**
**EAST REGIONAL BENCH : KOLKATA**

## Customs Appeal No.76345 of 2017

(Arising out of Order-in-Original No.Kol/Cus/Commissioner of Customs/Airport & ACC/12/2017 dated 12.06.2017 passed by Commr. of Customs (Airport & Air Cargo Complex, Customs House, Kolkata)

**Mr.Roz Mohammed**
S/o Md.Irshad, 7/A Rajib Ali Lane, P.O. Khidderpore, Kolkata-700023
**Appellant**

*VERSUS*

**Commr. of Customs (Airport & Admn.), Kolkata**
15/1 Strand Road, Kolkata-700001
**Respondent**

**WITH**

## Customs Appeal No.76346 of 2017

(Arising out of Order-in-Original No.Kol/Cus/Commissioner of Customs/Airport & ACC/12/2017 dated 12.06.2017 passed by Commr. of Customs (Airport & Air Cargo Complex, Customs House, Kolkata)

**Mr.Noor Alam**
S/o Zahir, Dent Mission Road, P.S. Ekbalpore Lane, Kolkata-700023
**Appellant**

*VERSUS*

**Commr. of Customs (Airport & Admn.), Kolkata**
15/1 Strand Road, Kolkata-700001
**Respondent**

**AND**

## Customs Appeal No.76347 of 2017

(Arising out of Order-in-Original No.Kol/Cus/Commissioner of Customs/Airport & ACC/12/2017 dated 12.06.2017 passed by Commr. of Customs (Airport & Air Cargo Complex, Customs House, Kolkata)

**Mr.Rajab Ali**
S/o Ashraf Ali,55/H/3 Dr.Sudhir Basu Road, P.O. Khidderpore, Kolkata-700023
**Appellant**

*VERSUS*

**Commr. of Customs (Airport & Admn.), Kolkata**
15/1 Strand Road, Kolkata-700001
**Respondent**

***Cus.Appeal Nos.76345,76346, 76347 &76534/2017***

**AND**

## Customs Appeal No.76534 of 2017

(Arising out of Order-in-Original No.Kol/Cus/Commissioner of Customs/Airport & ACC/12/2017 dated 12.06.2017 passed by Commr. of Customs (Airport & Air Cargo Complex, Customs House, Kolkata)

**Mr.Sarfaraz Mohammed**
S/o Abdul Latif, 37/4/1A, Watgunge Street, P.O. Khidderpore, Kolkata-700023
**Appellant**

*VERSUS*

**Commr. of Customs (Airport & Admn.), Kolkata**
15/1 Strand Road, Kolkata-700001
**Respondent**

Appearance:

Shri Arijit Chakraborty & Shri Prabir Bera, both Advocates for the Appellant
Shri H.S.Abedin, Authorized Representative for the Respondent

**CORAM:**
**HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER**
**HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER**

**FINAL ORDER NO.75518-75521/2020**

DATE OF E-HEARING : 05.10.2020
DATE OF PRONOUNCEMENT : 16.10.2020

**Per P.Anjani Kumar :**

Brief facts of the case, in these four appeals, are that the Directorate of Revenue Intelligence (DRI), on the basis of specific information received by them, intercepted the appellants, namely, S/ Shri Noor Alam, Roz Mohammed, Sarfaraz Mohammed and Rajab Ali at Netaji Subhash Chandra Bose International Airport, Kolkata on 03.10.2015. It was found that the said appellants were carrying high value electronic items, like, Mobile phone sets of different reputed brands, Sandisk pen drives, USB flash drives, RAM cards, Laptops, Watches of foreign origin in their checked in baggage; they have walked through the Green Channel and have not declared the goods, which cannot be considered personal baggage, being in commercial quantity.

**2.** During investigation, it was also found that the appellants have smuggled the goods on previous occasions. A show-cause notice was issued to the appellants proposing confiscation of the goods totally valued at Rs.1,00,62,979/- and proposing imposition of penalties on the appellants under Section 112(a) and (b) of the Customs Act, 1962. The said show-cause notice was adjudicated by Learned Commissioner, vide Order No. Kol/ Cus /Commissioner of Customs/ Airport &ACC/12/2017 dated 12.06.2017. Learned adjudicating authority

(i) Confiscated the goods under Section 111 (d) and 111 (l) of the Customs Act, 1962; he however, permitted the impugned goods to be redeemed on payment of redemption fine of Rs.3,50,000/- ( by Shri Noor Alam), Rs.6,00,000/- (by Shri Roz Mohammed), Rs.4,50,000/- (by Shri Sarfaraz Mohammed) and Rs.5,50,000/- (by Shri Rajab Ali).

(ii) Imposed penalties, of Rs.1, 75,000/-, Rs.3,00,000/- Rs. 2,25,000/- & Rs.2,75,000/- respectively on the appellants, under Section 112 (a) & (b) of the Customs Act, 1962

(iii) In respect of imports alleged to have made during the earlier period, penalties, of Rs.10,00,000/-, Rs.5,00,000/-, 1,00,00,000/- & Rs.1,25,00,000/-, were imposed respectively, on the appellants, under Section 112 (a) & (b) of the Customs Act, 1962.

**2.1.** Three appellants, S/Shri Noor Alam, Rajab Ali & Roz Mohammed have approached the Hon'ble High Court of Calcutta, against the impugned order, by filing WP No.385 of 2017; the fourth appellant Shri Sarfaraz Mohammed filed WP No.413/2017. The Hon'ble High Court vide orders dated 18.07.2017 & 25.07.2017, while setting aside the penalties at Sl. No. (iii) above, held that the penalties were imposed on an assumption and this cannot be sustained; the Hon'ble High Court, however, given liberty to the appellants to file appeal against the confirmation of confiscation, redemption fine and penalties as at Sl. No. (i) & (ii) above. Hence the present appeals.

**3.** The Learned Counsel for the appellants submits that the DRI has erred in arriving at the value of the goods on the basis of prices allegedly available on the internet, ignoring the fact that the said items are available in open market in India at considerably lower prices. He submits that in terms of Section 112, in case the goods are not prohibited, the penalty imposable is not exceeding the duty sought to be evaded on such goods or Rs.5,000/- whichever is greater. The Learned Counsel moreover submits that the principles of natural justice have not been followed inasmuch as the appellants were not given an opportunity to explain the proper value of the goods and valuation adopted by the Department. The Learned Counsel, however, submits that he is raising the question of valuation to the limited purpose of submitting that penalty imposable is dependent on the value; he is not pressing for arriving at the value of goods at this juncture by undertaking market survey etc and therefore, he is not pressing on merits of the case but pleads that penalties be reduced looking into the facts and circumstances of the case and actual value of the goods involved.

**4.** The Learned Authorised Representative, for the Department, submits that the Section 2 (33) of the Customs Act, 1962, reads as under:

> ***" (33) : 'prohibited goods' means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with ;"***

He submits that the Learned Commissioner has categorically found that the goods have assumed the character of prohibited goods.

Therefore, the penalty is imposable in terms of Section 112 (i) i.e not exceeding the value of the goods or Rs.5,000/- whichever is greater. The Learned Authorised Representative also submits that the learned Commissioner has observed that the goods are freely importable only to mean thereby that there are no restrictions imposed on the impugned goods in terms of the Policy or under any other law for time being in force. However, by the deeming provisions contained in Section 2 (33) of the Customs Act, 1962, the goods assumed the character of being prohibited goods and thus penalties levied were justified.

**5.** At this juncture, the Learned Counsel for the appellants, submits that as per the Hon'ble High Court of Calcutta, the goods cannot be considered as prohibited goods. Hon'ble High Court held, in the case of Gopal Saha Vs Union of India reported in 2016 (336) ELT 230 (Cal), that:

> ***"15. The expression "goods in respect of which any prohibition is in force" in the context of Section 112 of the Act would imply goods which are prohibited from being imported and not goods which have been smuggled into the country in contravention of the procedure established by law for the import thereof. Thus, while the corresponding provision in Section 111 of the Act permits the confiscation of the goods on a broader construction of the relevant expression with reference to the definition of "prohibited goods"; the similar provision in Section 112 of the Act has to be strictly construed and confined to goods which are expressly prohibited from being imported into the country."***

**6.** Heard both sides and perused the records of the case. On-going through the facts and circumstances of the case, it is clear that the appellants have imported goods in violation of baggage rules and have also accepted the same in their respective statements. However, it is to be seen as to whether the valuation adopted by the Department is in accordance with law and correct and as to whether the penalties were imposed in terms of Section 112 of the Customs Act, 1962. We find that the show-cause notice states that the value of the recovered goods has been ascertained on the basis of reference value found in different product websites as detailed in Annexure A. However, on-going through the said Annexure, it is seen that in fact there are 4 Annexures A, B, C and D, for the goods seized from the 4 appellants respectively. On-going through such Annexure, we do not find that though the Annexures contain details like description, Model, make, country of origin. However, the addresses of web sites from where the values are taken are not mentioned. Copies or screenshots of websites displaying the value of the products is not also made available. Similarly, there was no reasoning, for adoption of such values and the Rules under which the same is arrived at, has been given either in the SCN or OIO. Therefore, we find that it is not possible for anyone to verify the claim of the department. This certainly amounts to violation of principles of natural justice and for that reason itself, in addition to the arbitrary manner in which the value was decided, renders the order not legally maintainable. However, as the Learned Counsel for the appellants does not insist on revaluation at this juncture, we refrain from remanding the matter back to commissioner for reconsideration.

**7**. However, it is also seen that the appellant in their respective statements have accepted the fact of carrying the goods in excess of free allowances permitted under baggage and have also accepted the facts of mis-declaration/non-declaration of the items in baggage. There is no doubt whatsoever in our minds as to the nature of the impugned goods being smuggled in nature, the goods are liable for confiscation and the persons involved are liable for penalty. We find that the commissioner has imposed penalty under Section 112(a) and (b). It would have been logical if learned Commissioner had given any reasons for the same vis-à-vis the role of the individuals. Moreover, we find force in the contention of the Learned Counsel for the appellants that penalty irrespective of the sub-section of Section 112, depends on the value of the impugned goods. As per our discussion above, we find that the value adopted by the department is neither logical nor rational and nor on any legal basis. Under the circumstances, we find that while holding that the good are liable for confiscation and the appellants are liable for penalty under Section 112(b), the request for reducing the penalties can be accepted. Accordingly, we reduce the redemption fines and personal penalties imposed on the appellants. We order that the appellants shall pay Redemption fine and Penalty as indicated, in the following Table, against their names.

| **Sl. No.** | **Name S/Shri** | **Appeal No.** | **Redemption fine (Rs)** | **Penalty (Rs.)** |
|---|---|---|---|---|
| 1. | **Noor Alam** | C/76346/2017 | 70,000/- | 35,000/- |
| 2. | **Roz Mohammed** | C/76345/2017 | 1,20,000/- | 60,000/- |
| 3. | **Sarfaraz Mohammed** | C/76534/2017 | 90,000/- | 45,000/- |
| 4. | **Rajab Ali** | C/76347/2017 | 1,10,000/- | 55,000/- |

**8.** All the four appeals are disposed of in the above terms.

(Pronounced in the open court on 16.10.2020)

Sd/

**(P. K. Choudhary)**
**Member (Judicial)**

Sd/

**(P. Anjani Kumar)**
**Member (Technical)**

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