

REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

(i). F. No. **373/16/B/18-RA** & /894 : Date of Issue : 01.03.2022
(ii). F. No. **371/57/B/2018-RA** (Duplicate of (i) above, mistakenly repeated).

ORDER NO. J04-105/2022-CUS (SZ)/ASRA/MUMBAI DATED 25.02.2022 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.

Applicant : Shri. Arasakumaran.

Respondent: Commissioner of Customs, No. 1, Williams Road,
Tiruchirapalli - 620 001.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. 86/2017 - TRY-(CUS) dated 29.11.2017 [C24/06/2017-TRY(CUS)] passed by the Commissioner of Customs (Appeals), Tiruchirappalli.

ORDER

These two revision applications i.e. 373/16/B/18-RA and 373/57/B/2018-RA pertain to Shri. Arasakumaran (herein after referred to as the Applicant) and emanate from the same Order-in-Appeal no. 86/2017 – TRY-(CUS) dated 29.11.2017 [C24/06/2017-TRY(CUS)] passed by the Commissioner of Customs (Appeals), Tiruchirappalli. It is seen that inadvertently these revision applications have been numbered twice. i.e. R.A No. 373/57/B/2018-RA is duplicate of R.A No. 373/16/B/18-RA. Hence, the same are being taken up for a common order.

2. Brief facts of the case are that the applicant, a Malaysian national was intercepted by the Customs Officers at Trichy Airport where he had arrived from Kuala Lumpur onboard Malindo Air Flight No. OD-221 on 22.12.2015, after he had crossed the green channel. In the Customs declaration form he had declared a value of Rs. 5000/- for the dutiable goods in his possession. To the query regarding possession of any gold in his possession, he had replied in the negative. Nothing incriminating was found in his baggage. The applicant was made to pass through the door frame metal detector (DFMD) which indicated presence of a metallic item on his person. A personal check led to the recovery of a 1.30 meters long gold chain weighing 746 grams tied with a black thread and worn over his waist. The same was assayed which indicated that it was gold of 24 carats and that gold bullion had been converted into a crude chain. Therefore, the roughly finished crude gold chain weighing 746 grams and valued at Rs. 19,17,220/- was seized under the provisions of the Customs Act, 1962. It was noticed that the applicant was a frequent traveler and admitted that the said gold chain did not belong to him and that he had carried the same for monetary consideration.

3. The Original Adjudicating Authority viz the Jt. Commissioner of Customs (Trichy) vide Order-In-Original No. TCP-CUS-PRV-JTC-100-16 dated 02.12.2016 [DOI: 14.12.2016; C. No. VIII/10/04/2016-Cus.Adjn] ordered for

the absolute confiscation of the rough crude gold chain weighing 746 grams and valued at Rs. 19,17,2208- under Section 111(d), 111(i), 111(l) and 111(m) of Customs Act and imposed a penalty of Rs 4 lakhs under Section 112(a) and 112(b) of Customs Act, 1962 on the applicant.

4. Aggrieved by the said order, the applicant filed an appeal before the Commissioner of Customs (Appeals), Tiruchirappalli who vide Order-In-Appeal No. 86/2017 – TRY-(CUS) dated 29.11.2017 [C24/06/2017-TRY(CUS)] passed did not find it necessary to interfere with the absolute confiscation held by the Original Adjudicating Authority. However, in the interest of justice, the penalty imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 was reduced to Rs. 2,00,000/-.

5. Aggrieved with the aforesaid order dated 29.11.2017 passed by the Commissioner of Customs (Appeals), Tiruchirappalli, the Applicant has filed this revision application inter alia on the grounds that;

5.01. that the impugned order passed by the appellate authority was contrary to law and probabilities of the case,

5.02. that the appellate authority relied upon extraneous considerations which did not have any nexus with the case and had not applied his mind,

5.03. that the Adjudicating authority ought to have appreciated that dutiable goods brought in by the Applicant were neither restricted nor prohibited.

5.04. that the gold had not been concealed and the lower authorities should have allowed for its re-export as held by Hon'ble High Courts and Revision Authority.

5.05. that the gold chain had been declared and there was no mis-declaration or non-declaration of the goods and that the applicant had complied with the provisions Section 77 of the Customs Act.

5.06. that the goods were not prohibited items and should have been released and relied upon case law settled by Division Bench of Calcutta High Court in the case of Commissioner of Customs (Preventive) vs/ Umashanker Varma, reported in 2000 (120) ELT, Page 322 (Calcutta).

5.07. that the appellate authority had failed to note that the penalty of Rs.2,00,000/- imposed on the applicant was purely arbitrary and unreasonable and no reasoning or working sheet has been

5.08. that as per Section 125 (1), the Adjudicating Officer was under a mandatory duty to give option to the person found guilty to pay a fine in lieu of confiscation.

5.09. that applicant was not a smuggler and had not abetted in smuggling for anybody and the goods are non-notified goods under the provisions of Section 123 of Customs Act 1962 or Chapter IV A of the Act.

5.10. that the applicant relies on the decision of the Tribunal reported in 2000 (38) ELT 411 (CEGAT-Cal) 2001 (130) ELT 921 (T.Cal) and 1000 (32) RLT 700 (CEGAT) 2000 (117) ELT 182 (T) wherein it has been held that, in case of non-notified items, the onus to prove the smuggled nature of the same lies upon the Revenue, which is to be proved by sufficient evidence.

5.11. that the applicant has relied upon a plethora of case laws to buttress their case.

Applicant has prayed that the impugned order passed by the appellate authority may be set aside and pass any order taking back / re-export the impugned gold or pass any other order as deemed fit.

6. Online personal hearings in the case through the video conferencing mode were scheduled for 03.12.2021 and 09.12.2021. Shri. A.K Jayaraj, Advocate appeared in the office on 09.12.2021 and submitted a compilation of judgement. He requested to allow re-export of the goods as applicant is a foreign national. He submitted that gold chain was brought for marriage of his sister. He promised to submit additional submissions within a week.

6.1. Shri. A.K Jayaraj, Advocate vide his letter dated 10.01.2022 submitted a case law viz, W.P No. 24062/2021 of Hon'ble High Court, Madras in respect of M/s. Unik Traders v/s. Addl. Commissioner of Customs, Chennai & others.

7. At the outset, the Government notes that the Applicant had brought the gold which had been innovatively and ingeniously melted and formed into a chain to escape the scrutiny of the Customs at the airport. The applicant on being queried had replied in the negative for possession of dutiable goods. A true declaration had not been given in the Customs declaration form furnished to the Customs and a much lesser amount had been shown to hoodwink the Customs. A true declaration as required under section 77 of the Customs Act, 1962 for possession of any dutiable goods had not submitted and therefore the confiscation of the gold was justified and the applicant had rendered himself liable for penal action for his act of omission and commission.

8. 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”.

9. 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.

10. Government notes that the gold was concealed using innovative and ingenious method. In this case, Government also notes that the quantum of the impugned gold was 771 grams which is not a small quantity. It is evident, that a lot of planning and thought coupled with execution had gone in to bring the gold by melting it and crafting it into a chain. Perceptibly, this was done to avoid detection and to evade the payment of duty. The import of gold and its concealment and mis-declaration were a well thought out and premeditated action by the applicant to evade duty and hoodwink the Customs.

11. The main issue in the case is the manner in which the impugned gold was attempted to be brought into the Country. The applicant is a frequent traveller. 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 innovative and ingenious with a clear attempt to smuggle the impugned gold which had been melted and converted into a chain was presumptuously done to mislead and avoid detection, it is a fit case for absolute confiscation which would act as a deterrent to such offenders. Thus, taking into account the facts on record and the innovative and ingenious method adopted, the adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officers, the impugned gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold will encourage such concealment as, if the gold is not detected by the Custom authorities the passenger gets away with smuggling and if not, he has

the option of redeeming the gold. Such acts of mis-using the liberalized facilitation process should be meted out with exemplary punishment and the deterrent side of law for which such provisions are made in law needs to be invoked. The order of the Appellate authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

12. Also, in a recent case, discretion of the authorities to consider the release of the goods was decided by the Apex Court wherein in the 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. The Governments finds that the lower authorities considering the method of concealment as discussed above and that the fact that applicant was ineligible, the quantum being quite large indicating that it was not for personal use, the purity of the gold being 24 carats which cannot be said to be jewellery, have correctly and judiciously ordered for the absolute confiscation of the impugned gold. The Government is inclined not to interfere

in the absolute confiscation ordered by the original adjudicating authority and upheld by the appellate authority.

14. Considering the nature of the concealment as discussed above, the Government finds that the reduced penalty of Rs. 2,00,000/- imposed under Section 112 (a) and (b) of the Customs Act, 1962, is appropriate and is commensurate with the omissions and commissions committed. Government is not inclined to interfere in the same.

15. In view of the above, the Government is in agreement with the order passed by the appellate authority for the absolute confiscation of the impugned gold and imposition of penalty of Rs. 2,00,000/- under Section 112(a) & (b) of the Customs Act, 1962, as proper and judicious and does not find it necessary to interfere in the same.

16. Accordingly, the Revision Application is rejected.


(SHRAWAN KUMAR)

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

ORDER No: ¹⁰⁴⁻¹⁰⁵/2022-CUS (SZ) /ASRA/ DATED 25.02.2022

To,

1. Shri. Arasakumaran, S/o. Shri. Supayah, PT. 11309, Desa Cempaka, Putra Nilai, 71800 Nilai, Negeri Semilan, Malaysia.
2. Commissioner of Customs, No. 1, Williams Road, Tiruchirapalli - 620 001.

Copy to:

3. Shri. A.K. Jayaraj, New No. 3, Thambusamy Road, Kilpauk, Chennai - 600 010.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File. ,
6. File Copy.
7. Notice Board.