

REGISTERED
SPEED POST



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

F.No. 371/424/B/2022-RA

Date of issue: .01.2024

ORDER NO. 119 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024 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 : Mr. Joginder Singh Anand.

Respondent : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Subject : Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-661/2022-23 dated 11.07.2022 [Date of issue: 12.07.2022] [F. No. S/49-748/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

ORDER

This Revision Application has been filed by Mr. Joginder Singh Anand (herein referred to as the 'Applicant') against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-661/2022-23 dated 11.07.2022 [Date of issue: 12 07.2022] [F. No. S/49-748/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that On 13.02.2019, the officers of Air Intelligence Unit (AIU), D- Batch, CSMI Airport, Mumbai had intercepted applicant, holding Indian Passport No. Z 4907865, on arrival at CSMI Airport, Mumbai from Dubai by Emirates flight was found in possession of ingeniously concealed 44 gold bars of 500 grams each bearing Foreign markings totally weighing 22,000 grams, totally valued at Rs. 6,74,48,260/- were stitched in special pockets created in undergarment worn by him. Further, during the search of residential premises of the applicant an amount Rs. 1,51,50,000/- in cash was also seized. During the course of the investigation, statements of the applicant, and Mr. Suresh Jugraj Jain and other persons were recorded on 13.02.2019,08.03.2019,22.05.2019,and 19.08.2019 under Section 108 of the Customs Act, 1962 wherein it was admitted that he was not the owner of the seized gold Bars; that the said seized gold bars were handed over to him by Mr. Sagar who was at Dubai and he was supposed to hand over the same to Mr. Suresh Jain, owner of M/s S. J. Jain Jewellers, Mumbai; that he had carried the gold on monetary consideration Rs. 1,00,000/- (Rupees One Lakh only) per Kg.; that Mr. Suresh Jain used to pay this amount at the time of delivery of gold to him. The Applicant also admitted that he had smuggled gold around 12 times before; that he had carried 20 kgs. gold only once before this trip and rest of the time smuggled approximately 05 kgs. to 07 kgs. gold till date; that he had totally smuggled around 90 Kg. of gold since August, 2018 for which he had been paid. Rs. 1,00,000/- per kg.; that he had kept approximately Rs.1,50,00,000/- (Rs. One Crore Fifty Lakhs only) in cash at

his residence out of which 90 Lakhs was the amount earned through smuggling and rest of the amount i.e. approximately 60 Lakhs has been earned through his businesses. After considering statements of applicant including the others, CDR, SDR of mobile phones wherein various whatsapp chats between them and the Applicant and various voice recordings were retrieved by the department. From the above statement and facts it was cleared that the whole smuggling racket was run by a syndicate whose members were Mr. Sagar, supplier of gold from Dubai and the applicant, was a middle man who carries gold bars from Dubai to Mumbai without payment of duty and Mr. Suresh Jugraj Jain who used to receive the said smuggled gold Pursuant to being assayed, 44 gold bars of 500 grams each bearing Foreign markings totally weighing 22,000 grams, totally valued at Rs. 6,74,48,260/- and an amount Rs. 1,51,50,000/- was seized in the reasonable belief that the same were being smuggled into India and hence was liable to confiscation under the provisions of the Customs Act, 1962.

3. After following the due process of law, the Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSMI Airport, vide Order-In-Original (OIO) No. ADC/VDJ/ADJN/140/2020-21 dated 25.03.2021 [Date of issue:30.03.2021] issued through F.No. S/14-5-321/2019-20/ Adjn [SD/INT/AIU/73/2019 AP 'D'] ordered for the absolute confiscation of the seized gold bars of Rs. 6,74,48,260 (Rs. Six Crores Seventy Four lakhs Forty Eight Thousand Two hundred Sixty) alongwith undergarment and tissue paper and Indian currency of Rs.90,00,000/- (Rs. Ninety Lakhs only) seized from the residence of applicant as sale proceeds of smuggled gold under Section 111 (d), (1) and (m) , Section 119 and Section 121 of Customs Act, 1962 respectively and penalty Rs. 25,00,000/- was imposed on the applicant under section 112 (a) and 112 (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No MUM-CUSTOM-PAX-APP-661/2022-23 dated 11.07.2022 [Date of issue: 12.07.2022] [F. No. S/49-748/2021] upheld the order passed by the OAA after appropriated the personal penalty of Rs.25,00,000/- imposed on the applicant against the amount of Rs.61,50,500/- which was seized from the applicant and balance amount was ordered to be refunded to the applicant .

5. Aggrieved with the above order of the Appellate Authority, the Applicant has filed the revision application on the following grounds:

5.01. That the impugned order is bad in law and unjust;

5.02. That the impugned order has been passed without giving due consideration to the documents on record and facts of the case and is ex-facie, illegal and de-hors the provisions of law as contemplated in the Customs Act,1962;

5.03. That the OAA ought to have appreciated that dutiable goods brought by the Applicants is neither restricted nor prohibited;

5.04. That the foundation of seizure being without jurisdiction , is not sustainable in law.

5.05 That the respondent had come to the conclusion that the acts and/or omissions on the part of the Applicant was to evade customs duty and the evasion of customs duty can be done only in respect of dutiable goods and not prohibited goods;

5.06 That once the department accepts that the goods are dutiable, the option of redemption of goods as provided under Section 125 of the Customs Act, 1962 will have to be given to the Applicant;

5.07. That a bare perusal of the sub-section (1) of Section 125 of the Customs Act, 1962 makes it crystal clear that the respondent is required to give the notice an option to pay fine in lieu of confiscation in respect of the impugned goods which even as per the respondent are dutiable goods;

5.08. That absolute confiscation of the impugned dutiable goods would mean interpreting or giving a new meaning to the said sub-section (1) of Section 125 of the Customs Act, 1962;

The Applicant has relied upon the following case laws;

- (i) Rattan Kumar Shukla vs Commissioner of Customs, Patna ,2021(375) E.L.T.435(Tri-Kolkata)
- (ii) Union of India vs Imtiyaz Iqbal Pothiawala, 2019(365)E.L.T 167(Bom)
- (iii) Tulsı Das Agarwal vs Commissioner of Customs , Kanpur, 2003(158) E.L.T.725(Tri-Delhi)
- (iv) Ghisshibhai PravinKumar vs Commissioner of Customs, Mumbai, 2001(137) E.L T.1311(Tri-Mumbai)
- (v) Mohan Seth vs Commissioner of Customs (prev),Mumbai 2001(129) E.L.T 358 (Tri-Mumbai)
- (vi) Commissioner of Customs vs Bharat Kumar, 1999 (109) E.l T.552(Tribunal)
- (vii) Ramchandra vs Collector of Customs, 1992(60) E.L.T.227(Tribunal);

Under the circumstances, the Applicant prayed that set aside the impugned order and release the gold and Indian Currency without any penalty or fine.

6. Personal hearing in the case was scheduled for 15.09.2023. Shri N.J.Heera, Advocate of the Applicant attend the personal hearing on behalf of the applicant. During personal hearing, he submitted that the Applicant had given details of source of Indian Currency found at his residence. Further he submitted additional written Submission and requested to release the currency as department has not proved that currency found was sale proceeds of gold.

7. The Government has gone through the facts of the case and observes that the Applicant had brought 44 gold bars of 500 grams each bearing Foreign

markings totally weighing 22,000 grams, totally valued at Rs. 6,74,48,260/- in special pockets created in undergarment worn by him. Further, during the search of residential premises of the applicant an amount Rs. 1,51,50,000/- was recovered. From the statement dated 13.02.2019,08.03.2019,22.05.2019,and 19.08.2019 it is cleared that Applicant had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The Applicant had not disclosed that he was carrying dutiable goods. The gold was of very high purity and was in primary form, indicates that the same was for commercial use. The nature of concealment reveals the mindset of the Applicant to not only evade duty but smuggle the gold. It also reveals that the act committed by the Applicant was conscious and pre-meditated. Had he not been intercepted by the Customs officer , the Applicant would have gotten away with the gold. The confiscation of the gold was therefore justified and thus, the Applicant had rendered himself liable for penal action.

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 Applicant thus, liable for penalty.

10. 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 ”

11.1 Government observes that besides the quantum of gold, which indicates that the same was for commercial use. The purity and primary form of the gold indicated that the same was for commercial use. Government notes from the records that it had come to light that the Applicant had stated that he was not the owner of the gold and was a frequent flyer which further suggests that the Applicant was a carrier for a syndicate, entrusted with smuggling of the gold.

11.2. The aforesaid circumstances of the case and ingenious concealment, probates that the applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and has been rightly upheld by the Appellate Authority.

12. The main issue in the case is the manner in which the impugned gold was being 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 manner of concealment being clever, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold by the Applicant who stated that he was not the owner of the gold, 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 the impugned gold. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring 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. Government is in agreement with the order of the OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

13. Government find that there is seizure of huge amount in cash from the residential premises of the applicant, which was corroborated with his initial statement. During investigation, various Bank account and credit card statements being held by the applicant, his firms and family members were scrutinized and found that he had been swiping his own credit cards for large amounts in his own shops covering sale of goods without bill and invoices, which has been admitted by the applicant in his subsequent statement. It was also found that many transactions of large amount in cash mode were also noticed by the department. It was admitted by the applicant that he has carried the smuggled gold on a monetary consideration. And the quantity of goods sold was voluntarily disclosed by the applicant in his initial statement. Hence from the investigation and from the statement of the applicant, the condition for identification of the sale proceeds of the smuggled goods under section 121 of the Customs Act, 1962 has been fulfilled. Therefore, it stands that the amount of Rs.90,00,000/- seized from the residential premises of the applicant was the sale proceeds of the smuggled gold and was correctly held liable for confiscation as per the provisions of section 121 of the Customs Act, 1962.

14. For the aforesaid reasons, the Government is inclined not to interfere with the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-661/2022-23 dated 11.07.2022 [Date of issue: 12.07.2022] [F. No. S/49-748/2021] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

15. The Revision Application is dismissed as being devoid of merit.

Shrawan Kumar
31/1/24
(SHRAWAN KUMAR)

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

ORDER NO. 119 /2024-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2024.

To,

1. Mr. Joginder Sigh Anand, C/o- A.M Sachwani, Nulwala Building, Ground Floor, 41, Mint Road, Opp- G.P.O., Fort, Mumbai-400001.
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

1. The Commissioner of Customs (Appeals), Mumbai-III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.
2. Shri N.J.Heera , Advocate, Nulwala Building ,41,Mint Road, Opp.G.P.O Fort,Mumbai -400001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Noticeboard.