

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. 371/264/B/WZ/2018-RA / 623 : Date of Issue: 01.02.2023

ORDER NO. \A2/2023-CUS (WZ)/ASRA/MUMBAI DATED 30.01.2023
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.

Applicant : Shri. Mohammad Asif

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

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-313/18-19 dated 08.08.2018
issued on 14.08.2018 through (F.No. S/49-204/2018),
passed by the Commissioner of Customs (Appeals),
Mumbai – III.

ORDER

This Revision application has been filed by Shri. Mohammad Asif (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-313/19-20 dated 08.08.2018 issued on 14.08.2018 through (F.No. S/49-204/2018) passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Briefly stated the facts of the case are that on 20.02.2018, Shri. Mohammad Asif, the Applicant, holding Indian Passport No.P-6642761 was intercepted by the Customs Officers of AIU upon suspicion at CSI Airport, Mumbai. The Applicant had arrived from Dubai by Flight No. AI-984 dated 19.02.2018. During the personal search the applicant was found to have concealed one cut piece of gold bar in his body cavity i.e. rectum. The piece of gold weighing 63 grams and valued at Rs.1,75,679/- was recovered and seized under the provisions of Customs Act, 1962

3. After, due process of law, the Original Adjudicating Authority (OAA) viz, the Deputy Commissioner Of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AirCus/49/T2/2098/2018 'C' dated 20.02.2018 ordered for the absolute confiscation of the seized one piece of gold weighing 63 grams and valued at Rs.1,75,679/-under Section 111(d) of the Customs Act, 1962. Personal Penalty of Rs. 15,000/- was also imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-313/18-19 dated 08.08.2018 issued on 14.08.2019 through F.No. S/49-204/2018) who disposed

of the appeal holding that he did not find it necessary to interfere in the OIO and upheld the Order passed by OAA which was legal and proper.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.01 That the applicant is an illiterate person and he is not aware of the rules and implications of the laws of the Indian Custom Act, 1962.

5.02 That there is no specific charge against the applicant because there is no mis-declaration, non-declaration of the gold in question. Moreover there is no concealment on his part.

5.03 Gold weighing of 63 gms, and value of Rs. 175679/-, it is therefore requested the gold may please be allowed for home consumption and custom duty @36.5%.

5.04 The applicant relied on the following case wherein the gold was allowed for home consumption or re-export:

a) Mrs. Zainab Bibi appeal no. 04/ADC/Cus/SR/2014 dated 20-03-2014 passed by Addl. Commissioner of Custom, Amritsar and another case Mrs. Fatema Asam Kochona vide order no. 13-17-Cus dated 10-10-2017 passed by Govt. of India, Addl. Secretary, Sh. R.P. Sharma.

b) Smt. Farzana vide Order in Appeal No. ASR-CUSTOM-PRV-APP-206-15-16 dt. 23-09-2015 passed by Commissioner Appeal, Chandigarh-1

c) Sh. Hamid Hasan vide Order in Appeal No. 132/2016 dated 29-07-2016 passed by Asstt. Commissioner of Custom, IGI Airport, Terminal -3, New Delhi

5.05 In view of the above facts and the circumstances of the case, the applicant requested that the Gold weighing of 63 gms value of Rs. 1,75,679/- may please be allowed for home consumption and custom duty @36.5%.

6. Personal hearing in the case was scheduled on 04.08.2022, 26.08.2022, 23.09.2022 and 30.09.2022. However, no one appeared before the Revisionary Authority for personal hearing on any of the appointed dates for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

7. The Government has gone through the facts of the case. The Applicant had not declared the gold piece and only during the personal search, he admitted to having concealed gold bars in his body cavity ie rectum. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. The type of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that he had used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is 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, is liable for penalty.

10. 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. Government observes that the manner in which the gold was concealed i.e. inside his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold is not important, the method adopted is of relevance. Also, the gold was in primary form which indicates that the same was for commercial use. The circumstances of the case especially the ingenious concealment which could be risky to the applicant's life, adopted by him, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold bar.

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, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of the offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. 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. Further Government finds from the Orders relied upon by the applicant the concealment of the gold in those case are not ingenious, and those cases are of only non-declaration. The order

of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld.

13. The Government finds that the penalty of Rs. 15,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the applicant. The Government does not find it necessary to interfere in the penalty imposed by the appellate authority.

14. Government upholds the order of absolute confiscation of the impugned gold bar weighing 63 grams and valued at Rs.1,75,679/-passed by the OAA and upheld by the AA. Government does not find it necessary to interfere in the penalty of Rs. 15,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 by the OAA and confirmed by the AA.

15. The Revision Application filed by the applicant is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 42/2023-CUS (SZ) /ASRA/MUMBAI DATED 30.01.2023

To,

1. Shri. Mohammed Asif, S/o Shri Mohammed Rashid, H. No. 429, Ali Khurd Kairana, Shamli, UP-247774.
2. Pr. Commissioner of Customs, Terminal - 2, Level - II, Chhatrapati Shivaji International Airport, Sahar, Mumbai - 400 099.

Copy to:

1. Shri. Ravinder Wadhawan, Advocate H.No. 70, 2nd Floor, Street No. 1, Ram Prastha Green, Vaishali, Ghaziabad, U.P.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.