

REGISTERED  
SPEED POST

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

**F.No. 371/136/B/2019-RA / 674 :** **Date of Issue:** 02.02.2023

ORDER NO. 139 /2023-CUS (WZ)/ASRA/MUMBAI DATED 31.01.2023 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 :** Ms. Rafatjahan Shaukhat Ali Shaikh

**Respondent :** Commissioner of Customs, Pune.

**Subject :** Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. PUN-CT-APPII-000-002-19-20 dated 05.04.2019 [Date of issue: 05.04.2019] [F.No V(2) CT(A-II)/188/2018-19] passed by the Commissioner (Appeals-II), Central Tax, Pune.

**ORDER**

The revision application has been filed by Ms. Rafatjahan Shaukhat Ali Shaikh (herein after referred to as the "Applicant") against the Order-in-Appeal No. Order-in-Appeal No. PUN-CT-APPII-000-002-19-20 dated 05.04.2019 [Date of issue: 05.04.2019] [F.No V(2) CT(A-II)/188/2018-19] passed by the Commissioner (Appeals-II), Central Tax, Pune.

2.1. Briefly stated the facts of the case are that on 18.08.2017, on specific information, the officers of Customs, Pune International Airport, Pune, followed the Applicant who had arrived from Abu Dhabi by Jet Airways Flight No 9W 513, from the Aero-bridge and intercepted her while she attempted to pass through the Green channel without filing a customs declaration. The Applicant was asked whether she was carrying any dutiable goods to which she replied in the negative. On scanning the cabin baggage and the checked in baggage of the Applicant it was noticed that some suspicious item was found concealed in the outer cloth lining of the Trolley bag. The outer cloth lining along the corners of the Trolley bag was cut open and rhodium plated white coloured metallic wires, suspected to be gold, were found to be concealed in it. The Trolley bag contained clothes including two black coloured burkhas with brown coloured metal embroidery work done on them. The embroidery was separated from the burkhas and was found to be made of gold. Besides, a white coloured 'Omron brand Compressor Nebulizer' and 'Philips brand Juicer' were found in the bag, which on scanning showed images which showed concealment of some metal items. The 'Omron brand Compressor Nebulizer' was opened and one golden coloured biscuit with engraving 'ALETIHAD DUBAI UAE 10 Tola 999.0' and 02 golden coloured half cut biscuit with similar engraving were found. The 'Philips brand Juicer' was opened and one golden coloured elliptical/oval shaped metal item was recovered from the juicer.

2.2. The Government approved valuer certified that the said objects were made of gold having a purity of 24 K. The details of the gold recovered are as under

| Sr.No | Description of goods recovered              | Qty (No) | Net weight (grams) | Value (Rs) |
|-------|---------------------------------------------|----------|--------------------|------------|
| 1     | Rhodium plated gold wire pieces             | 4        | 596.04             | 16,83,790  |
| 2     | Embroidered gold wire                       | 1        | 116.51             | 3,44,753   |
| 3     | 1 Gold biscuit and 2 pieces of Gold biscuit | 3        | 227.32             | 6,72,640   |
| 4     | Raw Gold in oval shape                      | 1        | 1555.0             | 46,01,245  |
|       |                                             |          | 2467.87            | 73,02,428  |

2.3. The Gold articles mentioned above weighing 2467.87 grams along with the blue coloured Trolley bag in which it was concealed were seized under the reasonable belief that the same were being attempted to be smuggled into India in contravention of the provisions of the Customs Act, 1962.

2.4. The Applicant in her statement admitted that he was frequently travelling between India and Dubai since 3 years and that the gold had been purchased from her savings and from her cousin brother's savings and she was to sell the gold for a profit in Mumbai. She also stated that she did not have any receipts for the purchase of gold and that a case of illegal import of 20 boxes of cigarettes was booked against her in March 2016 at Mumbai airport.

2.5. Though the Applicant had stated that the instant case was the first time she had tried to smuggle gold, it came to light a case of smuggling of 05 gold bars weighing 580 grams and 19500 8GB Micro SD Class 6 memory cards was booked against that the Applicant at the CSI Airport, Mumbai, on 20.06.2016.

3. Following investigations and following the due process of law, the Original Adjudicating Authority i.e. Addl. Commissioner of Customs, Pune by Order-In-Original No. PUN-CUSTOMS-000-ADC-12-17/18 dated 28.03.2018 [Date of issue: 28.03.2018 [F.No. VIII/Cus/Adj/SCN-Rafatjahan/31/2017-18] ordered the absolute confiscation of the impugned seized gold collectively weighing 2467.870 grams, valued at Rs. 73,02,428/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed penalties on Javed Mukhtar Deshmukh and the Applicant. Penalty of Rs. 12,50,000/- was imposed on the Applicant under section 112 (a) and (b) of the Customs Act, 1962 and penalty of Rs. 1,00,000/- was imposed on the Applicant under Section 114AA of the Customs Act, 1962. The seized Trolley bag used for concealing the gold was confiscated under Section 118(a) of the Customs Act, 1962.

4. Aggrieved by the said order, the Applicant filed an appeal before the Appellate Authority i.e Commissioner (Appeals-II), Central Tax, Pune who vide Order-in-Appeal No. PUN-CT-APPII-000-002-19-20 dated 05.04.2019 [Date of issue: 05.04.2019] [F.No V(2) CT(A-II)/188/2018-19] rejected the Appeal on merits as well as limitation.

5. Aggrieved with the above order, the Applicant has filed the revision applications interalia on the grounds that;

5.01. That the AA erred in holding that there was delay in filing the appeal, which is beyond the condonable period and thus the appeal should be dismissed on this ground alone as the OIO dated 28.03.2018 was not received by the Applicant and pursuant to an RTI application, the CPIO sent a copy of the OIO on 02.02.2019 which was received on 08.02.2019 and the Appeal was filed on 22.02.2019 which was well within the limitation period. The Applicant has relied on the following case laws in support of their contention

(i) Neha Cosmetics vs. Commissioner of Central Excise

(ii) N. Balakrishnan vs. Krishnamurthy

5.02. That the OAA has erred in coming to the conclusion that gold is a prohibited item and AA has erred in holding that the act of omission and commission on the part of the Applicant has rendered the seized goods liable for confiscation under Section 111(d), (l) and (m) of the Customs Act, 1962. The Applicant has relied upon the following case laws in support of their contention;

- (i) Gauri Enterprises vs. Commissioner of Customs
- (ii) Yakub Ibrahim Yusuf vs. CC, Mumbai [2011 (263) E.L.T. 685 (Tri. Mumbai)]

5.03. That the AA erred in holding that the way the Applicant hid the gold, it seemed that the Applicant had knowingly and deliberately smuggled the gold and that it has been consistently held by the Hon'ble Courts, Tribunals and Revisionary Authority that if the import of commodities is not completely banned then such commodities or articles could be released on payment of redemption fine;

5.04. Applicant relies upon on the following cases where seized goods were released to a person on payment of redemption fine:

- (i) Hargovind Das K. Joshi vs. Collector of customs [1992 (61) ELT 172(SC)]
- (ii) Shaik Jamal Basha vs. Government of India [1997 (91) ELT 277(AP)]
- (iii) VP Hameed vs. Collector of Customs Mumbai 1994(73) ELT 425 (Tri)
- (iv) Kadar Mydin vs. Comnmissioner of Customs (Preventive), West Bengal [2011 (136) ELT 758]
- (v) Sapna Sanjeeva Kolhi v/s Commissioner of Customs, Airport, Mumbai
- (vi) Vatakkal Moosa vs. Collector of Customs, Cochin [1994 (72) ELT (G.O.I)]

- (vii) N. Kuttiyandi vs. CC Chennai (Appeals) [Order No C/29/2009 of CESTAT Bench]
- (viii) Mohd. Zia Ul Haque vs. UOI [2014(314) 849 GOI]
- (ix) Order No. 426/04 issued vide F.No 380/57/8/2004-RA-Cus dated 21.09.2004 passed by the Revisionary Authority

Under the circumstances, the Applicant prayed that the order of the Appellate Authority be set aside and requested to allow the Revision application.

6. Personal hearing in the case was scheduled for 11.08.2022 or 23.08.2022, 15.09.2022 or 22.09.2022. Shri Vinayak Kalgekar, Advocate appeared online for the hearing on 22.09.2022 on behalf of the Applicant. He submitted that gold was not a prohibited goods and the only contravention by the Applicant was on non-declaration of the same to the Customs. He requested to allow release of the gold on reasonable fine and penalty.

7. The Government has gone through the facts of the case and finds that the Appellate Authority had dismissed the appeal filed by the Applicant on the grounds of limitation as well as merits. As regards the rejection of the appeal on the grounds of limitation, Government notes that the Appellate Authority, in impugned Order-in-Appeal has in a lucid manner addressed the issue of delay in filing the appeal before the Appellate Authority. The Appellate Authority has at Para 7 of the impugned Order-in-Appeal has stated as under

*"7. Before proceeding with the merits of the case, I would prefer to discuss the issue of delay in filing the appeal. From the records available before me, I find that the Appellant has claimed the receipt of the said impugned order dt. 28/3/2018, only on 8/2/2019, which was said to be obtained by the appellant under the Right to Information Act, 2005, since the same was not received by the Appellant. In this connection, a report from the Assistant Commissioner, Customs, Pune, was called for, about the dispatch of the said order. The*

Assistant Commissioner, Customs, Pune, vide his letter dated 5th March, 2019 informed that the said order was dispatched by SPEED POST No. 37763079 1IN to the appellant, 31/03/2018, on the address "Flat No. 211, 2nd Floor, Islamia Building, Jacob Circle, Opp. Khatau Mill, Agri Pada, Byculla, Mumbai-400011. From this fact, I find that the address on which the impugned order was dispatched is the same which has been mentioned in the Form No. C.A-1 i.e. Form of Appeal to the Commissioner (Appeals) under Section 128 of the Customs Act, 1962, and there appears to be no change in the address. I further find that the said order which was dispatched to appellant has not been returned back to the sender i.e. Additional Commissioner, Customs, Pune, with any remarks. Thus I find, that the authority has taken proper steps to serve the impugned order at the address of the appellant available on records and the appellant has failed to controvert it. I further find that no other address/communication in connection with change in address was furnished to the adjudicating authority. In such a situation, there is no chance of any non-receipt of the said order by the appellant and this is the cooked story by the appellant to cover up the delay in filing the appeal and in absence of any logical reason, I am not convinced that the impugned order was not served on the appellant. Thus, it is not in dispute that the order was dispatched by Speed Post, which was not further received back, being un-served and accordingly there is compliance to the provisions of Section 153 (a) of the Customs Act, 1962. Further the referred to by the Appellant are of no use in the present case because the circumstances of all the case laws, if compared with the present issue, are totally different where the decisions were given against the department stating that there was no compliance to the provisions of Section 37C of the Central Excise Act, 1944, which is not the case in the present appeal. On the contrary, these case laws help the department in as much as there is sufficient proof available on records showing that there is proper compliance to the provisions of Section 153(a) of the Customs Act, 1962. Accordingly I find that there is a delay in filing the present appeal, which is further beyond the condonable period and thus the appeal merits to be dismissed on this ground alone....."

Further, as regards the contention of the Applicant in the Revision Application that the copy of the Order-in-Appeal was received by her on 08.12.2019 in pursuance of the application under RTI Act, 2005, Government observes that the CPIO, Pune Customs in reply to the application under the RTI Act, 2005 has stated that

*“On going through the records of this office it is found that the Order in Original No. Pune-Customs-000-ADC-12-17-18 dated 28.03.2018 was send by Speed Post to your above given address. However, as desired copy of the said OIO is enclosed herewith.”*

In view of the above, Government notes that there has been a delay on the part of the Applicant in filing the appeal before the Appellate Authority and concurs with the order of the Appellate Authority that the appeal merits dismissal on the grounds of limitation.

8. Be that as it may, as regards the merits of the case, Government observes that the 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 she was carrying dutiable goods. However, pursuant to detailed examination of the baggage after interception after she had cleared herself through the Green channel, the Rhodium plated gold wire pieces, Embroidered gold wire, 1 Gold biscuit and 2 half cut pieces of Gold biscuit and Raw Gold in oval shape were recovered from the inner cloth lining of thr Trolley bag, embroidered on two burkhas, from inside the ‘Omron Brand Compressor Nebulizer’ and from the motor of the ‘Phillips Brand Juicer’ respectively and the method of carrying the gold adopted by the Applicant by ingenious concealment clearly revealed her intention not to declare the said gold and thereby evade payment of Customs Duty by way of smuggling. The Applicant had used an



innovative method to hoodwink the Customs and smuggle out the gold without Customs duty being discharged on the same. Applicant had meticulously pre-planned the method adopted to smuggle the gold and had adopted an ingenious method to avoid Customs and payment of duty. Had it not been for the alertness exhibited by the Customs, the Applicant would have been successful in smuggling out the gold and evading Customs duty. It is clear that the Applicant had resorted to this innovative and ingenious method to evade duty. The confiscation of the gold is therefore justified and thus, the Applicant had rendered herself liable for penal action.

9. 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”.

10. 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 was thus liable for penalty.

11. 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.*

12. Government also observes that the manner in which the gold was concealed i.e. by using an innovative and ingenious method of concealing it in the inner lining of the Trolley bag, embroidered on burkhas, inside a branded Nebulizer and inside the motor of a branded juicer reveals the innate intention of the Applicant. It also reveals the criminal bent of mind wherein, this method was adopted by her with a clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially the ingenious method adopted, 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 Appellate Authority and the lower adjudicating authority while absolutely confiscating the impugned gold.

13. 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, innovative and ingenious with a clear attempt to smuggle the gold, Applicant being a habitual offender, this 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 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. 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 upholding the order of the

adjudicating authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.

14. The Government finds that the Applicant has cited and relied upon a plethora of case laws to buttress their case and the same have been perused and considered. The cases pertain to use / exercise of discretion and justification to redeem the gold. Government notes that the decision of redemption of goods is discretionary and dependent on the facts and circumstances of each case and the discretion to release the gold is based on various factors such as methodology of smuggling, manner of concealment, quantity, attempt of smuggling as part of a syndicate etc. In this case, the Government finds that the lower authorities have rightly considered all these factors while denying redemption.

15. Further the Applicant is a habitual offender as it is on record and admitted by the Applicant that a case of illegal import of cigarettes was booked against her in March 2016 and a case of smuggling of 05 gold bars weighing 580 grams and 19500 8GB Micro SD Class 6 memory cards was booked against her in June 2016.

16. The Government finds that the penalty of Rs. 12,50,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 and Rs. 1,00,000/- imposed under Section 114AA of the Customs Act, 1962 are appropriate and commensurate with the omission and commission committed by the Applicant.

17. The Applicant have pleaded for setting aside the Order passed by the Appellate Authority which has upheld the order passed by the Original Adjudicating Authority. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate Authority and finds that absolute confiscation is proper and judicious and also the penalty imposed

under Section 112(a) & (b) of the Customs Act 1962 is commensurate with the omission and commissions committed, does not find it necessary to interfere in the same.

18. In view of the above discussion, Government is inclined not to interfere with the Order-in-Appeal No. Order-in-Appeal No. PUN-CT-APPII-000-002-19-20 dated 05.04.2019 [Date of issue: 05.04.2019] [F.No V(2) CT(A-II)/188/2018-19] passed by the Commissioner (Appeals-II), Central Tax, Pune and upholds the same.

19. The Revision Application is hereby dismissed.

  
( SHRAWAN KUMAR )

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

**ORDER No. 159 /2023-CUS (WZ) /ASRA/**

**DATED 31.01.2023**

To,

1. Ms. Rafatjahan Shaukat Ali Shaikh, Flat No 211, 2<sup>nd</sup> Floor, Islamia Building, Jacob Circle, Opp. Khatau Mill, Agripada, Byculla, Mumbai – 400 011.
2. The Commissioner of Customs, GST Bhavan, 41/A, Sassoon Road, Pune- 411 001.

Copy to:

1. Shri Vinayak V.Kalgekar, 742, Guruwar Peth, C/o Rahul Dighe, Pune 411 042
2. The Commissioner (Appeals-II), Central Tax, Pune, 2<sup>nd</sup> Floor, 'F' Wing, GST Bhavan, 41/A, Sassoon Road, Pune 411 001.
3. Sr. P.S. to AS (RA), Mumbai.
4. File copy.
5. Notice Board.