

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. 380/39-40/B/WZ/2019

/4680

Date of Issue

02.09.2021

---

199-200  
ORDER NO. /2021-CUS (WZ)/ASRA/MUMBAI DATED 25.08.2021 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 : Pr. Commissioner of Customs, Mumbai

Respondent : Shri Afzal Shabbir Shroff &  
Shri Salim Anwar Shaikh

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. MUM-  
CUSTM-000-PAX-1266 & 1267/2018-19 dated 29.03.2019  
passed by the Commissioner of Customs (Appeals),  
Mumbai.

ORDER

This revision application has been filed by Pr. Commissioner of Customs, Mumbai (herein referred to as Applicant department ) against the order MUM-CUSTM-000-PAX-1266 &1267/2018-19 dated 29.03.2019 passed by the Commissioner of Customs (Appeals), Mumbai.

2. Briefly stated facts of the case are that the Officers of Customs on specific information intercepted Shri Afzal Shabbir Shroff, Shri Salim Anwar Shaikh and Shri Salim Ali Wagle all three domestic passengers who had arrived from Bhubaneshwar, on 08.02.2017 in the domestic section of the CSI Airport as they were proceeding towards the exit gate. Personal search of the passenger Shri Afzal Shabbir Shroff resulted in the recovery of four gold bars and two cut pieces of gold from his pant pockets totally weighing 580 grams valued at Rs. 15,39,274/- ( Rupees Fifteen lakhs Thirty nine thousand Two hundred and Seventy four ). The personal search of Shri Salim Anwar Shaikh and Shri Salim Ali Wagle was also conducted but did not yield anything. In his statement Shri Afzal Shabbir Shroff interalia stated that he was assigned the work of taking out the seized gold from the flights toilet by one Shri Mustafa Sheikh for which he was given a flight ticket and promised monetary consideration and that the gold was brought illegally into India from an international destination. Shri Salim Anwar Shaikh in his statement interalia stated that he was accompanying Shri Afzal Shabbir Shroff to help in retrieval of the gold from the flight toilet and was also promised monetary consideration and air tickets. Shri Salim Ali Wagle in his statement informed that he does not know the other two passengers. Investigations conducted with the route of the flight revealed that the flight had travelled from Muscat to Delhi, Delhi to Mumbai, Mumbai to Bhubaneshwar and from Bhubaneshwar to Mumbai.

3. After due process of the law vide Order-In-Original No. ADC/AK/ADJN/225/2017-18 dated 30.03.2018 the Original Adjudicating Authority ordered absolute confiscation of the gold bars and imposed penalty of Rs. 2,25,000/- (Rupees Two lakhs Twenty five thousand ) on Shri Afzal Shabbir Shroff, and Rs. 75,000/- (Rupees Seventy five thousand ) on Shri Salim Anwar

Shaikh under Section 112 (a) of the Customs Act, 1962. The proceedings against Shri Salim Ali Wagle were dropped.

4. Aggrieved by this order the Respondents filed appeals with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order allowed redemption of the gold on payment of Rs. 3,00,000/- (Rupees Three lakhs) and also reduced the personal penalty imposed on Shri Afzal Shabbir Shroff to Rs. 1,50,000/- (Rupees One lakh Fifty thousand ) and on Shri Salim Anwar Shaikh to Rs.50,000/- (Rupees Fifty thousand ) and allowed the appeal of the Applicant.

5. Aggrieved with the above order the Applicant department has filed this revision application inter alia stating that the order of the Appellate authority is not legal or proper on the following grounds;

5.1 In his statements recorded on 08.02.2017, 20.02.2017, 01.03.2017 and 26.07.2017 under section 108 of the Customs Act, 1962, the passenger Mr. Afzal Shabbir Shroff inter alia stated and admitted knowledge, possession, concealment, carriage and recovery of the gold valued at Rs. 15,39,274/-; that he was assigned the work of taking out the seized gold from flight's toilet and carrying it, by one Mr. Mustaffa Sheikh, who was the owner of seized gold, for which he was to receive a monetary consideration along with a train ticket to Bhubaneswar from Bombay and air ticket from Bhubaneswar to Bombay. He further stated that he had taken out the seized gold from the toilet of Air India flight No. AI-670 dated 08.02.2017 (from Bhubaneswar to Bombay); that the seized gold had been brought/imported illegally into India from some international destination; that he was knowing the other passenger namely Mr. Salim Anwar Shaikh. The seized gold had been brought/imported illegally into India from some international destination, Shri Salim Anwar Shaikh in his statements recorded on 08.02.2017 and 20.02.2017 the passenger Mr. Salim Anwar Shaikh inter alia stated that he is known to Mr. Afzal Shabbir Shroff, who had promised him to give monetary consideration for being with/accompanying him in his job of removal/taking out of the seized gold from toilet of flight No. AI-670 (in which they were travelling); that he was also paid money of Rs. 20,000/- for buying his air tickets (from Mumbai

to Delhi, Delhi to Bhubaneswar & Bhubaneswar to Mumbai) by Mr. Afzal Shabbir Shroff, for helping him to keep a watch, so that he may take the seized gold out of the said flight's toilet as well as from Airport safely; that he did not know Mr. Mustaffa Shaikh.

5.2 Advocate of Applicants submitted letter dated 02.05.2017 on behalf of his client stating that his client has claimed ownership of the seized gold and has retracted the statements. The retraction filed by the said passenger was rebutted by the department.

5.3 The passenger Mr. Afzal Shabbir Shroff had tried to clear the impugned gold without making a declaration before Customs, and the gold was recovered during personal search of the passenger. Mr. Afzal Shabbir Shroff has admitted that the seized gold was retrieved by him from the toilet of flight no. AI-670. The said flight had earlier returned from international sector (Muscat-Delhi), as informed by M/s Air India. Further, the said passenger has also admitted that the seized gold was imported illegally into India, and he removed the said gold from the toilet of flight no. AI-670, which were imported in contravention of the provisions of Section 111(d) of the Customs Act, 1962. The said flight had earlier returned from international sector (Muscat-Delhi), as informed by M/s Air India.

5.4 The passengers have not produced any evidence on record to prove that the seized gold were brought as bonafide baggage of the passengers in terms of Notification no. 12/2012-Customs dated 17.03.2012 read with Rule 3 and 5 of the Baggage Rules, 2016 and hence their importation was in violation of Para 2.26 of the Foreign Trade Policy (2015-20). Therefore goods become prohibited in terms of Section 2(33) of the Customs Act, 1962. The impugned goods are, therefore, liable for confiscation u/s 111(d) of the Customs Act, 1962 and the passenger liable for penalty u/s 112(b) of the Customs Act, 1962. 2.5 It is not in dispute that the impugned gold was brought by the passenger in concealment manner and there was attempt to smuggle the impugned gold out, without making declaration. The manner of recovery of the gold indicates that the same was premeditated and deliberate act to evade Customs duty. The circumstances of the case and the intention of the passengers were not at all considered by the Appellate Authority while giving the passenger an option to redeem the seized goods on payment of fine.

5.4 The manner in which the gold was brought i.e. the gold was retrieved from the toilet of the flight AI-670, and the passenger Mr. Afzal Shabbir Shroff stating that he was assigned the work of taking out seized gold from the flight's toilet for monetary consideration, indicated the greed and criminal mindset of the passenger. The passenger Mr. Afzal Shabbir Shroff interalia stated and admitted knowledge, possession, concealment, carriage and recovery of the said goods; that the gold totally weighing 580 grams belonged to one Mr. Mustaffa Shaikh; that he retrieved the gold from Aircraft's toilet for a monetary consideration and air tickets from Bhubaneswar to Mumbai and train ticket from Mumbai to Bhubaneswar. In the present case the gold being carried for monetary considerations and the manner of its concealment and retrieval from Aircraft's toilet being ingenious and is a fit case for Absolute Confiscation of seized gold as a deterrent punishment to passengers. In view of the above, the Commissioner (Appeals)'s order is not correct, and proper.

5.5 The Commissioner (Appeals) has also erred in granting the release of seized gold by imposing Redemption Fine under Section 125 of the Customs Act, 1962. In this regard, it is to state that the option to redeem the seized goods under Section 125 of the Customs Act, 1962 is the discretionary power of the Adjudicating authority depending on the facts of each case and after examining the merits. Thus, taking into account the facts on record and the gravity of the offence, the lower adjudicating authority had rightly ordered the absolute confiscation of the impugned gold.

5.6 The passenger being domestic passenger had retrieved the seized goods from the Aircraft's toilet, which clearly shows his intention to evade duty on dutiable goods and smuggle the same into India. Had the passenger not been intercepted he would have made good with the impugned goods; 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 need to be invoked. Considering the fact that the impugned goods were cleverly retrieved from the Aircraft's toilet by the passenger and he failed to declare the same, the Commissioner (Appeals) ought not to have allowed redemption of the impugned goods. The same should have been confiscated absolutely.

Therefore, Commissioner (Appeals)'s order is not proper from this aspect too.

5.7 Absolute confiscation of the impugned gold totally weighing 580 grams and valued at Rs. 15,39,274/-, ordered by the Adjudicating Authority is correct as in his statement passenger Mr. Afzal Shabbir Shroff admitted that the said gold was belonged to one Mr. Musataffa Shaikh and it is supported by the decision of Hon'ble Supreme Court in the case of Surjit Singh Chabra Vs. UOI 1997 (84) ELT (646) SC has held that "statement made before Customs Officers though retracted within 6 days is an admission and binding since Customs Officers are not police officers. As such, the statement tendered before Customs is a valid evidence under law. Therefore in the present case the Commissioner (Appeal)'s order is not correct on this ground too as the seized gold was brought into India with an attempt to smuggle the same into India in a clandestine manner to avoid detection by the Customs.

5.8 Regarding the redemption fine and penalty, it is pertinent to mention here that, it shall depend on the facts and circumstances of the case and other cases cannot be binding as a precedent. In support of this contention, I refer to the judgment of Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 wherein the Hon'ble High Court 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."

5.9 Therefore, on this ground alone, the Commissioner (Appeals)'s order is not proper in the eyes of law, as the Commissioner (Appeals) has not considered the facts of the present case, where the goods in question was gold totally weighing 580 grams valued at Rs. 15,39,274/-, the passenger being domestic passenger had retrieved the seized gold from the Aircraft's toilet, which falls under the ambit of ingenious method of smuggling and leads to other ulterior motives.

In view of the reasons stated above, the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1266 & 1267/2018-19 dated 29.03.2019, passed by the Commissioner of Customs (Appeals), Mumbai Zone —III, be set aside in terms of the following prayer:

(A)The impugned Order-in-Appeal may be set aside and the Order-in-Original be upheld. AND/OR

(B) Any other order as deemed fit and proper may be passed.

6. In view of the above, personal hearings in the case were scheduled on 20.11.2019, 28.11.2019, 10.12.2020, 17.12.2020, 03.02.2021, 18.03.2021 and 25.03.2021. Nobody attended the hearing on behalf of the Respondent nor the Applicant department. The case is therefore being decided on the basis of available facts on merits.

7. The Government has gone through the case records. It is observed that the respondents are domestic passengers. The impugned gold was recovered from the pant pockets of the respondents. The respondents were travelling on domestic route but it was an international flight earlier. In his initial statements dated 05.08.2014 recorded soon after his interception the respondent Shri Afzal Shabbir Shroff has stated that *"he was assigned the work of taking out the seized gold from the flights toilet by one Shri Mustafa Sheikh for which he was given a flight ticket and promised monetary consideration. Shri Salim Anwar Shaikh in his statement interalia stated that he was accompanying Shri Afzal Shabbir Shroff to help in retrieval of the gold from the flight toilet and was also promised monetary consideration and air tickets."* The Advocate of the respondent has retracted the statements later, and has claimed the impugned gold.

8. In allowing the impugned gold for redemption the Appellate authority in para 22 states *"The analysis of various judgments on the issue of redemption of gold under section 125 of Customs Act, 1962 make it clear that the discretion has to be exercised based on merits of each case and there cannot be any straight jacket formula to decide such cases. I also find that one of the crucial aspects of the case is that the passenger was a domestic passenger arrived from Bhuvneshvar and it was neither the connecting international flight nor any material on record to suggest if any international passenger brought the impugned gold. This itself is sufficient reason to exercise the option under section 125 of Customs Act, 1962. I also find that there is nothing in the order to reflect*

*about the exact incident of import of the offending goods in India to substantiate smuggling and its mode. The investigation has also failed to find out about the alleged owner of the gold or to whom the gold was to be delivered at Mumbai. Besides, there is nothing on record to suggest that the appellant passengers are habitual offender or were part of any repeated and organized smuggling racket. There are no findings or investigation with reference to Mr. Mustaffa Sheikh to whom the gold was to be delivered. It is strange that to recover the gold from the toilet of Muskat-Delhi flight, the appellant passengers travel from Mumbai to Bhuvneshvar via train and return to Mumbai by the last leg of same flight i.e. Bhuvneshvar-Mumbai. But despite all these shortcomings in investigation, section 123 of Customs Act, 1962 casts burden on the person from whose custody gold has been seized to prove that it is not smuggled and therefore even though the gold has been recovered from the domestic passenger, its smuggled character via air route will attract legal provisions under section 77 and Baggage Rules 1998 read with Para 2.20 of Foreign Trade Policy. Accordingly the appellant passengers will be deemed to have attempted to clear smuggled goods and will be liable to penal consequences including Baggage Rate of duty."*

9. The Government finds that the Appellate authority, has raised the aspect of the initial statements of the respondent and has thus established the modus operandi and the mensrea aspect and has justified the confiscation of the gold, and in furtherance of confiscation, allowed redemption on payment of redemption fine and penalty. The Applicant department has pleaded for setting aside the redemption, and prays for absolute confiscation of the gold. Government however observes that the Applicant department has not carried any further investigations inspite of the respondent naming the mastermind ie the person who is the owner of the gold and was instrumental in concealing the gold in the flights toilet and hiring the respondents for retrieving the gold. Government opines that the Investigating Officer should have enquired the matter in detail in support of their allegation, especially when the passengers are domestic, as they have relied heavily on the Applicants statements which have been retracted. The Supreme Court in the case of K.I. Pavunny Vs Asst. Collector of Central Excise in 1977 has held that "*Confessional statement of the accused can form the sole basis for conviction -if retracted, Court is required to examine whether it was obtained by threat, duress or promise and whether the confession is truthfull - if found to be voluntary and truthful inculpatory portion of retracted*



*confession could be relied upon to base conviction – However prudence and practice require that the court should seek assurance by way of corroboration from other evidences adduced by prosecution*” In this case no such corroboration from further investigations have been adduced through investigation, inspite of the fact that the applicant has revealed the name of the person who has engaged him to retrieve the gold.

10. The Appellate authority has noted that the Applicant being a domestic passenger is enough reason to exercise the option under section 125 of the Customs Act, 1962, and has extended the option of redemption. Government notes in the absence of any further investigations therefore, acceding to the pleadings of the Applicant department would lead to a miscarriage of justice in punishing without clear evidence. In view of the above facts, the order of the Appellate authority cannot be faulted in allowing redemption of the gold. Government therefore holds that the order of the Appellate authority is required to be upheld and the Revision application is liable to be dismissed.

11. Revision application is accordingly dismissed.

*Shrawan*  
25/8/21

( SHRAWAN KUMAR )  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India

199-200  
ORDER No. /2021-CUS (SZ) /ASRA/MUMBAI DATED 25-08-2021

To,

1. The Pr. Commissioner of Customs, CSI Airport, Mumbai.
2. Shri Shri Afzal Shabbir Shroff, 109, Shaukat Guest House, Chakala Street, Mumbai 400 003.
3. Shri Salim Anwar Shaikh, Bldg. No. 6, 3<sup>rd</sup> Floor, Room No. 302, Lucky Compound, Byculla, Mumbai 400008.

Copy to:

4. Shri N. J. Heera- Advocate, Nulwala Building, Ground Floor, 41- Mint Road, Opp. G.P.O. Fort, Mumbai 400 001.
5. Sr. P.S. to AS (RA), Mumbai.
6. Guard File.
7. Spare Copy.