



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 373/42/B/SZ/2017-RA | 3079 : Date of Issue : 22.07.2022

ORDER NO. 2/H/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 19.07.2022
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.

(i). F.No. 373/42/B/SZ/2017-RA

Applicant : Abdul Rehman Nathakar Bava

Respondent : Commissioner of Customs, Customs House,
Willingdon Island, Cochin, Kerala - 682 009.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Orders-in-Appeal No.
No. 118/2016 dated 29.09.2016 [(DOI : 05.10.2016)
(C27/93/Air/2016 AU CUS)] passed by the Commissioner of
Customs (Appeals), Custom House, Cochin - 682 009.

ORDER

This revision application has been filed by Abdul Rehman Nathakar Bava (hereinafter referred to as the Applicant) against the Order-in-Appeal No. 118/2016 dated 29.09.2016 [(DOI : 05.10.2016) (C27/93/Air/2016 AU CUS)] passed by the Commissioner of Customs (Appeals), Custom House, Cochin – 682 009..

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 16.11.2014 at Cochin International Airport, Nedumbassery, having earlier arrived from Sharjah onboard Air Arabia Flight No. G9-427/16.11.2014. A search of his person, led to the recovery of 3 crude gold chains of 24 ct purity, totally weighing 373.34 grams and valued at Rs. 9,05,781/- which had been kept concealed in a specially stitched cloth cavity which had been worn by the applicant around his waist. Earlier, to specific query put forth by the Officer whether he was carrying any dutiable items, the applicant had replied in the negative. The applicant had opted for the green channel.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, Air Customs, Cochin vide Order-In-Original No. O.S. 79/2016 dated 30.03.2016 [F.No. S.14/133/2014 Air Cus: OS No. 177/2014) ordered for the absolute confiscation of the three crude chains totally weighing 373.34 grams valued at Rs. 9,09,781/- (I.V) and Rs. 9,99,431/- under Sections 111(d), 111(i), 111(j) 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 50,000/- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Custom House, Cochin – 682 009, vide Order-In-Appeal No. 118/2016 dated

29.09.2016 [(DOI : 05.10.2016) (C27/93/Air/2016 AU CUS)] refrained from interfering in the order passed by OAA.

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

- 5.01. the applicant was not acquainted with Customs formalities.
- 5.02. that the gold was brought for personal use for his wife and daughters.
- 5.03. that the corroborative facts had not been mentioned by the OAA.
- 5.04. that the applicant was waiting to approach the Customs counter for examination but in the meantime had been intercepted by the Officers.
- 5.05. that option under Section 125 had not been considered by the OAA.
- 5.06. that gold was not a prohibited item but there was only a restriction of its import.

Under the above facts and circumstances of the case, the Applicant has prayed that the Revision Authority be pleased to return the confiscated gold on payment of duty and fine; that penalty may be set aside taking into consideration his poor economic condition.

6. Personal hearing through the online video conferencing mode was scheduled for 03.11.2021 / 10.11.2021, 11.01.2022 / 03.02.2022, 22.03.2022 / 29.03.2022. Shri. Manoj Pillai, Advocate for the applicant appeared for physical hearing on 29.03.2022 and reiterated his earlier submissions. He submitted that applicant works in Dubai, has daughter, brought small amount of gold for personal use, is not a habitual offender. He requested to allow redemption of gold on nominal RF and penalty.

7. Government notes that the applicant has filed an application for condonation of delay. It is stated that the OIA dated 29.09.2016 and DOI : 05.10.2016 was received by them on 09.10.2016 and the delay has been attributed to inability to send the same immediately to the Consultant. The Consultant had filed the revision application on 21.03.2017. The Government notes that the revision application has been filed by the applicant well within

the extension period i.e. 3 months + 3 months and the prayer for condonation of delay is accepted and delay is condoned.

8. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the impugned 3 crude gold chains without declaring the same to Customs. By his actions, it was clear that the applicant had no intention to declare the impugned gold to Customs and pay Customs duty on it. The Government finds that the confiscation of the gold chains was therefore justified.

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 'Applicants' 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 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.

12. The quantity of gold jewellery under import is small and is not of commercial quantity. The gold jewellery was safely kept on the waist of the applicant. Government notes that at times travellers resort to such safe keeping for safety reasons to avoid theft of their valuables. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

13. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government therefore, sets aside the impugned order of the appellate authority. The impugned 3 crude gold chains, totally weighing 373.34 grams and valued at Rs. 9,09,781/- are allowed redemption on payment of fine of Rs. 2,30,000/- (Rupees Two Lakhs Thirty Thousand only). The Government finds that the penalty of Rs. 50,000/- (Rupees Fifteen thousand only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed and the same does not merit interference.

14. Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 2-14/2022-CUS (WZ/SZ)/ASRA/MUMBAI DATED 19.07.2022.

To,

1. Abdul Rehman Nathakar Bava, 33, Alathumakuthanam East West Street, Pettai, Kadayanallur, Thirunelveli, Tamil Nadu - 627 751.

2. Commissioner of Customs, Customs House, Willingdon Island, Cochin, Kerala - 682 009.
3. Addl. Commissioner of Customs, Cochin International Airport Ltd, Nedumbassery

Copy to:

1. Shri. Manoj Pillai, Advocate, Taxaide, Kalyan, TC 26/1747[UR-72], Uppalam Road, Trivandrum - 695 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.