

371/200/B/2020

SPEED POST



सत्यमेव जयते

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

F.No. 371/200/B/2020

/5618

Date of Issue

30.09.2021

ORDER NO.234/2021-CUS (SZ)/ASRA/MUMBAI DATED 24.09.2021 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 : Shri Mohammed Faraaz Akhtar Upletwala

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-CUSTOM-PAX-APP-186/20-21 dated 23.07.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.



ORDER

This revision application has been filed by the Shri Mohammed Faraaz Akhtar Upletwala (herein referred to as Applicant) against the order No. MUM-CUSTOM-PAX-APP-186/20-21 dated 23.07.2020 passed by the Commissioner of Customs (Appeals), Mumbai-III.

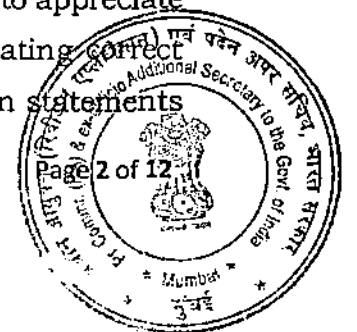
2. Briefly stated facts of the case are that the on 24.03.2016 the Officers of Customs intercepted Shri Mohammed Faraaz Akhtar Upletwala, bound for Hong Kong, at the C.S. International airport after he had cleared immigration. Personal examination of his checked in person and baggage resulted in the recovery of various foreign currencies equivalent to Rs. 1,26,17,029/- (Rupees One crore Twenty six lakhs Seventeen thousand and twenty nine).

3. After due process of the law vide Order-In-Original No. ADC/AK/ADJN/54/2019-20 dated 24.05.2019 the Original Adjudicating Authority confiscated the currency absolutely and imposed a penalty of Rs. 15,00,000/- (Rupees Fifteen lakhs) under section 114(i) of the Customs Act, 1962 on the Applicant.

4. Aggrieved by this order the Applicant filed an appeal with the Commissioner of Customs (Appeals), The Commissioner (Appeals) vide his order No. MUM-CUSTOM-PAX-APP-186/20-21 dated 23.07.2020 rejected the Appeal.

5. Aggrieved with the above order the Applicant has filed this revision application on the grounds that the Appellate order is neither legal nor proper for the following grounds:

5.1 The petitioner submits that the Respondent erred both, on facts and imposing penalty on the petitioner and therefore the impugned order is unsustainable and liable to be set aside. The Respondent failed to appreciate that the Show Cause Notice had been issued without appreciating facts in as much as the Respondent erred in placing reliance on statements

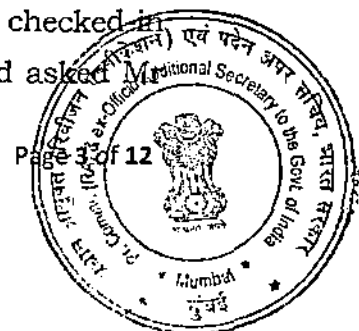


of the petitioner which were involuntary and against truth. He submitted that he is the owner of the foreign currency and had brought foreign currency on each of his return trips to India in limited permissible quantities.

5.2 The Applicant submits that he was on a business trip to Hongkong on 7-2-18 by Jet Airways Flight 9W076 which was to depart from Mumbai International Airport at 2.05 am on 7-2-18. He was carrying US \$ 2,00,000, 1260 Hongkong Dollars, 730 Chinese Yuan amounting totally to INR 1,25,87,406.50. He was carrying the currency in his laptop bag to Hongkong for business purpose. He reached the international airport at around 00.15 hrs on 7-2-2018. When he was proceeding towards the Jet Airways Airlines counter for checking-in, he was intercepted by some men in plain clothes when asked whether he was carrying foreign currency he replied in negative. However when he realized they were Custom officers he told them that he was carrying foreign currency. The officers then forcibly checked in his luggage and directed him towards immigration, after obtaining immigration they cancelled his immigration. Hence he was not given a chance to declare the currency.

5.3 The petitioner submits that the Respondent erred both, on facts and in law, in upholding the order of absolute confiscation of the currency and imposing penalty on the petitioner and therefore the impugned order is unsustainable and liable to be set aside. The Respondent failed to appreciate that the Show Cause Notice had been issued without appreciating correct facts in as much as the Respondent erred in placing reliance on statements of the petitioner which were involuntary and against truth.

5.4 The Officers took the applicant to the Jet Airways check-in counter and forced him to check-in both the trolley bags, though he had no intention to check-in the small size trolley bag wherein he had kept USD 2,00,000/-. No wise man win carry such a huge amount of foreign currencies in his checked-in bag. If the checked-in baggage is mishandled or lost, there is no assurance that he will get back the money. The Airlines Staff at the check-in counter issued the boarding pass and baggage tags to Mr Mohammed Faraaz Akhtar Upletawala. The Officers immediately took over both the checked-in bags from the airlines check-in counter and his laptop bag and asked Mr

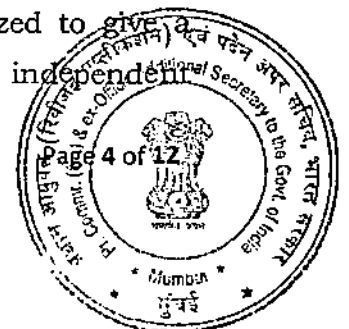


Mohammed Faraaz Akhtar Upletawala to go to the immigration counter for his immigration clearance. After he got the immigration clearance stamp affixed on his passport, one of the Customs Officers came to the Immigration Counter and requested the Immigration Officer for cancelling his immigration for the purpose of investigation.

5.5 The Order of the Commissioner of Customs (Appeals) is not an order on merits and not a speaking order. Whenever a case of smuggling is adjudicated or decided by the Appellate Authority, the decision of the Authority should include his findings, observation and conclusions, and the reasons underlying those findings and conclusions on all material issues of fact, law, or discretion presented in the record. If the bases of the decision of the adjudicating authority are reasonably discernible, a reviewing court can satisfy itself that the adjudicating authority gave a justifiable look at the relevant issues. On this short ground alone the order of the Additional Commissioner dated 31-1-2018 should have been set aside and the Order of the Commissioner of Customs (Appeals) is also liable to set aside.

5.6 There was no valid seizure of the assorted foreign currencies. Therefore, confiscation of the foreign currencies is not sustainable and no penalty can be imposed. The petitioner submits that the currency allegedly attempted to be exported by him was not validly seized by the Officers. In this connection, attention is invited to the instruction no 01/2017 issued by the Board under F.NO. 591/04/2016-cus (AS) dated 8-2-2017 wherein clear instruction has been given that whenever goods are being seized, the proper officer must pass an appropriate order (seizure memo/order/etc.) clearly mentioning the reasons to believe that the goods are liable for confiscation. However, in the present case, no seizure memo or order was passed by the proper officer.

5.7 The petitioner's statement were involuntary and against the truth they cannot be relied upon. He was forced to admit that he procured all foreign currencies from some agents in south Mumbai. These statement made by the Applicant were sought to be excluded from consideration as they were not voluntary and therefore irrelevant and he was pressurized to give a confession. As the investigative agency failed to get any independent



corroborative evidence, the retracted panchanama and statements cannot be relied upon.

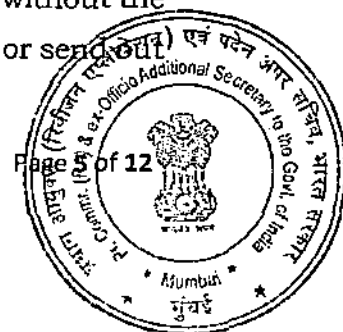
5.9 Foreign currency is not prohibited and its import or export is subject to law and rules and regulations issued by a competent authority. Foreign currency is not notified as 'prohibited' under Customs Act, 1962 and FEMA. In view of this fact, foreign currencies carried by the petitioner cannot be considered as prohibited goods.

5.10 Foreign currency is not a dutiable or prohibited item and its export or import is allowed subject to fulfilment of conditions regarding source of its acquisition and limit/per year as prescribed by RBI. Further, it is also a fact that there has been a series of liberalization in respect of remittance of foreign currency during last 20 years. In terms of circular no 6/2015-16 dated 1-7-2015 issued by RBI, remittance of USD 2,50,000 per year is allowed for private business visits etc.

5.11 Foreign currency is only a restricted item. Prohibition relates to goods which cannot be imported or exported by any one, such as arms, ammunition etc. The intention behind the provisions of Section 125 is clear that import of such goods under any circumstances would cause danger to the health, welfare or morals of people as a whole. This would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with.

5.12 The petitioner submits that foreign currency is not declared to be "prohibited goods" under provisions of either of Customs Act, 1962 or Foreign Exchange Management Regulations. As per Regulation 5 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 wherein Reserve Bank of India may by regulations, prohibit, restrict or regulate the export, import or holding of currency notes. The said Regulation 5 reads as under:

"Except as otherwise provided in these regulations no person shall without the general or special permission of the Reserve Bank of India import or send out of India, any Foreign Currency".



A plain reading of the Regulation makes it clear that Foreign Currency as such is not prohibited goods and its import or export is subject to the permission given by the Reserve Bank of India. Further as per Regulation 7(2) of the said Regulations '(2) person may take or send out of India foreign exchange

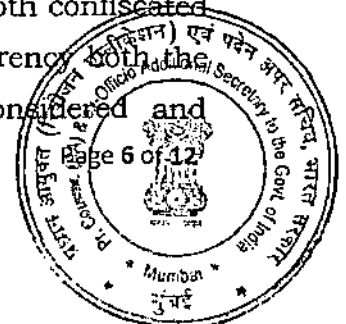
5.13 The decisions of Tribunals, High Courts and Supreme Court relied upon by the petitioner were rejected by the Appellate Authority without proper application of mind. Factual situation of the case of the petitioner fits in with the decisions on which reliance was placed. The learned Appellate Authority read those decisions in isolation and failed to read the decisions as whole in the context of the cases. The order of the appellate authority is vitiated on account of bias, violations of principles of natural justice and fair play. Therefore, the impugned Appellate order not sustainable.

5.14 The petitioner has submitted that CCTV footage of the departure hall was requested and the department failed to provide him the CCTV footage.

In view of the above the Applicant submitted case laws in support of his case and prayed for redemption of the currency.

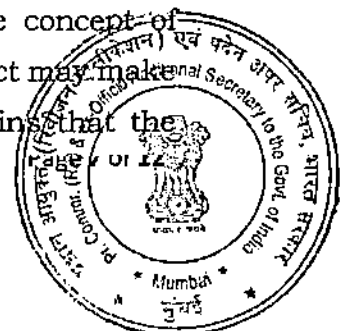
6. Accordingly personal hearing in the case was scheduled on 08.07.2021. Shri Prakash Shingrani, Advocate for the Applicant appeared for the hearing and reiterated the submissions and further submitted that the failure to declare the currency should not result in absolute confiscation. He requested release of the foreign currency on nominal fine and penalty. No one appeared on behalf of the department. The case is therefore being decided on the basis of available records on merits.

7. Government has gone through the facts of the case. The confiscation of the foreign currency was justified as the Applicant was carrying foreign currency in excess of the permitted limit. He has not produced any evidence of procuring the currency through proper legal channels. There is no declaration on record as required under section 77 of the Customs Act, 1962 filed by him. The order of the Original adjudicating authority and the Appellate authority have both confiscated the foreign currency absolutely. While confiscating the foreign currency both the lower adjudicating authority and Appellate Authority have considered



deliberated on the many claims made by the applicant in his defence, namely, that he was intercepted before he got an opportunity to declare the foreign currency and was forcibly made to check-in his baggage by the seizing officers; that the investigating agency claimed that he had made around 21 trips abroad from May 2016 to February 2018 and the applicant claimed to have brought in foreign currency in permissible quantities on each of his visits abroad. He was taking the currency abroad as he planned to start a fish and meat business in Hong Kong; that he had taken a loan of Rs. 1.73 crores from HDFC bank against property owned by his father, situated at Mariyam Apts., Flat No. 1501, 15th Floor, 22/28 Ismail Curray Road, Pydhonie Mumbai 400 003; that he owns 25% share in two Companies by name M/s Jagger Communications and M/s Maxsus Electronics having annual turnover of Rs. 8 crores respectively. However, the applicant could not provide any evidence that the seized foreign currency was obtained from legitimate / authorized sources. Also, the fact that the foreign currency was procured from persons other than authorized persons as specified under FEMA, makes the goods liable for confiscation in view of the prohibition imposed in Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 which prohibits export and import of the foreign currency without the general or special permission of the Reserve Bank of India. Therefore, the confiscation of the foreign currency was justified as the applicant was carrying foreign currency in excess of the permitted limit and no declaration as required under section 77 of the Customs Act, 1962 was filed. Therefore, the Government finds that the confiscation of the seized foreign currency by the Appellate Authority is proper and justified.

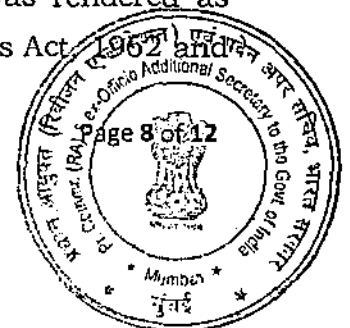
8. Government also notes that the Applicant in his revision application asserts that he had no intention to check-in the small trolley bag in which he had carried USD 2,00,000/-, because if the same was misplaced / mishandled then the chances of recovery was minimal. However, it was forcibly checked-in by the seizing officers and he had been deprived of an opportunity to declare the currency. The applicant has relied upon the judgement of the Hon'ble Apex Court in case of Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.), Escorts Ltd vs CCE, Delhi-II 2004 (173) E.L.T. 113 (S.C.) and CCE, Calcutta vs Alnoori Tobacco Products 2004 (170) E.L.T. 135 (S.C.) wherein it was stressed upon on the concept of "Circumstantial flexibility", and held that one additional or different fact may make a world of difference between conclusions. However, the fact remains that the



applicant had failed to declare the foreign currency to the Customs at the time of departure.

9. Further, the maximum amount of foreign currency which can be taken out of the country by any person per year for different purposes i.e. Private Visits/Business trip under the Liberalized Remittance Scheme which has been consolidated in Para A.4, A-9 and A.18 of Master Circular No. 6/2015-16 dated 1st July, 2015 issued by the Reserve Bank of India (RBI), allowed USD 2,50,000/- per financial year for business visit/private visit / for permissible currency or capital account transactions or a combination of both under Liberalized Remittance Scheme. The applicant was carrying foreign currency which was unaccounted and permission for the same was not obtained by him.

10. In the Revision Application, the Applicant has requested for release of the foreign currency, relying on a number of cases wherein the redemption of currency being taken abroad is justified. In this regard, the Government finds that the lower adjudicating authority has passed a cogent and judicious Order (i.e. ADC/AK/ADJN/54/2019-20 dated 24.05.2019) wherein every contention raised by the applicant in the revision application have been dealt with in great detail at the first stage itself. The case of the applicant has been thoroughly examined against the relevant provisions of the Customs Act, 1962, Foreign Trade (Development and Regulation) Act, 1992, Foreign Exchange Management (Export and Import of Currency) Regulations, 2015, Liberalised Remittance Scheme of RBI, etc. It has been held by the lower adjudicating authority that a passenger can carry Indian / foreign currency provided he fulfils the conditions specified in the Foreign Exchange Management (Export and Import of Currency) Regulations, 2015 and that any currency carried in violation of the restrictions imposed and non-declaration or mis-declaration thereof would render such currency liable to confiscation and the passenger would render himself liable to penalty for his / her act or omission and commission. Further, the lower adjudicating authority has held that the applicant had not complied with the conditions as laid down under Regulation 5 and 7(2)(b) of the Foreign Exchange Management (Export and Import of Currency) Regulation, 2015 and thus, had violated the restrictions imposed under the said Regulations, and the seized foreign currency was rendered as 'prohibited goods' under Section 113(d), (e) and (h) of the Customs Act, 1962 and

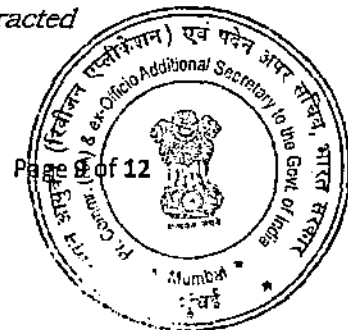


for this act of omission and commission, the applicant had rendered himself liable to penalty under Section 114(i) of the Customs Act, 1962.

11. The Government finds that every allegation made in the revision application such as, that the applicant was made to admit his offence; baggage was not searched in presence of Magistrate / Gazetted Officer; foreign currency has not been notified as prohibited under the Customs Act, 1962; that applicant intended to declare the foreign currency to Customs Officer at departure; CCTV footage was not provided; no wise man would carry such a huge amount of foreign currency in the checked-in baggage; case laws cited referred have not been considered, etc have been dealt with cogently by the lower adjudicating authority and have been deliberated upon and negated, point-wise. The lower adjudicating authority has discussed various contentions of the applicant in his Order-in-Original. Adjudicating Authority has noted,

"37.6. It is further observed that the defence has in written submissions contested the facts of Seizure Panchnama and statements as incorrect. In this regard, it is observed that the passenger had opportunities to deny the facts of the case on four occasions as his statements were recorded on four different dates i.e. on 07.02.2018 at the time of seizure and on 13.02.2018, 07.06.2018 and 02.07.2018 during investigation. In all his statements, he had admitted that the facts recorded in the Seizure Panchnama was correct and that he had procured the money from the illegal sources and he couldn't produce documents for their licit acquisition. Therefore, I reject this contention as mere afterthought.

37.7. The defense had claimed that his client intended to declare the foreign currency in departure but the officers of Customs effected the seizure. In this regard, I observe that the passenger has never disputed the contents of Seizure Panchnama during investigation. As per the legal provisions, the passenger was supposed to accompany all relevant documents for procurement of the seized foreign currency. But he had none of these documents which show that the claim of the defense was an afterthought. Besides this, in all his statements, the passenger had admitted that he had procured the money from illegal sources and he couldn't produce documents for their licit acquisition. He never retracted from the facts of the case during the process of investigation.



37.8. The defense has claimed that CCTV footage will prove that the case was fabricated. In this regard, in all his statements, the passenger had admitted, that he had procured the money from the illegal sources and he couldn't produce documents for their licit acquisition. He never retracted from the facts of the case during the process of investigation and had never asked for CCTV footage to prove otherwise as being claimed now by the defense. Thus, I find that this is an afterthought".

12. Government finds that the case of Commissioner of Customs v/s. Savier Poonolly [2014(310 E.L.T. 231 (Mad)] is squarely applicable in this case. Government relies upon the conclusions drawn at paras 10 to 12 of the said case.

10. On facts, there appears to be no dispute that the foreign currency was attempted to be exported by the first respondent - passenger (since deceased) without declaring the same to the Customs Department and therefore, it resulted in seizure.

11. Regulation 5 of the Foreign Exchange Management (Export and Import of Currency) Regulations, 2000 prohibits export and import of foreign currency without the general or special permission of the Reserve Bank of India. Regulation 7 deals with Export of foreign exchange and currency notes. It is relevant to extract both the Regulations, which are as follows :

5. "Prohibition on export and import of foreign currency. -

Except as otherwise provided in these regulations, no person shall, without the general or special permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.

7. Export of foreign exchange and currency notes. -

(1) An authorized person may send out of India foreign currency acquired in normal course of business.

(2) any person may take or send out of India, -

(i) cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000;

(ii) foreign exchange obtained by him by drawal from an authorized person in accordance with the provisions of the Act or the rules or regulations or directions made or issued thereunder

12. Section 113 of the Customs Act imposes certain prohibition and it includes foreign exchange. In the present case, the jurisdiction Authority has invoked Section 113(d), (e) and (h) of the Customs Act together with Foreign Exchange Management (Export & Import of Currency) Regulations, 2000, framed under Foreign Exchange Management Act, 1999. Section 2(22)(d) of the Customs Act, defines "goods" to include currency and negotiable instruments, which is corresponding to Section 2(h) of the FEMA. Consequently, the foreign currency in question, attempted to be exported contrary to the prohibition without there being a special or general permission by the Reserve Bank of India was held to be liable for confiscation. The Department contends that the foreign currency which has been obtained by the passenger otherwise through an authorized person is liable for confiscation on that score also.



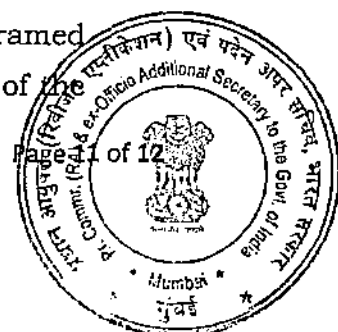
13. Once goods are held to be prohibited, Section 125 still provides discretion to consider release of goods on redemption fine. Hon'ble Supreme Court in case of M/s. Raj Grow Impex (*CIVIL APPEAL NO(s). 2217-2218 of 2021 Arising out of SLP(C) Nos. 14633-14634 of 2020 – Order dated 17.06.2021*) has laid down the conditions and circumstances under which such discretion can be used. The relevant paras 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.

14. The Government finds that the lower adjudicating authority has used discretion correctly in not releasing the foreign currency (i.e. release on redemption) which is consistent with the provisions of Section 125 of the Customs Act, 1962. The applicant has not produced any evidence suggesting that the foreign currency was garnered / accumulated from authorized persons and is bereft of any proof indicating the foreign currency had been generated out of legal dealings. Quantity, unaccounted source, manner of keeping, non-declaration and applicant not being to explain, etc are factors relevant for using discretion not to allow goods to be released on redemption fine.

15. The Government finds that the Appellate Authority too endorsed the order of the lower court and held that the applicant was a repeat offender and had contravened the provisions of Section 77 of the Customs Act, 1962 read with the provisions of FEMA, 1999 and the regulations framed thereunder. It also held that considering the facts and circumstance of the



case, the applicant cannot claim redemption of the foreign currency as a matter of right in terms of Section 125 of the Customs Act, 1962. The Government does not feel it necessary to interfere with the order passed by the appellate authority.

16.1. The Government finds that the personal penalty imposed on the applicant by the lower adjudicating authority are well justified and are commensurate with the act committed and admitted by them.

16.2. Further, the lower adjudicating authority has not imposed any penalty on the mother of the applicant and another person observing that no sustainable evidence was found against them during the investigations which the Government finds to be appropriate and judicious.

17. In view of the aforesaid, Revision Application is dismissed.

Shrawan
24/09/21

(SHRAWAN KUMAR)

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

ORDER No 234/2021-CUS (SZ) /ASRA/ DATED 24.09.2021

To,

1. Shri Mohammed Faraaz Akhtar Upletwala, Kinjal Residency, Flat No. 1401, 14th Floor, Opp MTNL Exchange, Agripada, Mumbai 400 011.
2. The Commissioner of Customs, (Airport) CSI Airport, Shar, Mumbai 400 099.

Copy to:

3. Shri Prakash Shingrani, Advocate, 12/334, New MIG Colony, Bandra (East) Mumbai 400 051
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.

ATTESTED

C. B. NAIR
C. B. NAIR
ASSISTANT COMMISSIONER
REVISION APPLICATION, MUMBAI

