

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. 371/428/B/2019-RA / 1068 **Date of Issue 17.02.2023**

ORDER NO 237/2023-CUS (WZ)/ASRA/MUMBAI DATED 14.02.2023
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 : Mr. Mohammed Faiq Jabali

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-CUSTM-PAX-APP-82/19-20 dated 30.04.2019
[Date of issue: 20.05.2019] [S/49-104/2017] passed
by the Commissioner of Customs (Appeals), Mumbai
Zone a- III.

ORDER

These revision applications have been filed by Mr Mohammed Faiq Jabali (herein referred to as 'Applicant') against the Order in Appeal No. MUM-CUSTM-PAX-APP-82/19-20 dated 30.04.2019 [Date of issue: 20.05.2019] [S/49-104/2017] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Brief facts of the case are that the Applicant arrived at CSI Airport, Mumbai on 11.07.2015 from Dubai by Emirates Flight No. EK-502 and was found to be roaming suspiciously near belt No. 10 of the terminal. The Officers kept a discreet watch on the Applicant when he entered the toilet which was located opposite the conveyor belt no. 10. As soon as the Applicant came out of the toilet, the dustbin in the toilet was checked and a packet wrapped by black adhesive tape was found lying in the dustbin of the toilet which was last used by the Applicant. The Applicant was intercepted after he had cleared himself through the Green Channel and was asked whether he was carrying any dutiable goods/gold or any other contraband in his baggage or on his person to which he replied in the negative. When confronted with the packet which was recovered from the dustbin in the toilet, the Applicant admitted that the said packet contained gold and the same was dropped by him. The Applicant disclosed that the packet contained gold bars. The 16 gold bars of 10 tolas each (24k) of 999% purity weighing 1865 grams and valued at Rs. 45,77,363/- recovered were seized under the reasonable belief that the same were smuggled into India and hence liable to confiscation under the provisions of the Customs Act, 1962. The Applicant had admitted that the seized gold did not belong to him and he had carried it for monetary consideration and was given instructions to drop the same in the dustbin of the toilet and that he did not know who was supposed to pick up the gold bars from

the toilet. The Applicant admitted the possession, carriage, non-declaration, concealment and dropping of the gold in the dustbin of the toilet.

3. After, due process of investigations and the law, the original adjudicating authority viz, Additional Commissioner of Customs, CSI Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/443/2016-17 dated 30.12.2016 [S/14-5-382/2015-16 Adjn (SD/INT/AIU/290/2015-16 AP 'A')], ordered for the absolute confiscation of the impugned 16 gold bars totally weighing 1865 grams and valued at Rs. 45,77,363/- under Section 111 (d), (1) and (m) of Customs Act, 1962 and a penalty of Rs. 4,57,736/- under section 112(a) & (b) of the Customs Act, 1962 was imposed on the Applicant.

4. Being aggrieved by the order, the Applicant filed an appeal before the Appellate Authority viz, Commissioner of Customs (Appeals), Mumbai Zone-III, who vide Order-In-Appeal No. MUM-CUSTOM-PAX-APP-82/19-20 dated 30.04.2019 [Date of issue: 20.05.2019] [S/49-104/2017], upheld the Order-in-Original and rejected the appeal.

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

5.01. That the Applicant admitted ownership;

5.02. That the lower authorities ought to have considered in similar cases option of redemption under Section 125 of the Customs Act, 1962 is granted and parity required that the Applicant also ought to have been granted the same.

5.03 The Applicant also furnished an exhaustive list of case laws and citations relied upon by them to buttress their case.

The Applicant has prayed that the absolute confiscation be set aside, since goods are disposed off sales proceeds be allowed after deducting government dues and personal penalty may be reduced.

7. Personal hearing in the case was scheduled for 10.08.2022 or 24.08.2022. Shri Prakash Shingrani, Advocate appeared for the hearing on 24.08.2022 on behalf of the Applicant. He submitted that the Applicant was working in Dubai for 04 years and that he had purchased the gold for making jewellery for his sister's daughter and that he got scared and accordingly hid the gold to save duty. He requested to release the gold on nominal redemption fine and penalty.

8. Applicant has filed for condonation of delay. Government notes that the revision application has been filed on 17.10.2019. The date of receipt of the appellate order by the Applicant is on 20.05.2019. Government notes that the same is within the extended period of 6 months (i.e. 3 months + 3 months) as prescribed in Section 129DD (2) of the Customs Act, 1962. Accordingly, Government condones the delay.

10. The Government has gone through the facts of the case. The Applicant had used a very ingenious method to smuggle the gold into the country. The packet containing the impugned gold bars was cleverly left by the Applicant in the dustbin in the toilet. The same was left behind for some accomplice to carry it away. It suggests that the Applicant was a part of a syndicate which was involved in smuggling the gold clandestinely into the country. But for the alertness of the staff of Customs, the gold would have escaped detection. The quantum of gold and the manner of attempting to smuggle indicates that the same was for commercial use. The Applicant in his statement to the department has submitted that the gold does not belong to him. The Applicant did not declare the gold bars

as required under section 77 of the Customs Act, 1962. The quantity of gold recovered was attempted to be smuggled to avoid detection. The confiscation of the gold is therefore justified and the Applicant has rendered himself liable for penal action for his act of omission and commission.

11. Government observes that 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.), 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.

12. 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.

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 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.”

15. Government observes that the Applicant had used a very ingenious method to smuggle the impugned gold i.e. the gold was concealed Furhtein a packet, wrapped by black adhesive tape which was left in the dustbin in the toilet in the airport. The method used indicates that there was an accomplice who would have carried away the gold bars. This indicates that the Applicant was part of a syndicate engaged in the smuggling of gold

and evading payment of duty. It also revealed his criminal bent of mind and a clear intention on the part of the Applicant and his accomplice to evade duty and smuggle the gold into India. The redemption of the gold would be an incentive to smuggle gold with impunity, pay the fine and get away.

16. Further, the Appellate Authority at para 7 of the impugned Order-in-Appeal has stated as under:

"7. I find that in the instant case the appellant has admitted to be working as carrier for monetary consideration and has failed to submit any documentary evidences to support his claim of ownership. The appellant dropped the packet containing gold bars in the dustbin kept in the toilet as per instruction of someone else, and it is a matter of common sense that there must be some other person who was to clear the said gold bars from dustbin to outside the airport which clearly suggest that there was an organized smuggling racket and the appellant knowingly and intentionally aided and abetted in smuggling of huge quantity of gold for monetary consideration. I find that the appellant is frequent traveller and had admittedly visited abroad 17 times since 2006. He visited abroad 3 times from CSI Mumbai during July 2014 to July 2015."

17. Though the option to allow redemption of the 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 and ingenious with a clear attempt to smuggle the gold bars totally weighing 1865 grams, it 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 serious and grave and novel and bold modus operandi, the original adjudicating authority had rightly ordered and the Appellate Authority has rightly echoed the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officers, the gold would have passed undetected. The redemption of the gold will encourage such concealment as, 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. Government thus concurs with the findings of the lower authorities and holds that the absolute confiscation of the gold to be in order.

18. Government notes that the penalty of Rs. 4,57,736/- imposed on the Applicant under Section 112 (a) and (b) of the Customs Act, 1962 by the Original Adjudicating Authority is commensurate with the omissions and commissions committed and Government is not inclined to interfere in the same.

19. In view of the above, the Government upholds the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-82/19-20 dated 30.04.2019 [Date of issue: 20.05.2019] [S/49-104/2017] passed by the Appellate Authority and is not inclined to interfere with the same.

20. The Revision Application is dismissed.


(SHRAWAN KUMAR)

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

ORDER No. 237 /2023-CUS (WZ) /ASRA/ DATED 19-02.2023

To,

1. Mr. Mohammed Faiq Jabali, s/o Mr Fakki Ali Jabali, Khankesha Azad Nagar, 2nd Cross Bunder Road, Bhatkal, Uttar Karnataka 581320.

Address No 2: Mr. Mohammed Faiq Jabali, c/o Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051.

2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai Zone - III, Awas Corporate Point, 5th Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai - 400 059.

Copy to:

1. Shri Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.