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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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**F.No. 371/212/B/2019-RA** / 1189 : **Date of Issue:** 23 02.2023

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ORDER NO. 26 /2023-CUS (WZ)/ASRA/MUMBAI DATED 23.02.2023 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.

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**Applicant** : Mr. Rafeeqe Pilathottathil

**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-CUS-PAX-APP-841-2018-19 dated 13.12.2018 [Date of issue: 19.12.2018] [F.No S/48-588/2014/AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

**ORDER**

The revision application has been filed by Mr. Rafeeqe Pilathottathil (herein after referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUS-PAX-APP-841-2018-19 dated 13.12.2018 [Date of issue: 19.12.2018] [F.No S/48-588/2014/AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.

2. Briefly stated the facts of the case are that on 19.04.2013, the officers of Customs, CSI Airport, Mumbai intercepted the Applicant, who had arrived from Dubai onboard Emirates Flight No EK500, while he was proceeding towards the exit gate after clearing himself through the Green channel of Customs. The Applicant was asked whether he was carrying any gold or contraband in his baggage on his person to which he replied in the negative. A hand metal detector was passed on the body of the Applicant and it gave a positive sign of indication that some metal was concealed on his person. On being questioned, the Applicant admitted that he had concealed two gold bars on his left leg thigh under the trouser worn by him. The two bars of one kilo each with marking of 'ARGOR HERAEUS SA-SWITZERLAND 1KOLO GOLD 995.0 MELTER ASSAYER L27573' and 'ARGOR HERAEUS SA-SWITZERLAND 1KOLO GOLD 995.0 MELTER ASSAYER L27527', wrapped in two polythene cut pieces having blue, white and red colour on it and on the inner side having grey colour, USD 5800 were recovered from the Applicant. The said two kilos of gold finally valued at Rs. 53,00,000/- and the foreign currency of USD 5800 equivalent to Rs. 3,05,950/- were taken over and seized under the reasonable belief that the same were attempted to be smuggled into India and hence liable for confiscation under the provisions of the Customs Act, 1962 read with FEMA 1999 and Foreign Exchange (Export and Import of Currency) Regulations 2000.

3. Following investigations and following the due process of law, the Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSI Airport, Mumbai vide Order-In-Original No. ADC/ML/ADJN/23/2014-15 dated 30.05.2014 [Date of issue: 24.06.2014] [F.No. S/14-5-51/2013-14 Adjn SD/INT/AIU/35/2013 AP "A"] ordered the absolute confiscation of the impugned seized 02 gold bars weighing 2 kgs valued at Rs. 53,00,000/- under Section 111(d), (l) and (m) of the Customs Act, 1962. The OAA also ordered confiscation of US\$ 5800 under Section 111(d), (l) and (m) of the Customs Act, 1962 and gave the Applicant an option to redemption of the impugned foreign currency on payment of fine of Rs. 50,000/-. Penalty of Rs. 6,00,000/- was imposed on the Applicant under Section 112(a) and (b) of the Customs Act, 1962 and a penalty of Rs. 5,000/- was imposed on the Applicant under Section 114AA of the Customs Act, 1962

4. Aggrieved by the said order, the Applicant filed an appeal before the Appellate Authority i.e Commissioner of Customs (Appeals), Mumbai Zone-III who vide Order-in-Appeal No. MUM-CUS-PAX-APP-841-2018-19 dated 13.12.2018 [Date of issue: 19.12.2018] [F.No S/48-588/2014/AP] rejected the Appeal.

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

5.01. That the order passed by the OAA was in gross violation of the principles of natural justice, as the Adjudicating Authority was under a legal bounden duty to furnish the copies of documents such as the returned postal cover containing the undelivered show cause notice and the relevant page of dispatch register evidencing the date of dispatch of the show cause notice;

5.02. The finding of the OAA as well as the AA that the show cause notice was issued on 17.10.2013 is factually incorrect as it is revealed from the very face of the show cause notice that it was issued on 15.10.2013. Hence, the admitted delay of sending the show cause notice by speed post on 21.10.2013 by tendering the explanation that 19.10.2013 and 20.10.2013 were holidays would not legally survive;

5.03. The Department cannot take shelter to the holidays for the admitted delay for the issuance of the show cause notice;

5.04. The finding of the OAA that the dispatch of the show cause notice within a period of 6 months from the date of seizure would be sufficient compliance of Section 110 (2) of the Customs Act is also erroneous as the show cause notice dated 15.10.2013 was not dispatched on the next working day and hence, Section 27 of the General Clauses Act also would not come for rescue of the stand taken by the Department;

5.05. That the AA deliberately ignored the case law of *Ambalal Morarji Soni vs. UOI* [AIR 1972 Gujarat (126)];

5.06. That the customs authorities by summoning the Applicant under the guise of giving evidence had resulted in infringing the fundamental rights of the Applicant and prevented him from undertaking his travel;

5.07. That the allegation that the Applicant was intercepted at the exit gate is without support of any admissible evidences;

5.08. That the customs declaration slip was with the Applicant and not the Customs officer and this proves that the interception was before crossing the

Customs and without affording an opportunity to declare the gold before the proper officer;

5.09. That there was no deceptive methods for concealment of gold to avoid detection at the time of scanning and metal detector check;

5.10. That the Applicant was constrained to put his signatures on papers wherein the contents of the language was not known to the Applicant and that certain questions were incorporated with the purpose of framing a false case;

5.11. That the Applicant had the intention to clear the gold on payment of duty but was prevented from making the declaration before the proper officer;

5.12. That absolute confiscation of gold under Section 111(d) of the CA, 1962 is not tenable as gold is not a prohibited commodity;

5.13. That the findings of the AA is unwarranted and unsupported by any material and the reason for confirmation of the order of confiscation shown in the OIA is in violation of Section 77 of the CA, 1962;

5.14. That neither the violations of the conditions prescribed under Rule 3(1) of Foreign Trade(Exemption from application of Rules in certain cases) Order, 1993 not violation of Section 77 of the CA, 1962 makes gold prohibited and that the lower authorities should have held that gold is only a dutiable item and hence cannot be absolutely confiscated and that grant of permission for redemption invoking Section 125 of the CA, 1962 is mandatory;

5.15. That the order of confiscation of the US\$5800 would not legally sustain in the absence of invocation of the relevant provisions of the FEMA and Export

and Import of Currency Regulation 2000 and as there is no legal requirement to declare the US\$ which was brought for the purpose of payment of customs duty;

5.16. That the penalty under Section 112(a) and (b) is improper and the quantum of penalty is highly excessive and disproportionate and imposition of penalty under Section 114AA of CA, 1962 is not in accordance with the law.

Under the circumstances, the Applicant prayed that the order of the Appellate Authority be set aside and he may be permitted to clear the same on payment of appropriate duty or in the alternative to permit the Applicant to redeem the gold on payment of reasonable fine and reduced penalty.

6. Personal hearing in the case was scheduled for 13.09.2022 or 27.09.2022. Shri Mohammed Zahir, Advocate, appeared online for the hearing on 27.09.2022 on behalf of the Applicant. He submitted that gold was owned by the Applicant and invoice of purchase was submitted at the time of seizure, He further submitted that there was no ingenious concealment and Applicant was not a habitual offender. He requested to allow the redemption of goods on reasonable fine and penalty.

7.1. Government has gone through the case records and the facts of the case. Government notes that the Applicant has again raised the issue of issuance of show cause notice beyond the prescribed period of six months and sought redemption of the gold on payment of redemption fine and reduction in the penalty. Government observes that the issue regarding the limitation period of the show cause notice has been discussed by the lower authorities in detail and all the issues raised by the Applicant has been addressed by the OAA and the AA. The OAA, at Para 3.3 to 3.7 of the discussion and findings has

elaborately dwelt on the issue factually by quoting the dates of the correspondence and status as reported by the postal agencies. Further the issue of the Applicant not honoring the summons issued during investigation and claiming to have not received the same has also been addressed in detail in the OAA.

7.2. Further, Government also finds that the Appellate Authority while echoing the views of the OAA has once again reiterated that the condition of the issuance of show cause notice within six months of seizure has been complied with by the department.

7.3. Government observes that the Applicants' raising of the issue of issuance of show cause notice within six month of the seizure despite the factual and detailed averment by the lower authorities on the issue, is seen as deliberate attempt on the part of the Applicant to sidetrack the indiscretions of the Applicant and holds that the lower authorities have rightly held that the show cause notice has been issued within the prescribed time limits and proceeds to examine the case on merits.

8.1 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 he was carrying dutiable goods. However, pursuant to detailed examination of the baggage after interception after he had cleared himself through the Green channel and personal search of the Applicant, the two gold bars of one kilogram each were recovered from two thigh pads worn by the Applicant on his left thigh under the trouser worn by him and the method of carrying the gold adopted by the Applicant by ingenious concealment clearly revealed his 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 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 in cahoots with his accomplice 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. By this action, it is clear that the Applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under Section 77 of the Customs Act, 1962. In this case, the quantity of gold seized is large and admittedly meant for commercial use and moreover, the method of concealment to evade Customs duty had been adopted. The Applicant had pre-planned and selected the method to avoid detection and thereby to evade Customs duty. The absolute confiscation of the gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

8.2. Further it is on record and admitted by the Applicant that he made a number of short visits to India and has not fulfilled the condition of continuous stay of 06 months abroad and brought gold in excess of the quantity allowed and thus the import of the impugned gold was prohibited.

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 reveals the criminal bent of mind wherein, this method was adopted by him 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 and innovative with a clear attempt to smuggle the gold, there being unaccounted foreign currency of US\$5800, 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. Hon'ble Delhi High Court in the case of Jain

Exports Vs Union of India 1987(29) ELT753 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.*". 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 made several unconvincing arguments to justify the action of smuggling of the large quantity of gold by him and justification to redeem the gold and the same have been perused and considered. 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. The Government finds that the penalty of Rs. 6,00,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 and Rs. 5,000/- imposed under Section 114AA of the Customs Act, 1962 are appropriate and commensurate with the omission and commission committed by the Applicant. The Government does not find it necessary to interfere in the order passed by the lower authorities.

16. In view of the above discussion, Government is inclined not to interfere with the Order-in-Appeal No. MUM-CUS-PAX-APP-841-2018-19 dated 13.12.2018 [Date of issue: 19.12.2018] [F. No S/48-588/2014/AP] passed by the Commissioner of Customs (Appeals), Mumbai Zone-III and upholds the same.

18. The Revision Application is hereby dismissed.

*Shrawan*  
22/2/23  
( SHRAWAN KUMAR )

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

**ORDER No. 26 /2023-CUS (WZ) /ASRA/**

**DATED 22.02.2023**

To,

1. Mr. Rafeeqe Pilathottathil, S/o Abdurahiman, Kakkumpurath House, Koduvally Post, Kozhikode, Kerala 673 572.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai Zone-III, Awas Corporate Point, 5<sup>th</sup> Floor, Makwana Lane, Behind S.M.Centre, Andheri-Kurla Road, Marol, Mumbai – 400 059.

Copy to:

1. Shri Mohammed Zahir, Advocate, 3/57-A, Nedungadi Gardens, West Nadakkavu, Calicut, Kerala 673011
2. Sr. P.S. to AS (RA), Mumbai.
3. File copy.
4. Notice Board.