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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

8<sup>th</sup> Floor, World Trade Centre, Centre – I, Cuffe Parade,  
Mumbai-400 005

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F.No. 380/93A/B/16-RA / 4088 :

Date of Issue 22.09.2022

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ORDER NO. 268 /2022-CUS (WZ)/ASRA/MUMBAI DATED .09.2022 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.

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Applicant : Pr. Commissioner of Customs, CSI Airport, Mumbai.

Respondent : Shri. Mohammad Minaz Md. Liyakaat Hussain Shaikh.

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-712-15-16 dated 14.03.2016 [S/49-937/2015 AP] passed by Commissioner of Customs (Appeals), Mumbai – III.

**ORDER**

This revision application has been filed by Pr. Commissioner of Customs, CSMI Airport, Mumbai (herein referred to as Applicant) against the MUM-CUSTOM-PAX-APP-712-15-16 dated 14.03.2016 [S/49-937/2015 AP] passed by Commissioner of Customs (Appeals), Mumbai - III pertaining to Shri. Mohammad Minaz Md. Liyakaat Hussain Shaikh (hereinafter referred to as the Respondent).

2(a). Brief facts of the case are that the respondent on arrival at CSMI Airport, Mumbai from Dubai by SpiceJet Flight No. 0014 on 06.10.2015 was intercepted by Customs Officers. The respondent had opted for green channel and had not declared the dutiable goods in his possession to the Customs. The respondent was returning back from Dubai after a stay of 3 days. The following goods were recovered from the baggage of the Respondent.

**TABLE No. 01**

Sr. No.	Description of goods	Quantity	Value in Rs.
1.	4 cut pieces of gold bar	232 gms	572344
2.	Gudang Garam cigarettes	3	4500
3.	1-Phone 6S	1	55000
4.	PS4 Blu-ray Disc	20	40000
5.	Laptop	1	40000
6.	Burkha	9	9000
7.	Assorted perfumes	9	27500
			748344/-

2(b). The respondent had submitted a written statement waiving the show cause notice.

3(a). The original adjudicating authority (OAA) viz, Addl. Commr. Of Customs, CSI Airport vide Order-in-Original No. Air Cus/49/T2/552/2015 dated 03.11.2015 ordered for the absolute confiscation of the aforesaid goods valued at Rs. 7,48,344/- under Section 111(d) of the Customs Act, 1962 and a penalty of Rs. 75,000/- under Section 112(a) and (b) of the Customs Act, 1962 was imposed on the respondent.

3(b). In the said Order-in-Original, the following was found noted.

*'Charges have been orally communicated to pax and he has signed for this fact. Prohibited to import as pax not eligible. Gold ingeniously concealed in rectum. Pax is habitual offender and thus, I find that he is professional smuggler. Relied on following judgements*

*(i). 2010 (254) ELT A15 (S.C)*

*(ii). 2012 (275) ELT 300 (Ker).*

4. Aggrieved with the Order, the respondent filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-712-15-16 dated 14.03.2016 [S/49-937/2015 AP] remanded the case back to the OAA for fresh considerations of the plea of the respondent that the gold had not been recovered from the rectum.

The operative part of the OIA is as under'

*9. Under the circumstances, I have no option but to remand the case for fresh consideration of the plea of the Appellant that the gold was not recovered from the rectum. The adjudicating authority shall pass speaking order in consistent with the legal position and instructions as regards to redemption of goods other than gold which prima facie are not in commercial quantity or within permissible limits allowable under Baggage Rules and after due consideration of the pleas of the Appellant*

*regarding recovery of gold from the bag along with electronic goods and not from the rectum in view of Panchanama / medical report / X-Ray / expert report or any other independent corroboration of the allegation that the gold was recovered from rectum to allege 'ingenious concealment'.*

*10. The Appeal is disposed of accordingly.*

5. Aggrieved with the order of the Appellate authority, the Applicant has filed this revision application inter alia on the grounds that;

5.01. The Order-in-Appeal was not legal and proper.

5.02. that the personal search of the respondent by the officers of Customs had resulted in the recovery of 4 cut pieces of gold bars, totally weighing 232 grams and valued at Rs. 5,72,344/- which had been ingeniously concealed in the rectum. Other items as mentioned at Table No. 01 above, had been recovered from the baggage of the respondent.

5.03. that the Commissioner (Appeals) had passed an order remanding the case back to the OAA for fresh consideration. But in this regard, instruction F.No. 275/34/2016-CX 8A dated 18.02.2010 issued by CBEC are relevant wherein it is clear that the power of remand is not available to the Commissioner (Appeals). An amendment had been made to the Section 128A(3) of the Customs Act, 1962 vide Finance Act, 2001 w.e.f. 11.05.2001 where the phrase "or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary" had been deleted. After the amendment in 2001, the said Section reads as follows, "The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming modifying or annulling the decision or order appealed against." The Commissioner (Appeals) however in Para 8 of the Order-in-Appeal discussed the judicial pronouncements for coming to the conclusion of exercising the powers of remand. However, the Hon'ble Supreme Court in its judgement dated 1.3.2007 in Civil Appeal No. 6988/2005 in the case of MIL India Ltd, (2007(210) ELT. 188(SC) had

observed that *"In fact the power of remand by the Commissioner(Appeals) has been taken away by amending Section 35A with effect from 11.05.2001 under the Finance Bill, 2001. Under the notes to clause 122 of the said Bill it is stated that clause 122 seeks to amend Section 35A so as to withdraw the power of the Commissioner (A) to remand matters back to the adjudicating authority for fresh consideration. Therefore, it is contended that Commissioner (Appeals)'s order was not correct and proper in the eyes of law.*

5.04. that the respondent, had also failed to make a true declaration in the Customs Declaration Form of the contents of his baggage to Customs as required under Section 77 of the Customs Act, 1962.

5.05. that the absolute confiscation of the goods including four cut pieces of gold recovered from the rectum of respondent ordered by the Adjudicating Authority was correct as it was supported by the decision of Hon'ble Supreme Court in the case of Samyanthan Murugesan v/s Commissioner of Customs (AIR), Chennai-I as reported in 2010(254) ELT A15 (SC). This decision of Hon'ble Supreme Court was in the appeal against the Hon'ble Madras High Court's Order reported as 2009(247) ELT 21 (Mad.). Therein, the Hon'ble High Court had found that the passenger had attempted to smuggle 7.075 kilogram gold by ingenious concealment in T.V. set without making declaration before Customs in violation of provisions under Section 11 & 77 of the Customs Act, 1962 and that the adjudicating authority had absolutely confiscated the gold. Thus, vide this order the Hon'ble High Court upheld the order of the Original adjudicating authority for absolute confiscation of gold. The Hon'ble High Court observed that "..... The concealment had weighed with the Commissioner to order absolute confiscation. He was right, the Tribunal erred". The Hon'ble Supreme Court after examining the High Court's Order upheld the judgement of Hon'ble High Court. Therefore, the applicant has stated that in the present case, the Commissioner (Appeals) Order was not correct as the gold pieces had been concealed in his rectum.

5.06. that in the present case, the manner of concealment being clever and ingenious coupled with the fact that the respondent was not eligible for

import of gold, it is a fit case for absolute confiscation as a deterrent to passengers mis-using the facility of Green channel with concealed gold. The Commissioner (Appeals)'s order is not correct on this ground too.

5.07. 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 accounts the facts on record and the gravity of the offence, the OAA had rightly ordered the absolute confiscation of the impugned goods. In the instant case, the respondent had not declared the said gold and other dutiable goods to Customs on his own and the subject gold was detected only after personal search of the passenger and detailed examination of his baggage was conducted. The manner in which gold was imported by ingeniously concealed in the rectum showed his criminal bent of mind and clear intention to evade duty on the dutiable goods and smuggle the same into India. Had the passenger not been intercepted he would have made good with the gold ingeniously concealed in the rectum; that 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. Hence the Commissioner (Appeals) ought not to have passed the order of remand the case for fresh consideration. The same should have been confiscated absolutely. Therefore, Commissioner (Appeals)'s order is not proper from this aspect too:

5.08. In this case the Hon'ble Supreme Court's judgment in the case of Om Prakash Bhatia Vs Commissioner of Customs, Delhi (2003(155) ELT 423 (S.C.) was squarely applicable as in the said case it was held that 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. In the present case, the passenger was not an "eligible passenger" to import the gold, thereby failing to fulfill the conditions for importing the gold and contravening the provisions of the Customs Act, 1962.

5.09. The Commissioner (Appeals) had referred to a number of judgments and mainly relied upon the judgment in the case of Dhanak Ramji Vs. Union

of India reported in 2010(252) ELT A 102 (S.C.) which did not apply in this concealment of gold. The passenger had opted for the green channel with gold ingeniously concealed in his rectum. The ingenious operandi weighed in favour of absolute confiscation.

5.10. that the Commissioner (Appeals) had referred to the Order of CESTAT, Chennai in the case of A. Rajkumari vs. CC (Chennai) [2015(321) ELT 540 (Tri-Chennai)] for drawing conclusion for remand of the case for fresh consideration. This case has been affirmed by Apex Court on grounds of delay and not on merits. Reference to this case is mis-placed.

5.11. The appellate authority remanding the case for fresh consideration by OAA is incorrect as per CBEC's instruction issued vide 275/34/2016-CX.8A dated 18.02.2010. Commissioner (Appeals)'s order is not proper in the eyes of the law as the Commissioner had not considered the facts of the present case where the goods had been ingeniously concealed in the rectum.

Under the circumstance, the applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the OAA or pass any other order as deemed fit.

6(a). Personal hearings in the case was scheduled for 01.10.2018, 30.10.2018 / 06.11.2018, 01.10.2019. After change in the revisionary authority, personal hearing through the video conferencing mode was scheduled for 17.08.2021 / 24.08.2021, 27.10.2021 / 10.11.2021, 02.12.2021.

6(b). Records indicate that Shri. Rajkumar Kulkarni, Supdt appeared on behalf of the applicant and reiterated the submissions made in the RA and pleaded that impugned OIA be set aside and RA be allowed.

6(c). None appeared for the respondents. It is seen that sufficient opportunities were accorded to the respondent to attend the personal hearing and put forth their case. They have chosen not to do so. The case is being taken up for a decision on the basis of evidence available on the records.

7(a). At the outset, the Government notes that the appellate authority has remanded the case back to the OAA for fresh adjudication. The primary reason for doing so, is that credence has been given to the contention of the respondent that the gold which had been recovered at his instance had not been kept secreted in the body cavity but had been found in the bag belonging to him. Government notes that the appellate authority had some circumspection on the observations in the OIO. In such a situation, Government notes that in terms of the standing instructions of the Board (referred above) that no case can be remanded back by the Commissioner (A), the appellate authority ought to have proceeded with a fresh order instead of remanding the case back. Government notes that the appellate authority had erred in remanding this case back to the OAA. Therefore, the Government is inclined to set aside the appellate order.

7(b). Having set aside the appellate order, Government finds that the OIO gets restored but finds that the same not being comprehensive, modifies the OIO in terms of the following,

8(a). The Government observes that the respondent had not declared the goods. Government observes that it has been noted in the proceedings of the original adjudication that the impugned gold had been kept secreted by the respondent in his body cavity. It is clear that the respondent had resorted to concealment to evade duty. By this action, it is clear that respondent had no intention to pay the Customs duty. The respondent had not declared the



impugned gold as required under section 77 of the Customs Act, 1962. In this case, the quantity of gold seized does not matter, what matters is the type of concealment adopted to evade duty. The respondent had pre-planned and selected this ingenious and risky method of body concealment to avoid detection and thereby to evade Customs duty. The absolute confiscation of the gold is therefore justified and thus, the respondent had rendered himself liable for penal action.

8(b). Government notes that later on, during the proceedings before the appellate authority, the respondent has alleged that the gold had not been kept secreted in the body cavity but had been kept in the bag alongwith the electronic and other items. Government notes that the respondent had waived the issuance of a SCN and had opted for spot adjudication. Having done so, the respondent now at this stage cannot renege on his commitment. In this regard, the Government relies on para 7 of the judgement of the Apex Court in the case of Commissioner of Customs, Mumbai v/s. M/s. Virgo Steels reported in 2002(141) ELT 0598 SC wherein it is observed that the allegation of coercion etc was made much later and it was held to be an afterthought. Government notes a similar situation in the instant case that only before the appellate authority the issue that the gold was found in the bag has been raised. This is clearly an afterthought.

8(c). The respondent has made an averment that in the OIO it is held that respondent was a repeat offender. However, Government notes that past offence has not been recorded in the OIO. Government notes that an opportunity to explain the position ought to have been given to the respondent. Government finds that the absolute confiscation of the goods other than gold and cigarettes was harsh. This order has been set aside by the appellate authority. Government is inclined to take a lenient view in the matter of the

goods other than gold which had been secreted in the body cavity and the cigarettes found in the bag.

8(d). Also, Government notes that the quantum of the goods at Sr. No. 3 to 7 of Table No. 1 above, carried by the respondent does not indicate that the same are for commercial use. These goods were found in the bag and had not been concealed. The absolute confiscation of these goods is harsh and unjustified. The total value of these goods from Sr. no. 3 to 7 of Table No. 1 above is Rs. 1,71,500/- and Government for the aforesaid reasons is inclined to release the same on payment of a redemption fine.

8(e). The respondent had also carried 3 cartons of cigarettes of Gudang Garam brand in his bag. The cigarettes do not bear the pictorial details as mandated by the Government and hence, its sale in the open-market is proscribed. Therefore, these 3 cartons of Gudang Garam cigarettes cannot be sold in the open market as the sale of such cigarettes is banned. Hence, confiscation of the same is justified.

9. With regard to the gold kept secreted in the body cavity, Government notes the following,

9(a). 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".

9(b). 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 'respondent', thus, liable for penalty.

9(c). 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.*

9(d). Government also observes that the manner in which the gold was concealed i.e. inside his own body, reveals the intention of the respondent. It also revealed his clear determination and a clear intention to evade duty and smuggle the gold into India. The respondent had a short stay abroad and was ineligible for import of gold. The circumstances of the case especially the concealment method adopted, probates that the respondent had no intention of declaring the gold to the Customs at the airport. All this had been considered by the OAA while confiscating the gold absolutely.

9(e). 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 ingenious and a clear attempt to smuggle gold, is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of 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 for confiscation of the gold is therefore liable to be upheld.

10. Cigarettes are restricted and hazardous and it was incumbent on the respondent to have declared the same upon arrival. The facts of the case reveal that a declaration of the impugned goods was required to be made by the respondent as required under Section 77 of the Customs Act, 1962. However, the respondent had failed to do so. The Government is of the opinion that the absolute confiscation of the cigarettes is justified and therefore liable to be upheld.

11. With regard to the goods at Sr. No. 3 to 7 of Table No. 1 above, in the absence of a cogent finding, the Government finds that the absolute confiscation of these goods is rather harsh and is unjustified. The Government therefore allows to redeem these goods totally valued at Rs. 1,71,500/- on payment of redemption fine of Rs. 35,000/- (Rupees Thirty Five Thousand) only.

12. Government notes that the penalty of Rs. 75,000/- imposed by the OAA on the respondent is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

13. The Government modifies the OIO dated 03.11.2015 as above.

14. The Revision Application filed by the applicant is partly allowed as above.

*Shrawan*  
19/9/22  
( SHRAWAN KUMAR )

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

ORDER No. 260 /2022-CUS (WZ) /ASRA/MUMBAI DATED 09.2022

To,

1. Pr. Commissioner of Customs, Chhatrapati Shivaji Airport, Sahar, Andheri (East), Mumbai – 400 099.
2. Shri. Mohammad Minaz Md. Liyakaat Hussain Shaikh, 30, Yakub Bldg, 2<sup>nd</sup> Floor, Room No. 28, 6<sup>th</sup> Kharuia Lane, Falkland Road, Girgaon, Mumbai.

Copy to:

1. Shri. Mohammad Minaz Md. Liyakaat Hussain Shaikh, C/o. Ms. Nuzhat Y. Pistawala, Advocate, 19/21, Maaz Mansion, First Floor, Room No. 7, 2<sup>nd</sup> Marine Street, Dhobi Talao, Mumbai – 400 002.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.