

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. 380/28/B/WZ/2017-RA/4011 : Date of Issue : 22.09.2022

ORDER NO. 271 /2022-CUS (WZ)/ASRA/MUMBAI DATED 20.09.2022
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.

Applicant : Commissioner of Customs, Goa.

Respondent : Smt. Shaheen Hussain Gadkar

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. GOA-
CUSTM-000-APP-042-2017-18 dated 05.06.2017 [F.No.
A-20/CUS/GOA/2017-18] passed by the Commissioner
(Appeals), Pune Appeal -II CX. (Goa), Goa – 403 001.

ORDER

This revision application has been filed by Commissioner of Customs, Goa (herein after referred to as the Applicant) against the Order-In-Appeal No. GOA-CUSTM-000-APP-042-2017-18 dated 05.06.2017 [F.No. A-20/CUS/GOA/2017-18] passed by the Commissioner (Appeals), Pune Appeal -II CX. (Goa), Goa.

2. Brief facts of the case are that the respondent on arrival at Goa Airport on 17.06.2015 from Dubai via Mumbai by Air India International Flight No. AI-944 was intercepted at the exit gate by the Customs Officers. To the query whether she was carrying any dutiable goods, the respondent had replied in the negative. Also, the applicant submitted a Customs Declaration Form declaring that she did not possess any dutiable goods / contraband. Nothing incriminating was found during the examination of her hand baggage and checked-in baggage. A metal detector was brought close to her waist which indicated presence of metal. Thereupon, the respondent removed two black packets duly wrapped in transparent tape one from front pocket of the jeans worn by her. The metal detector again indicated the presence of more metal when it was brought near the respondent's waist area. The respondent removed a multi-coloured stole which had been wrapped around her waist inside the jeans. The said stole when opened resulted in the recovery of two black colour packets duly wrapped in transparent adhesive tape. These 4 packets recovered from the respondent were cut open, which resulted in the recovery of 81 foreign marked gold bars of 10 tolas each of 999.0 purity grade, totally weighing 9447.84 grams and valued at Rs. 2,35,32,740/- These gold bars recovered from the respondent were seized under Section 110(1) of the Customs Act, 1962 under reasonable belief that the same are liable for confiscation under Section 111(I) of the Customs Act, 1962.

The respondent was arrested under Section 104 of the Customs Act, 1962 and had been remanded to two days judicial custody and thereafter was released on bail.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, Goa, vide Order-In-Original No. 27/2016-ADC(CUS) dated 29.07.2016 {DOI ; 05.08.2016; through F.No. 11/13/2015-R&I (APT)(AIU) ordered for the absolute confiscation of the 81 gold bars of 10 tolas each of 999.0 purity grade, totally weighing 9447.84 gms and valued at Rs. 2,35,32,740/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 25,00,000/- was also imposed on the respondent under Section of 112 (a) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the appellate authority (AA) viz, Commissioner (Appeals), Pune Appeal -II CX. (Goa), Goa who vide Order-In-Appeal No. GOA-CUSTM-000-APP-042-2017-18 dated 05.06.2017 [F.No. A-20/CUS/GOA/2017-18] allowed to redeem the 81 gold bars of 10 tolas each, totally weighing 9440 grams and valued at Rs. 2,35,52,284/- on payment of a redemption fine of 15% of the seizure value with payment of appropriate Customs duty, as applicable, under Section 125(1) of the Customs Act, 1962. Also, the penalty of Rs. 25,00,000/- imposed on the respondent was enhanced to 15% of the seizure value.

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

5.01. that the ratio of the judgement of Hon'ble Supreme Court in the case of Om Prakash Bhatia vs. Commissioner of Customs [2003 (155) ELT 423 (SC)] pertaining to.. correct interpretation of the words,

'prohibited goods' had not been taken into consideration by the appellate authority while allowing the redemption of the gold bars.

5.02. that there was a categorical finding of the adjudicating authority that the respondent had deliberately attempted to smuggle 9447.84 grams of gold by concealing and without declaration to Customs for a monetary consideration had not been considered by the appellate authority.

5.03. that the Order-in-Appeal is not legal and proper.

Applicant has prayed to set aside the order passed by the appellate authority and to restore the order passed by the original adjudicating authority or pass any order as deemed fit.

6. Personal hearings in the case were scheduled through online video conferencing mode was scheduled for 16.09.2021, 23.09.2021, 26.10.2021, 02.11.2021 and 02.12.2021. No one appeared for the applicant and respondent. Sufficient opportunities have been accorded to the applicant and respondent to put forth and defend their case. Since, none have appeared for the applicant and respondent, the case is being taken up for a decision on the basis of evidence on record.

7. The Government has gone through the facts of the case and notes that the respondent was carrying a very large quantity of gold on her person which had been innovatively strapped around her waist and also kept in her pockets and had not declared the same to the Customs. Even after interception, when the Respondent was asked about the possession of any gold or dutiable items, she had stoically denied that she was carrying any gold. The respondent had not declared the huge quantity of gold in her possession in the Customs declaration

form submitted by her. The Respondent had not filed a true declaration to the Customs and the respondent had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The respondent had cleverly and innovatively concealed the gold inside the garments worn by her which reveals her mindset to smuggle the goods and evade the duty. This method used by the respondent can be termed ~~was~~ ingenious, as she had successfully passed through the security of the overseas departing airport and also the security at the arrival airport. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent did not intend to declare the gold in her possession to Customs. Had she not been intercepted, the respondent would have gotten away with such a large quantity of gold. The Government finds that the confiscation of the gold is therefore justified.

8. 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. 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.

10. 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.

11. Government observes that the quantum of gold was very large, of high purity, in primary form, of commercial quantity and it was cleverly, consciously and premeditatedly concealed. Respondent was acting for monetary benefit and gold was being smuggled for some syndicate. It revealed her clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of huge commercial quantity and in primary form and was cleverly concealed, clearly brings out that the Respondent had no intention of declaring the gold to the Customs at the airport. All these facts have been properly considered by the Original Adjudicating Authority while absolutely confiscating the 81 gold bars, weighing 9447.84 grams, valued at Rs. 2,35,32,740/-.

12. Appellate Authority while ordering release of gold on redemption fine had relied on several judgements. These judgements have either been given in different set of facts or the ratios of the same have been selectively and obliquely applied to. As a result, correct position of law was not applied by the appellate authority in the given set of facts of instant application. The judgements mentioned in the previous paras here are latest on both the subjects of treating gold in the baggage and once goods are held to be prohibited, the circumstances and factors to be considered for allowing redemption of the same.

13. 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 conscious and firm intent to hoodwink the Customs and evade payment of duty, quantity being very large and commercial, this being a clear attempt to smuggle gold bars in primary form, 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 the gold. But for the intuition and the diligence of the Customs Officer, the large quantity of gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. Such blatant 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 absolute confiscation of the gold would act as a deterrent against such attempts and would deter persons who indulge in such acts with impunity. Therefore, the order passed by the appellate authority is liable to be set aside and the order passed by the original adjudicating authority is liable to be restored. That would be judicious application of discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 10, above.

14. The Government finds that the penalty of Rs. 25 lakhs imposed under Section 112 (a) by the original adjudicating authority has been set aside and that the same has been enhanced by the appellate authority to 15% of the seizure value. The Government finds that the enhancement of penalty on an appeal filed by the respondent is not appropriate and is bad in law and the courts have held that such enhancement which places an appellant in a worse

situation from their present position (as a consequence of filing an appeal filed by an appellant) is bad in law. The enhanced penalty imposed by the appellate authority is liable to be set aside. Government finds that the penalty of Rs. 25,00,000/- imposed by the original adjudicating authority is appropriate and commensurate with the omission and commission committed by the Respondent.

15. In view of the above, the Government sets aside the order passed by the appellate authority and restores in to-to, the order-in-original passed by the Original Adjudicating Authority.

16. Revision Application is allowed on above terms.

Shrawan
20/9/22
(SHRAWAN KUMAR)

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

ORDER No. 271 /2022-CUS (WZ) /ASRA/MUMBAI DATED 20.09.2022

To,

1. Commissioner of Customs, Goa Custom House, Marmagao, Goa – 403 803.
2. Smt. Shaheen Hussain Gadkar, Belin Post, Malvinkurve, Taluka Bhatkal, Karnataka – 581 320.

Copy To,

1. Sr. P.S. to AS (RA), Mumbai.
2. File Copy.
3. Notice Board.