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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. 371/262/B/WZ/2018-RA** 19739 : Date of Issue : 18.10.22

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ORDER NO. 287/2022-CUS (WZ)/ASRA/MUMBAI DATED 10.10.2022  
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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**(i). F.No. 371/262/B/WZ/2018-RA**

Applicant : Shri. Upletawala Mohamed Fahad Akhtar

Respondent : Pr. Commissioner of Customs, Custom House,  
Navrangpura, Ahmedabad.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal  
No. AHD-CUSTM-000-APP-061/17-18 dated 27.06.2018  
issued through F.No. S/49-102/CUS/AHD/17-18 passed  
by the Commissioner of Customs (Appeals), Ahmedabad.

**ORDER**

This revision application has been filed by Shri. Upletawala Mohamed Fahad Akhtar (hereinafter referred to as the Applicant) against the Order-in-Appeal No. AHD-CUSTM-000-APP-061/17-18 dated 27.06.2018 issued through F.No. S/49-102/CUS/AHD/17-18 passed by the Commissioner of Customs (Appeals), Ahmedabad.

2. Brief facts of the case are that the applicant was intercepted by Customs Officers on 28.10.2017 at Ahmedabad International Airport, having earlier arrived onboard Singapore Airlines Flight No. SQ-530. He was asked to walk through the door frame metal detector (DFMD) which indicated presence of metal. To query whether he was carrying any gold or dutiable items, he replied in the negative. The applicant was once again asked to pass through the DFMD which again indicated presence of metal. On being taken to the AIU office, the applicant admitted that he was carrying gold bars in his inner pant pockets. Two gold bars, weighing 500 grams and 311 grams, resp, totally weighing 811 grams, of 24 Karats purity, valued at Rs. 22,16,284/- (T.V) and Rs. 24,65,440/- (MV) were recovered from the applicant.

2(b). The applicant in his statement recorded on 29.10.2017 stated that he had purchased the 2 gold bars from his savings for his sister's marriage. He admitted to have not declared the gold to avoid payment of duty.

3. The Original Adjudicating Authority (OAA), viz, Addl. Commissioner, Air Customs, Ahmedabad vide Order-In-Original No. 20/ADC-MSC/SVPIA/O & A/2017 dated 27.11.2017 issued through F.No. VIII/10-77/SVPIA/O&A/2017 ordered for the absolute confiscation of the two gold bars, totally weighing 811 grams valued at Rs. 22,16,284/- (T.V) and Rs.

24,65,440/- (M.V) under Sections 111(d), 111(i), 111(l) & 111(m) of the Customs Act, 1962 and a penalty of Rs. 5,00,000/- under Section 112 (a) & (b) of the Customs Act, 1962 was imposed on the applicant.

4. Aggrieved by the said order, the applicant preferred an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Ahmedabad vide Order-In-Appeal No. AHD-CUSTOM-000-APP-061/17-18 dated 27.06.2018 issued through F.No. S/49-102/CUS/AHD/17-18 found no infirmity in the impugned OIO and upheld the same.

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

- 5.01. that the applicant was an NRI holding dual citizenship of Australia and India. i.e has an Australian Passport and is also holding an Overseas Citizen of India card.
- 5.02. that applicant was staying and working abroad.
- 5.03. that the gold had been kept by the applicant in his inner pant pocket for safety purpose.
- 5.04. that the gold belongs to the applicant and had submitted the invoice to the lower authorities evidencing its purchase; that the gold bars had been purchased from his savings for his sister's marriage.
- 5.05. that the applicant had prayed to the lower authorities to allow the re-export of the gold bars.
- 5.06. that he reiterates the same submissions made by him before the AA.

Under the circumstances, it has been prayed to allow the re-export of the gold on nominal redemption fine; that personal penalty may be reduced as it was on the higher side; or to grant any other relief as deemed fit and proper.

6(a). Personal hearing through the online video conferencing mode was scheduled for 02.08.2022, 25.08.2022 and on 29.09.2022. Shri. N.J Heera, Advocate for the applicant appeared for personal hearing on 29.09.2022 and submitted that applicant is an Australian passport holder and also has an OCI card. He further submitted that quantity of gold was for personal use and there is no dispute of the ownership. He requested to allow the re-export of gold as applicant resides in Australia.

7. The Government has gone through the facts of the case and notes that the applicant had failed to declare the goods in his possession as required under Section 77 of the Customs Act, 1962. The applicant had not disclosed that he was carrying dutiable goods and had he not been intercepted would have walked away with the impugned two gold bars without declaring the same to Customs. By his actions, it was clear that the applicant had no intention of declaring the impugned gold to Customs and pay Customs duty on it. Government finds that the confiscation of the gold bars was 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 'Applicant' 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 the 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. The quantity of gold bars under import is not substantial and is not in commercial quantity. The applicant claimed ownership of the gold bars and had produced an invoice for the purchase of the same. The applicant has submitted that this small quantity was for personal use. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The applicant is an Australian national and is a holder of an OCI card. The facts of the case indicate that it is a case of non-declaration of gold, rather than a case of smuggling for commercial considerations. Government notes that at times, passengers adopt innovative methods to bring valuables and attempt to evade payment of duty. That is why goods are liable to confiscation. Under the circumstances, the seriousness of the misdemeanour is required to be kept in mind when using discretion under Section 125 of the Customs Act, 1962 and while imposing quantum of penalty.

12. In a recent judgement passed by the Hon'ble High Court, Madras on 08.06.2022 in WP no. 20249 of 2021 and WMP No. 21510 of 2021 in r/o. Shri. Chandrasegaram Vijayasundarm + 5 others in a similar matter of Sri. Lankans wearing 1594 gms of gold jewellery (i.e. around 300 gms worn by each person) upheld the Order no. 165 – 169/2021-Cus (SZ) ASRA, Mumbai dated 14.07.2021 in F.No. 380/59-63/B/SZ/2018-RA/3716, wherein Revisionary Authority had ordered for the confiscation of the gold jewellery but had allowed the same to be released for re-export on payment of appropriate redemption fine and penalty.

13. The absolute confiscation of the gold bars, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Since applicant is an Australian citizen holding and OCI card and

resides in Australia for the aforesaid reasons, Government is inclined to accept the prayer put forth by the applicant for re-export of the impugned gold on payment of a redemption fine.

14. Government finds that the penalty of Rs. 5,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 constitutes nearly 20% of the value of the seized impugned gold bars. Government's notes that the said penalty of Rs. 5,00,000/- imposed on the applicant is not commensurate with the value of gold bars seized and is harsh and excessive and disproportionate to the omissions and commissions committed by him and the same deserves to be reasonably reduced.

15. For the aforesaid reasons, Government modifies the order of absolute confiscation of the appellate authority. The impugned 2 gold bars, totally weighing 811 grams and valued at Rs. 22,16,284/- (T.V) and Rs. 24,65,440/- (M.V) - are allowed to be re-exported on payment of a redemption fine of Rs. 4,25,000/- (Rupees Four Lakhs Twenty Five Thousand only). The penalty of Rs. 5,00,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is reduced to Rs. 2,25,000/- (Rupees Two Lakhs Twenty Five Thousand only).

16. Revision Application is decided on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER NO. 287/2022-CUS (WZ)/ASRA/MUMBAI DATED 10.10.2022.

To,

1. Shri. Upletawala Mohamed Fahad Akhtar, **Address No. 1.:** Unit No. 6, 8/10, Northumberland Road, Auburn, NSW 2144, Australia.  
**Address No. 2.:** Flat No. 1401, 14<sup>th</sup> Floor, Kinjal Residency, Farooq S. Umerbhai Road, Agripada, Mumbai - 400 011.

2. Pr. Commissioner of Customs, Custom House,  
Navrangpura, Ahmedabad.

Copy to:

1. Shri. N.J Heera, Advocate, Nulwala Bldg, 41, Mint Road, Opp. G.P.O,  
Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.