

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. 371/178/B/2018-RA / 6121 : Date of Issue : 31.10.2022

ORDER NO. 303/2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022 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.

Applicants : Shri Mohideen Batcha

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-CUSTOMS-PAX-APP-870/17-18 dated 06.12.2017 [F.No. S/49-931/2015/AP] passed by the Commissioner of Customs (Appeals), Mumbai -Zone -III.

ORDER

The Revision Applications has been filed by Shri Mohideen Batcha (herein referred to as the Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-870/17-18 dated 06.12.2017 [F.No. S/49-931/2015/AP] passed by the Commissioner of Customs (Appeals), Mumbai-Zone III

2. Brief facts of the case are that on 02.05.2014, the officer of the Air Intelligence Unit intercepted the applicant at the exit gate of the arrival hall of CSI Airport, Mumbai. The applicant who had arrived from Singapore on flight No SQ 422/02.05.2014 had cleared himself through the Green Channel. As the applicant denied having any gold or contraband in his baggage or on person, he was asked to pass through the Door Metal Frame Detector, which gave a positive indication of some metal concealed inside his body. During personal search of the applicant, he admitted that had had concealed gold in his rectum and ejected 05 gold bars with marking as 'valcambi Suisse 100 gm gold 999.9- AA384562, AA384563, AA384564, AA384568 and AA384569. The 05 gold bars totally weighing 500 gms valued at Rs 13,11,318 /- was seized.

3. The Original Adjudicating Authority (OAA) i.e. Additional Commissioner of Customs, CSI Airport, Mumbai vide his Order-In-Original (OIO) no. ADC/ML/ADJN/116/2015-16 dated 04.08.2015 [(DOI : 05.08.2015),(F.No. S/14-5-344/2014-15 Adj. SD/INT/AIU/279/2014AP B)] ordered for the confiscation of the impugned cut gold bar weighing 500 gms valued at Rs. 13,11,318/- under Section 111 (d), (l) & (m) of the Customs Act, 1962. A penalty of Rs. 1,30,000/- was imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962.

4. Aggrieved, with this Order, the applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai -

Zone III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-870/17-18 dated 06.12.2017 upheld the order passed by the OAA.

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 adjudicating authority did not give sufficient opportunity while deciding the case and the appellate authority simply glossed over the judgements and points raised in the appeal;
- 5.02. that the applicant was not allowed to read the panchnama which was a cut and paste job and his signatures were obtained on the same. Also that the applicant's signature was obtained for receipt of documents but were not supplied to him and the non supply of documents and show cause notice is a violation of Article 21 and 22(5)of the Constitution of India;
- 5.03. that the averments of the adjudicating and appellate authority that the gold was received by the applicant from some person is based on non existence materials;
- 5.04. that in the case of Bepari Saleem [F.No 373/43/B-Cus RA dated 16.04.2008] the Revisionary Authority while allowing re-export stated that the Customs Act, 1962 did not make any distinction between owner of the goods and person carrying it;+
- 5.05. that the authorities stated on one hand that the applicant had not declared the contents of the baggage as per Section 77 of Customs Act, 1962, while on the other had stated that he was not the owner of the goods which are contrary;
- 5.06. that as per Section 125 of the Customs Act, 1962, even when the goods are confiscated, the officer adjudicating it shall give the owner of the goods or where such person is not known, the person from whose possession or custody the goods have been seized, the option to pay in lieu of fine in lieu of confiscation;

5.07. that the gold has been recovered from the applicant and he is entitled to get back the gold on payment of baggage rate of duty and the department cannot argue that the applicant is not the owner of the gold or is the carrier;

5.08. The applicant has cited the following case laws to buttress their case

(i) *Peringatil Hamza vs. Commissioner of Customs, Mumbai* [2014(309) E.L.T. 259 (Tri.Mumbai)]

(ii) *Shaik Shahabuddin vs. Commissioner of Customs, Chennai* [2001(137) E.L.T. 127 (Tri.-Chennai)]

5.09. Under the circumstances, the applicant prayed to set aside the Order and permit him to re-export or release the gold and also reduce the personal penalty.

6. Personal hearings in the case was scheduled through the video conferencing mode for 04.08.2022 and on 26.08.2022. No one appeared for the Applicant and for the Respondent. Smt Kamalamalar Palanikumar, the advocate for the Applicant vide letter dated 16.08.2022 informed that due to personal reasons she would not be able to attend the personal hearing and requested to issue the order on the basis of the available records and also show leniency. As no further personal hearings have been requested, 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. The Applicant was intercepted at the exit gate after he had exited through the green channel. To queries whether he was carrying any dutiable goods, the Applicant had replied in the negative. The impugned gold was secreted in his body cavity i.e. rectum. It is clear that the Applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that 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. The type of concealment adopted to evade duty is important here. The Applicant had pre-planned and selected an ingenious and risky method that he used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore justified and thus, the Applicant had rendered himself liable for penal action.

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, is liable for penalty.

10. 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 manner in which the gold was concealed i.e. inside his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the

gold into India. The circumstances of the case especially the ingenious concealment 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 confiscating the gold bar absolutely.

12. 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 with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be 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. Such acts of misusing 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 is therefore liable to be upheld.

13. The Government finds that the penalty of Rs. 1,30,000/- imposed on the Applicant under Section 112(a) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed by the Applicant. The Government does not find it necessary to interfere in the penalty imposed by the adjudicating authority.

14. Government upholds the order of absolute confiscation of the impugned gold passed by the adjudicating authority and confirmed by the AA. Government does not find it necessary to interfere in the penalty of Rs.

1,30,000/- imposed on the Applicant under Section 112(a) of the Customs Act, 1962.

15. The Revision Application is disposed of on the above terms.


(SHRAWAN KUMAR)

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

ORDER NO. 303 /2022-CUS (WZ)/ASRA/MUMBAI DATED 31.10.2022

To,

1. Shri. Mohideen Batcha, 1-13 Small Street, Valuthoor, Ayyampettai, Thanjavur Dist, Tamil Nadu 614 201
(Address No 2: C/o S. Palanikumar, Advocate, No 10, Sunkurama Street, Chennai 600 001
2. The Pr. Commissioner of Customs, Terminal-2, Level-II, Chhatrapati Shivaji International Airport, Mumbai 400 099.

Copy to:

2. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Awas Corporate Point, Makwana Lane, Behind S.M.Centre, Andheri Kurla Road, Marol, Mumbai 400 059
3. Smt. Kamalamalar Palanikumar, Advocate, No 10, Sunkurama Street, Chennai 600 001
4. Sr. P.S. to AS (RA), Mumbai.
5. File copy,
6. Notice Board.