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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)  
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Mumbai-400 005

F.No. 371/44/B/2017-RA & 380/24A/B/WZ/17-RA Date of Issue 22/12/2021  
17362

ORDER NO. 317 - 318 /2021-CUS (WZ)/ASRA/MUMBAI  
DATED 15.12.2021 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.

**F.No. 371/44/B/2017-RA**

Applicant : Shri. Mohammad Saleem Ahamed

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

**F.No. 380/24A/B/WZ/17-RA**

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTOM-PAX-APP-05/17-18 [S/49-312/2016  
AP] dated 07.04.2017 passed by the Commissioner of  
Customs (Appeals), Mumbai - III.

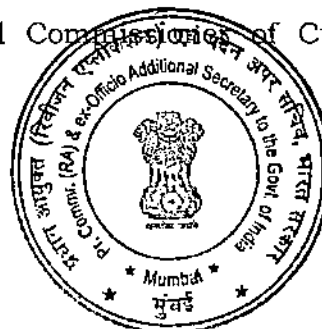


ORDER

These revision applications have been filed by (i). Shri. Mohammad Saleem Ahamed (herein referred to as Applicant) and (ii). Commissioner of Customs, CSI Airport, Mumbai (hereinafter referred to as the Applicant-department) against the Order in Appeal No. MUM-CUSTM-PAX-APP-05/17-18 [S/49-312/2016 AP] dated 07.04.2017 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that the applicant arrived at CSI Airport, Mumbai on 28.08.2014 from Dubai by Emirates Flight No. EK -506 / 28.08.2014 and the Officers had kept a discreet watch on the applicant when he had entered the toilet which was located opposite the conveyor belt no. 10. Later, the Officers recovered three gold bars of 1 kg each and 3 gold bars of 10 tolas each which had been wrapped in two black coloured packets taped with adhesive tape which had been kept inside a tissue box in the toilet. Thereafter, the applicant was intercepted by the Customs Officers at the exit gate after he had crossed the green channel and had submitted a Customs Declaration Form in which he had indicated that he was not carrying any dutiable goods. Also, on being questioned about possession of any dutiable items, applicant had replied in the negative. Upon being questioned about the black coloured packets found in the toilet initially, the applicant replied in the negative. However, on persistent and sustained questioning, the applicant admitted that the two packets were placed by him inside a tissue box and this tissue box was left in the toilet. The applicant disclosed that the two packets contained gold bars. Thus, in all, 3348 gms of foreign marked gold bars valued at Rs. 87,35,769/-were seized. The applicant had admitted that the seized gold did not belong to him and he had carried it for monetary consideration.

3. After, due process of investigations and the law, the original adjudicating authority viz, Additional Commissioner of Customs, CSI



Airport, Mumbai, vide Order-In-Original No. ADC/RR/ADJN/28/2016-17 dated 22.04.2016 [S/14-5-687/2014-15 Adjn (SD/INT/AIU/628/2014 AP"A")], ordered for the absolute confiscation of the impugned gold under Section 111 (d), 111 (1) and 111(m) of Customs Act, 1962 and a penalty of Rs. 9,00,000/- (Rupees Nine Lakhs only) under section 112(a) & (b) of the Customs Act, 1962 was imposed on the applicant.

4. Being aggrieved by the order, the applicant filed an appeal before the appellate authority viz, Commissioner of Customs (Appeals), Mumbai – III, who vide Order-In-Appeal No. MUM-CUSTM-PAX-APP-05/17-18 [S/49-312/2016 AP] dated 07.04.2017, allowed the applicant to redeem the impugned gold on payment of redemption fine of Rs. 16,00,000/- (Rupees Sixteen Lakhs only) and maintained the penalty of Rs. 9,00,000/- imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

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

5.1. that the impugned order passed by the appellate authority was bad in law and was unjust.

5.2. that the impugned order was passed without giving due consideration to the documents on record and facts of the case.

5.3. that the original adjudicating authority ought to have appreciated that the dutiable goods brought by the applicant were neither restricted nor prohibited.

5.4. that the goods had been brought for the first time and that there was no case previously registered against the applicant.

5.5. that the original adjudicating authority was required to impose redemption fine under Section 125 of the Customs Act, 1962 to the extent of difference between CIF and market value to wipe out margin of profit.



5.6. that the department had not given any local market value of the goods and in the absence of the same, the margin of profit ascertained was incorrect and after payment of duty of 36.05% and redemption fine of Rs. 16,00,000/-, the applicant had not been left with any margin of profit. Therefore, the heavy fine and personal penalty was totally unjustified.

The applicant has prayed that the order passed by the appellate authority be set aside and the redemption fine and personal penalty may be reduced.

6. Aggrieved with the order passed by the appellate authority, the applicant – department has filed this revision application and the grounds of revision are as under;

6.1. that the order passed by the appellate authority was not legal and proper

6.2. that the appellate authority had not considered that the applicant; had not declared; had knowledge; had possessed; had carried; had concealed the gold bar and that the said gold bars seized under Seizure Panchanama dated 28.08.2014 had been recovered from the applicant.

6.3. that the applicant had admitted that true declaration of the contents of his baggage as required under Section 77 of the Customs Act, 1962 had not been made.

6.4. that applicant – department relies on the decision of Kerala High Court in the case of Abdul Razak v/s UOI- as reported in 2012(275) ELT 300(Ker). This decision of the Kerala High Court found that the passenger had attempted to smuggle 8 kilogram of gold by ingenious concealment in emergency light, mixie, grinder, car horns etc. without making declaration before Customs in violation of provisions under Section 11 & 77 of the Customs Act, 1962 and the adjudicating authority had absolutely confiscated the gold. Thus, vide this order the Kerala High Court upheld the order of the original adjudicating authority for absolute confiscation of gold. The Kerala High Court held that a carrier has no right to claim release of gold on



payment of fine and penalty. Therefore, in the above said case, it is observed that the pax was merely a carrier of the seized gold, redemption of seized goods is not to be allowed to the carrier in view of said Kerala High Court Judgement.

6.5. that in the present case, the manner of concealment being clever and ingenious, it was a fit case for absolute confiscation of the seized gold which would be a deterrent punishment to passengers mis-using the facility of green channel

6.6. considering the fact that the gold was ingeniously concealed and the applicant had failed to declare the same, the appellate authority ought not to have allowed redemption of the impugned gold.

6.6. the applicant – department has also placed reliance on the (i). decision of Hon'ble Supreme Court in the case of Samyanthan Murugesan v/s Commissioner of Customs (AIR), Chennai-1 as reported in 2010(254) ELT A15 (SC).

6.7. that the reliance placed by the appellate authority on the order of CESTAT, Chennai in the case of A. Rajkumari Vs CC (Chennai) 2015 (321) ELT 540 (Tri Chennai) for drawing the conclusion of release of impugned gold on redemption fine since the same was affirmed by the Apex Court is incorrect as this case was dismissed by the Apex Court on grounds of delay and not on merit. Hence, reliance placed on this case of CESTAT was misplaced.

The applicant – department has prayed that the order of the appellate authority be set aside and that the order-in-original passed by the original adjudicating authority be upheld.

7. Personal hearing in the case in the online video conferencing mode was scheduled for 19.09.2021 / 24.09.2021, 21.10.2021 / 28.10.2021, 16.11.2021 / 23.11.2021. Shri. N.J Heera and Shri. A.M Sachwani, Advocates for the applicant appeared on 23.11.2021 and submitted that the revision application filed by the department was not maintainable as the



same had not been filed after review by the competent committee of Commissioners. They submitted that fine and penalty be reduced. The applicant also furnished a written submission against the revision application filed by the applicant-department which contained an exhaustive list of case laws and citations relied upon by them to buttress their case.

8. Applicant has filed for condonation of delay. Government notes that the revision application has been filed on 15.09.2017. The date of receipt of the appellate order by the applicant is on 15.04.2017. Government notes that the same is within the extended period of 6 months (i.e. 3 months + 3 months) as prescribed in Section 129DD (2) of the Customs Act, 1962. Accordingly, Government condones the delay.

9. During the personal hearing, the applicant has stated that the revision application filed by the department was not maintainable as the same has not been filed after review by the 'Competent Committee of Commissioners'. In this regard, sub-section (1A) of Section 129DD is reproduced below,

**Section 129DD. Revision by Central Government.**

*"(1A). The Principal Commissioner of Customs or Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under Section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order."*

9.1. The Government notes that as per sub-section (1A) of Section 129DD, no such requirement of review by the 'Competent Committee of Commissioners' is recommended in the law for filing an application before the Revisionary Authority. In the instant case, the Government notes that the 'FORM No. CA-8' alongwith the statement of facts and grounds of revision which have been filed with the revisionary authority have all been signed by the Commissioner of Customs, CSI Airport, herself. In view of the same, Government finds that the contention raised by the applicant that the revision application filed by the department was required to be approved by



the 'Competent Committee of Commissioners' is incorrect and is mis-placed. Hence, the plea of the applicant that the revision application filed by the department was not maintainable, is rejected.

10. The Government has gone through the facts of the case. The Applicant had used a very ingenious method to smuggle the gold into the country. The two packets containing the impugned gold bars was cleverly left in the toilet by the applicant. The same was left behind for some accomplice to carry it away. It suggests that the applicant was a part of a syndicate which was involved in smuggling the gold clandestinely into the country. But for the alertness of the staff of Customs, the gold would have escaped detection. The quantum of gold indicates that the same was for commercial use. The applicant in his statement to the department has submitted that the gold does not belong to him. The Applicant did not declare the gold bars as required under section 77 of the Customs Act, 1962. The quantity of gold recovered was ingeniously concealed to avoid detection. The confiscation of the gold is therefore justified and the Applicant has rendered himself liable for penal action for his act of omission and commission.

11. Government observes that 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.), 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 Applicants thus liable for penalty.



12. 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.

13. 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.*





14. The advocates of the applicant have submitted several judgement during the personal hearing. All these judgements are old and are not directly relevant to facts of the case. Two judgement mentioned in above paras have dealt in detail on the nature of gold, whether it is to be treated as prohibited goods and under what circumstances discretion is to be exercised under Section 125 of the Customs Act, 1962. Thus judgements submitted does not help the cause of the applicant.

15. Government observes that the applicant had used a very ingenious method to smuggle the impugned gold i.e. the gold was concealed in two packets, cleverly placed in a tissue box which was left in the toilet in the airport. The method used indicates that there was an accomplice who would have carried away the gold bars. This indicates that the applicant was part of a syndicate engaged in the smuggling of gold and evading payment of duty. The method adopted reveals that the applicant had connived with an intention to evade payment of duty. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Government finds that all these have not been properly considered by the Appellate Authority while allowing the impugned gold to be redeemed. The redemption of the gold would be an incentive to smuggle gold with impunity, pay the fine and get away. Government finds that the observations made by the appellate authority that (i). the adjudicating authority had not given any findings on the claim of the applicant that he was a NRI and therefore, was eligible, (ii). the identity of the persons named by the applicant had not been established during the investigations, (iii). identity of the person who would have removed the gold from the toilet had not been established, (iv). the retraction dated 16.09.2014, (v). no findings with regard to the invoice made available on 18.09.2014 which bears the name of the applicant, etc are misplaced. These points are relevant to the extent of unearthing the syndicate and investigations, past similar attempts by the syndicate. The Government finds that for the instant issue, all these contentions are an afterthought on the part of the applicant to inveigle the investigations and the same have rightly not been considered by the original adjudicating authority. The



seizure of the impugned gold had taken place on 28.08.2014. The retraction is dated 16.09.2014. The retraction filed after nearly 20 days is just mechanical in nature and was not done at the first opportunity. The Order-in-Original clearly mentions that the applicant had not made himself available during the investigations, attempts were made through the departmental counterparts at Kasargod, which revealed that the address was not existent. Investigations had revealed that the applicant had made five visits since January, 2014 prior to the seizure date i.e. 28.08.2014. A message was found in the mobile of the applicant which revealed that he had been directed to leave the said packets in the toilet. The quantum of gold seized was large and was commercial in nature. Government notes that all these have been considered by the original adjudicating authority and due weightage has been given to the factual position while passing the order.

16. Though the option to allow redemption of the 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 the gold bars totally weighing 3348 grams, it 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 serious and grave and novel and bold modus operandi, the original adjudicating authority had rightly ordered the absolute confiscation of the impugned gold. But for the intuition and the diligence of the Customs Officers, 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 such concealment as, 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 is therefore liable to be set aside and the Order-In-Original dated 22.04.2016 passed by the Original Adjudicating Authority is liable to be restored.

17. Government notes that the penalty of Rs. 9,00,000/- imposed under Section 112 (a) and (b) of the Customs Act, 1962 by the original adjudicating authority is commensurate with the omissions and commissions committed and Government is not inclined to interfere in the same.

18. In view of the above, the Government sets aside the order passed by the appellate authority and restores the order passed by the Original Adjudicating Authority.

19. Accordingly, the Government rejects the revision application filed by the applicant and allows the revision application filed by the applicant-department by way of restoring the order passed by the Original Adjudicating Authority.

*Shrawan*  
15/12/21  
(SHRAWAN KUMAR)

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

ORDER No. 317-318 /2021-CUS (WZ) /ASRA/ DATED 12.12.2021

To,

1. Shri. Mohammad Saleem Ahamed, S/o. Ahmed Abdullah, R/o. Choor, R.D Nagar P.O, Kasargod Distt., Kerala - 671 215.
2. Pr. Commissioner of Customs (Airport), [Review Cell], Avas Corporate Point, Andheri-Kurla Road, Marol, Andheri (East), Mumbai - 400 059.

Copy to:

1. Advani Sachwani & Heera Advocates, Nulwala Building, 41, Mint Road, Opp. GPO, Fort, Mumbai - 400 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.

