



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

F.No. 371/319/B/2019-RA / 7204

Date of Issue 08/12/2022

ORDER NO. 356 /2022-CUS (WZ) /ASRA/MUMBAI DATED 07.12.2022 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 : Mohammed Fawaz Kabadsha.

Respondent : The Commissioner of Customs (Appeals), Mumbai-III

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-267/19-20 dated 28.06.2019 [F.No. S/49-445/2018] passed by the Commissioner of Customs (Appeals), Mumbai – III.

ORDER

This revision application has been filed by Shri Mohammed Fawaz Kabadsha (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-267/19-20 dated 28.06.2019 [F.No. S/49-445/2018] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 04.01.2017, acting on specific information, Officers of DRI, Mumbai Zonal Unit intercepted the applicant passenger Mr. Mohammed Fawaz Kabadsha holding Indian Passport No. Z-3923467, who had earlier arrived at CSI Airport, Mumbai from Dubai by flight no. 9W-537 dated 04.01.2017. The passenger was intercepted near the exit gate after he had cleared himself through green channel of Customs. During detailed examination of the baggage being carried by the passenger 42 gold bars of 10 tolas each were recovered. The said gold bars totally weighing 4872 grams and valued at Rs.1,31,00,000/- were seized under the provisions of section 110 of the Customs Act, 1962, under the reasonable belief that the same had been smuggled to India in a clandestine manner and in contravention of the provisions of the Customs Act, 1962. In the statement recorded on 05.01.2017 under Section 108 of the Customs Act, 1962, the applicant admitted:

i) that the seized gold does not belong to him and had carried the same as per the instruction of one Shri Samam of Dubai and that he was supposed to handover the gold to one person unknown to him at the washroom of CSI Airport, Mumbai.

ii) that as per the instruction of Shri Samam, he had earlier smuggled totally 5 Kg Gold (2.5 kgs on each trip) on earlier two occasions by way of concealing the same inside the cover of his seat in the aircraft. He informed Shri Samam the seat numbers after arriving which was passed by Shri Samam to his representatives who collected the gold from the aircraft.

iii) that he received Rs. 25,000/-per trip from Samam at Bangalore through Hawal alongwith the cost of air tickets.

iv) that the partner of Shri Samam in India was Shri Hasnain Raza Gaima located at Bangalore.

3. The case was adjudicated after completion of investigation and issuance of SCN on 30.06.2017. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSI Airport, Mumbai vide his OIO No. ADC/AK/ADJN/137/2018-19 dated 29.06.2018, absolutely confiscated the impugned 42 gold bars of 10 tolas each collectively weighing 4872 gms and valued at Rs 1,31,00,000/- under Section 111(d), (1), (m) of the Customs Act, 1962. Penalty of Rs. 16,00,000/- was imposed on Mr. Mohammed Fawaz Kabadsha under Section 112(a) & (b) of customs Act, 1962 and a Penalty of Rs. 5,00,000/- was imposed on Mr. Mohammed Fawaz Kabadsha under Section 112(a) & (b) of customs Act, 1962 for admitted past smuggling of gold.

4. Aggrieved by this Order, the Applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeal), Mumbai – III, who vide his Order-in-Appeal No. MUM-CUSTOM-PAX-APP-267/19-20 dated 28.06.2019 [F.No. S/49-445/2018] rejected the applicant's appeal and upheld the Order in Original issued by the Original Adjudicating Authority.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

5.1. that the Order of the respondent is against law, weight of evidence and circumstances and probabilities of the case. The gold is not prohibited item and according to the liberalized policy the gold can be released on payment of redemption fine and baggage duty.

5.2. that bare perusals of section 125 (1) of the Customs act 1962 makes it crystal clear that the respondent is required to give the notices an option to pay fine in lieu of confiscation in respect of the impugned goods. He placed reliance on the following judgments in support of his case.

- a) Union of India Vs Dhanak M.RAMji-2009 (24) ELT 127 (BOM) Affirmed vide 2010 (252) ELT A 102 (SC):

- b) The Hon'ble Tribunal in the case of T. Elavarasan Vs commissioner of customs (Air) reported in 2011 (266) ELT 167 (Mad);
- c) The Hon'ble Tribunal in the case of Yakub Ibrahim Yusuf Vs Commissioner of customs.
- d) Mumbai reported in 2011 (263) ELT 685 (Tri MUMBAI): Sapna Sanjeev Kohl Vs commissioner of customs, Airport, Mumbai 2008 (230) ELT 305
- e) The Hon'ble Tribunal in the case of Mohini Bhatia Vs Commissioner of customs reported in 1999 (106) ELT 485 (Tri BOMBAY):
- f) Dhanak M. M. Ramji Vs Commissioner of Customs (airport) Mumbai 2009 (237) ELT (280)(Tri Mumbai)

5.3. that the applicant had not passed through the green channel. He was all along red channel at the arrival hail of Airport. But the authority failed to see all the relevant points at the time of drafting show cause notice. The applicant further submitted that the call data records only indicate the calls made and received but would not indicate that they smuggled the gold and hence the appellate authority had not applied its mind and the contention of the appellate authority is based on nonexistence material and also amounting to extraneous consideration.

5.4 that retracted statements of the notices cannot be substantive evidence in the absence of any corroboration from the statements from the independent evidence/material, there is no such material. It has to be accepted that the statements attributable to the noticee were in fact retracted and therefore it is incumbent on this authority to seek for corroboration by independent material to rely on the statements in the first instance. In this connection, the applicant relied on the following judgments: Vinod Kumar Salanki 2007 (233) ELT 157, Tajudeen 2015 (317) ELT 177, 1992 SC 2781 KTMS MOHAMED, and Sainulabdeen 2014 (314) ELT 342.

5.5. The applicant further submitted that he has not brought it for any monetary consideration but the authority order stated that the passenger received the gold from Saman person is not based on any evidence. The averments of the authority that received the gold from one Mr. Saman person of is based on nonexistence

materials and the same is amounting to extraneous consideration and to be hand over to person identified him is also based on nonexistence materials.

5.6. that there is no distinction between owner and carried under the Customs Act 1962. Section 125 of the Customs Act stipulates that when even confiscation of any good is authorized by this act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or where such owner is not known, the person from whose possession or custody been such goods have seized. But the customs authority always claims that person carrying goods is not entitled to claim the gold under the said act. The officers of customs are made up their mind that the gold should not be released and the act of the department is totally against the provisions of the customs act and contrary to the section 125 of the said act.

5.7. that as per section 77 of the customs Act 1962, the owner of any baggage shall, for the purpose of clearing it, make declaration of its contents to the proper officer. Since the passenger is being the owner of the baggage, in that circumstances the passenger is only liable for make declaration under the said act not any other person. The applicant further submitted that the authority one way stated that the passenger has not declared the contents of the baggage as per section 77 of the said act, other it is stated that he is not the owner of the goods. If authority had taken the stand that the passenger had not declared, then he cannot take the stand that he is not the owner of the baggage or goods.

5.8. The applicant further submitted that it is an admitted fact the goods have been recovered from the applicant and hence he is entitled to get back the gold on payment of baggage rate of duty. Further if the authority promptly read section 125 of the customs act 1962, the department cannot argue that the appellant is not the owner of the gold or carrier. The contention of the department the owner or carrier is unsustainable under law, when the law permits to release the gold on payment of redemption fine and baggage rate of duty from whose possession the gold have been recovered, the authority cannot interpret that the gold cannot be released on the ground that the appellant is not the owner of the gold is

contrary to law and abuse of process of law and mockery of justice. Thus it is clearly established that the authority bound by law and should exercise his power, otherwise the order become illegal.

They relied on the following case laws: a) 2014 (309) E.L.T. 259 (Tri. Mumbai) In The Cugat, South Zonal Bench, Mumbai In Case Of Peringatil Hamza Versus Commissioner Of Customs, Mumbai and b) 2001 (137) E.L.T. 127 (Tri. - Chennai) In The Cugat, South Zonal Bench, Chennai in case of Shaik Shahabuddin Vs Commissioner Of Customs, Chennai.

5.9. The appellant further submitted the seized gold belongs to him and he has purchased through his earnings and he has not brought it for third party and the same is belonging to his family for personal use and the same is not trade or commercial.

5.10. That the goods must be prohibited before export or import, simply because of non-declaration of the goods cannot become prohibited after import. Therefore the authority has come to the conclusion that the gold is prohibited because of non declaration is nothing but clear non application of mind.

5.11. There is no provision for absolute confiscation of goods. The option should be given under section 125 of the Customs act. Further there are several judgments by Revisional authority and Cestat and hon'ble supreme court and High court said the authority should exercise the power under section 125 of the act because the same is mandatory.

5.12. The appellant further submits that the Apex court in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC) and the several other cases has pronounced that a quasi judicial authority must exercise discretionary powers in a judicious manner and not in arbitrary manner. As per the provisions of section 125 of the customs act, 1962 in case of goods which are prohibited the option of redemption is left to the discretionary power of the authority who is functioning as a quasi judicial authority and in cases of others goods option to allow redemption is mandatory. Considering the facts and the circumstances and various precedent orders passed by the CESTAT/Government of India (order No. 135/2003 (GOI) CESTAT 2451/99). The seized gold ornaments should be release

on the payment of nominal redemption fine. Further there are no provisions for absolute confiscation of the goods. He relied on the following judgements:

a) The hon'ble High court Andhra Pradesh judgment reported in 1997 (91) ELT 277 (AP) Sheik Jamal Basha Vs Government of India;

b) The Revisional authority has passed order reported in 2011 (270) ELT 447 (GOT) MUKUADAM RAFIQUE AHMED order no. 198/2010-CUS dated 20.05.2010;

c) The hon'ble Supreme Court judgment dated 30.09.2011 in OM Praksah's case Vs Union of India.

5.13. The applicant further submitted that the confiscation of the goods valued about Rs. 1,31,00,000 imposed the personal penalty of Rs. 16, 00,000.00 (personal penalty 15%) is very high and unreasonable and hence the same to be reduced substantially and reasonably. The appellant further submits that the adjudication authority has imposed penalty of Rs. 5, 00,000 under section 112 (a) and (b) of the customs act for having brought the previous occasions is totally abuse of process of law. No goods or proof are available that the applicant had brought the gold on previous occasions and there is no evidence except the retracted confessional statement and there is no independent evidence or corroborative evidence to substantiate the contention of the department and mere entries in the passport of appellant does not establish that he had brought the gold in earlier occasions and hence the imposition of the penalty is untenable and the same is liable to be set aside. Under the above circumstances of the case the applicant has prayed to set aside the impugned order and to permit him to re-export or release the gold and also reduces the personal penalty sum of Rs 16,00,000/- and Rs.5,00,000/- under section 112 (a) and (b) of the Customs act 1962 and thus renders justice.

6. Personal hearing in the matter was scheduled for 22.09.2022 and 28-09-2022. The Advocate of the applicant expressed their inability to attend the hearing and requested to pass the order with available records and show leniency while passing the order.

7. The Government has gone through the facts of the case. The applicant was intercepted after he had cleared himself through Customs by opting green channel. The detailed examination of his baggage resulted in recovery of 42 pieces of Gold bars of 10 tolas each bearing foreign markings total weighing 4872 gms and valued at Rs.1,31,00,000/-. The applicant had not declared the same on arrival, as required under Section 77 of the Customs Act, 1962. The same was detected only after the detailed examination of the DRI officers. The quantity of gold recovered is quite large, of commercial quantity and it was consciously concealed to avoid detection. 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 Applicants 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 large, of commercial quantity and it was cleverly and consciously concealed which reveals the intention of the Applicant. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The Applicant had a short stay abroad and was ineligible for import of gold. The circumstances of the case especially that it is of commercial quantity and cleverly concealed, 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 Original Adjudicating Authority while absolutely confiscating the 42 pieces of foreign marked gold bars.

12. The main issue in the case is the quantum and 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, quantity being large and commercial, this being a clear attempt to smuggle the foreign marked gold bars, 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 specific intelligence and the diligence of the DRI Officers, the gold would have passed undetected. 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. Government is in agreement with the order of the Appellate Authority upholding the Original Adjudicating Authority's Order. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity.

13. With regards to the applicant's contention that he is the owner of the gold, Government finds that the applicant could not produce any licit or valid document regarding his legal possession of the Gold of foreign origin. He neither had any sufficient currency to pay the applicable duty of the impugned gold nor has he produced any evidence of sound financial condition for procuring such a large quantity of gold. Government finds that this statement was just an afterthought. With regard to the request by the applicant for re-export of the seized gold Government finds that since the goods are absolutely confiscated, there is no question of re-export.

14. The Government finds that the penalty of Rs. 16,00,000/- lakhs imposed under section 112 (a) and (b) is appropriate and commensurate with the omission and commission committed by the Applicant and find no reason to interfere with the same. Personal penalty of Rs. 5,00,000/- imposed on the basis of the statement given by the applicant stating that he had brought 5 Kgs of foreign marked gold bars on the earlier 2 occasions, is also sustained.

15. In view of the above, the Government upholds the order passed by the appellate authority.
16. The Revision Application is dismissed on above terms.

*Shrawan*  
*7/12/22*

( SHRAWAN KUMAR )  
Principal Commissioner & ex-officio  
Additional Secretary to Government of India

ORDER No. 356 /2022-CUS (WZ) /ASRA/ DATED 07.12.2022

To,

1. Shri. Mohammed Fawaz Kabadsha, House no. 417, Opp Madrasa Tanveerul Islam, Mavalli 1, Murudeshwar, Uttara Kannada District, Karnataka-581350.
2. Pr. Commissioner of Customs, CSI Airport, Terminal - 2, Level-2, Andheri East, Mumbai : 400 099.

Copy to:

1. Kamlamalar Palani Kumar (Advocate), 10, Sunkuram Street, Second Floor, Chennai-600001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File,
4. File Copy.
5. Notice Board.