



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/13/B/2019-RA / 2423

Date of Issue 12/12/2022

ORDER NO. 359/2022-CUS(WZ)/ASRA/MUMBAI DATED 08.12.2022
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 : John Mohamed.

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-856/2018-19 dated 19.12.2018
[F.No. S/49-218/2016/AP] passed by the Commissioner of
Customs (Appeals), Mumbai - III.

ORDER

This revision application has been filed by Shri John Mohamed (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-856/2018-19 dated 19.12.2018 [F.No. S/49-218/2016/AP] passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 12.07.2014, acting on specific information, officers of the Air Intelligence Unit (AIU), Mumbai intercepted the applicant passenger Shri John Mohamed holding Indian Passport No. Z-2798932, who had earlier arrived at CSI Airport, Mumbai from Singapore by flight no. SQ 424/11.07.2014. The passenger was intercepted after he had cleared himself through green channel of Customs. During detailed examination of the applicant and his baggage, two yellow metal discs, two yellow metal round blocks, one yellow metal block and four yellow metal cut pieces which were cleverly concealed in 'Hot Plate of Toyomi brand' and 'AV receiver', totally weighing 2458 grams valued at Rs.63,22,664/-, were recovered. The said gold bars totally weighing 2458 grams and valued at Rs.63,22,664/- 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 under Section 108 of the Customs Act, 1962, the applicant admitted:

- i) that one Mr. Saddam from Singapore had given him the Toyami brand Double hot plate and Pioneer Brand receiver to be handed over to some person in Chennai and
- ii) that Mr. Saddam had informed him that there was 500gms gold in it, that the seized gold does not belong to him and that he was offered Rs. 50,000/- for this job. He did not declare the gold to avoid payment of Customs Duty.

3. The case was adjudicated after completion of investigation and issuance of SCN. 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/ML/ADJN/255/2015-16 dated 18.01.2016, absolutely confiscated (i) the impugned gold weighing 2458 grams valued at Rs.63,22,664/- under

Section 111(d), (1), (m) of the Customs Act, 1962 and (ii) Hot plate of 'Toyomi' brand and AV receiver of 'Pioneer' brand used for concealing the gold under Section 119 of the Customs Act, 1962 and (iii) Penalty of Rs.6,00,000/- was imposed on the applicant under Section 112(a) & (b) of customs Act, 1962.

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-856/2018-19 dated 19.12.2018 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 the applicant had not passed through the green channel. He was all along red channel at the arrival hall of Airport. But the authority failed to see all the relevant points at the time of drafting show cause notice.

5.3. 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 Saddam person is not based on any evidence. The averments of the authority that received the gold from one Mr. Saddam 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.

5.4 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 had 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.

5.5. 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.

5.6. 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 excise 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 Cegat, 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 Cegat, South Zonal Bench, Chennai in case of Shaik Shahabuddin Vs Commissioner Of Customs, Chennai.

5.7. 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

5.8. 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.

5.9. That as per condition of the Central government liberalized policy. if any passenger being an Indian origin or Indian passport holder stayed abroad more than required period and is an eligible to bring 10 Kg of gold under concessional rate duty. In the context of Policy gold falls under restricted list and is not a prohibited item and hence absolute confiscation of gold is unwarranted Therefore the Government may ordered to redeem the gold under section 125 ibid on payment of customs duty.

5.10. 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 excise the power under section 125 of the act because the same is mandatory.

5.11. 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 excise 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.

The hon'ble High court Andhra pradesh judgment reported in 1997 (91) ELT 277 (AP) Sheik Jamal Basha Vs Government of India held that under section 125 of the of the act is mandatory duty to give option to the person found guilty to pay in lieu of confiscation, (Gold was concealed).

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 in FNO. 375/14/8/2010-RA-CUS permitted the appellant to reshipment the goods on payment of lesser redemption fine even if not declared are required under section 77 of the customs act 1962.

The appellant further submits that the Hon'ble Supreme Court (full bench) has delivered a judgment on 30.09.2011 in OM Prakash's case Vs union of India wherein it is categorically stated that the main object of the enactment of the said act was the recovery of excise duties and not really to punish for infringement of its provisions. Further held that the offences are compoundable under section 137 of the said act and summary proceedings under section 138 of customs Act

5.12. The applicant further submitted that the confiscation of the goods valued about Rs. 63,22,664/- imposed the personal penalty of Rs. 6,00,000.00 (personal penalty 10%) is very high and unreasonable and hence the same to be reduced substantially and reasonably

5.13. 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 6, 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 by the AIU officers after he had cleared himself through Customs by opting green channel. The detailed examination of his baggage resulted in recovery of two yellow metal discs, two yellow metal round blocks, one yellow metal block and four yellow metal cut pieces which were cleverly concealed in 'Hot Plate of Toyomi brand' and 'AV receiver', weighing 2458 grams valued at Rs.63,22,664/-. 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 by the AIU 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. The two yellow metal discs, two yellow metal round blocks, one yellow metal block and four yellow metal cut pieces were cleverly concealed in 'Hot Plate of Toyomi brand' and 'AV receiver'. This type of concealment also

revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. 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 impugned gold.

12. Government observes that the applicant has submitted that as per condition of the Central government liberalized policy, if any passenger being an Indian origin or Indian passport holder stayed abroad more than required period, is eligible to bring 10 Kg of gold under concessional rate duty. Government finds that Notification No. 26/2012-Cus dated has reduced the eligible quantity of import of gold and silver as passenger baggage to 1 kg of gold and 10Kg of silver.

The applicant has also submitted that since gold is not a prohibited item, absolute confiscation of gold is unwarranted and Government may order to redeem the gold under section 125 ibid on payment of customs duty. 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 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 AIU 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. They 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. Therefore, the order passed by the appellate authority is upheld.

14. The Government finds that the penalty of Rs. 6,00,000/- 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.

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

ORDER No. 359/2022-CUS (WZ) /ASRA/

DATED 08.12.2022

To,

1. Shri. John Mohamed, No. 38, Typhoon Ali Khan Street, Chepauk, Chennai-600005, Tamil Nadu.
2. Pr. Commissioner of Customs, CSI Airport, Terminal – 2, 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.