

REGISTERED  
SPEED POST



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

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F.No. 371/432/B/WZ/2019-RA २६५२ Date of Issue 16/12/2022

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ORDER NO. 389/2022-CUS (WZ) /ASRA/MUMBAI DATED 14.12.2022  
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.

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Applicant : Shri. Mohammad Murad Motiwala

Respondent : Pr. Commissioner of Customs (Airport), CSMIA, Mumbai.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTM-PAX-APP-581/19-20 dated 10.10.2019 issued  
on 11.10.2019 through F.No. S/49-98/2019 passed by the  
Commissioner of Customs (Appeals), Mumbai - III.

**ORDER**

This revision application has been filed by Shri. Mohammad Murad Motiwala (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-581/19-20 dated 10.10.2019 issued on 11.10.2019 through F.No. S/49-98/2019 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that on 18.04.2018, the Officers of Customs had intercepted the Applicant near the exit gate of CSMI Airport, Mumbai where he had arrived from Dubai by Air India Express Flight No. IX 248 /17.04.2018. The Applicant had been intercepted after he had cleared himself through the green channel of Customs. A personal search of the applicant was carried out which resulted in the recovery of 270 grams of gold dust which had been ingeniously concealed by pasting it with glue in between two T-shirts worn by him.

2(b). The applicant revealed that during the past three months, he had visited Dubai three times; that the gold dust belonged to him and that he had purchased the same and was aware that not declaring the gold to the Customs was an offence.

2(c). Subsequently, the gold dust was assayed at the India Government Mint, Mumbai where it was certified that the gold dust had purity of 995.0, weighed 282.329 grams and valued at Rs. 8,03,757/-.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Asstt. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. AC/SR/ADJN/05/2018-19 dated 21.12.2018 (DOI : 07.01.2019) through F.No. SD/INT/AIU/181/2018 AP'D' ordered for the absolute confiscation of the gold dust, totally weighing 282.329 grams, valued at Rs. 8,03,757/- under Section 111 (d), (l) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 50,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority i.e. Commissioner of Customs (Appeals), Mumbai – III who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-581/19-20 dated 10.10.2019 issued on 11.10.2019 through F.No. S/49-98/2019 upheld in toto, the OIO passed by the OAA.

5. Aggrieved by this Order, the applicant has filed this revision application and craved to refer and rely upon orders passed in similar cases where concealment was established and option of redemption had been granted.

Applicant has prayed that the absolute confiscation be set aside and goods be released on duty, fine and penalty or to grant any such reliefs as deemed fit.

6. Personal hearing in the case was scheduled through the online video conferencing mode for 10.08.2022 and 24.08.2022. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing on 24.08.2022 and submitted that goods were brought for personal use, applicant is not a habitual offender. He requested for release of goods on nominal RF and penalty.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while availing the green channel facility. The impugned gold in the form of dust had been pasted with glue in between two T-shirts worn by the applicant. The concealment had been resorted to by the applicant with an express intention of hoodwinking the Customs and evading payment of Customs duty. The quantity of gold is small, of high purity and was in a unique form, i.e. dust. The applicant clearly had failed to declare the goods to the Customs at the first instance, as required under Section 77 of the Customs Act, 1962. The gold in the form of dust had been kept hidden between two T-shirts in an innovative manner. Had he not been intercepted; the applicant would have gotten away with the gold. Therefore, the confiscation of the gold was 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 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 the gold under import is small and is not of commercial quantity. The gold dust had been kept hidden in between two T-shirts worn by the applicant. There are no allegations that the applicant is a habitual offender and was involved in similar offence earlier. The quantity of gold and 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. 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. The absolute confiscation of the gold, leading to dispossession of the applicant of the gold in the instant case is therefore, harsh and not reasonable. Government for the aforesaid reasons, is inclined to set aside the absolute confiscation held in

the OIA and grant option to release the impugned gold on payment of a redemption fine.

13. Government notes that the penalty of Rs. 50,000/- imposed on the applicant under Section 112(a) and (b) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

14. Accordingly, the Government sets aside the impugned order of the appellate authority. The impugned gold in the form of dust, totally weighing 282.329 grams and valued at Rs. 8,03,757/- is allowed redemption on payment of fine of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand only). The Government finds that the penalty of Rs. 50,000/- (Rupees One lakh only) imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed.

15. Revision Application is decided on the above terms.

  
( SHRAWAN KUMAR )

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

ORDER No. 389/2022-CUS (WZ) /ASRA/MUMBAI DATED 17.12.2022

To,

1. Shri. Mohammad Murad Motiwala, House No. 12, Jawabit Lane, Opp. Lily Talkies, Barkhedhi, Bhopal, Madhya Pradesh - 462 001.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Terminal -2, Level-II, Sahar, Andheri (East), Mumbai - 400 099.

Copy to:

1. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051.
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.