

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. 371/19/B/15-RA/1233

Date of Issue 13.02.2021

ORDER NO. 39/2021-CUS (WZ)/ASRA/MUMBAI DATED .10.02.2021 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.

Applicant : Shri Mohammed Ahmed

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

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal MUM-CUSTM-PAX-APP-526-527/14-15 dated 12.11.2014 passed by the Commissioner of Customs (Appeals), Mumbai-III.



ORDER

This revision application has been filed by Shri Mohammed Ahmed (herein referred to as Applicant) against the order MUM-CUSTOM-PAX-APP-526-527/14-15 dated 12.11.2014 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated facts of the case are that the Officers of Customs intercepted Shri Mohammed Ahmed at the CSI Airport, Mumbai on 28.12.2013 after he had cleared himself at the green channel. As he was passing through the Metal detector frame, it registered a loud beep and he was subjected to questioning. Examination of his person resulted in recovery of 05 gold biscuits totally weighing 580 grams valued at Rs. 14,51,983/- (Rupees Fourteen lacs Fifty one thousand Nine hundred and Eighty three). The gold was recovered from his rectum.

3. After due process of the law vide Order-In-Original No. ADC/ML/ADJN/06/2014-15 dated 16.04.2014 the Original Adjudicating Authority ordered absolute confiscation of the gold under Section 111 (d) (l) and (m) of the Customs Act, 1962 and imposed penalty of Rs. 2,00,000/- (Rupees Two lacs) under Section 112 (a) and (b) of the Customs Act,1962.

4. Aggrieved by this order the applicant filed an appeal with the Commissioner of Customs (Appeals), Commissioner (Appeals) vide his order MUM-CUSTOM-PAX-APP-526-527/14-15 dated 12.11.2014 rejected the appeal of the Applicant.

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

5.1 In the panchnama dated 28-12-13 there is no mention that the officer, who effected the seizure had reasonable belief to consider the goods as smuggled goods and hence liable for confiscation under the provisions of Customs Act. The reason given by the Officer to seize the gold bars was that the passenger had cleared himself through the green channel and had not declared anything. Therefore the reason given for the seizure was not properly justified.



5.2 ~~Section 123 of Customs Act, 1962 provides inter alia that "where~~ goods are seized under the Act on the reasonable belief that they were smuggled goods, the burden of proving that they were not smuggled goods shall be on the person from whose possession the goods were seized." If a Customs Officer effects the seizure of any goods without entertaining a reasonable belief that the said goods are smuggled goods, then it is an unreasonable restraint on the citizen's rights to hold property.

5.3 The contention of the petitioner is that Section 2(33) is not applicable to that facts of the present case as the goods are not prohibited goods. It is only a restricted item.

5.4 The learned Additional Commissioner observed that the modus operandi adopted by the petitioner shows criminal intent on his part. The petitioner does not dispute that he had carried the gold bars seized by the Officers concealed in his rectum He did so for the purpose of safe carrying. It is his further submission, that given the social and economic circumstances, carrying gold openly combines the risk of losing the same and will also endanger the life of the person carrying the same.

5.5 Whenever confiscation is authorized by this Act, The officer adjudicating it may, in the case of any goods, the importation or exportation whereof is prohibited, give an option under Section 125 of the Customs Act, 1962 to pay fine in lieu of have confiscation. Therefore the Adjudicating authority ought to have released the gold to the petitioner, on his paying the proper customs duty, fine and penalty, as per the provisions of the Customs Act, 1962.

5.6 It is respectfully submitted by the petitioner that he is entitled to an opportunity for redeeming the gold bars. This opportunity was denied to him by the Commissioner of Customs (Appeal) who confirmed the order of absolute confiscation of the gold bars. There is no provision in the Customs Act which made it mandatory to order absolute confiscation of the gold bars in the circumstances of the case.

5.7 It has been consistently held by Hon'ble Courts, Tribunals and Revisionary Authority of the Government of India that if the import of commodities is not completely banned, then in such commodities of articles could be released on payment of redemption fine.



~~5.8 The Applicant finally submitted that it was a single incident of an~~
 alleged act of smuggling goods, which can never be justifiable grounds for absolute confiscation and cannot be termed as an organized crime or manifesting of an organized smuggling activity. The Applicant is not a habitual offender. Claiming ownership of the gold the Applicant prayed for release of the gold on payment of appropriate fine and penalty.

6. A personal hearing in the case was scheduled in the case on 5.09.2019, 01.10.2019 and 05.11.2019. However neither the Applicant nor the department attended the said hearing. Due to change in the Revisionary authority personal hearing was again scheduled on 05.02.2021. Shri Prakash Shringrani and Shri G. Babu both advocates attended the said hearing and requested release of the goods. In their written submission they submitted that,

6.1 When a panchnama and SCN are defective, no adjudication can be drawn under the Act on the basis of such panchnama and notice and the entire exercise on the basis of such defective notice is illegal.

6.2 Gold is not a prohibited item. It is only a restricted item. There is no restriction on the petitioner to import gold on payment of normal tariff rate of duty.

6.3 Section 125 empowers the authority to give an option to the owner or the person from whom goods were seized to pay fine in lieu of such confiscation for return of the goods. Since, the petitioner is the importer of the gold bars, the Adjudicating and Appellate authority ought to have released the gold to the petitioner, on his paying the proper customs duty, fine and penalty, as per the provisions of the Customs Act, 1962.

6.4 There is no provision in the Customs Act which made it mandatory to order absolute confiscation of the gold bars in the circumstances of the case.

6.5 It is submitted by the petitioner that absolute confiscation was not warranted in his case in view of the Government's liberalisation policy relating to import of gold.

7. The Government has gone through the facts of the case, the Applicant was intercepted after the Metal detector frame detected metal concealment. He had already cleared the green channel thereby indicating that he had



declare. On personal examination the officers recovered ~~05 gold biscuits~~ totally weighing 580 grams from his rectum.

8. In his revision application the Applicant has pointed to errors in the panchanama etc. to indicate that there was no "reasonable belief" that the gold under seizure was smuggled goods and hence liable for confiscation under the provisions of Customs Act, 1962. It is a matter on record that the impugned gold was recovered from the Applicants rectum. It is thus clear that the concealment was purposeful in order to avoid detection by the Customs authorities. The manner of concealment also indicates mensrea, and if he was not intercepted the Applicant would have succeeded in smuggling the gold into India. The Applicant had no intentions of declaring the gold. It is therefore clear that just because the panchanama etc does not specifically mention "reasonable belief" the confiscation of the gold could not be called unjustified.

9. The Applicant has contended that gold is not a prohibited item. In addressing this contention, Government observes, 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 Honble Apex Court in the case of Sheikh Mohd. Omer V/s Collector of Customs, Calcutta and others, reported in 1970 (2) SCC 728 has laid down that the expression 'prohibition' used in section 111 (d) must be considered as a total prohibition. The Hon'ble Court ruled that "..... any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions." 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". 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



of Customs (Air), Chennai-I V/s P. Sinnasamy, 2016 (344) E.L.T. 1154 (Mad.) referred supra has held that the adjudicating authority is within his discretion to confiscate the goods absolutely and that redemption cannot be allowed as a matter of right. Given the circumstances of the case, Government also does not find any reason to take a different view. The revision application is therefore liable to be dismissed.

12. The Revision Application is accordingly dismissed.

Shrawan
10/02/21
(SHRAWAN KUMAR)

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

ORDER No. 39/2021-CUS (WZ) /ASRA/MUM(BA) DATED 10.02.2021

To,
Shri Mohd. Ahmed, C/o Shri P. K. Shingrani- Advocate, 12/334, New MIG
Colony, Bandra (E), Mumbai - 51.

Copy to:

1. The Pr. Commissioner of Customs, CSI Airport, Sahar, Mumbai.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. Spare Copy.

ATTESTED

अधीक्षक
Superintendent
रिवीजन एप्लीकेशन
Revision Application
मुंबई इकाई, मुंबई
Mumbai Unit, Mumbai

