

**REGISTERED**  
**SPEED POST**



**F.No.380/59/B/13-RA**  
GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE  
(REVISION APPLICATION UNIT)

14, HUDCO VISHALA BLDG., B WING  
6<sup>th</sup> FLOOR, BHIKAJI CAMA PLACE,  
NEW DELHI-110 066.

Date of Issue.. 8/2/16.....

**ORDER NO. 05/2016-CUS DATED 29.01.2016** of the Government of India,  
passed by Smt. RIMJHIM PRASAD, Joint Secretary to the Government of India,  
under section 129 DD of the Customs Act, 1962.

Subject : Revision Application filed under section 129 DD of the  
Customs, against the Order-in-Appeal No. 314/2013 dated  
28.02.2013 passed by Commissioner of Customs (Airport  
& Aircargo), Chennai.

Applicant : Commissioner of Customs (Airport), Chennai.

Respondent : Smt. Dineshwari.

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## ORDER

This revision application is filed by Commissioner of Customs (Airport & Aircargo), Chennai, against the Order-in-Appeal No. 314 dated 28.02.2013 passed by Commissioner of Customs (Appeals), with respect to Order-in- Original No.O.S.344/2012-Air(AIU) dated dated 23.06.2012 passed by Deputy Commissioner of Customs, (Airport), Chennai.

2. The brief facts of the case is that Smt. Dineshwari, holder of Sri Lankan Passport No. N 0011663 dated 06/08/2003 arrived as a passenger from Colombo by Flight No. UL 123 on 23.06.2012 and brought one number of gold bangle weighing 87.5 grams valued at Rs. 2,47,275/- and attempted to clear the same without declaring it to the Customs. The said gold bangle was recovered after interception by the Custom Officers immediately after the exit point. Thus passenger contravened the provisions of Section 77 of the Customs Act, 1962 by not declaring the same to the Customs at red channel. Spot adjudication was conducted, on having passenger's request, for the waiver of Show Cause Notice. During oral personal hearing, passenger admitted the fact that she is a carrier and brought the gold bangle on behalf of someone else for some monetary gains.

2.1 In terms of Section 77 of the Customs Act, 1962, the owner of any baggage shall for the purpose of clearing it make a declaration of its contents to the proper officer. Further, any dutiable or prohibited goods which are not included or are in excess of those included in the declaration made under Section 77 of the Customs Act, 1962 or any goods which do not correspond in respect of the value or in any other particular with the declaration made under Section 77 of the Customs Act, 1962, shall be liable for confiscation under Section 111(j) and (m) of the Customs Act, 1962. Further, in terms of Para 2.20 of Chapter 2 of the Foreign Trade Policy 2009- 14, bonafide household goods and personal effects may be imported as part of passenger baggage as per limits, terms and conditions thereof specified in the Baggage Rules, 1998. Further, all dutiable articles imported by a passenger or a member of a crew in his / her baggage under heading 9803 are restricted as per the ITC-HS 2011-12 read with Rule 3(1)(b) of the Foreign Trade (Exemption for Application of Rules in certain cases) Order, 1993 and Rule 3 of the Baggage Rules, 1998.

2.2 In the instant case, the passenger was only a carrier and not the owner of the gold and she did it for a financial consideration. Moreover, she was not entitled for the benefit of concessional rate of duty under Customs Notification No. 31/2003 being Sri Lankan national. As she had attempted to smuggle the said 87.5 gram of gold bangle without declaring it to Customs, she contravened the provisions of Section 77 of the Customs Act, 1962 and accordingly the goods in question were found liable for



confiscation. The passenger was also found liable for penal action under section 112 of the Customs Act, 1962 for the offence committed by her.

2.3 Accordingly, Deputy Commissioner of Customs (Airport) passed the Order-in-Original dated 23.06.2012 and ordered:-

(i) Absolute confiscation of the aforesaid one number of gold bangle weighing 87.5 grams valued at Rs. 2,47,275/- (Rupees two lakhs forty seven thousand two hundred seventy five only) under Section 111(d), (l) and (m) of the Customs Act, 1962 read with Section (3) of the Foreign Trade (D&R) Act, 1992.

(ii) Imposition of penalty of Rs. 25,000/- (Rupees twenty five thousand only) on Smt. Dineshwari under Section 112(a) of the Customs Act, 1962.

3. Being aggrieved by the said Order-in-Original, the respondent filed appeal before Commissioner (Appeals) who vide his Order-in-Appeal No. 314 dated 28.02.13 set aside order of the adjudicating authority confiscating absolutely the gold jewellery and allowed redemption of the same under Section 125 of the Customs Act, 1962 for the purpose of re-export on payment of Redemption fine of Rs.40,000/- and also reduced the penalty to Rs. 10,000/- with the direction to original adjudicating authority that to ensure the gold jewellery was re-exported out of India after following the procedures within 30 days of the receipt of this order.

4. Being aggrieved by the impugned Order-in-Appeal, the Department has filed this revision application under Section 129 DD of Customs Act, 1962 before Central Government on the following grounds :

4.1 The order of Commissioner (Appeals) does not discuss why the concession of re-export is being given in spite of the passenger acting as a carrier for monetary consideration which is recorded in the record of personal hearing before the adjudicating authority held on 26/06/12 and adequately discusses in O-in-O passed by the adjudicating authority. This fact of the passenger being a carrier has been ignored and not taken into consideration resulting in granting an unintended benefit to the smuggler passenger.

4.2 The adjudication authority at Chennai airport in its Order-in-Original No 343/2012 dated 30/06/2011, 32/10 dated 03/05/2012, 33/10 dated. 3/5/2011 and in several other orders has ordered absolute confiscation in carrier cases. The said orders were upheld by Commissioner (Appeals) in Order-in-Appeals No 480/11 dated 29/7/2011, 479/2011 dated 29/07/2011 and 481/11 dated 29/7/2011. Finally, the absolute confiscation was also upheld by Government in these cases vide GOI order No 352-354/12 dated 28/8/2012. Similarly, Government in its Revision order No 401-



406/12-CUS dated 11.10.2012 and 407-409/12-Cus dated 12.10.2012 pertaining to Chennai cases has upheld the absolute confiscation of goods brought by carrier passenger.

4.3 Absolute confiscation in such cases is upheld in the judgments of Hon'ble Tribunal order No 1980- 1995/09 dated 24/12/09, in the case of G.V Ramesh and others Vs CC Air Chennai 2010 (252) EL T 0212(T-Mad).

4.4 Hon'ble High Court of Bombay in the case of UOI Vs Mohamed Aijaj Ahmed WP No 1901/2003 decided on 23/07/2009 reported in 2009(244) ELT 49 (Bom) has set aside the order of CESTAT allowing redemption of gold and upheld the order passed by Commissioner of Customs ordering absolute confiscation of gold. In this case the gold did not belong to the passenger Mr. Mohamed Aijaj who acted as carrier of gold. The said order of Bombay High Court was upheld by Hon'ble Supreme Court in its decision reported in 2010(253) ELT E83(SC). In view of the above, it is prayed that the Order-in-Appeal be set aside, absolute confiscation and penalty be upheld or such an order be passed as deemed fit.

5. A show Cause Notice was issued to the respondent under Section 129 DD of Customs Act, 1962 and on 21.03.2014 and 01.08.2015 filed their counter reply as under:-

5.1. That the respondent is a Srilankan National and on 23.06.2012 she along with five ladies came to India in order to attend a marriage at Pondicherry and landed at Chennai International Airport.

5.2. That the respondent was wearing the gold bangle. That the bangle brought by the respondent is not prohibited and is her personal effects.

5.3 That as per Appendix E of rule 7 of the Baggage Rules, she is allowed to bring gold, if these goods are for personal use.

5.4. That the appellate authority had seen that the respondent was admittedly wearing the gold bangle and which can be cleared free of duty on the condition of re-export as per Rule 7 of Appendix 'E' of the Baggage Rules.

5.5. That the appellate authority had also found that the mere non declaration is contravention of Section 77 of the Customs Act. And that he also found out the gold jewellery was not concealed in any ingenious manner and the gold jewellery was wearing in her hand by the respondent. That she requested to release the gold bangle on redemption fine under Section 125 of the Customs Act and allowed her to take back the goods while going back to Srilanka.



5.6. That there was no offence registered in the name of respondent previously the personal penalty was reduced by the appellate authority and there is no ambiguity in the said order of the Commissioner (Appeals).

5.7. That the Hon'ble Tribunal order in the case of Uma Balasaraswathi Vs Collector of Customs reported in 1988 (37)ELT 106 is squarely applicable to the present case in as much as the order of absolute confiscation by stating that the non-declaration which entails confiscation under Section 111(1) should be conscious and intentional non-declaration and would not take within its ambit more unintentional omission such as not declaring the ornaments worn on the person which are not at all concealed but are visible to the naked eye. That in this case the respondent was wearing the gold bangle in her hand. That it is not denied by the applicant. That there is no declaration required but the original authority had imposed redemption fine and penalty but the Commissioner (Appeals) had applied his mind and passed the order legally and properly.

5.8. That Section 125 of the Customs Act, 1962 is very much clear that the goods confiscated can be allowed to be redeemed by the owner or the owner is not known the person from whose possession or custody such goods have been seized. That the legislature has clearly stated to give option to redeem the goods either to owner or the person whom the goods seized in lieu of confiscation. That nowhere in that Act says the goods should be absolutely confiscated if the goods brought by other than the owner. That no statement under Section 108 of the Customs Act, was recorded to prove their version. That the respondent was wearing one gold bangle only and that too was seized in spite of warning the same and was visible to naked eye.

5.9. That to confiscate the goods absolutely an officer of customs can forcibly obtain a statement from passenger implicating any name as owner. That the department did not give any Show Cause Notice nor do they find the receiver. That this clearly shown it is all fictitious.

5.10. The respondent also places reliance on the following case laws:-

- Yakub Ibrahim-Yusuf Vs Commissioner of Customs (Mum) 2011(263) ELT 685
- Revision Application No. 373/22/B/2009-RA.Cus

6. Personal hearing was scheduled in this case on 04.08.2015, 02.09.2015 and 15.09.2015. The representative of the respondent Shri Ganesh, Advocate appeared for hearing on 04.08.2015, reiterated the cross objection filed to the Revision Application. The respondent vide her fax letter dated 02.09.2015 sought exemption



from appearing personally and requested that her counter reply submitted earlier in response to the Show Cause Notice dated 09.09.2013, may be treated as their written and oral submission in the instant case. Nobody from the department appeared for personal hearing on any of the scheduled dates mentioned above.

7. Government has carefully gone through the relevant case records and perused Order-in-Original and Order-in-Appeal.
8. Upon perusal of records, Government observes that the respondent was wearing the impugned gold bangle in her hand while walking through the green channel, did not declare it to the Customs as required under Section 77 of the Customs Act, 1962 and was intercepted by the Customs officer immediately at exit point. Spot adjudication was conducted on having respondent's request for waiver of Show Cause Notice. During the course of the hearing before the adjudicating authority the passenger admitted the fact that she had brought the impugned goods on behalf of somebody else for some monetary consideration. As the respondent attempted to smuggle 87.5 grams of gold without declaring it to Customs, in contravention of Section 77 of the Customs Act, 1962. The impugned Order-in-Original ordered the absolute confiscation of the goods; imposed penalty of Rs. 25000/- under Section 112(a) of the Act, *ibid*. Being aggrieved by the order, the respondent filed appeal before Commissioner(Appeals), who allowed re-export on payment of redemption fine of Rs.40,000/- and reduced the penalty to Rs. 10,000/- Aggrieved by the impugned Order-in-Appeal, the Department has filed the Revision Application on grounds in the para 4.
9. Government observes that the main contention of the Department is that the fact that respondent is a carrier has been ignored by the Commissioner (Appeals) who has allowed the unintended benefit of re-export to a carrier. It is therefore, pleaded that absolute confiscation ordered and penalty imposed by original authority be upheld.
10. Government further observes that before the Commissioner(Appeals) the respondent claimed she is not a carrier and gold is not a prohibited item and requested for re-export as she is a Sri Lankan passport holder. The Commissioner (Appeals) accepted the request for redemption under Section 125 *ibid* and re-export under Section 80 *ibid* holding that the respondent had attempted to smuggle the gold bangle in contravention of Section 77 but it was not concealed in any ingenious manner and is a Sri Lankan passport holder with no offence registered previously. In the counter to the Revision Application filed by the Department it is once again claimed that the bangle was personal effects covered under "Appendix E" of Rule 7 of Baggage Rules and can be cleared free of duty on the condition of re-export.



11. Government notes that in the impugned Order-in-Original the record of personal hearing reads as under :

*" The Passenger Smt Dineshwary appeared for the personal hearing before me on 26/06/2012. During the course of the hearing, the passenger stated that the gold bangle weighing 87.5 grams was handed over to her at Colombo by one Shri Satish who runs a goldsmith shop at Colombo; that the said gold bangle is to be handed over to one Shri Thangaraj outside Chennai Airport; that she had done this for a consideration as told by Shri Satish that the Air Ticket for travel would be arranged by him; that she had done this without applying her mind and prayed for lenient view."*

11.1 There is nothing on record to show that the said submission has been made under any pressure or duress. In fact it is undeniably a voluntary statement/submission made by the respondent during the course of personal hearing granted in the interest of natural justice, clearly admitting that the gold bangle weighing 87.5 grams was handed over to her by one Shri Satish, running a goldsmith shop to be handed over to Shri Thangaraj outside Chennai Airport. There was also a clear admission that the travel including air ticket would be arranged by Shri Satish. Any contrary claim regarding ownership of the impugned goods made before Commissioner (Appeals) and in the counter reply to the Revision Application is clearly an afterthought.

11.2 Government opines that any oral submission made before the adjudicating authority will be a material piece of evidence. In view of the specific admission made by the respondent before the adjudicating authority, Government is inclined to hold that the respondent is a carrier of the impugned goods.

12. In the present case as the passenger is not the owner of the goods and neither Shri Satish who handed the gold over to the passenger nor Shri Thangaraj to whom the gold was meant to be handed over have claimed the impugned goods. Therefore, the gold cannot be allowed to be handed over to the respondent for re-export who is only a carrier. In this regard Government places reliance on the following decisions of the higher Courts the ratio of which is squarely applicable to the instant case.

12.1 Government notes that the absolute confiscation in such cases is upheld in the judgements of Hon'ble High Court of Madras in the case of CC Air, Chennai Vs. Samynathan Murugesan 2009 (247) ELT 21 (Mad.) The said order was upheld by Hon'ble Supreme Court in the order dated 11.02.2010 reported as 2010 (254) ELT A 015 (S.L) dismissing the petition for special leave to Appeal (civil) No. 22072 of 2009 filed by Samyanathan Murugesan. Supreme Court passed the following order:-



*"Applying the ratio of the judgment in the case of OM Prakash Bhatia Vs. Commissioner of Customs, Delhi reported in 2003 (155) ELT 423 (S.C) 2003(6) Section 161 to the facts of the case/ we find that; in the present case/ the assessee did not fulfill the basic eligibility criteria, which makes the imported item a prohibited goods; hence/we see no reason to interfere with the impugned order. The special leave petition is accordingly dismissed."*

12.2 Hon'ble High Court of Madras in their judgment dated 02-03-2012 in WP No. 21086/2002 in the case of Aiyakannu Vs. JC Customs reported on 2012-110L-806-HC-MAD-Cus has also held as under:-

*"Petitioner being a foreign (Sri Lankan) national is not entitled to import gold in terms of clause 3 of Foreign Trade (Exemption from application of Rules in certain cases) order 1993/as it will apply to the passenger of Indian origin - attempt to smuggle 10 gold bars with Foreign markings wrapped in carbon paper by concealing in baggage justifies the order of absolute confiscation."*

12.3 Government also notes that Hon'ble High Court of Bombay in its judgment dated 23.07.2009 in the case of UOI Vs. Mohammed Aijaj Ahmed (WP No. 1901/2003) reported as 2009 (244) ELT 49 (Bom.) has set aside the order of CESTAT ordering to allow redemption of gold and upheld the absolute confiscation of gold ordered by Commissioner of Customs. In this case the gold did not belong to passenger Mr. Mohammad Aijaj Ahamed who acted as carrier of gold. The said order of Bombay High Court was upheld by Hon'ble Supreme Court in its decision reports as 2010 (253) ELT E83 (SC). Further the Hon'ble High Court of Chennai in the case of S. Faisal Khan vs. Joint Commissioner of Customs (Airport) Chennai 2010 (259) ELT 541 (Mad) upheld absolute confiscation of goods carried on behalf of someone else for a monetary consideration. In the case of Ram Kumar vs. Commissioner of Customs 2015 (320) ELT 368 (Del) also the Hon'ble High Court of Delhi has held that carrier is not entitled to benefit of Section 125 of Customs Act, 1962. Government, therefore, holds that in the present case the gold imported by the passenger as a carrier are liable for absolute confiscation as rightly pleaded by the Department.

13. Notwithstanding the above, Government further notes that the provision to re-export of baggage is available under Section 80 *ibid*. However this Section is applicable only to cases of bonafide baggage declared to Customs, which the respondent failed to do and is not eligible for re-export of impugned goods. In similar circumstances, Central Government has denied re-export of goods in the case of Hemal K. Shah 2012(275) ELT 266(GOI). Further the Apex Court in the case of CC Kolkata Vs. Grand Prime Ltd. 2003(155) ELT 417(SC) has supported the view that goods which are liable for confiscation cannot be allowed to be re-exported. Hence, Government is of the view that the order of the Commissioner (Appeals) allowing re-export of impugned goods is not legal and proper and cannot be allowed.



14. Government also finds no merit in the plea of the respondent that the gold was not required to be declared and can be cleared free of duty on the condition of re-export. Government notes that in terms of Section 77 anything imported by a passenger is required to be declared to Customs and is chargeable to duty above the specified limits. Further gold and gold jewellery can be imported only by eligible passengers subject to fulfillment of conditions thereof. Government finds that the passenger was a Sri Lankan passport holder not eligible to import the impugned goods and the same was also not declared to the Customs. But for being apprehended by Customs, the passenger could have been successful in smuggling the impugned goods into the country on behalf of another. Penalty has rightly been imposed upon the respondent under Section 112 *ibid*. However, considering the circumstances of the case, Government finds no reason to interfere with the order of the Commissioner (Appeals) to the extent that penalty has been reduced to Rs. 10,000/- only.

15. In view of the above circumstances, the re-export of the impugned goods allowed in this case by the Commissioner (Appeals) is therefore set-aside and the impugned Order-in-Original ordering absolute confiscation is restored. The impugned Order-in-Appeal is modified to this extent.


16. Revision Application thus succeeds in above terms.

17. So, ordered.

  
( RIMJHIM PRASAD )

Joint Secretary to the Government of India

Commissioner of Customs ( Airport & Aircargo),  
New Customs House, Aircargo complex,  
Meenambakkam  
Chennai-600027.

  
Attested

Attested  
Signature  
( )  
( )



**ORDER NO. 05/2016-CUS DATED 29.01.2016**

Copy to:

1. Smt. Dineshwari, No.17, Veerama Munivar Street, Pondicherry- 605001.
2. The Commissioner of Custom (Appeals), Customs House, Chennai 600001.
3. The Additional Commissioner of Customs, Airport, Custom House, Chennai- 600 001
4. Shri A. Ganesh, Advocate, F Block, 179 Anna Nagar, Chennai-600102.
5. PA to JS (RA)
6. Guard File

Attested



(Shaukat Ali)  
Under Secretary(RA)

शुकात अली  
अंडर सेक्रेटरी (आरए)  
कस्टम हाउस, चेन्नई