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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. 380/12/B/2017-RA(MUM) / 9868 Date of Issue : 31.07.23

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ORDER NO. 537 /2023-CUS (WZ)/ASRA/MUMBAI DATED 27.07.2023  
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 : Commissioner of Customs, Marmagoa, Goa.

Respondent : Shri. Oomer Abdul Razak Khan.

Subject : Subject : Revision Application filed, under Section  
129DD of the Customs Act, 1962 against the Order-in-  
Appeal No. GOA-CUSTOM-000-APP-332-2016-17 dated  
31.01.2017 issued on 15.02.2017 through F.No. A-  
23/CUS/GOA/2016-17 passed by the Commissioner of  
Customs (Appeals), Pune Appeal-II-(GOA).

**ORDER**

This revision application has been filed by Commissioner of Customs, Customs House, Marmagoa, Goa - 403803 (herein after referred to as the Applicant) against the Order-In-Appeal No. GOA-CUSTOM-000-APP-332-2016-17 dated 31.01.2017 issued on 15.02.2017 through F.No. A-23/CUS/GOA/2016-17 passed by the Commissioner of Customs (Appeals), Pune Appeal-II-(GOA).

2(a). Brief facts of the case are that the respondent on arrival at Dabolim International Airport, Goa on 27.06.2015 from Sharjah by Air Arabia Flight No. G9-492 Dubai-Mumbai-Goa, was intercepted at the exit gate by the Customs Officers after he had walked through the green channel. The respondent had filed a Customs declaration form showing the value of the goods in his possession as nil. A thorough examination of the checked-in baggage, hand baggage and personal search of the respondent was carried out. A black coloured soldering machine bearing model Quick 700 Rework System Sr. No. 7001504F0090 made in China, which was unusually heavy was found. The soldering machine was opened and the winding wires of the coil was found to be made of gold. Thus, gold wires, totally weighing 2997 grams and valued at Rs. 74,48,069/- concealed inside the soldering machine was recovered.

2(b). The respondent in his statement recorded under Section 108 of the Customs Act, 1962 admitted that the gold did not belong to him and he had agreed to carry the same for a monetary consideration.

3. After due process of the law, the Original Adjudicating Authority, viz Additional Commissioner of Customs, Customs House, Marmagoa vide Order-In-Original No. 20/2016-ADC(CUS) dated 12.05.2016 through F.No.

11/17/2015-R&I(APT)(AIU) ordered for the absolute confiscation of the 2997 grams of gold, valued at Rs. 74,48,069/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 10,00,000/ was also imposed on the respondent under section of 112 (a) of Customs Act, 1962.

4. Aggrieved by the said order, the respondent filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Pune Appeal-II-(GOA) who vide Order-In-Appeal No. GOA-CUSTOM-000-APP-332-2016-17 dated 31.01.2017 issued on 15.02.2017 through F.No. A-23/CUS/GOA/2016-17 allowed to redeem the gold on payment of a redemption fine of 15% of the seizure value of the gold alongwith applicable duty. Further, the Soldering Iron was also allowed to be redeemed on payment of Rs. 1000/-. The quantum of penalty imposed on the respondent by the OAA was upheld by the AA.

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

- 5.01. the AA had not considered the ratio of the judgement dated 23.08.2016 passed by the Hon'ble High Court of Madras in the case of Commissioner of Customs (Air), Chennai - 1 v/s. Shri. P. Sinnasamy in C.M.A No. 1631 of 2008.
- 5.02. the AA had not abided by the maxim 'ut res magis valiat quam pereat' i.e. lest the intention of the legislature may go in vain or be left to evaporate into thin air.
- 5.03. that the literal interpretation of the words 'prohibited goods', and the contention that gold was not notified and therefore can be released, would cut down the wide ambit of the inbuilt prohibitions and restrictions in the Customs Act, 1962 and any other law for the time being in force.
- 5.04. that the different provisions in the statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express.
- 5.05. the expression in Section 2(33) of the Customs Act, 1962, 'prohibition under this Act', or any other law for the time being, has to be examined with other provisions in the Customs Act,

- 1962; that Section 2(39) of the Customs Act, 1962 defines 'smuggling', in relation to any goods, which means, any act or omission which will render such goods liable to confiscation under Section 111 or Section 113 of the Customs Act, 1962; that Chapter IV of the Customs Act, 1962 dealt with prohibition of importation and exportation of goods; Section 11 deals with the power to prohibit importation or exportation of goods,
- 5.06. one of the important aspects to be taken note by the authorities while exercising the powers under Section 125 of the Act was whether, import of goods was prohibited, within the meaning of Section 2(33) of the Customs Act, 1962 and where, in any other law for the time being in force, such prohibition was mentioned?
  - 5.07. that reliance is placed on the case law of Samyanathan Murugesan vs. Commissioner of Customs [2010-254-ELT-A15(SC)] passed by the Apex Court.
  - 5.08. that from the various case laws cited, it was manifestly clear that the adjudicating authorities / Courts have to consider two aspects viz, (i). eligibility of the passengers to import the goods and (ii). whether such passengers had fulfilled the conditions of import or export, any restriction on import or export, which is also treated as prohibition.
  - 5.09. that there may not be total prohibition for import of goods, but if import is not done lawfully, in other words against any prohibition or restriction, which are inbuilt in the Customs Act, 1962 or any other law for the time being in force, then such goods should fall with the definition of Section 2(33) of the Act.
  - 5.10. reliance is also placed on the judgement of the Apex Court in the case of Om Prakash Bhatia vs. Commissioner of Customs, Delhi [2003(155) ELT 423(SC)].
  - 5.11. that the exercising of the discretion under Section 125 of the Customs Act, 1962 by discarding the rules, procedure, the purpose of which it is conferred and object sought to be achieved is not legally tenable. Order passed while exercising the discretion under Section 125 of the Customs Act, 1962 is not legally tenable.
  - 5.12. Reliance is placed on Public Notice No. 214/(PN)/92-97 dated 01.06.1994 as amended from time to time, in which gold could be imported only against a Special Import Licence by agencies authorized by RBI.
  - 5.13. Non-cognizance of the ratio of the judgement of Hon'ble Supreme Court relied upon by the OAA in the OIO.
  - 5.14. in their exhaustive written submission appended to their revision application, the applicant has relied upon a host of case law, a few of those are as below;

- (a). P. Sinnasamy vs. Commissioner of Customs (Air), Chennai – I passed by Hon'ble High Court of Madras alongwith the cases of the Apex Court / High Courts referred therein.
- (b). Poppatlal Shah vs. State of Madras – AIR 1953 SC 274,
- (c). State of Bihar vs. Hira Lal Kejriwa. – AIR 1960 SC 47,
- (d). Om Prakash Bhatia vs. Commr. Of Customs, Delhi – 2003(155) ELT 423 (SC),
- (e). Commr. Of Customs (Air), Chennai – I vs. Samynathan Murugesan – 2009 (247) ELT 21 (Mad) confirmed by Apex Court reported in 2010 (254) ELT A-15 (SC),
- (f). Abdul Razak vs. UOI – 2012 (275) ELT 300 (Ker)(DB),
- (g). Commr. Of Customs (Chennai) vs. Brinda Enterprises – 2010 (262) ELT 239 (Mad),
- (h). Commr. Of Customs (Prev), Mumbai vs. M. Ambalal & Co. – 2010(260) ELT 487 (SC),
- (i). Aero Traders Pvt. Ltd vs. Ravinder Kumar Suri AIR 2005 SC 15 on the issue of use of discretion
- (j). Indian Railway Construction Co. Ltd vs. Ajay Kumar 2003 (4) SCC 579 of Apex Court on the issue of use of discretion.
- (k). etc.

Applicant has prayed to set aside the order passed by the appellate authority and to pass any order as deemed fit.

6. Personal hearings in the case including option of online hearing was scheduled for 11.11.2022, 24.11.2022, 13.12.2022 and 10.01.2023, Sufficient opportunities have been given to the applicant / respondent. None turned up on behalf of the Applicant / Respondent for the personal hearing. Therefore, the case is being taken up for a decision, ex-parte, on the basis of evidence available on the records.

7. The Government has gone through the facts of the case and notes that the Respondent had not declared the gold and had passed through the green channel. Also, in the Customs Declaration Form, the respondent had not declared the gold. An ingenious attempt had been made to smuggle large quantity of gold into the country. First the gold had been converted into wires. Thereafter, it was made inot coils and placed inside the Soldering machine and

was wrapped with paper to conceal the gold. The Respondent had clearly failed to make a truthful declaration of the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The nature of concealment reveals the mindset of the respondent to not only evade duty but smuggle the gold. It also reveals that the act committed by the respondent was conscious and pre-meditated. The respondent was given an opportunity to declare the dutiable goods in his possession but having confidence in the nature of concealment, he had not availed the same. Had he not been intercepted, the respondent would have gotten away with the gold concealed in the Soldering machine. The Government finds that the confiscation of the gold is therefore, 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<sup>ble</sup> 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 'respondent' 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<sup>ble</sup> 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 besides the quantum of gold which indicates that the same was for commercial use, the manner in which it was attempted to be brought into the country is vital. The impugned gold was cleverly, consciously and ingeniously concealed which reveals the intention of the respondent. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The quantity of the gold indicated that the same was for commercial use. The respondent alongwith those involved in the case had ingeniously converted the gold into wire which was then used to form coils and placed inside the soldering machine. The respondent had attempted to hoodwink the Customs authorities by ingeniously placing it inside the soldering machine to avoid detection and thereby, evade Customs duty.

12. The main issue in the case is the 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, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, 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 the impugned gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. 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 OAA absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Considering the aforesaid facts, Government finds that the appellate authority had erred in ordering for the release of the gold. Therefore, the Government finds that the order passed by the appellate authority releasing the impugned gold deserves to be set aside and the Government for the aforesaid reasons, is inclined to restore the original order passed by the OAA.

13. Government finds that the penalty of Rs. 10,00,000/- imposed on the respondent by the OAA under Section 112(a) of the Customs Act, 1962 is commensurate with the omissions and commissions committed and is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government sets aside the order passed by the appellate authority and restores the Order-in-Original passed by the OAA as legal and proper. The Revision Application filed by the applicant, succeeds.

15. Accordingly, the Revision Application filed by the applicant is allowed in the above terms.

*Shrawan*  
27/7/23  
( SHRAWAN KUMAR )

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

**ORDER No. 537/2023-CUS (WZ) /ASRA/MUMBAI DATED 27.07.2023**

To,

1. COMMISSIONER OF CUSTOMS - [GOA], CUSTOMS HOUSE, MARMAGOA, GOA - 403 803.
2. Shri. Omer Abdul Razak Khan, Aisha Bldg, 2<sup>nd</sup> Floor, Room No. 3/5/7 32 - New Bangalipura Street, Dongri, Mumbai - 400 009.

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1. Sr. P.S. to AS (RA), Mumbai.
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