

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. 371/117/B/WZ/2022-RA / 530 Date of Issue : 24.01.2024

ORDER NO. 62/2024-CUS (WZ)/ASRA/MUMBAI DATED 19.01.2024
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.

F.No. 371/117/B/WZ/2022-RA

Applicant : Shri. Mohammed Rashik Puchala,
S/o. Shri. Sultan Bawa.

Respondent : Pr. Commissioner of Customs, CSMI Airport, Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No. MUM-
CUSTM-PAX-APP-1024/2021-22 dated 15.11.2021
issued on 17.11.2021 through F.No. S/49-1131/2020
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Shri. Mohammed Rashik Puchala, S/o. Shri. Sultan Bawa (hereinafter referred to as the Applicant) against the Order-In-Appeal No MUM-CUSTM-PAX-APP-1024/2021-22 dated 15.11.2021 issued on 17.11.2021 through F.No. S/49-1131/2020 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2(a). Brief facts of the case are that the applicant on arrival at CSMI Airport on 10.04.2019 from Jeddah by Air India Flight No. AI-932/09.04.2019 was intercepted by the Customs Officers near the exit gate after he had cleared the green channel of Customs. To the question put forth to him by the Customs Officers whether he was in possession of any dutiable goods, contraband or gold, the applicant had replied in the negative. A personal search of the applicant led to the recovery of 3 F.M gold bars of 1 kg each which had keep kept concealed in specially stitched pockets of the denim blue Wrangler jeans worn by him. A Government Approved Valuer certified that the 3 gold bars of 1 kg each were of 999% purity (24KT), totally weighing 3000 grams and valued at Rs. 86,88,198/-

2(b). In his statement recorded under Section 108 of the Customs Act, 1962, the applicant had admitted to possession, carriage, concealment, non-declaration and recovery of the 3 gold bars, weighing 3000 grams. He further stated that he was not the owner of the gold bars and had carried the same for monetary consideration.

2(c). During the course of the investigations, 3 nos of summons were issued to the applicant who did not respond to the same. Analysis of his phone number had been carried out and persons who were in constant touch with

him were summoned. However, they had not responded to the summons. Applicant had submitted a letter dated 06.09.2019 wherein he had retracted his statement. The same had been rebutted by the investigating agency on 12.09.2019.

3. After due process of the law, the Original Adjudicating Authority (OAA), viz Additional Commissioner Of Customs, CSMI Airport, Mumbai, vide Order-In-Original No. ADC/SKR/ADJN/103/2020-21 dated 11.09.2020 issued on 15.09.2020 through S/14-5-240/2019-20/Adjn (SD/INT/AIU/166/2019-AP'D' ordered for the absolute confiscation of the 03 nos of F.M gold bars of 1 kg each, of 999.0 (24KT) purity, totally weighing 3000 grams and valued at Rs. 86,88,195/- under Section 111(d), 111(1) and 111 (m) of the Customs Act, 1962 and a penalty of Rs. 8,70,000/- was also imposed on the applicant under Section of 112 (a)(i) of the Customs Act, 1962.

4. Aggrieved by the said order, the applicant filed an appeal before the appellate authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide her Order-In-Appeal No. MUM-CUSTM-PAX-APP-1024/2021-22 dated 15.11.2021 issued on 17.11.2021 through F.No. S/49-1131/2020 did not find any reason to interfere in the impugned OIO and upheld the same in toto.

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

5.01. that the retracted panchnama and statements of applicant should not have been relied upon; that applicant had retracted their statements at the earliest opportunity; that the Investigating Agency there should be some corroborative evidence from an independent source outside the confession which would have probable that the confession was true. that the applicant has relied upon an exhaustive list of case laws on the subject;

- (a). Rafikul Alam & Others vs. The State of West Bengal 2008;
 - (b). Padala Veera Reddy vs. State of Andhra Pradesh and Others 1989 Supp. 2 SCC 706
 - (c). Apex Court in Navaneethakrishnan Versus The State by Inspector of Police.
 - (d). Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras [(1999) 6 SCC 1];
 - (e). Apex Court in the matter of Mohtesham Mohd. Ismail [2007 (220) ELT 3 (S.C.)];
 - (f). Apex Court in The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. – JT 2000 (8) SC 530;
 - (g). Apex court in Vinod Solanki Vs. U.I.O. 2009 (233) ELT 157 (S.C.);
 - (h). Hon'ble High Court of Delhi in the matter of DRI vs. Mahendera Kumar Singhal 2016 (333) ELT (250) (Del);
 - (i). Hon'ble Gujarat High Court in Commissioner of C.Ex, Ahmedabad-III vs Deora Wires N Machines Pvt Ltd 2016 (332) ELT 393 (Guj);
 - (j). Hon'ble High court of Delhi again in the matter of CCE, Delhi-I Vs. Vishnu & Co Pvt. Ltd., 2016 (332) ELT 793 (Del.) and Rakesh Kumar Garg Vs. CCE, 2016 (331) ELT 321 (Del.)
 - (l). Apex Court in Ravindran and Peter John v. The Superintendent of Customs – 2007-TIOL-89-SC-CUS:
 - (m). Hon'ble Bombay High Court in V. Ananthraman v. Union of India – 2003 (151) E.L.T. 278 (Bom.) and
 - (n). Hon'ble Calcutta High Court in Nicco Corporation Ltd. v. Commissioner of Service Tax – 2014 (307) E.L.T. 228 (Cal.) = 2014 (35) S.T.R. 727 (Cal.).
 - (o). etc;
- 5.02. that the order of absolute confiscation was not sustainable; that gold was not a prohibited item and was only a restricted item; that prohibition was in relation to goods which cannot be imported by any one, such as arms, ammunition, drugs etc; that this would not apply to a case where import/export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with; that in such a situation, the release of such goods confiscated would not cause any danger or detriment to public health; The above view was also supported by the decision of Honble High Court of Calcutta in the case of Commisisoner of Customs (Preventive), West Bengal Vs. India Sales International reported in 2009 (241) ELT 182 (Cal.); that gold was now removed from the negative list and can be imported in terms of notification No.171/94-Cus dated 30.9.94; that

Tribunals have been consistently taking the view that even in extreme circumstances of attempting to smuggle foreign branded gold biscuits the authorities are required to release the gold biscuit on payment of redemption fine as held in V.P.HAMEED Vs CC, BOMBAY reported in 1994 (73) ELT 425(T); Judgement of KAMLESH KUMAR Vs CC reported in 1993 (67) ELT 1000 (G.O.I.);in the case of HARGOVID DAS K.JOSHI& OTHERS Vs CC 7 OTHERS reported in AIR 1987 SC 1982; In the case of SHAIK JAMAL BASHA Vs GOI & OTHERS; Etc.

- 5.03. that the undermentioned decisions relied upon by AA cannot be made applicable to the case of the applicant;
- (a). Uttam Chand Sawal Chand Jain vs UoI (2013) 42 GST 11 (Bom HC DB)
 - (b). Ranwolf Charles Luka vs UoI (1996) 83 ELT 274 (BOM HC DB)
 - (c). Rafal Fawl, a Syrian National in 1992 (59) ELT 338
 - (d). Hsui Ringg Chang vs CC 1992 (62) ELT 225 (CEGAT)
 - (e). Abdul Razak vs Union of India
 - (f). Commissioner of Customs vs P.Sinnasamy;
- 5.04. that while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind; that they have cited the undermentioned case laws;
- (a). CCE, Calcutta Vs Alnoori Tobacco Products [2004 (170) ELT 135 (SC)];
 - (b). Escorts Ltd. Vs CCE, Delhi [2004 (173) ELT 113 (SC)];
 - (c). CC (Port), Chennai Vs Toyota Kirloskar [2007 (213) ELT 4 (SC)];
 - (d). Sri Kumar Agency vs CCE, Bangalore 2008 (232) E.L.T. 577 (S.C.),
 - (e). etc.
- 5.05. that for concluding that the imported gold was prohibited goods and for ordering absolute confiscation of the gold, AA had relied upon the judgment in the case of Om Prakash Bhatia, which has been over ruled by a Larger Bench of Supreme Court:
- 5.06. that there cannot be presumptions of illegal activity of smuggling just because applicant was a frequent traveler,
- 5.07. that the applicant was was not a carrier; that his friend had only helped him in purchasing the gold on credit, however, this had been twisted while recording his statement; that in his statement he had claimed that he was the owner and has given the source of his finance; that he has been working abroad from a long time.
- 5.08. that Circular no. 495/5/92-Cus VI dated 10.05.93 issued by Board cannot prevail over the statue. Circulars are issued only to clarify the statutory provision and it cannot alter or prevail over the statutory provision; that

Board's Circular no. 495/5/92-Cus.VI dated 10.05.1993 specified that in r/o gold seized for non-declaration, no option to redeem the same on redemption fine under Section 125 of the Customs Act, 1962, should be given, except in very trivial cases where the adjudicating authority was satisfied that there was no concealment of the gold in question. ;that there was no concealment of gold;Reliance is placed on an exhaustive list of case laws.

- 5.09. that the OIO dated 15.11.2021 was not an order on merits and not a speaking order; that the OIO was not an order on merits and not a speaking order and it should be set aside;
Reliance has been placed on the following decisions
- (a). Case of CESTAT, New Delhi in M/s Sahara India TV Network Vs CCE, Noida;
 - (b). Apex Court in the case of Joint Commissioner of Income Tax, Surat vs. Saheli Leasing & Industries Ltd., reported in 2010 (253) ELT 705 (S.C.)
 - (c). CESTAT, New Delhi M/s. Vikas Enterprises vs CCE, Allahabad.
 - (d). M/S Sharp Carbon India Vs Commissioner of Central Excise, Kanpur
 - (e). Gujarat High Court -Union of India vs Sri Kumar Agencies reported on 1 December, 2010
 - (f). Apex Court of India in the case of M/s. International Woolen Mills Ltd Vs. M/s. Standard Wool (UK) Ltd.,
 - (g). Apex Court in the case of Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan{Citation:- 2011 (273) ELT 345 (SC)}
 - (h). Apex Court in M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others, AIR 1970 SC 1302;
 - (i). Apex Court in M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another, AIR 1973 SC 2758,
 - (j). etc.
- 5.10. that the penalty of Rs 8,70,000/- imposed on the applicant was disproportionate to the value of gold imported by him; that imposition of heavy penalty was not sustainable: that they have referred to an exhaustive list of case laws on the subject.
- 5.11. that the applicant claimed the ownership of the goods under absolute confiscation and prayed for the redemption of the 3 gold bars:

Under the circumstance, the applicant has prayed to the revisionary authority that the 3 gold bars under absolute confiscation may be ordered to be released to him on payment of reasonable fine, penalty and applicable duty and further

proceedings against him may be dropped. Also, applicant has prayed for the reduction in the penalty imposed on him by the lower authorities.

6. Applicant has filed an application for condonation of delay and has attributed the same to the extraordinary situation at that time due to Covid pandemic.

7. Personal hearings in the case was scheduled for 05.10.2023, 12.10.2023. Shri. Prakash Shingrani, Advocate appeared for personal hearing on 05.10.2023 and submitted that applicant brought some gold. He further submitted that gold is not prohibited item under Customs Act. He also submitted that there was no ingenious concealment and applicant is not a habitual offender. He requested to allow redemption of gold on reasonable fine and penalty.

8. On the issue of condonation of delay, Government notes that the revision application has been filed on 28.02.2022. The OIA was issued on 17.11.2021. Government notes that during this period, the restrictions due to Covid pandemic had been imposed in the country. Due to the prevalent Covid conditions, Government observes that the Apex Court had granted a moratorium for filing appeals etc from 15.03.2020 to 28.02.2022 [Misc. Appln. No. 21/2022]. The applicant has filed the Revision Application on 28.02.2022. Considering the said moratorium period granted by the Apex Court, it is seen that the applicant had filed the revision application within time.

9. The Government has gone through the facts of the case and notes that the applicant was carrying a very large quantity of gold which had been innovatively concealed in specially stitched pockets of the denim blue Wrangler jeans, worn by him. Even after interception, when the applicant was asked about the

possession of any gold or dutiable items, he had stoically denied that he was carrying any gold. The applicant had not declared the huge quantity of gold in his possession to the Customs. The applicant had not made a true declaration to the Customs and the applicant had clearly failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. The applicant had cleverly and innovatively concealed the gold inside specially stitched pockets of the denim blue Wrangler jeans worn by him which reveals his mindset to smuggle the goods and evade the duty. It reveals that the act committed by the applicant was conscious and pre-meditated. The applicant did not intend to declare the gold in his possession to Customs. The quantity of gold is large and the gold was in primary form, indicating that the same was for commercial use. Had he not been intercepted, the applicant would have gotten away with such a large quantity of gold. The Government finds that the confiscation of the gold is therefore justified.

10. 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”.

11. 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.

12. 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.

13. Government observes that the quantum of gold was large, of high purity, in primary form, of commercial quantity and it was cleverly, consciously, innovatively and premeditatedly concealed. Applicant was acting for monetary benefit and gold was being smuggled for commercial purpose. It revealed his clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially that it is of large commercial quantity and in primary form and was cleverly concealed, clearly brings out that the applicant had no intention of declaring the gold to the Customs at the airport. All these facts have been properly considered by the Original Adjudicating Authority while absolutely confiscating the 03 nos of F.M gold bars of 1 kg each, of 999.0 (24KT) purity, totally weighing 3000 grams and valued at Rs. 86,88,195/-.

14. Government finds that the retraction of statement is clearly an afterthought. Government notes that subsequent summons were sent to the applicant but he did not respond. The statement was recorded on 10.04.2019 while the retraction was sent on 06.09.2019, nearly 5 months later. Also, the exhaustive case laws cited by the applicant were submitted by him before the OAA and AA who had considered the same and rejected the plea. Government finds the same as repetition. These judgements have either been given in different set of facts or the ratios of the same have been selectively and obliquely applied to. As a result, correct position of law has not been appreciated by the

applicant in the given set of facts of instant application. These judgements are not of much help to applicant.

15. 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 innovative with conscious and firm intent to hoodwink the Customs and evade payment of duty, quantity being large and commercial, this being a clear attempt to smuggle gold bars in primary form, 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 the offence, the adjudicating authority had rightly ordered the absolute confiscation of the gold. But for the intuition and the diligence of the Customs Officer, the large quantity of 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 blatant 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. The absolute confiscation of the gold would act as a deterrent against such attempts and would deter persons who indulge in such acts with impunity. Therefore, Government finds that the OIO passed by the OAA is proper and legal and the same has been rightly upheld by the AA. In this case, judicious application of discretion in light of directions of Hon'ble Supreme Court as contained in decision at para 12, above is evident.

16. The Government finds that the penalty of Rs. 8,70,000/- imposed under Section 112 (a) and (b) of the Customs Act, 1962 by the original adjudicating authority is commensurate with the omissions and commissions committed by the applicant and does not find it necessary to interfere in the same.

17. In view of the above, the Government finds that the OIA passed by the AA who has upheld the OIO passed by the OAA is legal and proper and Government does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails.

18. Revision Application filed by the applicant is rejected / dismissed.

(SHRAWAN KUMAR)

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

ORDER No. 2/2024-CUS (WZ) /ASRA/MUMBAI **DATED** 19.01.2024

To,

1. Shri. Mohammed Rashik Puchala S/o. Shri. Sultan Bawa, Near Darul Falah, Puchala, Mood Parera, Bajpe, Mangaluru (Dakshina Kannada), Karnataka - 574 166.
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level - II, Terminal - 2, Sahar, Andheri West, Mumbai - 400 099.

Copy To,

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