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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

F.No. 371/150/B/WZ/2022-RA

1525

Date of Issue

24.01.2024

ORDER NO. 63/2024-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.

Applicant : Shri. Rasheed Mulakumthottathil Aboobacker

Respondent : Pr. Commissioner of Customs, Chhatrapati Shivaji  
Maharaj International Airport, Sahar, Andheri (East),  
Mumbai – 400 099.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.  
MUM-CUSTM-PAX-APP-1563/2021-22 dated 27.01.2022  
issued on 28.01.2022 through F.No. S/49-1074/2020  
passed by the Commissioner of Customs (Appeals),  
Mumbai - III.

**ORDER**

This revision application has been filed by Shri. Rasheed Mulakumthottathil Aboobacker (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTM-PAX-APP-1563/2021-22 dated 27.01.2022 issued on 28.01.2022 through F.No. S/49-1074/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2(a). Brief facts of the case are that on 21.10.2018, the Officers of Customs had intercepted the Applicant at CSMI Airport, Mumbai where he had arrived from Dammam by Jet Airways Flight No. 9W0563 / 20.10.2018. The Applicant had been intercepted after he had cleared himself through the green channel without declaring anything dutiable at the red channel of Customs. Detailed examination of his checked in baggage resulted in recovery of a one rechargeable speaker having brand name 'ISONIC' Model no. iS452. On screening the said speaker, a suspicious image was noticed. On dismantling / opening the said rechargeable speaker, one cylindrical shaped piece of yell metal purported to be gold was recovered which had been cleverly concealed in place of the magnet inside the said rechargeable speaker. The same were got assayed through a Government Approved Valuer who certified that the recovered cylindrical piece of metal of yellow colour was gold having 24 KT i.e. 999% purity, totally weighing 806 grams and valued at Rs. 23,53,512/-.

2(b). The applicant in his statement admitted the possession, carriage, non-declaration and recovery of the one cylindrical piece of gold weighing 806 grams which had been kept concealed inside the rechargeable speaker having brand name 'ISONIC' Model no. iS452; that the same had been given to him in Dammam by one Shri. Salli Ahemed; that as per his instructions, he was required to hand over the speaker at Kozhikode to a person who would contact him when he reached there; that he claimed that the gold did not belong to him and he had agreed to carry the same for a monetary consideration of Rs.

25,000/-; that he was aware that import of gold without declaring the same and non-payment of duty was an offence punishable under the Customs Act, 1962; that he admitted to possession, knowledge, carriage, non-declaration, concealment and recovery of gold from him.

3. After due process of investigations and the law, the Original Adjudicating Authority i.e. the Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/34/2020-21 dated 13.07.2020 issued on 15.07.2020 through S/14-5-27/2019-20 (SD/INT/AIU/462/2018 AP'A), ordered for the absolute confiscation of the one cylindrical shaped melted gold piece of 24KT purity, weighing 806 grams of gold, valued at Rs. 23,53,512/- under under Section 111 (d), (1) and (m) of the Customs Act, 1962, which had been kept concealed in the rechargeable speaker having brand name 'ISONIC' Model No. iS452. Further, a penalty of Rs. 2,50,000/- was imposed on the applicant under Section 112 (a)(i) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the appellate authority (AA) i.e. Commissioner of Customs (Appeals), Mumbai - III who vide Order-in-Appeal No. MUM-CUSTM-PAX-APP-1563/2021-22 dated 27.01.2022 issued on 28.01.2022 through F.No. S/49-1074/2020 observed that he did not find any reason to interfere in the OIO passed by the OAA and upheld the same in to-to.

5. Aggrieved by this Order, the applicant has filed this revision application on the undermentioned grounds of revision;

- 5.01. that the copy of the panchanama had not been given to the applicant which had caused prejudice to him; that copy of his statement recorded on 21.10.2018 too had not been given to him; they have relied on a host of case law;
- (a). Shankar Banglokar vs. State of Goa, 1992-2-BINCR 169 which is a NDPS case;

(b). Mohamed Rashid Mohamedi vs. V.M Dosi, 2002-144-ELT-279-Bom,

(c). Kishanchand Sobhrajmal vs. Astt. COMmr. of I.T, 1992-41-ITD-97-JP.

5.02. 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 Commissioner 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 while holding the jewellery as prohibited goods, the OAA had relied on the case of Om Prakash Bhatia which has been over ruled by a larger bench of the Apex Court; that they have relied on 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). etc.

5.04. that the applicant was not a carrier and the allegation was based on assumption

5.05. 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.
- 5.06. that decisions of the Tribunals, High Courts and Apex Court relied upon by the applicant had been rejected by the AA;
- 5.07. that Circular no. 495/5/92-Cus VI dated 10.05.93 issued by Board cannot prevail over the statute. 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. Reliance is placed on an exhaustive list of case laws;
- 5.08. that the applicant claims ownership of the gold under absolute confiscation and prayed for redemption on payment of reasonable fine and penalty;
- 5.09. that on the issue of option to redeem the gold, they have relied upon the undermentioned case laws;
- (a). that the Andhra Pradesh High Court in the case of Shaikh Jamal Basha vs Government of India - 1992 (91) ELT 227(AP) has held that option to pay fine in lieu of confiscation has to be given

to imported gold as the same is otherwise entitled to be imported on payment of duty.

(b). In CC (Airport), Mumbai Vs Alfred Menezes 2009 (242) ELT 334 (Bom.), the Hon'ble High Court held that Section 125(1) ibid clearly mandates that it is within the power of adjudicating authority to offer redemption of goods even respect of prohibited goods.

(c). In Yakub Ibrahim Yusuf 2011 (263) EL. T. 685 (Tri. Mumbai) the Tribunal held that option of redemption has to be given to person from whose possession impugned goods are recovered, even though he had not claimed its ownership.

(d). In VP Hameed Vs Collector of Customs Mumbai 1994(73) ELT 425 (Tri) it was held that there is no bar in allowing redemption of gold being an item notified under Section 123 of Customs Act, 1962 or for any other reason.

(e). In T. Elavarasan Vs Commissioner of Customs (Airport), Chennai 2011 (266) ELT 167 (Mad), the Hon'ble High Court held that Gold is not a prohibited item and option is available to owner of goods or person from whom goods seized to pay -fine in lieu of confiscation.

(f). etc.

In view of the above submissions, the applicant has prayed to the revisionary authority to set aside the impugned OIA and to release the gold weighing 806 grams valued at Rs. 23,53,512/- on payment of a reasonable fine and penalty and to drop further proceedings.

6. Personal hearing in the case was scheduled for 18.10.2023, 25.10.2023. Shri. Prakash Shingrani, Advocate for the applicant appeared for personal hearing on 18.10.2023 and submitted that the applicant brought some quantity of gold. He further submitted that concealment does not determine the prohibition of gold. He further submitted that applicant was working overseas and had brought gold for family purpose. He also stated that applicant is not a habitual offender He requested to allow redemption on reasonable fine 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 had been ingeniously concealed inside the rechargeable speaker and this was done with the express intention of hoodwinking the Customs and evading payment of Customs duty. 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 concealment used reveals the mindset of the applicant to evade the payment of duty. It reveals that the act committed by the applicant was conscious and pre-meditated. Had he not been intercepted, the applicant would have gotten away with the gold concealed in the noodle making machine. 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. Government observes that in addition to the quantum of gold attempted to be smuggled into the country, the manner in which the gold was attempted to be brought into the country is also vital. The impugned gold was ingeniously concealed inside the rechargeable speaker. The rechargeable speaker had to be dismantled to retrieve the gold. This act was conscious, pre-planned and pre-meditated which reveals the intention of the applicant. The aforesaid quantity, purity, ingenious concealment, applicant being admittedly, a carrier, probates that he did not have any intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while ordering the absolute confiscation of the gold and appellate authority had rightly upheld the same.

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, pre-planned and ingenious, 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. 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 AA 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 is inclined not to interfere in the order of absolute confiscation passed by the AA.

13. Government notes that the penalty of Rs. 2,50,000/- imposed on the applicant under Section 112(a)(i) of the Customs Act, 1962 by the OAA and upheld by the AA is commensurate with the omissions and commissions committed in carrying the gold in an ingenious manner and therefore, is not inclined to interfere in the same.

14. For the aforesaid reasons, the Government finds that the OIA passed by the AA is legal and proper and does not find it necessary to interfere in the same. The Revision Application filed by the applicant, fails.

15. Accordingly, for the reasons stated above, the Revision Application filed by the applicant is dismissed.

( SHRAWAN KUMAR )

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

**ORDER No. 3 /2024-CUS (WZ)/ASRA/MUMBAI DATED 19.01.2024**

To,

1. Shri. Rasheed Mulakumthottathil Aboobacker, Mulakumthottathil, Thalayad PO, Kozhikode – 673 574
2. Pr. Commissioner of Customs, Chhatrapati Shivaji Maharaj International Airport, Level-II, Terminal-2, Sahar, Andheri (East), Mumbai – 400 099.

Copy to:

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