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GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 371/51/B/WZ/2020-RA

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Date of Issue 12.09.2023

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ORDER NO. 639/2023-CUS (WZ) /ASRA/MUMBAI DATED 07.09.2023  
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 : Ms Rukia Mohamed Hirsi

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

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. MUM-  
CUSTM-PAX-APP-815/2019-20 dated 26-12-2019 issued on  
02-01-2020 [F.No. S/49-513/2019] passed by the  
Commissioner of Customs (Appeals), Mumbai-III.

**ORDER**

This revision application has been filed by Ms Rukia Mohamed Hirsi (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-815/2019-20 dated 26-12-2019 issued on 02-01-2020 [F.No. S/49-513/2019] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 20.03.2019, the Officers of CSMI Airport Mumbai, intercepted one passenger Ms Rukia Mohamed Hirsi, the applicant, holding Kenyan Passport who had arrived from Adis Ababa at CSMI Airport. On suspicion the applicant was diverted from the Green channel for her personal search which yielded no result. However when the applicant passed through the Metal Detector frame a beep sound was heard and hence the applicant was subjected to hand held metal detector, which showed positive signs of gold concealment in the rectum. The concealed gold in the rectum was ejected and found to be 02 gold bar pieces totally weighing 343 grams and totally valued at Rs.9,71,180/-. The same were seized by the officers in the reasonable belief that the same was smuggled into India in a clandestine manner in contravention of the provisions of the Customs Act, 1962.

3. The case was adjudicated by the Original Adjudicating Authority (OAA) i.e. the Deputy Commissioner of Customs, Airport, Mumbai vide Order-In-Original No. AirCus/T2/49/553/2019 "B" dated 21-03-2019 ordered for the absolute confiscation of the recovered gold be 02 gold bar pieces weighing 343 grams and valued at Rs.9,71,180/-under Section 111 (d), (1) and (m) of the Customs Act, 1962. Further, a penalty of Rs. 1,00,000/- was imposed on the applicant under Section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by this Order, the applicant preferred an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III,

who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-815/2019-20 dated 26-12-2019 issued on 02-01-2020 [F.No. S/49-513/2019] upheld the order passed by the OAA.

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

5.1 That the Applicant is a Foreign National and does not know to read and write English Language & understands only her mother tongue.

5.2 That the Applicant when arrived at Airport was asked by the officer in plain clothing whether Applicant was carrying any Gold, to which the Applicant answered in affirmative and then the Applicant took out the Gold from her person and handed over to the Custom Officer. The Applicant submits that the officer had taken the charge of Gold and prepared some papers in English Language & obtained her signature on those papers.

5.3 The Statement of the applicant was also recorded by the Customs u/s. 108 of the Customs Act, which was typed in English Language which is not known to the Applicant and the customs dept. made out the case of non-declaration and the said statement was duly retracted by her at the first available opportunity.

5.4 That the Applicant is the owner of the goods and ready to pay the customs dues and she was not aware that being a Foreign National she was not supposed to import Gold.

5.5 That the Gold brought by the Applicant is neither restricted nor prohibited and can be released for Re-export under section 125 of the Customs Act, 1962.

5.6 That the violation if any occurred, was out of ignorance, technical in nature and due to language problem.

5.8 That no proper panchnama was drawn to support the claim of the department that the applicant had concealed the gold inside her rectum. The allegation of Concealment in her rectum is totally incorrect as the alleged concealment in rectum is neither supported with any X-Ray report nor with a Doctor's examination report that whether it was possible for the Applicant to insert the gold of the size and weight (as seized) in her rectum or whether there was any injury mark etc., noticed in the rectum of the Applicant to establish that the gold was inserted and ejected from the rectum. In absence of any supporting confirmation and in light of denial by the Applicant that the gold was ever concealed by her in her rectum, the said allegation was not even supported by a panchnama, however, the same was not considered by Adjudicating Authority and gold was absolutely confiscated.

5.7 That the Respondent has come to the conclusion that the acts and/or omissions on the part of the Applicant were to evade Customs duty. The evasion of Customs duty can be done only in respect of dutiable goods and not prohibited goods. The Applicant humbly submits that once the department or respondent accepts that the goods are dutiable, the option of redemption of goods as provided under section 125 of the Customs Act, 1962 will have to be given to the Applicant. A bare perusal of the above sub-section (1) of Section 125 of the Customs Act, 1962, makes it crystal clear that the Respondent is required to give the Noticee an option to pay fine in lieu of confiscation in respect of the impugned goods, which even as per the Respondent are dutiable goods.

5.8 The Applicants relied on various judgments passed by various authorities, wherein re-export of goods have been granted even when the goods were not declared which are as follows:

1. Collector of Customs vs. Elephanta Oil and Inds. Ltd.; 2003-(152)-ELT-0257-Supreme Court.

2. Kusum Bhai DayaBhaiPatel Vs. Commissioner of Customs 1995 (79) ELT 292 Tri Mumbai
3. A.K.Jewellers vs. Commissioner of Customs Mumbai: 2003 (155) E.L.T. 585 (Tri- Larger Bench)
4. Patel vs. Commissioner of Customs Citation: 2003 (153) ELT 226 Tr
5. M.V. Marketing and Supplies vs. Commr.Of Customs (Import), Chennai; 2004 (178) E.LT. 1034 (Tri-Chennai).

5.9 The applicant also listed the cases wherein re-export has been granted by the Government of India, New Delhi:

1. Revision order no.38/2008 in case Mrs. Majeeda Mohammed Yonus
2. Revision order no.178 /2008 in case Mr. RavinderSadhuram Dulari
3. Revision order no.33/2008 in case Shri DeepakHiralal Parekh
4. In Revision order no.34/2008 in case Shri Pradeep Kumar Bhanwarlal
5. In Revision order no.392/2002 in case Shri Nasir AsgarMirab

5.10 That in view of the aforesaid submissions, the Customs department shall release the goods u/s. 125 of Customs Act, 1962 for Re-export on nominal redemption fine and reduce the personal penalty as the violation, if any, is of technical in nature.

In view of the above the applicant prayed that the Gold may kindly be released for re-export on nominal fine and personal penalty may kindly be reduced substantially.

6. Personal hearing in the matter was scheduled for 27-07-2023. Shri N. J. Heera, Advocate of the applicant appeared for the hearing and submitted that gold is not prohibited item and manner of concealment is not relevant. He requested to allow re-export on 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 was secreted in body cavity i.e. rectum. It is clear that the applicant had resorted to concealment to smuggle gold and evade duty. This action manifests that applicant had no intention to pay the Customs duty. The Applicant had not declared the impugned gold as required under section 77 of the Customs Act, 1962. The type of concealment adopted to evade duty is important here. The applicant had pre-planned and selected an ingenious and risky method that she had used to avoid detection and thereby to evade Customs duty. The confiscation of the gold is therefore, justified and thus, the Applicant had rendered herself liable for penal action.

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 Applicants 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 the manner in which the gold was concealed i.e. inside her own body, reveals the intention of the Applicant. It also reveals her criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially the ingenious concealment which could be risky to the applicant's life, adopted by her, probates that the Applicant had no intention of declaring the gold to the Customs at the airport.

The method of concealment indicates that the same was conscious and pre-meditated. All these facts have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the gold bar.

12. Government notes that the applicant has submitted in the revision Application, that gold was found on her and the allegation of the department of concealment of the gold in the body cavity is not correct and that the department's allegation is neither supported with any X-ray report nor doctor's examination report nor any Panchnama. Government notes that the applicant had waived the issuance of a SCN and had opted for spot adjudication. Having done so, the applicant now at this stage cannot apostate on her voluntary submission at the time of adjudication. Government notes that retraction of her statement after opting for spot adjudication is clearly an afterthought.

13. 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, ingenious and risky with a clear attempt to smuggle gold, it is a fit case for absolute confiscation which would also be 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 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. The order of the Appellate authority upholding the order of the adjudicating authority is therefore liable to be upheld and the Revision Application is liable to be dismissed.



14. The Applicant has also pleaded for reduction of the penalty imposed on him. The value of the gold in this case is Rs. 9,71,180/-. Government finds that the penalty of Rs. 1,00,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate to the omissions and commissions of the Applicant.

15. The Government, keeping in mind the facts of the case is in agreement with the observations of the Appellate authority and finds that absolute confiscation is proper, legal and judicious and also penalty imposed under Section 112 (a) and (b) of the Customs Act 1962 is appropriate. Government does not find it necessary to interfere in the OIA passed by the AA.

16. Accordingly, the Revision Applications filed by the applicant is dismissed.

*Shrawan*  
7/19/23  
( SHRAWAN KUMAR )

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

ORDER NO. 639/2023-CUS (WZ)/ASRA/MUMBAI DATED 07.09.2023

To,

1. Ms Rukia Mohamed Hirsi, C/o Advani, Sachwani & Heera Associates, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
3. The Commissioner of Customs (Appeals), Mumbai-III, 5th Floor, Avas Corporate Point, Makwana Lane, Behind S. M. Centre, Andheri Kurla Road, Andheri (East), Mumbai 400 059.

Copy to:

1. Advocate N. J. Heera, Nulwala Building, Ground Floor, 41, Mint Road, Opp. G.P.O. Fort, Mumbai-400001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

