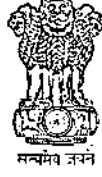


REGISTERED
SPEED POST



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

F.No. 371/38 & 39/B/2017-RA (Mum) / 647 Date of Issue 18/02/22

ORDER NO. ⁶⁷⁻⁶⁸ /2022-CUS (WZ)/ASRA/MUMBAI DATED 16.02.2022 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. 371/38/B/2017-RA (MUM).

Applicant : Shri. Mir Shabraz Hussain

F.No. 371/39/B/2017-RA (MUM).

Applicant : Shri. Gouse Basha Shaik.

Respondent : Pr. Commissioner of Customs, (Airport), Mumbai.

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal MUM-
CUSTM-PAX-APP-186 & 187/17-18 dated 29.05.2017
[F.No. S/49-838/2015 AP] passed by the Commissioner of
Customs (Appeals), Mumbai-III:

ORDER

These two revision applications have been filed by Shri. Mir Shabraz Hussain and Shri. Gouse Basha Shaik (herein after referred to as the Applicants; Alternatively, Shri. Gouse Basha Shaik is also referred to as Applicant No. 1 and Shri. Mir Shabraz Hussain is referred to as Applicant no. 2) against the Order in appeal No. MUM-CUSTOM-PAX-APP-186 & 187/17-18 dated 29.05.2017 [F.No. S/49-838/2015 AP] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that the Applicant No. 1 i.e. Shri Shaik Gouse Basha a domestic passenger, arrived at CSI Airport, Mumbai onboard Air India Flight AI-343/01.02.2014 from Chennai and was intercepted by Customs Officers. Said AI flight no. AI-343/01.02.2014 had operated as an International Flight from Singapore-Chennai-Mumbai. Applicant no. 1 was queried as to whether he was carrying any dutiable / contraband goods to which he had replied in the negative. During the course of the personal search, one gold bar weighing 1 kg and 12 gold bars of 100 gms each, i.e. gold totally weighing 2200 grams and totally valued at Rs. 55,69,388/- (Rupees Fifty five lakhs Sixty nine Thousand and Three hundred and eighty eight) was recovered from the jeans trousers worn by him. On enquiry, the Applicant No. 1 had revealed that the said gold was given to him, in the flight, by Shri. Mir Shabraz Hussain (Applicant No. 2) an international passenger and identified him as he was waiting at the baggage screening. Applicant No. 2 was queried viz, Shri. Mir Shabraz Hussain about possession of any dutiable goods to which he had replied in the negative. Also, to query whether he had handed over any gold to anyone in the flight, Applicant no. 2 had replied in the negative. The Applicant No. 2 was confronted with Applicant no. 1. Applicant No. 2 admitted that he had carried gold from Singapore and had handed over the same to Applicant No 1 during the course of the flight from Chennai to Mumbai.

3. The Original Adjudicating Authority i.e. Addl. Commissioner of Customs, CSI Airport, Mumbai by a common order i.e. Order-In-Original No. ADC/RR/ADJN/126/2015-16 dated 31.07.2015 (S/14-5-123/2014-15Adjn - SD/INT/AJU//3/2014 AP'D' ordered the absolute confiscation of the impugned gold collectively weighing 2.2 kilograms, valued at Rs. 55,69,388/- under Section 111(d), (l) and (m) of the Customs Act, 1962. Penalty of Rs. 3,00,000/- (Rupees Three lakhs) each was imposed on the Applicants No. 1 & 2 under section 112 (a) and (b) of the Customs Act, 1962.

4. Aggrieved by the said order, both the applicants filed an appeal before the Appellate Authority i.e Commissioner of Customs (Appeals), Mumbai - III who vide a common order i.e. Orders-In-Appeal No. MUM-CUSTOM-PAX-APP--186 & 187/17-18 dated 29.05.2017 [F.No. S/49-838/2015 AP] rejected both the Appeals.

5. Aggrieved with the above order, both the Applicants have filed these revision applications interalia on the grounds that;

5.01. the impugned order passed by the Appellate Authority was bad in law and unjust.

5.02. the impugned order had been passed without giving due consideration to the documents on record and facts of the case.

5.03. that gold was neither a restricted nor a prohibited item.

5.04. that applicant no. 2 had claimed ownership of the impugned gold and was ready to clear the goods on payment of Customs dues.

5.05. that it was the first time that the applicants had brought such type of goods and there was no previous case registered against them.

5.06. that the adjudicating authority had not taken into consideration the points in the SCN which clearly indicates that the impugned gold was dutiable and not prohibited.

5.07. that to buttress their case, the applicants have relied upon some case laws wherein gold has been released on payment of fine and penalty.

The Applicants have prayed that the revision authority be pleased to release the gold under Section 125 of the Customs Act, 1962 on nominal redemption fine alongwith applicable duty; personal penalty be reduced substantially or pass any order as deemed fit and proper.

6. Personal hearings in the case was scheduled for 05.12.2019 / 12.12.2019. Thereafter, upon the change of the revisionary authority, personal hearing through the online video conferencing mode was scheduled for 10.12.2020 / 17.12.2020 / 24.12.2020, 28.01.2021, 20.04.2021 / 27.04.2021, 16.12.2021. Shri N. J. Heera, Advocate attended the physical hearing on 16.12.2021 and reiterated the written submissions. He requested to release the gold on reasonable RF and penalty based on judgements submitted. He promised to submit additional judgements in a week.

6.1. Additional written submissions were furnished on 29.12.2021 wherein a catena of judgements were attached basically to buttress their contention for release of the impugned gold on RF.

7. The Government has gone through the facts of the case. Applicant no. 1 was a domestic passenger and had taken the impugned gold from Applicant no. 2 onboard the flight, who was travelling as an International passenger and had attempted to pass the Customs when they were both, intercepted. The applicants had used an innovative method to hoodwink the Customs and smuggle out the gold without Customs duty being discharged on the same. Applicant had meticulously pre-planned the method adopted to smuggle the gold and had adopted an ingenious method to avoid Customs and payment of duty. Had it not

been for the alertness exhibited by the Customs, the applicants would have been successful in smuggling out the gold and evading Customs duty. It is clear that the applicants had resorted to this innovative and ingenious method to evade duty. By this action, it is clear that applicants had no intention to pay the Customs duty. The Applicants had not declared the impugned gold as required under Section 77 of the Customs Act, 1962. In this case, the quantity of gold seized is large and meant for commercial use and moreover, a very innovative and ingenious method of concealment to evade Customs duty had been adopted. The applicants had pre-planned and selected the method that they would use to avoid detection and thereby to evade Customs duty. The absolute confiscation of the gold is therefore justified and thus, the Applicants had rendered themselves, 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 also observes that the manner in which the gold was concealed i.e. by using an innovative and ingenious method of exchanging the gold mid-flight between an International passenger and a domestic passenger, reveals the innate intention of the Applicants. It also reveals their criminal bent of mind wherein, this

method was adopted by them in tandem with a clear intention to evade duty and smuggle the gold into India. The circumstances of the case especially the concealment method adopted, probates that the Applicants had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the impugned gold.

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, innovative and ingenious with a clear attempt to smuggle the gold, this is a fit case for absolute confiscation which would act 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 gold. But for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of *Jain Exports Vs Union of India 1987(29) ELT753* has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". The redemption of the gold will encourage non bonafide and unscrupulous elements to resort to concealment and bring gold. If the gold is not detected by the Custom authorities the passenger gets away with smuggling and if not, he has the option of redeeming the 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.

13. The Government finds that the applicants have cited and relied upon a plethora of case laws to buttress their case. Cases such as, (i). *Sanjay Kumar Agarwal v/s. Commissioner of Customs (Airport), Mumbai [2017(357) ELT 364 (Tri-Mumbai)]*, (ii). *Commissioner of Customs v/s. Rajinder Nirula [2017 (346)*

ELT. 9 (HC-Bombay)], (iii). Raju Sharma v/s. UOI [2020 (372) ELT 249 (HC-Delhi)], (iv). Hargovind Das K Joshi v/s. Collector of Customs [1992 (61) ELT 172 SC], (v). Alfred Menezes v/s. Commissioner of Customs (Mumbai) [2011 (236) ELT 587 (Tri-Mumbai)], (vi). Mohini Bhatia v/s. Commissioner of Customs [1999 (106) ELT 485 (Tri-Mumbai)], (vii). Yakub Ibrahim Yusuf v/s. Commissioner of Customs, Mumbai [2011 (263) ELT 685 (Tri-Mum)], (viii). Umar Syed v/s. Commissioner of Customs (Airport), Chennai [2019 (368) ELT 385 (HC-Madras)], (ix). Ashok Kumar Verma passed by Revisionary Authority [2019 (369) ELT 1677 (GOI)], (x). A Rajkumari v/s. C.C Chennai [2015 (321) ELT 540 (Tri-Chennai)], (xi). Commissioner of Customs (Prev), Lucknow [2018 (363) ELT 534 (Tri-Allahabad)], (xii). Kadar Mydin v/s. Commissioner of Customs, West Bengal [2001 (136) ELT 758], (xiii). Commissioner of C.Ex & S.T, Lucknow v/s. Mohd. Halim Mohd. Shamim Khan [(2018 (359) ELT 265 (Tri-Allahabad)], (xiv). S Revankar & Otr, Order passed by Commissioner (Appeals), Pune Appeal – II (at Goa), (xv). Birla Corporation Ltd. v/s. Commissioner of C.Ex, [2005 (186) ELT 266 (SC)] etc. The above cited cases have been perused and considered. The cases mentioned at sr. nos (i) to (iii) above, pertain to seizure of foreign currency and are not of relevance to the instant case. The cases cited at (iv) to (vi) and (ix) to (xiii) above, pertain to use / exercise of discretion to redeem the gold. As already stated, discretion to release the gold is based on various factors such as manner of concealment, quantity, attempt of smuggling with impunity, etc. In this case, the Government finds that the lower authorities have rightly considered all these factors while denying redemption. The cases cited at (vii) and (viii) above, pertain to ownership of gold and release of gold to the person from whom the gold has been seized. Since, the gold has been absolutely confiscated, therefore, question of release of the same to the claimant in the instant case is irrelevant. Case cited at (xv) above pertains to modvat credit and is not relevant to the instant case and case mentioned at (xiv) above has been passed by the Commissioner (Appeals) which are not precedent cases for the Revisionary Authority.

14. The Government finds that the penalty of Rs. 3,00,000/- each, imposed on both the applicants under Section 112(a) & (b) of the Customs Act, 1962 is appropriate and commensurate with the omission and commission committed

by the applicant. The Government does not find it necessary to interfere in the order passed by the lower authorities.

15. The Applicants have pleaded for setting aside the Order passed by the Appellate Authority which has upheld the order passed by the Original Adjudicating Authority. 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 and judicious and also the penalty imposed under Section 112(a) & (b) of the Customs Act 1962 is proper and judicious and commensurate with the omission and commissions committed, does not find it necessary to interfere in the same.

16. Both the Revision Applications are hereby, dismissed.


(SHRAWAN KUMAR)

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

67-68
ORDER No. /2022-CUS (WZ) /ASRA/

DATED 16.02.2022

To,

1. Shri. Mir Shabraz Hussain, R/o 2361, 2 M.N Sultan Park Road, Mandi Mohalla, Mysore - 570 021.
2. Shri. Gouse Basha Shaik, D.No. 2/172, Masjid Street, Kotecheruvr, Ananatpur District, Andhra Pradesh - 515 133.
3. The Pr. Commissioner of Customs, Chhatrapati Shivaji International Airport, Terminal - 2, Sahar, Mumbai - 400 059.

Copy to:

4. Advani Sachwani & Heera, Advocates, Nulwala Building, 41 Mint Road, Fort, Opp. G.P.O. Fort, Mumbai 400 001.
5. Sr. P.S. to AS (RA), Mumbai.
6. Guard File.
7. File Copy.
8. Notice Board.