

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. 371/92/B/2021-RA / 6830 :

Date of Issue: 15.09.2023

ORDER NO. 670 /2023-CUS (WZ)/ASRA/MUMBAI DATED 15.09.2023
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.

Applicants : Ms Shirwahe Waris Farahe.

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-691/2020-21 dated 07-01-2021
[F.No. S/49-906/2019] [Date of issue: 22.01.2021]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Ms Shirwahe Waris Farahe (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-691/2020-21 dated 07.01.2021 [F.No. S/49-906/2019] [Date of issue: 22.01.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 09.09.2019, the Customs Officers at CSI Airport Mumbai intercepted one passenger Ms Shirwahe Waris Farahe, the applicant, holding Ethiopian Passport number EQ 0002014 who had arrived from Ethiopia, Flight No. ET-640, after she had cleared herself through Green channel of Customs Mumbai. The applicant cleared herself without giving any declaration of dutiable goods to Customs. During personal search the Officers recovered assorted gold jewellery i.e. gold chain with locket, earrings) totally weighing 92.5 grams (inadvertently written as 62.5 grams in OIA) valued at Rs.3,34,006/-, ingeniously concealed in her rectum. 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 Original Adjudicating Authority (OAA) viz the Deputy Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO no. AirCus/49/ T2/1095/2019, 'D' dated 09.09.2019 ordered absolute confiscation of the recovered assorted gold jewellery i.e. assorted gold jewellery i.e. gold chain with locket, earrings) totally weighing 92.5 grams (inadvertently written as 62.5 grams in OIA) valued at Rs.3,34,006/-, under Section 111 (d), (l) and (m) of Customs

Act, 1962. A personal penalty of Rs. 35,000/- under section 112(a)(i) of the Customs Act, 1962 was also imposed on the applicant.

4. Aggrieved, with this Order, the Applicant filed an appeal before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai-III, who vide Order-in-Appeal No. MUM-CUSTOM-PAX-APP-691/2020-21 dated 07-01-2021 [F.No. S/49-906/2019] [Date of issue: 22.01.2021] 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 concealment of gold in the rectum as alleged in the SCN is doubtful as no panchnama was drawn for confirmation of these fact;

5.2 That the gold jewellery seized from the applicant were not in commercial quantity and they were not for sale. The applicant carried the jewellery to India for safety purpose and for use during her stay in India;

5.3 That the applicant as a tourist was eligible to import personal jewellery/accessory;

5.4 That the applicant was not involved in any smuggling activity;

5.5 That the Gold jewellery imported by the applicant was not dutiable;

5.6 That the Gold is not a prohibited item and the gold jewellery is not liable for absolute confiscation;

5.7 That the value of the gold jewellery was assessed at market value in an arbitrary manner;

5.8 That the decision relied upon by the Commissioner (Appeals) cannot be made applicable to the case of the applicant;

5.9 That the applicant claims ownership and redemption of the gold under absolute confiscation;

In view of the above the applicant prayed for unconditional release of the jewellery for re-export and drop further proceedings against her.

6. Personal hearing in the matter was scheduled for 02-08-2023. Shri Prakash Shingarani appeared for the hearing. He submitted that the applicant is a foreign national and has brought small quantity of personal jewellery. He requested to release the same unconditionally.

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 concealed 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/s. 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 Panchnama for confirmation of the fact. 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 the applicant's aforesaid submission 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. Government finds that the penalty of Rs. 35,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 for the goods valued at Rs3,34,006/- 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
25/9/23
(SHRAWAN KUMAR)

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

ORDER NO. G-70/2023-CUS (W2)/ASRA/MUMBAI DATED 5.09.2023

To,

1. Ms. Shirwahe Waris Farahe, C/o Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051
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. Shri. Prakash K. Shingrani, Advocate, 12/334, Vivek, New MIG Colony, Bandra (East), Mumbai - 400 051
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.