

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. 373/107& 107A/B/15-RA / 10 2 2

Date of Issue 12.03.2021

ORDER NO. 73²⁴/2021-CUS (SZ)/ASRA/MUMBAI DATED 10.03.2021 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 Rafiq Malliyoth and Smt. Fahina Nuchilakath

Respondent : Commissioner of Customs(Airport), Cochin

Subject : Revision Application filed, under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal No. COC-CUSTM-OOO-APP-322 & 323-14-15 dated 04.11.2014 passed by the Commissioner of Customs (Appeals), Cochin.

ORDER

This revision application has been filed by Shri Rafiq Malliyoth and Smt. Fahina Nuchilakath (herein after referred to as the Applicants) against the Order in appeal No. COC-CUSTOM-OOO-APP-322 & 323-14-15 dated 04.11.2014 passed by the Commissioner of Customs (Appeals), Cochin.

2. Briefly stated the facts of the case are that the officers of AIU, on specific intelligence intercepted the Applicant, Shri Rafiq Malliyoth who had arrived with his wife and son and daughter from Dubai on 22.07.2013, at the exit after he cleared himself through the green channel. When questioned whether he had brought any dutiable goods he replied in the negative. A personal search of the passenger resulted in the recovery of a two gold bars of 1 kg each wrapped to the upper portion of his hands with cello tape. A similar personal search of his wife Smt. Fahina Nuchilakath resulted the recovery of a two gold bars of 1 kg each from the pockets of the jeans worn by her under purdah. The four gold bars totally weighing four kilograms were valued at Rs. 1,04,37,660/- (Rupees One crore Four lakhs Thirty seven Thousand Six hundred and Sixty).

3. The Original Adjudicating Authority vide Order-In-Original No. 24/2014 dated 20.08.2014 ordered absolute confiscation of the impugned gold, and imposed penalty of Rs. 10,00,000/- (Rupees Ten lakhs) each on Shri Rafiq Malliyoth and Smt. Fahina Nuchilakath under section 112 (a) of the Customs Act, 1962 on Applicant.

4. Aggrieved by the said order, the applicants filed appeal before the Commissioner (Appeals) who vide Order-In-Appeal No. COC-CUSTOM-OOO-APP-322 & 323-14-15 dated 04.11.2014, rejected the Appeal of the Applicants.

5. Aggrieved with the above order the Applicants have filed revision applications inter alia on the grounds that;

5.1 The order of the Commissioner of Customs (Appeals) is perverse to the facts and circumstances of the case.

5.2 The case of the Applicant is that they were apprehended by the officers before making a true and correct declaration of the contents of the material brought by them.

5.3 The Adjudicating authority overlooked the fact that the gold biscuits were brought from the BIN SABI JEWELLERY L.L.O at Dubai and the receipt issued by the Jewellery bears the signature of the Appellant. The receipts show that the entire case is a cooked up and the statement purported to be recorded from the Appellant is not true and there is no friend by name Shajal who handed out the gold bars to the Appellant.

5.4 The Adjudicating authority ought to have noticed the fact that the applicants were always ready to pay the duty of the gold which they are legally entitled to pay and the same was not considered by the customs officials who intercepted them for getting back the gold bars.

5.5 The findings of the adjudicating authority that the Appellants are not eligible to import gold through accompanied baggage is not legally sustainable and such findings was arrived without understanding the facts of the case. The authority should have found that the 1st Appellant was staying in the Gulf countries for the last 10 years and he is eligible for import gold and he is eligible to exercise option under section 125 of the Customs Act and the gold biscuits should have been returned to the Appellants on payment of fine.

5.6 The customs official did not inform the Applicants about their legal rights to request to have the presence of a gazetted officer or Magistrate before taking them to personal search and X-Ray examination which is against the principles of Natural Justice.

In view of the above and other grounds to urged at the time of hearing, it is submitted that the impugned order is bad in law and is liable to be quashed. The absolute confiscation of the gold be set aside. The confiscated gold may be ordered to be released without penalty by paying the actual duty amount which this applicants are always ready to pay. In the alternate review petitioner may be permitted to re-export the gold by paying the nominal amount of fine and penalty. Any other order or orders deemed fit and proper

by the Hon'ble Revision Authority considering the facts and circumstances of the case.

6. In view of the above, personal hearing in the case was held on 04.03.2021. Shri P. K. Anil, Advocate appeared for the Applicant online. He reiterated the submissions made on the matter. He submitted that the husband and wife were working overseas and brought the gold while coming to India. Therefore the gold may be released on nominal fine and penalty. Nobody attended the hearing on behalf of the Respondent.

7. The Government has gone through the facts of the case, The Applicant has contended that they were apprehended by the officers before making a true and correct declaration of the contents of the material brought by them. Government notes that the Applicant and his wife were intercepted at the exit after they had cleared themselves through the Green Channel. On enquiry he denied carrying any dutiable items. The Applicant and his wife had both declared the value of the goods imported by them as Rs. 2500/-. Personal search of the passenger resulted in the recovery of two gold bars of 1 kg each wrapped in upper arm. A personal search of his wife also resulted in the recovery of two gold bars of 1 kg each from the pocket of the jeans worn by her under purdah. These facts regarding the interception and subsequent detection, clearly reveal that the Applicant and his wife had ample opportunities to declare the gold and therefore it thoroughly negates their contentions that they were not allowed to declare the gold.

8. The Applicant has stated that he was staying in the Gulf countries for the last 10 years and therefore he is eligible for import gold. However he has also clarified that he returned to India and worked in a Bakery. In addressing the issue of Eligibility, the Order in original quotes. *".....Scrutiny of the Applicants passport indicated that he went abroad on 13.06.2013, 23.06.2013, and 18.07.2013 and returned to India on 18.06.2013, 28.06.2013 and 22.07.2013.Likewise scrutiny of the passport of Smt. Fahina Nuchilakath showed that she went abroad only on 18.07.2013 and returned on 22.07.2013. Thus it is clear that both the passengers were not eligible to import gold".* The respondents have not stayed abroad for the period stipulated under Notification no. 12/2012 dated 17.03.2012 and therefore were not eligible to import gold. The confiscation of

the gold bars is therefore justified and both the Applicants have rendered themselves liable for penal action.

9. 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.* 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, makes the applicant an "ineligible passenger" and has made the impugned gold "prohibited" and therefore liable for confiscation and the Applicants thus liable for penalty.

10. In addressing their contention that the gold was legally purchased. Government notes that the Original adjudicating authority has in para 32 of its order stated that even though the name of the buyer and date of purchase match with the facts of the case, the signatures of the customers in the said invoice are different from the Applicants and his wife. Further, the Applicant has also not satisfactorily explained how he procured the gold. In his statements he has stated that he is a bakery employee and his wife is a housewife and therefore being of modest means, they do not have the financial capability to purchase/import gold valued more than a crore. It is thus clear that they were acting as carriers for smuggling gold for monetary gains.

11. The Applicant in his statements during investigations has stated that his friend, Shri Shyjal proposed that if he was ready to bring gold into India, he would arrange his family's visit to Dubai, by giving him and his family to and fro tickets and Rs. 25,000/- for kilo of gold brought into India. The Applicant has accepted the proposal. Accordingly, the gold bars were given to him by Shri Shyjal which was intercepted by the Officers. In his further statements he also admitted that he filed a false declaration and secured the gold on his upper hand so as to smuggle the gold into India, by evading customs duty. Hon'ble Supreme Court in the case of K.I. Pavunny v. Asst. Collector (HQ) Central Excise Collectorate, Cochin 1997 (90) ELT 241 SC has held that: "Even though the Customs officers have been invested with many of the powers which an officer in charge of a police station exercises while investigating a cognizable offence, they do not, thereby, become police officers within the meaning of Section 25 of the Evidence Act and so the confessional statements made by the accused persons to Customs officials would be admissible in evidence against them". The statements of the Applicant recorded under section 108 of the Customs Act, 1962 are therefore admissible as evidence.

12. It is clear that the Applicants have acted as carriers and attempted to smuggle the gold into India for monetary considerations. In view of the above, the original Adjudicating authority has confiscated the impugned gold absolutely and imposed a penalty of Rs.10,00,000/- on each Applicant. The Appellate authority in its order dated 04.11.2014 states *"I find that appellants carried the gold for someone else for a consideration and do not show any evidence as to the willingness for payment of duty. Therefore, I find that the appellants have contravened the provisions of Section 77 of the Customs Act and will attract the provisions of Section 111 of the Customs Act. The Adjudicating Authority's findings in this respect are correct.....I further find that the appellants' plea to exercise the option under Section 125 of the Customs Act, 1962 cannot be applied in these appeals in view of the decision of the Supreme Court in the dismissal of the petition for Special Leave to Appeal (Civil) No.22072 of 2009 filed by Swamynathan Murugesan against the Madras High Court Judgment and Order dated 27/04/2009 in CMA No.2040 of 2007 as reported in 2009(247)ELT 21(Mad) Commissioner of Customs vs. Sathyanathan Murugesan. In the present appeals too, the concealment had weighed with the Adjudicating Authority to order absolute confiscation which should prevail. In view of the above, I reject the appeals and uphold the impugned Order-in-Original."* Thus, taking into

into account the facts on record and the gravity of offence, the Government notes that the adjudicating authority had rightly ordered the absolute confiscation of gold and the order has been rightly upheld by the Appellate authority. The order of the Appellate authority is therefore liable to be upheld and the Revision Application liable to be dismissed.

13. The Revision Application is accordingly dismissed.

Shrawan
10/03/2021
(SHRAWAN KUMAR)

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

ORDER No. ⁷³⁻⁷⁴ /2021-CUS (SZ) /ASRA/MUMBAI DATED 10-03.2021

To,

1. Shri. Rafeek Malliyoth, Thejus, Panniyannur P.O., Kannur Dist., Kerala.
2. Smt. Fahina Nuchilakah, Nuchilakah House, Pilackool, Temple gate (P.O.), Thalassery, Kannur Dist. Pin 670102.

Copy to:

3. The Commissioner of Customs, Cochin International Airport, Cochin.
4. Shri P. K. Anil, Advocate, K. K. Padmanabhan Road, Cochin 18.
- ✓ 5. Sr. P.S. to AS (RA), Mumbai.
6. Guard File. ,
7. Spare Copy.