

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. 371/124/B/2021-RA/7691: Date of Issue : 30.10.23

ORDER NO. 789 /2023-CUS (WZ)/ASRA/MUMBAI DATED 26.10.2023
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.

Applicant : Mrs. Sharda Deepak Wadhwa

Respondent : Pr. Commissioner of Customs, Airport-I, Mumbai

Subject : Revision Application filed, under Section 129DD of the
Customs Act, 1962 against the Order-in-Appeal No.
MUM-CUSTM-PAX-APP-1772/2020-21 dated 25.02.2021
passed by the Commissioner of Customs (Appeals),
Mumbai - III.

ORDER

This revision application has been filed by Mrs. Sharda Deepak Wadhwa (herein referred to as Applicant) against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1772/2020-21 dated 25.02.2021 passed by the Commissioner of Customs (Appeals), Mumbai - III.

2. Brief facts of the case are that on 09.01.2020, the applicant, an Indian National, on arrival at CSI Airport, Mumbai from Singapore by flight No.6E-29 was intercepted by the Officers of Customs at CSI Airport and she was found in possession of 01 piece of crude gold bar and 01 cut piece of gold bar totally weighing 134 grams and valued at Rs.4,56,334/-. The impugned gold was concealed by the applicant in 'Rectum.

3. The case was adjudicated and the impugned gold was confiscated absolutely under Section 111 (d), (l) and (m) of Customs Act, 1962 by the adjudicating Authority and penalty of Rs. 1,75,000/- was imposed under section of 112 (a) & (b) of Customs Act, 1962.

4. Being aggrieved, the applicant has filed the appeal before Commissioner of Customs (Appeals), Mumbai - III, who vide impugned OIA modified the OIO to the extent of reducing the penalty from Rs. 1,75,000/- to Rs. 50,000/-.

5. Aggrieved with the above order, the Applicant has filed this revision application on the following grounds;

5.1 The order passed by the lower authority was not in conformity with the spirit of the B.Rules, (Amendment), 2016. Hence the same deserves to be set aside in the interest of justice.

5.2 The Applicant humbly submits that the order of the absolute confiscation of the gold was not at all justified. The Applicant had clearly stated at the time of P.H. that she had not contravened any provisions of C.A. 1962 or any other allied Laws for the time being in force and she had no malafide intention to hide anything from Customs to avoid payment of duty as

wrongly alleged. The Applicant had brought the Gold for the first time for her personal & household use and not for sale or any trade purpose.

- 5.3 *the order passed by the Ld. Commr. (A) Hyderabad, who vide O/A No. HYD-CUS-000-APP-017-16-17 dated 10/5/2016 had observed in the order that the absolute confiscation of the import of non-declared personal gold through baggage mode was not prohibited and hence the Ld. Commr. (A) Hyderabad had allowed the non-declared concealed gold bars in rectum to the frequent visitor also on fine. The Ld. Commr. (A) Hyderabad had cited various judgments of Tribunal, High Court & Supreme Court while allowing the release of Gold. Hence on this count also the Gold is liable for release forthwith as the circumstances of the case were similar.*

The Applicant therefore hopes that she would not be denied the justice at your Honour's hands and after perusing the records of the case, she would be given the benefit of doubt and she would be exonerated of all the charges and allegations by Your Honour, as the Gold was quite in reasonable Qty., of assorted nature and was in small value. The Gold was bonafide item of the baggage. The Applicant was not a carrier for somebody else but she was the actual owner of the Gold & she had not implicated anybody in any manner whatsoever. This further proves that the lower authority has taken the biased approach on the applicant without any justification. She is ready to pay the duty, fine & penalty for clearance of the Gold.

- 5.4 The applicant has prayed to the Revision Authority:

- i. The Gold under absolute confiscation valued at Rs. 456334/- be ordered to be released U/S 125 of C.A. 1962 on fine particularly when the gold is not banned under the Baggage Rules. (Amendment) 2016.
- ii. The P.P. of Rs. 50000/- be ordered to be waived/reduced.

6. Personal hearing in the case was scheduled on 03.08.2023. Shri. O.M. Rohira, Advocate for the applicant appeared for personal hearing and submitted that the applicant brought small quantity of gold. He further submitted that manner of concealment is no ground to influence confiscation. He requested to allow redemption on reasonable fine and penalty.

7. The Government has gone through the facts of the case. The Applicant was intercepted by the Officers of Customs at CSI Airport. The applicant had not declared the gold and only upon passing through the DFMD, she admitted to having concealed gold in her body cavity. 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 himself 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 'Applicant' thus, is liable for penalty.

10. 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 his own body, reveals the intention of the Applicant. It also reveals his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. Quantity of gold is not important, the method adopted is of relevance, Also, the gold was in primary form which indicates that the same was for commercial use. Government notes that applicant did not make herself available for the investigations. The circumstances of the case especially the ingenious concealment which could be risky to the applicant's life, adopted by him, probates that the Applicant had no intention of declaring the gold to the Customs at the airport. The method of concealment indicates and the same was conscious and pre-meditated. All these have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the 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, 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.

13. The Government finds that the penalty of Rs. 50,000/- imposed on the applicant 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 penalty imposed by the appellate authority.

14. Government upholds the order of absolute confiscation of the impugned gold passed by the AA. Government does not find it necessary to interfere in the penalty of Rs. 50,000/- imposed on the applicant under Section 112(a) & (b) of the Customs Act, 1962, modified by the AA.

15. The Revision Application filed by the applicant is dismissed.

Shrawan
26/10/23
(SHRAWAN KUMAR)

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

ORDER No. 789 /2023-CUS (WZ) /ASRA/MUMBAI DATED 26th 10/2023

To,

1. Mrs. Sharda Deepak Wadhwa, BK. No. 1030, Room No. 15, Section-23, Dassera Maidan, Ulhasnagar, Thane.
2. Pr. Commissioner of Customs, Airport-I, Chhatrapati Shivaji International Airport, Terminal - 2, Level - II, Andheri(E), Mumbai - 400099.

Copy to:

1. The Commissioner of Custom Appeals, Mumbai-III, Awas Corporate Point(5th Floor), Makwana Lane, Behind S. M. Centre Andheri-Kurla Road, Marol, Mumbai-400059.
2. Shri. O.M. Rohira, Advocate, 148/301, Uphaar, 10th road, Khar(W),Mumbai-400052.
3. Sr. P.S. to AS (RA), Mumbai.
4. File Copy.
5. Notice Board.