

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. 371/136/B/2021-RA / 7909 :

Date of Issue: 16.11.2023

ORDER NO. 828 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.11.2023
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 : Shri Mohamed Hanifa.

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-CUSTOM-PAX-APP-1471/2020-21 dated 04-02-2021
[F.No. S/49-1024/2019] [Date of issue: 17.02.2021]
passed by the Commissioner of Customs (Appeals),
Mumbai-III.

ORDER

This Revision Application has been filed by Shri Mohamed Hanifa (herein referred to as the "Applicant") against the Order-in-Appeal No. MUM-CUSTOM-PAX-APP-1471/2020-21 dated 04-02-2021 [F.No. S/49-1024/2019] [Date of issue: 17.02.2021] passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that on 22.05.2018, the Customs Officers for Inline section, while screening of checked in baggages, noticed suspicious dark images in one of the checked in baggage and accordingly a watch was kept on the passenger who would be collecting the same from the conveyor belt. Shri Mohamed Hanifa, the applicant collected the said bag and opted for green channel. The applicant, holding Indian Passport number Z 4307071 who had arrived from Dubai by Jet Airways Flight No. 9W 0557 was intercepted, after he had opted for Green channel for Customs clearance. He was diverted alongwith his baggage to the counter. Detailed examination of his checked-in baggage resulted in the recovery of multiple pieces of gold beads coated with chrome colour weighing 181 grams and 19 cut pieces of gold coated with colour weighing 246 grams purported to be gold were recovered from Magnetic Bracelets, Erasers, Burkhas and Bluetooth speakers. Thereafter the applicant was made to move through the Metal Detector Door which gave a positive indication of concealment of some metal. The applicant then admitted that he had concealed the gold in his rectum and voluntarily ejected one piece of metal weighing 60 grams and handed over to the Customs officers. The Government approved valuer examined and certified the recovered goods in the form of bar, cut pieces and beads to be gold, collectively weighing 487 grams with purity of 999% (24KT) and valued at Rs.14,20,883/-. The same were seized by the officers in the reasonable belief that the same were 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 Additional Commissioner of Customs, C.S.I. Airport, Mumbai, vide his OIO no. ADC/AK/ADJN/134/2019-20 dated 20.08.2019 ordered for absolute confiscation of the recovered gold in the form of bar, cut pieces and beads, collectively weighing 487 grams with purity of 999% (24KT) and valued at Rs.14,20,883/-, under Section 111 (d), (l) and (m) of Customs Act, 1962. A personal penalty of Rs. 1,45,000/- under section 112(a) & (b) 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-1471/2020-21 dated 04-02-2021 [F.No. S/49-1024/2019] [Date of issue: 17.02.2021] 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;

5.01 That the gold is not a prohibited item and according to the liberalized policy the gold can be released on payment of redemption fine and baggage duty;

5.02 That the seized gold belonged to the applicant; that the ownership of the gold is not disputed and that there is no ingenious concealment; that he had not passed the green channel;

5.03 That as per section 77 of the Customs Act 1962, the owner of any baggage shall, for the purpose of clearing it, make declaration of its contents

to the proper officer. Since the passenger is being the owner of the baggage, in that circumstances the passenger is only liable for make declaration under the said act not any other person. The applicant further submitted that the authority one way stated that the passenger has not declared the contents of the baggage as per section 77 of the said act, other it is stated that he is not the owner of the goods. If authority had taken the stand that the passenger had not declared, then he cannot take the stand that he is not the owner of the baggage or goods;

5.04 That it is an admitted fact the goods have been recovered from the applicant and hence he is entitled to get back the gold on payment of baggage rate of duty. Further if the authority promptly read section 125 of the customs act 1962, the department cannot argue that the appellant is not the owner of the gold or carrier. The contention of the department the owner or carrier is unsustainable under law, when the law permits to release the gold on payment of redemption fine and baggage rate of duty from whose possession the gold have been recovered, the authority cannot interpret that the gold cannot be released on the ground that the appellant is not the owner of the gold is contrary to law and abuse of process of law and mockery of justice. Thus it is clearly established that the authority bound by law and should excise his power, otherwise the order become illegal.

5.05 That there is no provision for absolute confiscation of goods. The option of redemption should be given under section 125 of the Customs act. Further there are several judgments by Revisional authority and Cestat and Hon'ble Supreme Court and High Court which states that the authority should excise the power under Section 125 of the act because the same is mandatory. The applicant relied on the following case laws:

- i) Apex court judgement in the case of Hargovind Dash Vs Collector of Customs 1992 (61) ELT 172 (SC);

- ii) The Hon'ble High court Andhra Pradesh judgment reported in 1997 (91) ELT 277 (AP) Sheik Jamal Basha Vs Government of India;
- iii) The Revisional authority's Order reported in 2011 (270) ELT 447 (GOT) MUKUADAM RAFIQUE AHMED order no. 198/2010-CUS dated 20.05.2010 in FNO. 375/14/8/2010-RA-CUS;
- iv) Hon'ble Supreme Court (full bench) judgment on 30.09.2011 in OM Prakash's case Vs union of India ;
- v) Etc.

5.06 That the confiscation of the goods and the personal penalty imposed is very high and unreasonable and hence the same to be reduced substantially and reasonably.

5.07 Under the above circumstances of the case the applicant has prayed to set aside the impugned order and to permit him to re-export or release the gold and also reduce the personal penalty sum of Rs 1,45, 000 under section 112 (a) and (b) of the Customs act 1962 and thus renders justice.

6. Personal hearing in the matter was scheduled for 09.08.2023 and 23.08.2023. The Advocate of the applicant vide letter dated 23.08.2023, expressed their inability to attend the hearing and requested to pass the order with available records and show leniency while passing the order.

7. The Government has gone through the facts of the case and notes that the applicant had not declared the gold while opting for the green channel facility. The impugned gold was concealed ie 181 grams in the form of beads and 246 grams in the form of cut pieces coated with chrome colour. Further, 60grams of gold in the form of bar was concealed in the 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 he 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/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 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. 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 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 not concealed which is not correct. The gold was concealed in his rectum and rest of the gold was coated in chrome to avoid detection. 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 risk to own life and with a clear attempt to smuggle gold, 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 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.

13. Government finds that the penalty of Rs. 1,45,000/- imposed on the Applicant under Section 112(a) & (b) of the Customs Act, 1962 for the goods valued at Rs.14,20,883/- is appropriate and commensurate to the omissions and commissions of the Applicant.

14. 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.

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


(SHRAWAN KUMAR)

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

ORDER NO. 828 /2023-CUS (WZ)/ASRA/MUMBAI DATED 16.11.2023

To,

1. Shri Mohamed Hanifa, 1/160, West Street Nambuthalai, Thiru Vandani, TK Ramanathapuram, Tamil Nadu-623403.
2. Shri Mohamed Hanifa, C/o Kamalamal Palanikumar, Advocate, No.10, Sunkurama Street, Second Floor, Chennai-600001.
3. The Pr. Commissioner of Customs, C.S.I Airport, Terminal 2, Level-II, Sahar, Andheri (East), Mumbai 400 099.
4. 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. Kamalamal Palanikumar, Advocate, No.10, Sunkurama Street, Second Floor, Chennai-600001
2. Sr. P.S. to AS (RA), Mumbai.
3. File Copy.
4. Notice Board.

