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SPEED POST



GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
(DEPARTMENT OF REVENUE)

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Mumbai-400 005

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F.No. 371/298-299/WZ/2022-RA | 8372 : Date of Issue : 15 .12.2023

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ORDER NO. 915-916/2023-CUS (WZ)/ASRA/MUMBAI DATED 12.12.2023  
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.

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Applicant 1 : (i) Ms Raziya Yunus Shaikh  
Applicant 2 : (ii) Ms Nilofer Yunus Shaikh

Respondent : Pr. Commissioner of Customs, CSMI, Mumbai.

Subject : Revision Application filed, under Section 129DD of the  
Customs Act, 1962 against the Orders-in-Appeal Nos.  
MUM-CUSTM-PAX-APP-103/2022-23 dated 29.04.2022  
issued on 06.05.2022 through F.No. S/49-1734/2020  
passed by the Commissioner of Customs (Appeals),  
Mumbai – III.

**ORDER**

These revision applications have been filed by (i). Ms Raziya Yunus Shaikh and (ii). Ms Nilofar Yunus Shaikh (hereinafter referred to as the Applicants or alternately as Applicant no. 1 [A1] and Applicant no. 2 [A2] resp.) against the Order-In-Appeal Nos. MUM-CUSTOM-PAX-APP-103/2022-23 dated 29.04.2022 issued on 06.05.2022 through F.No. S/49-1734/2020 passed by the Commissioner of Customs (Appeals), Mumbai – III.

2. Brief facts of the case are that on 14.09.2018, the Officers of AIU, D batch, CSMI Airport, Mumbai had intercepted two passengers viz Ms Raziya Yunus Shaikh (Mother) holding Indian Passport No.S1711587 and Ms Nilofar Yunus Shaikh (Daughter) holding Indian Passport No.S6508583, the applicants, upon their arrival from Dubai by Emirates Flight No. EK500 dated 13.09.2018, after they had opted to pass through green channel. On screening the hand bag of Applicant 1, suspicious black images were noticed on the monitor and hence the applicants were diverted for detailed examination. In presence of punchas they were asked whether they were carrying any gold or dutiable item in their baggage or in person to which they replied in negative. Detailed examination of the hand bag resulted in the recovery of 6 foreign marked Gold Tola bars kept in 3 packets wrapped in transparent white coloured plastic. Personal search of the Applicant 1 resulted in recovery of another 6 foreign marked Gold Tola bars kept in 3 packets wrapped in transparent white coloured plastic which were concealed inside her upper inner garment. Personal search of the Applicant 2 resulted in recovery of another 12 foreign marked Gold Tola bars kept in 6 packets wrapped in transparent white coloured plastic which were concealed inside her upper inner garment. Thus 24 foreign marked Gold bars totally were recovered from the applicants. The Government Approved Valuer examined and certified that the gold recovered were 24 Foreign marked gold bars having 999% purity,

totally weighing 2798 grams and valued at Rs.78,15,304/-. After due process of investigation Show cause Notice was issued to the Applicants on 06.03.2019.

3. The Original Adjudicating Authority viz, Addl. Commissioner of Customs, CSMI Airport, Mumbai vide Order-In-Original No. ADC/SKR/ADJN/84/2019-20 dated 28.02.2020 ordered for the absolute confiscation of the seized gold viz 24 Foreign marked gold bars having 999% purity, totally weighing 2798 grams and valued at Rs.78,15,304/- under Section 111(d), (l) and (m) of the Customs Act, 1962 and imposed a personal penalty of Rs. 4,0,000/- on the A1 and A2 respectively under Section 112(a) (i) of the Customs Act, 1962.

4. Aggrieved by the said order, applicants filed appeals before the Appellate Authority (AA) viz, Commissioner of Customs (Appeals), Mumbai – III, who vide his Orders-In-Appeal Nos. MUM-CUSTOM-PAX-APP-103/2022-23 dated 29.04.2022 issued on 06.05.2022 through F.No. S/49-1734/2020, did not find any reason to interfere in the impugned OIO passed by the OAA.

5. Aggrieved with the above order, the Applicants have made an exhaustive submission of case laws and have submitted copies including their submissions made before the lower authorities etc. They have filed these revision applications on the following main points:

5.1 That the applicants are not carrier;

5.2 That there is no proof for any syndicate of persons for smuggling of gold; that the investigating agency failed to establish that there was a conspiracy for smuggling of gold;

5.3 That Gold is not a prohibited item and hence the seized gold was not liable for absolute confiscation;

5.4 That for concluding the imported gold was prohibited goods and for ordering absolute confiscation of the gold, the OAA relied upon the judgement in the case of Om Prakash Bhatia which has been overruled by a larger Bench of Supreme Court;

5.5 That ignorance of law can be an excuse;

5.6 That Penalty imposed on the applicant was disproportionate to the value of the gold imported by individual International passenger and that imposition of heavy penalty on the applicant is not sustainable;

5.7 That the applicant claim ownership of the gold under absolute confiscation and prayed for redemption on payment of reasonable fine and penalty;

5.8 The applicant concluded by submitting that it was a single and solitary incident of an alleged act of smuggling and can never be justifiable ground for absolute confiscation of the goods; that the act of the applicant cannot be termed as crime or manifesting of an organized smuggling activity. The applicants submitted that they are from a respectable family and law abiding citizens and has never come under any adverse remarks.

Under the circumstances, the applicants have prayed that the gold under absolute confiscation may be ordered to be released to them on payment of reasonable fine and penalty.

6. Personal hearings in the case was scheduled on 5.10.2023. Shri. Prakash Shingarani, Advocate appeared for personal hearing and submitted that the applicants had brought small quantities of gold for personal purposes. He further submitted that quantity of both applicants have been clubbed by the appellate authority. He also submitted that gold was not concealed and applicants has no past record of any offence. He requested to allow release of gold on reasonable fine and penalty.

7. The Government has gone through the facts of the case. The Applicants were intercepted when they had opted to pass through the green channel. The impugned gold was cleverly concealed by the applicants in their innerware. Only when they were searched, the concealment was detected. The act was pre-meditated and well thought out. It is clear that the applicants had resorted to an ingenious method of concealment 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. 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 observes that in the statements recorded both the applicants had admitted that they were not the owners of the gold seized and they were handed over at Dubai Airport to carry and they would be given monetary consideration for this task. They had concealed the gold in their innerware and they still denied they were carrying any dutiable goods when they were asked in the presence of punchas. Subsequently they claimed they were the owners of the gold and were bought by their hard earned money. However they have neither produced any documents like purchase bills etc evidencing the purchase of the impugned gold nor they have shown the source of money used for purchasing the gold. The quantity of gold brought by the applicants is quite substantial even if it is not clubbed together, each of the applicant had brought nearly 1399 grams of foreign marked gold having 999% purity which clearly shows that it is for commercial purpose. The mode of bringing the gold by the applicants, shows their clear intention and a systematic attempt to evade duty and smuggle the gold into India. The circumstances of the case probates that they did not have any intention of declaring the gold to the Customs at the airport. These facts have been properly considered by the Appellate Authority and the lower adjudicating authority while absolutely confiscating the impugned gold bars.

12. 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 and ingenious and clear attempt to smuggle such large quantity gold, this is a fit case for absolute confiscation as a deterrent to such offenders. Thus, taking into account the facts on record and the gravity of offence, the adjudicating authority had rightly ordered the absolute confiscation of gold. 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 Customs 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 while imposing penalties on A1 and A2 under Section 112(a) and (b) of the Custom Act, 1962, the lower authorities have considered the role played by them in the smuggling activity and had appropriately imposed Rs.4,00,000/- on each for the gold totally valued at Rs.78,15,304/-. The penalty imposed commensurate with the omissions and commissions committed by them and therefore, Government is not inclined to interfere in the same.

14. The Applicant has 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, 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 Appellate Authority.

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

*Shrawan*  
*12/12/23*

( SHRAWAN KUMAR )

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

ORDER NO. 915-916/2023-CUS (WZ)/ASRA/MUMBAI DATED 12.12.2023

To,

1. Ms Raziya Yunus Shaikh, 425/26, Industrial Estate, Market Yard, Gultekdi, Pune 411037.
2. Ms Nilofer Yunus Shaikh, 425/26, Industrial Estate, Market Yard, Gultekdi, Pune 411037.
3. Principal Commissioner of Customs, Chhatrapati Shivaji International 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. 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.

