



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

8th Floor, World Trade Centre, Centre - I, Cuffe Parade,
Mumbai-400 005

(i). F.No. **373/303/B/SZ/2018-RA** & Date of Issue 23.02.2022
(ii). F.No. **373/349/B/SZ/2018-RA** / 806

ORDER NO. 96-9/2022 CUS (SZ)/ASRA/MUMBAI DATED 21.02.2022 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.

(i). F.No. 373/303/B/SZ/2018-RA

Applicant : Shri. Riyaz Ahmed.

Respondents : Commissioner of Customs (Preventive), No. 1 Williams Road,
Cantonment, Tiruchirappalli - 620 001.

Subject : Revision Applications filed respectively, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. TCP-CUS-000-APP-205-18 dated 31.10.2018 [A.No. C24/118/2018-TRY(CUS)] passed by the Commissioner of GST, Service Tax & C.Ex (Appeals), Trichirappalli - Pin : 620 001.

ii). F.No. 373/349/B/SZ/2018-RA

Applicant : Shri. Riyaz Ahmed.

Respondents : Commissioner of Customs (Preventive), No. 1 Williams Road,
Cantonment, Tiruchirappalli - 620 001.

Subject : Revision Application filed respectively, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No. TCP-CUS-000-APP-176-18 dated 26.09.2018 [A.No. C24/12/2018-TRY(CUS)(D)] passed by the Commissioner of GST, Service Tax & C.Ex (Appeals), Trichirappalli - Pin : 620 001.

ORDER

These two revision applications have been filed by Shri. Riyaz Ahmed (herein after referred to as the Applicant) against the following two Orders-in-Appeal Nos. (i). TCP-CUS-000-APP-205-18 dated 31.10.2018 [A.No. C24/118/2018-TRY(CUS)] & (ii). TCP-CUS-000-APP-176-18 dated 26.09.2018 [A.No. C24/112/2018-TRY(CUS)] both passed by the Commissioner of GST, Service Tax & C.Ex (Appeals), Trichirappalli – Pin : 620 001. It is noted that these two Orders-in-Appeal have emanated from a common or same Order-in-Original No. TCP-CUS-PRV-JTC-010-18 dated 31.01.2018 [C.No.VIII/10/64/2017-Cus.Adj] passed by Jt. Commissioner of Customs (Preventive), Trichy

2. Brief facts of the case are that the applicant on arrival at Trichy Airport from Colombo by Sri Lankan Airlines Flight No. UL133 was intercepted on 24.07.2017 at the exit gate by the Customs. To the query whether he was carrying any dutiable goods, the applicant had replied in the negative. On examination of the baggage brought by the applicant, 4 Samsung and 1 Sony DVD players were found. Before checking the same on X-ray machine, the applicant was once again asked whether he had concealed any gold in the DVD players to which he had replied in the negative. The scanning of the DVD players showed an extra shine which indicated that gold may be concealed therein. Each of the DVD players were opened and from near the transformer one piece of gold in cube form and two small cut bits of gold were recovered. Thus, from the 5 DVDs, pieces of gold in cube form and ten nos of small cut bits of foreign marked gold of 24 carats purity, totally weighing 539 grams and valued at Rs. 15,43,696/- were seized under the Customs Act, 1962.

3. After due process of the law, the Original Adjudicating Authority, viz Jt. Commissioner of Customs (Preventive), Trichy vide Order-in-Original No. TCP-CUS-PRV-JTC-010-18 dated 31.01.2018 [C.No.VIII/10/64/2017-Cus. Adj] ordered for the absolute confiscation of the impugned 539 grams of gold valued at Rs 15,43,696/- under Section 111(d), 111(1) and 111 (m) ibid of the Customs Act, 1962 and a penalty of Rs. 50,000/- was also imposed on the applicant under section of 112 (a) and (b) of Customs Act, 1962.

4(a). Aggrieved by the said order, the applicant filed an appeal before the Commissioner of GST, Service Tax & C.Ex (Appeals), Trichirappalli who vide Order-In-Appeal No. TCP-CUS-000-APP-205-18 dated 31.10.2018 [A.No. C24/118/2018-TRY(CUS)] upheld the Order-in-Original and rejected the appeal filed by the Applicant.

4(b). Aggrieved by the said order, the respondent i.e. Commissioner of Customs (Preventive), Tiruchirappalli filed an appeal before the Commissioner of GST, Service Tax & C.Ex (Appeals), Trichirappalli who vide Order-In-Appeal No. TCP-CUS-000-APP-176-18 dated 26.09.2018 [A.No. C24/12/2018-TRY(CUS)(D)] modified the Order-in-Original to the extent of the penalty imposed which was enhanced to Rs. 2,00,000/- from Rs. 50,000/- and upheld the absolute confiscation.

5. Aggrieved with the above two orders-in-appeal mentioned at paras 4(a) and 4(b) above, the Applicant has filed two these two revision applications i.e. 373/303/B/SZ/2018-RA and 373/349/B/SZ/2018-RA on the following grounds;

5(a). F.No. 373/303/B/SZ/2018-RA

- (i) that the Order-in-Appeal is against law, weight and circumstances of the case.
- (ii). that the OIO had been received late, only after making a request for the same.
- (iii). that gold was a restricted item not a prohibited item.
- (iv). that option under Section 125 had not been considered by the lower authorities.
- (v). that the applicant has cited various case laws to buttress his claim.

Applicant has prayed to set aside the order of the appellate authority and to reduce the penalty.

5(b). F.No. 373/349/B/SZ/2018-RA

- (i). that the Order-in-Appeal is against law, weight and circumstances of the case.
- (ii). that the appellate authority has passed two orders which are contrary to each other.

- (iii). That the order in which penalty amount is enhanced is required to be set aside.
- (iv). that the reply dated 01.08.2018 filed by the applicant had not been considered by the appellate authority.

Applicant has prayed to set aside the impugned order dated 26.09.2018 and also to set aside the personal penalty of Rs. 2,00,000/- imposed under Section 112 (a) of the Customs Act, 1962.

6. Personal hearings in the case was scheduled through the video conferencing mode for 03.12.2021 / 09.12.2021. Smt. Kamalamalar Palanikumar, Advocate requested to prepone the personal hearing to 07.12.2021 as she was coming to Mumbai. Accordingly, the advocate attended the hearing on 07.12.2021. She requested to release the gold on reasonable RF and penalty.

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. Thereafter, on interception he had been asked whether he was carrying any dutiable items to which he had replied in the negative. Further, before scanning / opening of the DVD players, the applicant had been once again asked about possession of gold, to which he had replied in the negative. Also, the impugned gold had been ingeniously concealed inside the DVD players. The quantity of gold is quite substantial and the type of gold being of 24 carats in cut bits / cube form indicates that the same was for commercial use. The applicant clearly had failed to declare the goods to the Customs at the first instance as required under Section 77 of the Customs Act, 1962. Further, the respondent had cleverly and ingeniously concealed the gold in the DVD players. The nature of concealment reveals the mindset of the respondent to evade the duty. It also reveals that the act committed by the respondent was conscious and pre-meditated. The applicant had been questioned repeatedly and persistently about possession of gold, but he had stoically and vehemently denied carrying any gold. Had he not been intercepted, the respondent would have gotten away with the gold concealed in the DVD players. The Government finds that the confiscation of the gold is therefore, justified.

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, 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 quantum of gold was substantial and type of gold being 24 carats, in cut bits / cube indicated that the same was for commercial use. The impugned gold was cleverly, consciously and ingeniously concealed which reveals the intention of the applicant. It also revealed his criminal bent of mind and a clear intention to evade duty and smuggle the gold into India. The aforesaid circumstances of the case and ingenious concealment, probates that the applicant had no intention of declaring the gold to the Customs at the airport. All these have been properly considered by the Original Adjudicating Authority while absolutely confiscating the impugned 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, conscious and ingenious, type of gold being for commercial use, this being a clear attempt to brazenly smuggle the impugned gold, 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 the impugned gold. But

for the intuition and the diligence of the Customs Officer, the gold would have passed undetected. Hon'ble Delhi High Court in the case of Jain Exports Vs Union of India 1987(29) ELT753 has observed that, "*the resort to Section 125 of the C.A. 1962, to impose fine in lieu of confiscation cannot be so exercised as to give a bonanza or profit for an illegal transaction of imports.*". 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 Custom authorities, the passenger gets away with smuggling and if detected, 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. Government is in agreement with the order of the lower authorities absolutely confiscating the impugned gold. The absolute confiscation of the gold would act as a deterrent against such persons who indulge in such acts with impunity. Therefore, the Government finds that the order passed by the appellate authority upholding the order of absolute confiscation of the impugned gold passed by the original adjudicating authority is proper and correct. Government does not find it necessary to interfere in the same.

13. On the issue of the penalty, it is noticed that two different appellate orders have been passed on the same original order. In the order i.e OIA where the department is an applicant i.e. in RA no. F.No. 373/349/B/SZ/2018-RA and OIA no. TCP-CUS-000-APP-176-18 dated 26.09.2018 [A.No. C24/12/2018-TRY(CUS)(D)], the penalty imposed under Section 112(a) & (b) of the Customs Act, 1962 has been enhanced from Rs. 50,000/- to Rs. 2,00,000/- whereas in OIA no. TCP-CUS-000-APP-205-18 dated 31.10.2018 [A.No. C24/118/2018-TRY(CUS)] i.e. subject matter of RA no. F.No. 373/303/B/SZ/2018-RA, the penalty of Rs. 50,000/- imposed by the original adjudicating authority under Section 112(a) and (b) of the Customs Act, 1962 has been maintained / upheld. In such a situation, where there is a divergent view on the same OIO and in the absence of an appeal filed by the respondent before the Revisionary Authority, then the order in which the applicant is better placed will have to be sustained. In this case, it would be in RA No. 373/303/B/SZ/2018-RA and the other order i.e OIA which is subject matter of RA no. 373/349/B/SZ/2018-RA is liable to

be set aside to the extent of enhancement of the penalty. Accordingly, the Government passes the following order.

14. In view of the above, the Government sets aside the Order-in-Appeal No. TCP-CUS-000-APP-176-18 dated 26.09.2018 [A.No. C24/12/2018-TRY(CUS)(D)] passed by the appellate authority and upholds in to-to, the Order-in-Appeal no. TCP-CUS-000-APP-205-18 dated 31.10.2018 [A.No. C24/118/2018-TRY(CUS)] passed by the appellate authority. In other words, the Order-in-Original No. TCP-CUS-PRV-JTC-010-18 dated 31.01.2018 [C.No.VIII/10/64/2017-Cus.Adj] passed by the Original Adjudicating Authority i.e. Jt. Commissioner of Customs is upheld in to-to.

15. As a consequence, both the Revision Applications i.e. F.No. 373/303/B/SZ/2018-RA & F.No. 373/349/B/SZ/2018-RA filed by the applicant fails and are accordingly, dismissed.


(SHRAWAN KUMAR)

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

96-97
ORDER No. /2022-CUS (SZ) /ASRA/

DATED 21.02.2022

To,

1. Shri. Riyaz Ahmed, S/o. Shri. Seyed Abuthair, Old No. 2, New No. 5, Radhakrishnan Nagar, 1st Street, Choolimedu, Chennai – 600 094
2. Commissioner of Customs (Preventive), No. 1 Williams Road, Cantonment, Tiruchirappalli – 620 001.

Copy to:

1. Smt. Kamalamalar Palanikumar, No. 10, Sunkurama Street, Second Floor, Chennai- 600 001.
2. Sr. P.S. to AS (RA), Mumbai.
3. Guard File.
4. File Copy.
5. Notice Board.